3510-DS-P

**DEPARTMENT OF COMMERCE**

**International Trade Administration**

**19 CFR Part 351**

**[Docket No. 240703-0184]**

**RIN 0625-AB25**

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

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

**ACTION:** Proposed rule; request for comments.

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

**DATES:** To be assured of consideration, written comments must be received no later than [Insert date 60 days after date of publication in the *Federal Register*].

**ADDRESSES:** Submit electronic comments only through the Federal eRulemaking Portal at https://www.Regulations.gov, Docket No. ITA-2023-0003. Comments may also be submitted by mail or hand delivery/courier, addressed to Ryan Majerus, Deputy Assistant Secretary for Policy & Negotiations, Performing the Non-Exclusive Functions and Duties of the Assistant Secretary for Enforcement and Compliance, Room 18022, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, DC 20230. An appointment must be made in advance

with the Administrative Protective Order (APO)/Dockets Unit at (202) 482-4920 to submit comments in person by hand delivery or courier. All comments submitted during the comment period permitted by this document will be a matter of public record and will be available on the Federal eRulemaking Portal at https://www.Regulations.gov. Commerce will not accept comments accompanied by a request that part or all the material be treated as confidential because of its business proprietary nature or for any other reason. Therefore, do not submit confidential business information or otherwise sensitive or protected information.

Any questions concerning the process for submitting comments should be submitted to Enforcement & Compliance (E&C) Communications office at ECCommunications@trade.gov or to John Van Dyke, Import Policy Analyst, at john.vandyke@trade.gov. Inquiries may also be made of the E&C Communications office during business hours at (202) 482-0063.

**FOR FURTHER INFORMATION CONTACT:** Scott D. McBride, Associate Deputy Chief Counsel for Trade Enforcement and Compliance, at (202) 482-6292, or Jesus Saenz, Attorney, at (202) 482-1823.

**SUPPLEMENTARY INFORMATION:**

General Background

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

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

and material injury or threat of material injury to that industry in the United States is found by the ITC.

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

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

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

Explanation of the Proposed Rule

Commerce proposes several updates to the AD and CVD regulations found at part 351.[1] The proposed changes are summarized here and discussed in greater detail below. Commerce invites comments on all proposed regulatory changes and clarifications, including suggestions to improve them.

- Revise the Subpart A heading of part 351 to reflect the provisions to which it applies.
- Revise § 351.104(a)(7) to reflect that preliminary and final issues and decision memoranda issued in investigations and administrative reviews before the implementation of Commerce's filing system, Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), may be cited in full in submissions before Commerce without placing the memoranda on the record.
- Revise § 351.107 to accurately and more holistically describe Commerce's establishment and application of cash deposit rates, including explaining that some cash deposit rates are calculated on an *ad valorem* basis at importation, while others are calculated on a per-unit basis. The proposed regulation would also describe situations in which Commerce applies cash deposit rates in a producer/exporter combination and the process by which a producer/exporter combination may be excluded from provisional measures and an AD or CVD order as a result of a calculated *de minimis* cash deposit rate following an investigation. Furthermore, the regulation would set forth an AD cash deposit hierarchy for imports from market economies, an AD cash deposit hierarchy for imports from nonmarket economies, and a CVD cash deposit hierarchy. Finally, revised § 351.107

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

would describe the effective date for cash deposit rates following the correction of ministerial errors in investigations and administrative reviews.

- Codify and update Commerce's methodology for determining if an entity exporting merchandise from a nonmarket economy should receive an antidumping duty rate separate from that of the nonmarket economy entity. New § 351.108 would provide that in a nonmarket economy, one dumping margin may apply to all exporting entities from that economy. It would explain that if an entity located in a nonmarket economy is majority-owned by the government, the government can control its production, management, sales and export activities and it will not receive a separate rate. It would also describe additional scenarios in which an entity in the nonmarket economy will not receive a separate rate if the government owns 50 percent or less of the entity's shares and (1) the government has a disproportionately larger degree of influence or control over the entity's production and commercial decisions than the ownership share would normally entail and the Secretary determines that the degree of influence or control is significant; (2) the government has the authority to veto or control the entity's production and commercial decisions; (3) government officials, employees or representatives have been appointed as officers and have the ability to make or influence production or commercial decisions; or (4) the entity is required by law to maintain or in fact maintains one or more government officials, employees, or representatives in positions of authority who have the ability to make or influence production or commercial decisions. Further, it would also codify Commerce's analysis for determining if an entity is *de jure* and *de facto* separate from the government for purposes of export determinations, including an additional consideration of whether the entity, regardless of government ownership, must maintain government officials, employees or representatives in positions of authority who have the ability to make or influence decisions on export activities. In addition, the proposed rule would allow for consideration of any other information on the record

suggesting that the government has direct or indirect influence over the exporter's export activities. Finally, proposed § 351.108 would clarify the requirements for a separate rate application or certification and would suggest a revision to deadlines for separate rate applications of fourteen days following publication of the notice of initiation in the *Federal Register.*

- Add § 351.109 to address Commerce's methodologies for selecting respondents in investigations and administrative reviews, including the steps Commerce would take to determine the number of exporters or producers that is practicable to investigate or review for calculating the all-others rate in investigations and for calculating a rate for unexamined exporters and producers. This provision would allow for a single country-wide subsidy rate, provide a waiver from examination if both petitioners and the potential respondent agree to non-selection of that potential respondent, and clarify that a nonmarket economy entity rate is not the same thing as an all-others rate. In addition, § 351.109 would move the existing voluntary respondent provisions from § 351.204 to § 351.109 and update and revise the regulatory provisions applicable to the selection of voluntary respondents and deadlines for voluntary respondent submissions.
- Modify § 351.204 to move § 204(d)(1)-(3) to section 109 and move § 204(e)(1)-(3) to section 107. Further, update and simplify § 204(a) and (c), and move § 204(e)(4) to § 204(d), along with a new subheading for that paragraph and a new heading for section 204 itself.
- Modify § 351.212(b) to clarify that entries may be assessed either on an *ad valorem* value or per-unit basis.
- Modify § 351.213(f) to indicate that Commerce may select respondents, including voluntary respondents, in the context of an administrative review.
- Modify the header of § 351.214 to emphasize that the regulations cover both new shipper reviews and CVD expedited reviews, each derived from different statutory authorities.

- Modify § 351.301(b)(2) to require that interested parties submitting new information to rebut, clarify or correct factual information on the record must identify in writing the specific information being rebutted, clarified, or corrected and explain how the new factual information rebuts, clarifies or corrects that existing factual information.
- Modify § 351.301(c)(3) to revise the time in which surrogate value submissions in nonmarket economy country antidumping proceedings and benchmark information in countervailing duty proceedings may be submitted in investigations and administrative, new shipper, and changed circumstances reviews.
- Modify § 351.306(a)(3) to clarify that Commerce may share business proprietary information with CBP officials involved in negligence, gross negligence, or fraud investigations.
- Add paragraphs (g), (h), and (i) to § 351.308 to reflect that pursuant to section 776 of the Act, Commerce may apply partial or total facts available, may use previously calculated dumping margins and countervailable subsidy rates in separate segments of the same proceeding without the need to corroborate those margins or rates, may use the highest dumping margin available as adverse facts available, need not estimate what an antidumping or countervailing duty rate would have been if an entity had acted to the best of its ability, and need not consider the "commercial reality" of an interested party in applying adverse facts available.
- Revise § 351.309(c) and (d) to request that parties include a table of contents, sources such as tribunal decisions and administrative case determinations in the table of authorities, and a public executive summary of no more than 450 words for each discrete issue raised in case briefs and rebuttal briefs. This change would remove the encouraged inclusion of a five-page summary.
- Modify § 351.401(f) to reflect that Commerce may treat both producing and non-producing affiliated parties as a single collapsed entity.

- Add § 351.404(g) to address the filing requirements for those alleging the existence of a multinational corporation and to clarify that the multinational corporation provision will not be applied when the non-exporting country is located in a nonmarket economy.
- Add § 351.405(b)(3) to set forth the criteria Commerce would normally consider in selecting an amount of profit normally realized by exporters or producers in connection with the sale of same or similar merchandise in determining constructed value under the constructed value profit cap.
- Modify § 351.408(b) to update and enhance Commerce's selection of economically comparable countries as part of its nonmarket economy methodology in accordance with sections 773(c)(2)(B) and 773(c)(4)(A) of the Act. In addition to selecting a comparable economy based on *per capita* gross domestic product (GDP) or gross national income (GNI), Commerce could also consider factors including the size and composition of export activity in certain countries and the availability, accessibility, and quality of data from those countries as part of its analysis.
- Remove current § 351.502(d), (e), and (f) which state that integrally linked subsidies, agricultural subsidies and subsidies to small- and medium-sized businesses are not "specific" for purposes of determining the countervailability of a subsidy under the CVD law.
- Move § 351.502(g) covering disaster relief to § 351.502(d) and add that such relief includes pandemic relief.
- Amend § 351.502(e) to explain that subsidies that provide employment assistance to workers grouped in general categories (such as age, gender, and/or the existence of a disability, veterans, or unemployment status) will not be considered specific if those assistance programs are generally available to everyone hired within those categories without restrictions specific to individual industries.

- Remove § 351.502(f) and (g) entirely, as those provisions are no longer required with the other above-listed edits incorporated.
- Add § 351.503(b)(3) to address the general treatment of the balance or value of contingent liabilities/assets not otherwise covered in paragraph 503(a) as an interest-free provision of funds and calculate the benefit using a short-term commercial interest rate.
- Add § 351.505(a)(6)(iii) to provide an initiation standard for government-owned policy banks that would find the threshold for specificity met if a party can sufficiently allege that a policy bank provides loans pursuant to government policies or directives.
- Modify§ 351.505(b) to remove the term "otherwise" from the regulation to bring the language into conformity with other regulations addressing the treatment of long-term loans.
- Modify § 351.505(c) to remove paragraphs (c)(3) and (c)(4) and update paragraph (c)(2) to be the only provision addressing long-term loans. The benefit for long-term loans would be calculated by determining the difference between what a party would have paid on a comparable commercial loan and the actual amount the party paid on a government loan during a period of investigation (POI) or review (POR), and then allocating the benefit amount to the relevant sales during the POI or POR. Consistent with the language of section 771(5)(E) of the Act, remove sentences in current § 351.505(c)(1) and (c)(2) that state that the present value in the year of receipt of the loan should never be permitted to exceed the principal of the loan in our calculations.
- Consistent with section 771(5)(E) of the Act, modify § 351.505(e) to remove the sentence "[i]n no event may the present value (in the year of receipt of the contingent liability loan) of the amounts calculated under this paragraph exceed the principal of the loan."
- Modify § 351.509, the regulation addressing direct taxes, to add a clause stating that the calculation of a benefit under § 351.509(a)(1) applies to firms located in an area designated by the government as being outside the customs territory of the government.

- Modify § 351.511(a)(2)(i) to provide for the comparison of a government price to either an actual transaction in the country in question or to "actual sales from competitively run government auctions" in determining a benchmark price under the definition of "adequate remuneration." In addition to defining actual transaction prices, modified § 351.511(a)(2)(i) would also define "competitively run government auctions."
- Complete § 351.512, applicable to the purchase of goods, which is currently reserved. New § 351.512(a)(1) would provide that in general, where goods are purchased by the government from a firm, a benefit will exist if the goods are purchased for more than adequate remuneration. Proposed § 512(a)(2) would define adequate remuneration for this provision, including an explanation that Commerce will use ex-factory or ex-works comparison prices and the price paid to the firm for the good by the government in order to measure the benefit conferred to the recipient. Proposed § 512(a)(3) would explain that when the government is both a provider and purchaser of a good, Commerce will normally measure the benefit by comparing the price the government sold the good to a firm with the price the government paid when purchasing the good from the same firm. Proposed § 512(b) would state that date of receipt of the benefit will be at the time of receipt of payment for the purchased good, and § 351.512(c) would address the time period in which Commerce would allocate the benefit for the purchase of a good.
- Remove reserved § 351.521 titled "Import substitution subsidy," because no such regulation is necessary in light of the definition of an import substitution subsidy found in section 771(5A)(C) of the Act.
- Replace § 351.521 with a new regulation addressing export subsidies which exempt, remit, or defer indirect taxes and import charges on capital goods and equipment. Proposed § 521(a)(1) would address the benefits received through an export subsidy that provides for the full or partial exemption or remission of an indirect tax or an import charge on the purchase or import of capital goods and equipment. Proposed § 521(a)(2)

would address the benefits received through a deferral of indirect taxes or import charges. Proposed § 521(b) would explain the time of receipt of the benefit in the case of full or partial exemptions or remissions of indirect taxes or import charges, as well as the time of receipt of deferral of indirect taxes or import charges. Finally, proposed § 351.521(c) would explain that Commerce will allocate the benefit of a full or partial exemption, remission, or deferral to the year in which the benefit is considered to have been received.

- Delete and reserve § 351.522, as it addresses green light and green box subsidies that lapsed pursuant to section 771(5B)(G) of the Act.
- Revise § 351.525(b)(6)(iii), which addresses the attribution of subsidies to holding companies and their subsidiaries. Specifically, this proposed rule would remove the second sentence of the provision in § 351.525(b)(6)(iii), which states that if a holding company merely served as a conduit for the transfer of the subsidy from the government to a subsidiary of the holding company, Commerce will attribute the subsidy to products sold by the subsidiary. The agency would remove this language because it is proposing to modify the language in the regulation addressing the transfer of subsidies from cross-owned companies in new proposed § 351.525(b)(6)(vi) to state that a transferred subsidy will be solely attributed to the products produced by the recipient of the transferred subsidy. This modification would apply to all cross-owned companies, including holding or parent companies.
- Revise § 351.525(b)(6)(iv), which currently addresses the attribution of subsidies to input suppliers. The proposed rule would revise the subheading to apply to input producers and divide the paragraph into § 351.525(b)(6)(iv)(A) and § 351.525(b)(6)(iv)(B). Proposed § 525(b)(6)(iv)(A) would use language similar to the current provision, addressing input producers that supply a downstream producer. Proposed § 525(b)(6)(iv)(B) would list several factors that Commerce may consider in determining if an input product is primarily dedicated to the production of the downstream product.

- Move current § 351.525(b)(6)(vi), the definition of cross-ownership, to a new § 351.525(b)(6)(vii).
- Move current § 351.525(b)(6)(v), covering the transfer of subsidies between corporations with cross-ownership producing different products, to § 351.525(b)(6)(vi) and modify it to address the transfer of subsidies from any cross-owned corporation. Under this modification, a transferred subsidy from a cross-owned corporation would be attributed solely to products produced by the recipient of the transferred subsidy.
- Modify § 351.525(b)(6)(v) to cover the attribution of subsidies to cross-owned corporations providing electricity, natural gas or other similar utility products. The regulation would provide that Commerce will attribute subsidies received by a provider of utility products to the combined sales of the cross-owned producer and the sales of products sold by the producer of subject merchandise if at least one of two identified conditions are met.
- Add a new § 351.525(b)(8) to propose that Commerce would not tie or attribute subsidies on a plant- or factory-specific basis.
- Add a new § 351.525(b)(9) to propose that a subsidy normally would be determined to be "tied" to a product or market when the authority providing the subsidy was made aware of, or had knowledge of, the intended use of the subsidy and so acknowledged the intended use of the subsidy prior to, or concurrent with, the approval or bestowal of the subsidy.
- Revise language in § 351.525(b)(1) to reflect that the attribution regulations now extend to § 351.525(b)(9) and add a sentence that states that Commerce may limit the number of cross-owned companies examined under this provision if the facts on the record and available resources warrant such a limitation.
- Revise § 351.525(c), which addresses the attribution of subsidies to trading companies, to address the formula for cumulating subsidies, both when the trading company exports the

individually examined respondent's merchandise and when the trading company is the individually examined respondent itself.

- Add § 351.525(d) to explain Commerce's adjustment of the *ad valorem* subsidy rate when a country is experiencing high inflation, which is defined for this provision as an inflation rate greater than 25 percent per annum during the relevant period.
- Replace current § 351.526, which is no longer relevant, with language codifying Commerce's practice with respect to subsidy extinguishment from changes in ownership. Proposed § 526(a) would explain that, in general, Commerce will presume that non-recurring subsidies continue to benefit a recipient in full over a particular allocation period notwithstanding an intervening change in ownership. Proposed § 526(b) would set forth the criteria by which an interested party may rebut the presumption of the continuation of a benefit in full over the relevant allocation period. Furthermore, proposed § 526(c) would explain that if the presumption is rebutted, the full amount of the benefits from subsidies preceding the change in ownership would be found to be extinguished, including the benefits of concurrent subsidies meeting the criteria set forth in § 351.526(c)(2).
- Update § 351.104(a)(2)(iii), § 351.214(1)(1), § 351.214(l)(3)(iii), § 351.301(c)(1), and § 351.302(d)(1)(ii**)** to correct for cross-citations modified as a result of this Proposed Rule.

**1. Revising Subpart A Heading to Part 351 to Include the Record of Proceedings, Cash Deposits, Nonmarket Economy Antidumping Rates, All-Others Rate, and Respondent Selection**

Currently, Subpart A to part 351, which covers §§ 101-107, is titled "Scope and Definitions," although it also covers administrative record requirements and proceedings, as well as cash deposits. In this Proposed Rule, Commerce proposes the revision of the cash deposit regulation, as well as the creation of two new regulations which codify the agency's separate rates and respondent selection practice and procedures. Accordingly, Commerce proposes changing the

name of Subheading A to "Scope, Definitions, the Record of Proceedings, Cash Deposits, Nonmarket Economy Antidumping Rates, All-Others Rate, and Respondent Selection."

**2. Revising Commerce's Filing Requirements to Allow Citation of Preliminary and Final Issues and Decision Memoranda Issued Before the Implementation of Commerce's ACCESS Filing System Without Placing Them on the Record – §351.104(a)(7)**

On March 25, 2024, Commerce issued a final rule which provided clarity and procedures for interested parties submitting documentation to the agency, explaining which documents may be cited without placing documents from other segments and proceedings on the record and which documents must be placed on the record to be considered by Commerce in its analysis and determinations.[2] Those modifications added § 351.104(a)(7), which currently states that interested parties citing to public versions of documents which were issued by Commerce in other segments or proceedings before the implementation of ACCESS must place copies of those documents on the record because such documents have no assigned ACCESS barcode number.

Commerce has reconsidered the scope of public documents to which § 351.104(a)(7) applies and has determined that public preliminary and final issues and decision memoranda issued in investigations and administrative reviews pursuant to §§ 351.205, 210 and 213 before ACCESS was implemented need not be subject the requirements of that provision. Accordingly, this proposed rule would remove the requirement that such memoranda be placed on the record to be considered. Citations to these memoranda, like all such citations relied upon by interested parties in submissions to Commerce, must be cited in full (albeit without an ACCESS barcode number) and, as set forth in § 351.104(a)(6), if Commerce determines that a citation is not cited in full, it may decline to consider and analyze the cited preliminary or final issues and decision memoranda in its preliminary and final determinations.

**3. Explaining Commerce's Cash Deposit Procedures and Calculations Including Producer/Exporter Combination Rates, AD/CVD Hierarchies, and Effective Dates for Ministerial Errors – § 351.107**

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[2] *See Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws, Final Rule*, 89 FR 20766, 20768 – 20773 (March 25, 2024).

Sections 703(d)(1)(B), 705(d), 733(d)(1)(B), 735(c), and 751 of the Act provide Commerce with the statutory authority to determine cash deposit rates and order the suspension of liquidation and collection of cash deposits in antidumping and countervailing duty investigations and reviews. Specifically, sections 703(d)(1)(B) and 705(d) of the Act direct Commerce to determine cash deposit rates and issue instructions to CBP pursuant to preliminary and final determinations in CVD investigations, and sections 733(d)(1)(B) and 735(c) of the Act direct Commerce to determine cash deposit rates and issue instructions to CBP pursuant to preliminary and final determinations in AD investigations. With respect to section 751 of the Act, various provisions, such as sections 751(a)(1), 751(a)(2)(C), and 751(d), describe procedures by which Commerce instructs CBP to suspend liquidation of entries of merchandise, collect cash deposits, and revoke or terminate the collection of cash deposits pursuant to the results of different types of reviews. Commerce proposes a revision to § 351.107(a) that addresses Commerce's authority to take such actions under the Act.

Proposed § 351.107(b) would establish the general rule that Commerce will instruct CBP to suspend liquidation of merchandise subject to an AD or CVD proceeding and apply cash deposit rates determined in that proceeding to all applicable imported merchandise. Proposed § 351.107(b) would also establish that, in general, cash deposits should be calculated in proportion to the estimated value of the merchandise, as reported to CBP, on an *ad valorem* basis. This provision would be similar to the description of the final assessment of merchandise pursuant to AD and CVD proceedings on an *ad valorem* basis as already set forth in § 351.212(b).

In 1997, Commerce promulgated § 351.107 to provide guidance on the rules for calculating the cash deposit rate.[3] Since that rulemaking, Commerce has encountered several scenarios where the current § 351.107 did not provide guidance in applying a cash deposit rate or rates. For example, although the 1997 regulations provide for the assessment of entries on an *ad*

[3] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27318–19 (May 19, 1997) (*1997 Final Rule*) (discussing the finalized cash deposits regulation).

*valorem* basis, the cash deposit regulations do not address the similar calculation of cash deposits. Over the years, relying on statutory and court guidance, Commerce developed various practices that are reflected in the proposed § 351.107 revision. Although Commerce normally instructs CBP to calculate cash deposits on an *ad valorem* basis, it has also at times instructed CBP to calculate cash deposit rates on a per-unit basis. Proposed § 351.107(c)(1) describes the exception to Commerce's normal *ad valorem* practice, stating that the calculation of cash deposits on a per-unit basis might be appropriate if the information normally used to calculate an *ad valorem* cash deposit rate is not available or the use of an *ad valorem* cash deposit rate is otherwise not appropriate. For example, it is Commerce's practice to calculate cash deposits on a per-unit basis when an *ad valorem* basis will result in an under-collection of duties.[4]

Accordingly, to ensure the proper calculation of the cash deposit rate, Commerce is codifying its practice of relying on reported unit measurements when relying on reported sales values would result in an inaccurate cash deposit rate because entered sales values are unknown, undervalued, or systematically understated.[5] The regulation explains that units to which a cash deposit rate may be applied include, but are not limited to, weight, length, volume, packaging (such as the type or size of packaging), and individual units of the product itself. Notably, the U.S. Court of International Trade (CIT) has affirmed Commerce's use of a per-unit methodology.[6]

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[4] *See Certain Activated Carbon from the People's Republic of China Final Results of Antidumping Duty Administrative Review; 2010-2011*, 77 FR 67337, (November 9, 2012) and accompanying IDM (*Certain Activated Carbon from the People's Republic of China* IDM) at 34 (stating "the regulation, however, does not proscribe {Commerce} from resorting to other methods of calculating and assigning assessment and cash deposit rates, and the agency does so in certain circumstances . . . {Commerce} changed the cash deposit and assessment methodology from an ad valorem to a per-unit basis because the application of an ad valorem rate based on net U.S. price would yield an under-collection of duties due to Jacobi's undervaluing of its United States sales.").

[5] *See id.*; *see also 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2016-2018*, 84 FR 67925, (December 12, 2019) and accompanying IDM (*1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China* IDM) at Comment 5; *Wooden Bedroom Furniture from the People's Republic of China: Final Results and Final Rescission in Part*, 75 FR 50992 (August 18, 2010), and accompanying IDM (*Wooden Bedroom Furniture from the People's Republic of China* IDM) at Comment 17; and *Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 70 FR 38872 (July 6, 2005) and accompanying IDM (*Honey from the People's Republic of China* IDM) at Comment 7.

[6] *See Wuhan Bee Healthy Co. v. United States*, Slip Op. 2008-61 at 12 (CIT May 8, 2008) (*Wuhan Bee*).

Commerce normally calculates a cash deposit rate applicable to all imported subject merchandise exported by an examined exporter or produced by an examined producer. Proposed § 351.107(c)(2) would provide an exception whereby Commerce may apply a cash deposit rate determined in the current or a preceding examination only to imported merchandise both produced by an identified producer and exported by an identified exporter in a producer/exporter combination rather than all the subject merchandise exported by an examined exporter or produced by an examined producer. Commerce's regulations already provide for the application of cash deposit rates to certain producer/exporter combinations in current § 351.107(b); however, unlike the newly proposed paragraph, the current regulation addresses only merchandise where the producer and exporter are not the same entity. The CIT has held that Commerce has "broad discretion to determine when and how to administer combination rates" in order to prevent the evasion of the calculated cash deposit rates.[7] Accordingly, Commerce proposes to revise and clarify the producer/exporter combination provisions in the regulation, including the example set forth in proposed § 351.107(c)(2)(i).

To provide even greater clarity on the application of producer/exporter combinations, § 351.107(c)(2)(ii)(A) through (D) sets forth four examples in which Commerce would instruct CBP to apply a determined cash deposit rate to a producer/exporter combination. Specifically, Commerce would instruct CBP to collect cash deposits for producer/exporter combinations in (1) new shipper reviews;[8] (2) AD investigations of exporters or producers from a nonmarket economy;[9] (3) scope, circumvention, and covered merchandise inquiries when Commerce has

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[7] *See Tianjin Magnesium Int'l Co. v. United States*, 772 F.Supp.2d 1322,1341 (CIT 2010) (stating, "Commerce has broad discretion to determine when and how to administer combination rates."); *Lifestyle Enter., Inc. v. United States*, 768 F. Supp.2d. 1314 (CIT 2011) (stating "Commerce has a duty to prevent circumvention of AD law and may do so by imposing combination rates.").

[8] *See*, *e.g.*, *Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2014–2015*, 81 FR 62712 (September 12, 2016), ("With respect to Hyundai Steel Company, the respondent in the new shipper review, the Department established a combination cash deposit rate for this company consistent with its practice, as follows . . .").

[9] *See*, *e.g.*, *Carbon and Certain Alloy Steel Wire Rod From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 79 FR 68860, 68861 (November 19, 2014) ("{Commerce} will instruct CBP to require a cash deposit equal to the weighted-average amount by which the normal value exceeds U.S. price, with the above-noted adjustments, as

made a determination on a producer/exporter combination basis;[10] and (4) any additional segments Commerce deems appropriate based on the facts of the record.[11]

In addition, under another exception to Commerce's normal application of cash deposit rates to all imported subject merchandise exported by an examined exporter or produced by an examined producer, when Commerce determines in an AD or CVD investigation that a respondent should be excluded from an AD or CVD order, it is Commerce's long-standing practice to instruct CBP to apply that exclusion on a producer/exporter combination basis. Sections 703(b)(4)(A) and 733(b)(3) of the Act provide that Commerce shall disregard any countervailable subsidy rate and any dumping margin, respectively, that is zero or *de minimis* in the preliminary determination. Moreover, sections 705(c)(2) and 735(c)(2) of the Act provide that Commerce shall "terminate" the investigation, suspension of liquidation, and collection of cash deposits for the investigated exporter or producer when Commerce makes a negative determination based on a zero or *de minimis* countervailable subsidy rate or dumping margin for that exporter or producer. In other words, when a zero or *de minimis* countervailable subsidy rate or dumping margin is calculated for an exporter or producer based on particular investigated producer/exporter transactions, Commerce's long-standing enforcement of the Act has been to exclude future imports of merchandise from the disciplines of the AD or CVD order using those same investigated producer/exporter combinations. Proposed § 351.107(c)(3) would codify Commerce's practice of excluding the producer/exporter combination or combinations examined

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follows: (1) The rate for the exporter/producer combinations listed in the chart above will be the rate we have determined in this final determination.").

[10] *See*, *e.g.*, *Glycine from the People's Republic of China: Preliminary Partial Affirmative Determination of Circumvention of the Antidumping Duty Order and Initiation of Scope Inquiry*, 77 FR 21532, 21535 (April 10, 2012).

[11] For an example of an additional appropriate usage of combination rates, in *Tung Mung Development Co. v. United States*, 354 F. 3d 1371, 1380 (Fed. Cir. 2004), *affirming Tung Mung Development Co. v. United States*, 219 F. Supp. 2d 1333 (CIT 2002), the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) affirmed Commerce's use of a combination rate in addressing middleman dumping – a situation in which a foreign producer sold merchandise for less than normal value to a foreign exporter, and the foreign exporter subsequently sold the merchandise for even less than normal value to the United States.

in the investigation that satisfy those statutory requirements and identifying that combination or combinations publicly in the *Federal Register*.[12]

Commerce's current regulations address the exclusion of producers, exporters, and combinations of nonproducing exporters and producers in current § 351.204(e)(1)-(3). For purposes of clarity, Commerce proposes to move the paragraphs found in current § 351.204(e)(1) through (3) to proposed § 351.107(c)(3)(i) through (iii) and update the language and examples to better reflect Commerce's practices and procedures in applying a producer/exporter combination in exclusions from AD and CVD investigations and orders. Commerce proposes recognizing that in a preliminary determination, with respect to entries of subject merchandise for which a producer/exporter combination has been preliminarily determined to have an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or *de minimis*, as long as that producer/exporter combination is identified in the *Federal Register*, Commerce would not instruct CBP to suspend liquidation of entries of subject merchandise or collect cash deposits. Similarly, with respect to final determinations, proposed § 315.107(c)(3)(ii) states that (1) Commerce would instruct CBP to exclude a producer/exporter combination identified in the *Federal Register* from an AD or CVD order and (2) resellers of subject merchandise cannot benefit from an exclusion applicable to a producer/exporter combination determined in an investigation.

Commerce is also proposing the addition of a fourth paragraph to § 351.107(c) to address cash deposit instructions that require the use of a certification. Commerce added § 351.228 to the regulations in 2021 to require certifications by importers and other interested parties

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[12] *See Common Alloy Aluminum Sheet from Italy: Final Affirmative Determination of Sales at Less Than Fair Value (LTFV)*, 86 FR 13309 (March 8, 2021) (stating that "because the estimated weighted- average dumping margin for Laminazione is zero, entries of shipments of subject merchandise produced and exported by this company will not be subject to suspension of liquidation or cash deposit requirements."); *see also Common Alloy Aluminum Sheet from Bahrain, Brazil, Croatia, Egypt, Germany, India, Indonesia, Italy, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan and the Republic of Turkey: Antidumping Duty Orders*, 86 Fed. Reg. 22139, 22141 (April 27, 2021) (finding that "because the estimated weighted average dumping margin is zero for subject merchandise produced and exported by Laminazione Sottile S.p.A., entries of shipments of subject merchandise from this producer/exporter combination are excluded from the antidumping duty order on subject merchandise from Italy.").

regarding whether merchandise is subject to an AD or CVD order.[13] In accordance with that provision, in certain instances certifications are required to accompany the payment of cash deposits. Proposed § 351.107(c)(4) would add a paragraph that states that the agency may instruct CBP to apply a cash deposit requirement that reflects the record information and effectuates the administration and purpose of the certification.[14]

Current § 351.107(c)(1) provides guidance for applying cash deposit rates where entry documents do not identify the producer of subject merchandise. That paragraph is no longer necessary under this proposed rule because proposed § 351.107(d) and (e) would set forth cash deposit hierarchies that provide more detailed guidance regarding the application of cash deposit rates. Specifically, the hierarchies set forth in proposed § 351.107(d) and (e) would address the situation in which a producer and exporter each have different AD or CVD cash deposit rates and CBP must determine the rate to apply in collecting cash deposits regarding a given entry of subject merchandise. When the entry documents do not identify a specific party (*i.e.*, a producer or exporter) in a step of the proposed cash deposit hierarchy, the subsequent step of the proposed cash deposit hierarchy would apply. When the entry documents do not identify any party for which the Secretary has established a current cash deposit rate, CBP would be instructed to apply the all-others rate or nonmarket economy entity rate to entries of the subject merchandise, pursuant to sections 705(c)(5) and 735(c) of the Act and proposed § 351.108(b) and § 351.109(f) of Commerce's regulations. These provisions apply only when Commerce has not previously established a combination cash deposit rate for the producer and exporter in question under § 351.107(c)(2).

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[13] *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 FR 52300, 52383 (Sept. 20, 2021).

[14] *See, e.g.*, *Certain Uncoated Paper From Brazil, the People's Republic of China, and Indonesia: Affirmative Final Determinations of Circumvention of the Antidumping Duty Orders and Countervailing Duty Orders for Certain Uncoated Paper Rolls*, 86 FR 71025, 71027 (December 14, 2021) ("Commerce is continuing to impose a certification requirement . . ., in order to not be subject to cash deposit requirements, the importer is required to meet the certification and documentation requirements described in Appendix IV for merchandise from Brazil, Appendix VI for merchandise from China, and VII for merchandise from Indonesia.").

Commerce routinely articulates a cash deposit hierarchy for market and nonmarket antidumping proceedings in its determinations based on the factors listed in proposed § 351.107(d)[15] and proposes to codify the antidumping market and nonmarket cash deposit hierarchies under paragraphs (d)(1)(i) and (ii), respectively.

The antidumping duty order cash deposit hierarchy for a market economy proceeding proposed in § 351.107(d)(1)(i) includes three steps for determining the applicable cash deposit rate for a given entry of subject merchandise. Commerce would first determine if it has already determined a cash deposit rate for the exporter and, if so, instruct CBP to apply that cash deposit rate to the exporter's entries of subject merchandise. When such an exporter-specific cash deposit rate does not exist, proposed § 351.107(d)(1)(i)(B) would provide that if a cash deposit rate exists for the producer in question, Commerce would instruct CBP to apply that rate to the entries of subject merchandise at issue. If the first and second steps do not yield a result (*i.e.*, Commerce has not previously established a cash deposit rate for either the exporter or the producer of subject merchandise), under proposed § 351.107(d)(1)(i)(C) Commerce would instruct CBP to apply the all-others rate determined in the investigation of the underlying proceeding, pursuant to section 735(c) of the Act and proposed § 351.109(f), as the cash deposit rate for the entries of subject merchandise in question.

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[15] *See*, *e.g.*, *Methionine From Spain: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 86 FR 38985, 38986 (July 23, 2021) ("we will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondent listed above will be equal to the company-specific estimated weighted-average dumping margin determined in this final determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.") and *Glass Containers From the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 85 FR 58333, 58337 (September 18, 2020) ("Commerce will instruct CBP to require a cash deposit equal to the weighted-average amount by which the normal value exceeds U.S. price as follows: (1) The cash deposit rate for the exporter/producer combinations listed in the table above will be the rate identified in the table; (2) for all combinations of Chinese exporters/producers of subject merchandise that have not received their own separate rate, the cash deposit rate will be the cash deposit rate established for the China-wide entity; and (3) for all non-Chinese exporters of subject merchandise which have not received their own separate rate, the cash deposit rate will be the cash deposit rate applicable to the Chinese exporter/ producer combination that supplied that non-Chinese exporter.").

For proceedings involving a nonmarket economy country, proposed § 351.107(d)(1)(ii) would apply. First, under proposed § 351.107(d)(1)(ii)(A), if Commerce has already established a cash deposit rate for the exporter, such as in an investigation, the agency would instruct CBP to apply it to the entries of subject merchandise in question. If Commerce has not established a cash deposit rate for the exporter, pursuant to proposed § 351.107(d)(1)(ii)(B) Commerce would instruct CBP to apply the cash deposit established for the nonmarket economy entity pursuant to proposed § 351.108(a) to the entries at issue.

Next, proposed § 351.107(d)(1)(ii)(C) would addresses entries of subject merchandise resold in the United States through a third-country reseller under proceedings involving a nonmarket economy country. In that situation, Commerce would normally instruct CBP to apply the cash deposit rate applicable to either the nonmarket economy country exporter that supplied the subject merchandise to the reseller or to an applicable producer/exporter combination, as warranted.

Finally, proposed § 351.107(d)(2) would provide an exception to the two AD cash deposit hierarchies pursuant to which based on unique facts in an underlying proceeding. Commerce might determine that an alternative cash deposit rate (*i.e.*, a cash deposit rate not identified under proposed paragraph § 351.107(d)(1)) is the most appropriate cash deposit rate to apply to the entries in question, and accordingly instruct CBP to apply that alternative cash deposit rate.

In addition to the AD cash deposit hierarchies set forth in proposed § 351.107(d), proposed § 351.107(e) would establish a new CVD cash deposit hierarchy that applies when the producer and exporter in question have differing cash deposit rates. Under proposed § 351.107(e)(1)(i), when a cash deposit rate is established for both the producer and exporter of subject merchandise, Commerce would instruct CBP to apply the higher of the two rates for the entry of subject merchandise in question. If that step does not apply and a cash deposit rate exists for the producer but not the exporter of subject merchandise, Commerce would instruct

CBP to apply the producer's cash deposit rate to the entries in question under proposed § 351.107(e)(1)(ii). If that step does not apply and a cash deposit rate exists for the exporter but not the producer of subject merchandise, Commerce would instruct CBP to apply the exporter's cash deposit rate to the entries of subject merchandise at issue under proposed § 351.107(e)(1)(iii). Finally, if none of those rates exist, Commerce would instruct CBP to apply the all-others rate determined in the investigation to the entries of subject merchandise at issue under proposed § 351.107(e)(1)(iv).

Just as with the AD cash deposit hierarchies' exception found in proposed § 351.107(d)(2), if Commerce determines that a cash deposit rate other than that resulting from the CVD cash deposit hierarchy should apply based on the unique facts in the underlying proceeding, then under proposed § 351.107(e)(2) Commerce might instruct CBP to use an alternative methodology in applying cash deposit rates to entries of subject merchandise.

Proposed § 351.107(f) would address effective dates for amended preliminary and final determinations and results of review upon the correction of a ministerial error, in accordance with sections 703, 705(e), 733, and 735(e) of the Act and § 351.224(e) through (g) of Commerce's regulations. When Commerce amends a preliminary or final determination in an investigation and the amendment increases the dumping margin or the countervailable subsidy rate, proposed § 351.107(f)(1) would provide that the new cash deposit rate would be applied to entries made on or after publication of the amended determination.[16]

On the other hand, under proposed § 351.107(f)(2), when Commerce's amends a preliminary or final determination in an investigation and that amendment results in a decrease of the dumping margin or the countervailable subsidy rate, then the new cash deposit rate would be

[16] *See Urea Ammonium Nitrate Solutions from the Republic of Trinidad and Tobago: Amended Preliminary Determination of Sales at Less Than Fair Value*, 87 FR 12935, 12936 (March 8, 2022) ("Because these amended rates result in increased cash deposit rates, they will be effective on the date of publication of this notice in the Federal Register.").

retroactive to the date of publication of the original preliminary or final determination, respectively.[17]

Furthermore, under proposed § 351.107(f)(3), when Commerce amends the final results of an administrative review, the effective date of the amended cash deposit rate would be retroactive to entries following the date of publication of the original final results of review, regardless of whether the dumping margin or countervailable subsidy rate increases or decreases.[18]

In addition to amended cash deposit rates made pursuant to ministerial error corrections under paragraphs § 351.107(f)(1) through (3), Commerce may also make such amendments as a result of litigation when alleged or disputed ministerial errors are at issue. In those circumstances, as reflected in proposed § 351.107(f)(4), the effective date of the amended cash deposit rates may differ from those resulting from the application of § 351.107(f)(1) through (3). Furthermore, proposed § 351.107(f)(4) explains that the applicable effective date following litigation will normally be identified in a Federal Register notice. In most cases, in accordance with the statute, such amendments pursuant to litigation will be prospective in application.

**4. Describing and Modifying Commerce's Separate Rates Practice and Procedures for Nonmarket Economy Country Antidumping Proceedings – § 351.108**

Section 771(18)(A) of the Act defines a nonmarket economy country as any foreign country which Commerce determines "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." Further, section 771(18)(C)(i) of the Act states that "{a}ny determination that a

[17] *See Raw Honey from Brazil: Amended Preliminary Determination of Sales at Less Than Fair Value*, 86 FR 71614, 71615 (December 17, 2021) ("Because these amended rates result in reduced cash deposit rates, they will be effective retroactively to . . . the date of publication of the Preliminary Determination.").

[18] *See Certain Carbon and Alloy Steel Cut-to Length Plate from Belgium; Amended Final Results of Antidumping Duty Administrative Review*, 2018-2019, 86 FR 21274 (April 22, 2021) ("The following cash deposit requirements will be effective retroactively for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after March 24, 2021, the publication date of the *Final Results* of this administrative review.").

foreign country is a nonmarket economy country shall remain in effect until revoked" by Commerce.

For over three decades, in antidumping proceedings involving nonmarket economy countries, Commerce has repeatedly determined that legally distinct entities are in a sufficiently close relationship to the government to be considered part of a single entity (*i.e.*, the government-controlled entity).[19] Reflecting that dynamic, current § 351.107(d) states that "{i}n an antidumping proceeding involving imports from a nonmarket economy country, 'rates' may consist of a single dumping margin applicable to all exporters and producers."

In the 1991 *Sparklers from China* investigation,[20] Commerce established a separate rate test, which it further developed in a subsequent 1994 investigation on *Silicon Carbide from China*.[21] Under the separate rate test, if an entity can demonstrate that the foreign government does not have either legal (*de jure*) control or control in fact (*de facto*) over the entity's export activities, it may receive a separate rate. Commerce's separate rate test has been affirmed as in accordance with law and otherwise acknowledged multiple times by the Federal Circuit.[22]

Over the past decade, Commerce has modified its practice pursuant to a series of CIT decisions and remand redeterminations. For example, in *Advanced Technology*, the CIT held that Commerce's traditional separate rate practice was deficient because it failed to recognize the authority that a government may hold over an entity's commercial activities when it owns a

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[19] *See Fine Denier Polyester Staple Fiber from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 83 FR 6335 (Jan 5, 2018), and accompanying Preliminary Decision Memorandum, dated December 18, 2017, at "Separate Rates" (*Polyester Staple Fiber from the PRC PDM*). For an example of a Commerce determination finding a country is a non-market economy, *see Antidumping Duty Investigation of Certain Aluminum Foil From the People's Republic of China: Affirmative Preliminary Determination of Sales at Less-Than-Fair Value and Postponement of Final Determination*, 82 FR 50858, 50861 (November 2, 2017).

[20] *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588, 20589 (May 6, 1991) (*Sparklers from China*).

[21] *See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585, 22586-22587 (May 2, 1994) (*Silicon Carbide from China*).

[22] *See Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1310-11 (Fed. Cir. 2017); *see also Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1009 (Fed. Cir. 2017); *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1349-50 (Fed. Cir. 2015); and *Canadian Solar Int'l LTD v. United States*, 68 F. 4th 1267, 1270 (Fed. Cir. 2023).

significant portion of that entity.[23] Accordingly, consistent with the Court's holdings on this issue, it is now Commerce's practice to conclude that when a government holds a majority ownership share, either directly or indirectly, in a respondent exporting entity, the majority holding in and of itself demonstrates that the government exercises, or has the potential to exercise, control over the entity's operations generally.[24] This may include control over, for example, the selection of management, a key factor in determining whether an entity has sufficient independence in its export activities to merit a separate rate. Consistent with normal business practices, Commerce would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the entity, including the selection of management and the strategic and financial decisions of the entity. Thus, under Commerce's current separate rate practice, if a foreign government holds a majority ownership share of a respondent exporting entity, Commerce will not grant that entity a separate rate.

As described below, Commerce is now proposing to codify Commerce's separate rate practice in § 351.108. Although a government in a nonmarket economy country may own or control entities located both within and outside of a nonmarket economy country, the proposed regulation addresses only the application of Commerce's separate rate practice to entities located within the nonmarket economy country. In addition, Commerce is also proposing to modify its separate rate practice in § 351.108 to address additional real-world factors through which a foreign government can control or influence production decisions, pricing and sales decisions, and export behavior. Finally, Commerce is proposing the codification and modification of separate rate application and certification requirements.

Proposed § 351.108(a) would provide that if Commerce determines that entities located in a nonmarket economy country are subject to government control (*i.e.*, in a sufficiently close relationship to be considered part of a single entity, the government-controlled entity), absent

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[23] *See Advanced Technology & Materials Co., Ltd. v. United States*, 885 F. Supp. 2d 1343, 1349-1357 (CIT 2012), affirmed in *Advanced Technology & Materials Co., Ltd. v. United States*, Case No. 2014-1154 (Fed. Cir. 2014).
[24] *See, e.g., Polyester Staple Fiber from the PRC* PDM at "Separate Rates."

evidence on the record indicating otherwise, Commerce will assign such entities a single antidumping duty deposit rate. This paragraph replaces current § 351.107(d) and clarifies that the single cash deposit or assessment rate is called "the nonmarket economy entity rate."

Proposed § 351.108(b) would provide that an entity may receive its own rate, separate from the nonmarket economy entity rate, if it demonstrates to Commerce that it was sufficiently independent from the control of the nonmarket economy government with respect to its commercial and export activities during the relevant period of investigation or review to justify the application of a separate rate. The regulation would then set forth the circumstances and criteria which Commerce would consider in determining if the application of a separate rate is warranted based on record information.

The first circumstance pertains to nonmarket economy government ownership and control. When a government, at any level, owns an entity, either directly or indirectly, the proposed regulation describes certain situations in which no separate rate will be permitted. The first ownership situation, set forth in § 351.108(b)(1)(i), as described above and consistent with Commerce's current practice, is when the government has a majority share, described as "over fifty percent ownership," of the entity. If the government owns more than fifty percent of an entity subject to an antidumping proceeding, Commerce will not determine that the entity is separate from government control and will not calculate a separate rate for that entity.

In addition, proposed § 351.108(b)(1)(ii) sets forth a modification to Commerce's practice in addressing four specific situations in which the government has an ownership interest which is fifty percent or less of an entity but still has the ability to control or influence the entity's production and commercial decisions. Under those specific situations, in accordance with this Proposed Rule, Commerce would not determine that the entity is separate from government control and thus would not calculate a separate rate for that entity.

Under the first circumstance, set forth in proposed § 351.108(b)(1)(ii)(A), if the government's ownership share provides it with a greater degree of control or influence over the

entity's production and commercial decisions than an ownership share of that amount would normally entail absent such special treatment, and Commerce concludes that the degree of control or influence of the entity is significant,[25] the entity would not be eligible for a separate rate. Such special shares in a company are sometimes referred to as "golden shares."[26] When a government owns such special shares it may have the ability to exercise a disproportionate level of influence or control over an entity's decisions central to Commerce's calculations.

Under the second circumstance, set forth in proposed § 351.108(b)(1)(ii)(B), if the government has the authority to veto or control an entity's production and commercial decisions, Commerce would find the entity at issue ineligible for a separate rate. Such authority can have an outsized effect on the production and commercial decisions made by an entity, so Commerce has concluded it would be inappropriate to find an entity eligible for a separate rate if the government holds veto power or control over these decisions.

Under the third circumstance, as set forth in proposed § 351.108(b)(1)(ii)(C), if government officials, employees, or representatives hold positions of authority in the entity, including as members of the board of directors or other governing authorities in the entity, that have the ability to make or influence production and commercial decisions for the entity, then Commerce would find the entity at issue ineligible for a separate rate.

Likewise, under the forth circumstance, set forth in proposed § 351.108(b)(1)(ii)(D), if the entity is obligated by law, its foundational documents (such as its articles of incorporation),

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[25] A determination that the degree of control or influence is "significant" would be based on a case-by-case analysis and dependent on consideration of the government's, as well as other shareholder's, abilities to control or influence the entity's production and commercial decisions. For example, the government may own one percent of the shares of an entity and still make certain production or commercial decisions for the entity despite disagreement by the owners of the other ninety-nine percent of shares. The significance of the degree of control or influence by the government would be entirely dependent on the facts on the record before Commerce.

[26] Organization for Economic Co-operation and Development, OECD Guidelines on Corporate Governance on State-owned Enterprises, 17-16 (2015) ("Some borderline cases need to be addressed on a case-by-case basis. For example, whether a "golden share" amounts to control depends on the extent of the powers it confers on the state.") and ("{M}inority ownership by the state can be considered as covered by the Guidelines if corporate or shareholding structures confer effective controlling influence on the state (e.g. through shareholders' agreements."). *See also id.* at 63 ("Any special rights or agreements that diverge from generally applicable corporate governance rules, and that may distort the ownership or control structure of the SOE, such as golden shares and power of veto, should be disclosed.").

or other *de facto* requirements to maintain one or more officials, employees, or representatives of the government in positions of power (including as members of the board of directors or other governing authorities in the entity, which have the ability to make or influence production and commercial decisions for the entity at issue), then Commerce would not calculate a separate rate for the entity in that situation. Unlike the scenario described in § 351.108(b)(1)(ii)(C), there is no requirement in this paragraph that a government official, employee, or representative actually hold such an influential position in the entity, only that information on the record shows that the entity is required to have a government official, employee, or representative hold such a position. Whether there is the potential for a government official, employee or representative taking a position of power, or the government official, employee or representative actually holds such a position of power, both situations are means by which the government could exercise an outsized amount of influence or control over the entity.[27] Boards of directors generally control many of an entity's production and commercial decisions, so if the entity is required to have a government representative on a board of directors, for example, then it is reasonable to conclude that the government representative on the board could also exercise control, or could have the potential to exercise control, over the entity's production and pricing decisions.

It is Commerce's observation over many years of administering AD and CVD proceedings that government entities who own the same percentage of shares of a company as non-government entities do not always have the same influence over company decisions as the non-government entities. In fact, Commerce has observed that governments that have ownership interest in companies and have officials, employees, or representatives in positions of power within those companies frequently hold greater influence over company decisions than those

[27] *Id.* at 14 ("Examples of an equivalent degree of control" to the state "being the ultimate beneficiary owner of the majority of voting shares" would include, "for instance, cases where legal stipulations or corporate articles of association ensure continued state control over an enterprise or its board of directors in which it holds a minority stake.").

without the institutional, political and resource backing of the government.[28] Furthermore, it is also Commerce's observation that government representatives often do not have the entity's profits as their primary motivating factor, unlike most non-government share-holders.[29]

To be clear, Commerce is not proposing that any of these factors, standing alone without some amount of government ownership, would result in a denial of a separate rate. However, if the government has a minority ownership in the entity and one of these four factors exists as well, then, as with majority ownership, there exists the ability or potential for the nonmarket economy government to exercise control over the entity's operations in general, thereby warranting a determination that no separate rate should be calculated for that entity.

Under proposed § 351.108(b)(2) and (3), if an entity demonstrates that there is no majority government ownership of the entity or there is fifty percent or less government ownership and the criteria listed in § 351.108(b)(1)(ii) do not exist, Commerce would then apply its analysis to determine the existence or absence of *de jure* or *de facto* nonmarket economy government control. In addition to the three factors historically considered by Commerce in applying its *de jure* analysis (the absence of restrictive stipulations by the government associated with an individual entity's business and export licenses, legislative enactments decentralizing government control of companies, and other formal measures by the government decentralizing control of companies) and the four factors historically considered by Commerce in applying its *de facto* analysis (whether export prices are set by or are subject to the approval of a government agency, whether the entity has authority to negotiate and sign contracts and other agreements without government involvement, whether the entity has autonomy from the government in

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[28] This observation is most notable in Commerce's CVD proceedings involving China. Commerce has observed that the Chinese government has certain ownership interests which allow it to influence certain companies and individuals. *See, e.g.,* Commerce Memorandum, "Countervailing Duty Administrative Review of Steel Racks from the People's Republic of China: Public Bodies Analysis Memo," dated August 2, 2022 (ACCESS Barcode 4270527-01 – 4270527-10), at 16-20.

[29] Likewise, Commerce has also observed in China CVD proceedings that profit is frequently not the government representatives' primary motivating factor in making share-holder decisions. *See, e.g.,* Commerce Memorandum, "Countervailing Duty Administrative Review of Steel Racks from the People's Republic of China: Analysis of China's Financial System," dated August 3, 2022 (ACCESS Barcode 4270869-01 – 4270869-13) at 3-7; 17-19.

making decisions regarding the selection of its management, and whether the entity retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses), Commerce is also proposing the consideration of three additional relevant factors for purposes of applying a separate rate.

First, under proposed § 351.108(b)(2)(i), as part of the *de jure* analysis, an entity would be required to demonstrate that there is no legal requirement that one or more officials, employees, or representatives of the government serve as officers of the entity, members of the board of directors, or other governing authorities in the entity which make or influence export activity decisions.

Similarly, under proposed § 351.108(b)(3)(i), as part of the *de facto* analysis, if an entity has demonstrated that the factors listed in § 351.108(b)(1)(i), (ii), and (2) do not apply to the entity, it would be required to demonstrate that there are no government officials, employees, or representatives actually serving in such leadership roles in the entity. Similar to the inclusion of government representatives in company positions that allow them to make or influence production or commercial decisions discussed above when there is partial government ownership, these factors are included in the *de jure* and *de facto* analyses to consider if government officials, employees, or representatives, regardless of government ownership of entity, may be in a position to control or influence an entity's export activities.

Furthermore, Commerce proposes in § 351.108(b)(3)(vi) that a sixth factor be included in its *de facto* analysis, allowing Commerce to consider "any additional evidence on the record suggesting that the government has no direct or indirect influence over the entity's export activities." It is not Commerce's intention in this Proposed Rule to provide an exhaustive list of examples of additional evidence that might indicate *de facto* government influence over export activities, and such a determination would be left to Commerce to determine based on the information on the record on a case-by-case basis. However, one example of means by which a government could influence an entity's export activities that is not articulated in the regulation is

through threats, coercion, or intimidation. If the administrative record showed that the government participated in or sanctioned threats, coercion, or intimidation of an entity, either directly or indirectly, and those actions impacted, or likely influenced, the entity to modify its export activities, Commerce would deny separate rate treatment to an entity under this provision. Governments can influence the export activities of companies through a variety of *de facto* means, such as through company decision-making when the government is an owner of shares in a company, when there are "insiders" within the company who directly work for the entity but take orders from the government, or when decision-making is made under duress associated with government-directed threats, coercion, and intimidation.[30] This provision is intended to make certain that all such relevant *de facto* scenarios are captured and considered in Commerce's separate rate *de facto* analysis.

In addition, proposed § 351.108(c) would explain that if a company is located in a nonmarket economy and is subject to a nonmarket economy country proceeding, but is wholly owned by a market economy foreign entity, then the application of the separate rate analysis codified in paragraph (b) would be unnecessary to determine whether it is independent of nonmarket economy government control.[31] The paragraph would clarify that for an entity to be wholly owned by a market economy foreign entity, the foreign entity must be both incorporated and headquartered in a market economy country or countries. Thus, for purposes of this provision, if a foreign entity is incorporated in a market economy country but headquartered in a nonmarket economy country, Commerce would not consider the company located in the nonmarket economy to be wholly owned by a market economy foreign entity. Likewise, if the

[30] Commerce does not intend to provide an exhaustive list of types of threats, coercion or intimidation which governments may use on an entity or an entity's colleagues, associates, friends and family members to control or influence an entity's export behavior. Some obvious examples involve bodily harm (kidnapping, defenestration, muggings), harm to property (arson, vehicular damage, personal property damage), blackmail, threats to living welfare (such as threats to employment and access to housing, electricity, heating, internet and medical care), or cyber-attacks, but there are many additional examples which do not fall into these categories and would still be considered threats, coercion or intimidation which could control or influence an entity's export decisions under Commerce's *de facto* analysis.

[31] *See Polyester Staple Fiber from the PRC PDM* at "Separate Rates."

foreign entity is headquartered in a market economy but incorporated in a nonmarket economy country, Commerce would not consider the company located in the nonmarket economy to be wholly owned by a market economy foreign entity, for purposes of this provision. In either of those situations, Commerce would conduct its separate rate analysis of the company located in the nonmarket economy under the understanding that the company is from the nonmarket economy country. The reason for this requirement is simple: Commerce does not want companies to evade the application of its separate rates analysis when those companies are owned by entities either headquartered or incorporated in a nonmarket economy country and may be controlled by the nonmarket economy government.

Proposed § 351.108(d)(1) and (2) would codify the requirement that separate rate applications and certifications be submitted by each entity seeking a separate rate. In antidumping investigations, new shipper reviews, and administrative reviews in which an entity has not previously been assigned a separate rate, the entity must file a separate rate application, the form of which, pursuant to the proposed regulation, Commerce would make available to the public. In administrative reviews in which an entity already has been assigned a separate rate, under proposed § 351.108(d)(3), the entity would instead file a certification attesting that it had entries for which liquidation was suspended during the period of review and that it otherwise continued to meet the criteria for obtaining a separate rate.

Under these provisions, for new shipper reviews and administrative reviews, Commerce has included a proposed requirement that interested parties submitting an application must provide documentary evidence of an entry with the separate rate applications for which liquidation was suspended during the period of review in § 351.108(d)(2). Commerce would not consider separate rate applications in new shipper reviews and administrative reviews if it is possible that no entry was suspended during the period of review for a particular entity, because without entries to which Commerce could assess duties there would be no purpose for a separate rate analysis. Furthermore, § 351.108(d)(3) would explain that if the agency determined in a

previous segment of the proceeding that certain exporters and producers should be treated as a single entity, then a separate rate certification in a subsequent administrative review must identify and certify the required information for all of the companies comprising that single entity.

Commerce is also proposing in § 351.108(d)(1), (2), and (3) that all separate rate applications and certifications[32] be filed with Commerce no later than fourteen days following publication of the notice of initiation of an investigation or review in the Federal Register. This would be a change from the current thirty-day deadline.[33] The current thirty-day deadline delays Commerce from selecting respondents in its nonmarket economy proceedings because Commerce cannot select respondents for individual examination until it first determines the pool of exporters who have satisfied the separate rate analysis. Likewise, until Commerce selects respondents, it cannot issue respondent questionnaires. Commerce has determined that by revising the deadline for submitting separate rate applications and certifications to Commerce to fourteen days, Commerce will be able to select respondents sooner in its investigations and reviews, and thereby provide more time for Commerce to conduct its proceedings.

The last proposed provision of § 351.108 is paragraph (e), which would require entities that have submitted separate rate applications or certifications, and then are subsequently selected to be examined as an individually examined respondent, respond to all sections of Commerce's antidumping questionnaire in order to be eligible for a separate rate. In other words, all entities filing a separate rate application or certification must be prepared to fully participate in Commerce's proceedings if they are selected to be individually examined respondents.

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[32] Separate rate application and certification forms are available on Commerce's website, which is recognized in Commerce's nonmarket economy AD initiation notices. *See, e.g., Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 87 FR 35165, 35166-67 (June 9, 2022) ("The Separate Rate Certification form will be available on Commerce's website at https:// enforcement.trade.gov/nme/nme-sep-rate.html on the date of publication of this Federal Register notice.").

[33] *See, e.g.*, *Glass Wine Bottles from Chile, the People's Republic of China, and Mexico: Initiation of Less-Than-Fair-Value Investigations*, 89 FR 4911, 4914 (Jan 25, 2024).

**5. Including Procedures for Selecting Respondents, Calculating an All-Others Rate, Calculating a Rate for Unexamined Respondents, and Selecting Voluntary Respondents – § 351.109**

Sections 777A(c)(1) and 777A(e)(1) of the Act direct Commerce to determine an individual weighted-average dumping margin or countervailable subsidy rate for each known exporter and producer of the subject merchandise. However, Commerce may limit its examination to a reasonable number of exporters or producers under sections 777A(c)(2) and 777A(e)(2) of the Ac if it determines that it is not practicable to determine an individual weighted-average dumping margin or countervailable subsidy rate because of the large number of exporters or producers involved in the investigation or review.

In addition, sections 703(d)(1)(A), 705(c)(5), 733(d)(1)(A), and 735(c)(5) of the Act set forth the general rules and exceptions which Commerce applies in investigations for determining the rate applied to all exporters and producers not individually examined in the investigation, known as all-others rate, in both the preliminary and final determinations.

Finally, section 782(a) provides that in investigations and administrative reviews in which Commerce has limited the number of exporters or producers examined, or determined a single-country wide rate, Commerce may select voluntary respondents for examination if certain criteria are satisfied.

The current regulations do not address the all-others rate and provide little guidance about limiting examination of exporters and producers; what guidance does exist in the regulation applies only in investigations. The current voluntary respondent regulation at § 351.204(d) applies only to investigations, does not provide details about voluntary respondent submission deadlines, and does not reference Commerce's practice for selecting voluntary respondents when there is more than one voluntary respondent treatment request on the record. Commerce is therefore proposing the addition of § 351.109 to its regulations to address and clarify each of these issues.

Proposed § 351.109(a) would introduce each of these concepts, including Commerce's respondent selection practice. Commerce's statutory authority to engage in respondent selection is built on the proposition "that the largest exporters by volume are assumed to be representative of the non-selected respondents."[34] The Act creates this assumption of representativeness by explicitly addressing the impracticability of individually examining a large number of respondents and the expectation that Commerce use the rates calculated for the mandatory respondents as the basis for the rate for firms not selected for individual examination.[35]

Commerce's respondent selection practice is not a means to gauge whether a potential respondent is willing to participate in an investigation or review, but rather whether Commerce can effectively examine a reasonable number of producers and exporters, as Congress intended, to calculate an accurate dumping margin or countervailable subsidy rate.[36] The Act explicitly allows Commerce to focus its resources on individual examination of certain respondents and, in doing so, allows Commerce to decline to examine others.[37] In codifying Commerce's respondent selection practice, the agency seeks to promote transparency and efficiency when conducting administrative reviews and investigations involving a large number of known exporters and producers of subject merchandise.

Sections 777A(c)(1) and 777A(e)(1) of the Act direct Commerce to determine an individual weighted-average dumping margin or countervailable subsidy rate for each known exporter and producer of the subject merchandise in an investigation[38] or administrative review, where practicable, and Commerce has proposed codifying that language in § 351.109(b).

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[34] *See PrimeSource Bldg. Prod., Inc. v. United States*, 581 F. Supp. 3d 1331 (CIT 2022) ("Consistent with this assumption, the cases also stand for the proposition that Commerce is expected to use the mandatory respondents' rates to determine the antidumping duty rate to be assigned to the non-selected respondents.").
[35] *See* sections 777A(c)(2) and 777A(e)(2)(A) of the Act.
[36] *See Parkdale Int'l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)).
[37] *Id*.
[38] For investigations, specifically, current § 351.204(c) reflects this general rule. Proposed § 351.109(b) would replace that provision, as explained below, and would apply equally to administrative reviews, consistent with the language of sections 777A(c)(1) and 777A(e)(1) of the Act.

However, in many of Commerce's investigations and administrative reviews, there are a large number of exporters and producers of the merchandise under investigation or review, and therefore Commerce normally does not have the resources to examine "each known exporter and producer."[39] Accordingly, Commerce limits the exporters or producers under examination consistent with sections 777A(c)(2) and 777A(e)(2) of the Act.[40] In doing so, Commerce normally issues a respondent selection memorandum that provides its respondent selection analysis, which has been affirmed by the CIT as in accordance with law. [41]

Proposed § 351.109(c) would codify Commerce's long-standing respondent selection analysis, whereby Commerce determines based on record information whether it is practicable to determine individual dumping margins or countervailable subsidy rates for every exporter or producer. If it is not practicable to do so because of the large number of exporters or producers involved in an investigation or review, in accordance with proposed § 351.109(c)(1), Commerce would then determine the exporters or producers to be examined based on either a sample of exporters or producers that is statistically valid based on record information or the number of respondents that can be reasonably examined based on the largest volume of exports of subject merchandise from the exporting country.

Notably, the Act does not provide guidance as to how Commerce should reach a statistically valid result or how Commerce must account for the largest volume of subject merchandise that can reasonably be examined.[42] Moreover, the Act does not require Commerce

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[39] *See, e.g.*, Commerce Memorandum, "2020-2021 Antidumping Duty Administrative Review of Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Selection of Respondents for Individual Examination," dated March 18, 2022, (ACCESS Barcode 4222983-1).

[40] *Id*.

[41] *See Mid Continent Nail Corp. v. United States*, 949 F. Supp. 2d 1247, 1274 (CIT 2013) (*Mid Continent Nail Corp.*) (affirming "Commerce's decision not to conduct individual reviews of all respondents was properly based on the agency's determination that the proceeding here involved a "large number" of exporters and producers.").

[42] *See Shanxi Hairui Trade Co. v. United States*, 503 F. Supp. 3d 1307, 1320 (CIT 2021), *aff'd*, 39 F.4th 1357 (Fed. Cir. 2022) ("The statute authorizes Commerce to employ a statistically valid sampling method when choosing respondents to investigate, but does not instruct Commerce as to how to reach a statistically valid result in calculating the sample rate…"); *Pakfood Pub. Co. v. United States*, 753 F. Supp. 2d 1334, 1343 (CIT 2011), *aff'd*, 453 F. App'x 986 (Fed. Cir. 2011) ("{Commerce}turns to issuing Q & V questionnaires or other sources of information when the CBP data for the subject merchandise in question does not provide sufficient or adequate data for the Department's respondent selection purposes.").

to use only the two aforementioned methodologies in limiting its examination.[43] Rather, the Act grants Commerce discretion in reaching a "reasonable number" of respondents for individual examination, accounting for any practicability concerns that may affect Commerce's ability to examine multiple respondents.[44]

When Commerce determines to limit the number of exporters or producers for individual examination based on the largest volume of exports of subject merchandise from the exporting country, proposed § 351.109(c)(2)(i)-(iv) would provide the factors Commerce will consider as part of its analysis. Under § 351.109(c)(2)(i), Commerce would first select the data source to determine the largest exporters or producers of subject merchandise. Normally, Commerce's selection would be based on information derived from CBP, but Commerce may use another reasonable means of selecting potential respondents in an investigation or review, such as quantity and value questionnaires. Under § 351.109(c)(2)(ii), Commerce would then select the largest exporters or producers of the subject merchandise. Normally, that analysis would be conducted based on the volume of imports of subject merchandise. However, the analysis may instead be conducted based on the value of imported products, depending on the product and record information.

Under proposed § 351.109(c)(2)(iii), once the list of exporters or producers with the largest number of imports, either through volume or value, is compiled, Commerce would next determine if the number of exporters or producers on the list is too large to practically individually examine each known exporter and producer of subject merchandise. This provision lists the factors which Commerce might consider in making such a determination, including the

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[43] *See United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word "may," when used in a statute, usually implies some degree of discretion… {but} can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute.").

[44] *See Mid Continent Nail Corp.*, 949 F. Supp. 2d at 1272 ("{N}either the statute nor the legislative history makes any reference to "reasonable volume" (only "the largest volume of the subject merchandise ... that can be reasonably examined.")); *see also Husteel Co. v. United States*, 98 F. Supp. 3d 1315, 1331 (CIT 2015) (citing *Mid Continent Nail Corp.*, 949 F. Supp. 2d at 1272 ) ("{N}othing herein should be understood to suggest that Commerce's discretion to choose between the two methodologies … is wholly unfettered, or that 'representativeness' could never constrain Commerce's ability to … affect a determination as to whether a specific number of exporters and producers is "reasonable" given the facts of a particular case.").

amount of resources and detailed analysis which would be necessary for Commerce to examine each potential respondent's information, the current and future workload of the office administering the proceeding, and Commerce's overall current resource availability.

Under proposed § 351.109(c)(2)(iv), if Commerce determines that the number of exporters is too large to practically individually examine each known exporter or producer of the subject merchandise, Commerce would then determine the number of exporters or producers which can be reasonably examined. Under this provision, Commerce would first consider the total and relative volumes (or values) of entries of subject merchandise for each potential respondent derived from the data source considered in § 351.109(c)(2)(ii), then rank potential respondents by the total volume or value of entries into the United States during the relevant period. Lastly, Commerce would determine how many respondents it can reasonably examine based on that information and select the exporters or producers with the largest volume or values of entries consistent with that number.

In addition, proposed § 351.109(c)(2)(v) would address situations in which one or more selected potential respondents do not respond to Commerce's questionnaires or elect to withdraw from participation in the segment of the proceeding soon after filing questionnaire responses, or, early in the segment of a proceeding, Commerce determines that they are no longer participating in the investigation or administrative review [45] or that their U.S. sales are not *bona fide* sales of subject merchandise.[46] In each of those cases, when Commerce is selecting respondents based

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[45] *See, e.g., Fresh Garlic from the People's Republic of China: Final Results of the Changed Circumstances Review*, 80 FR 57579 (September 24, 2015), and accompanying Issues and Decision Memorandum at Comment 4 (analyzing the additional burdens of selecting another respondent following the withdrawal of a selected respondent); *see also Viet I-Mei Frozen Foods Co. v. United States*, 83 F. Supp. 3d 1345, 1362 (CIT 2015), *aff'd*, 839 F.3d 1099 (Fed. Cir. 2016) ("{T}o the prevention of abuse where Commerce expends resources to initiate an individual examination—and the respondent seeks to withdraw its participation when it changes its mind about the benefit of such examination and prefers the 'all others' rate instead—is a reasonable basis on which Commerce may decline to abort its examination.").

[46] Commerce has a long history of reviewing only *bona fide* sales in investigations, administrative reviews and new shipper reviews. *See, e.g., Windmill Int'l Pte v. United States*, 193 F. Supp. 2d 1303, 1312 - 1314 (CIT 2002) (affirming Commerce's rescission of an administrative review because it determined that the respondent's sale of two cut-to-length carbon steel plates to the United States was not "commercially reasonable and was atypical of the normal business practices between Windmill and the United States purchaser."). Therefore, the language as proposed will have Commerce select respondents only from those exporter or producers with *bona fide* sales to the

on the largest exporter or producers, Commerce proposes, at its discretion, to select the exporter or producer with the next largest volume or values to replace the respondents initially selected for examination.[47]

With respect to proposed § 351.109(d), it is important to recognize that current § 351.204(c) states that Commerce "may decline to examine a particular exporter or producer if that exporter or producer and the petitioner agree." Commerce proposes to move this provision to new § 351.109(d) and revise it to become a waiver provision.[48] Accordingly, the proposed new paragraph states that Commerce may waive individual examination of an exporter or producer if both the selected respondent and petitioner file waiver requests for that exporter or producer no later than five days after Commerce has selected respondents. If Commerce determines to provide such a waiver and had selected the waived respondent based on an analysis of the largest exporters or producers, proposed § 351.109(d) provides that Commerce could select the next largest exporter or producer to replace the waived respondent.

Proposed § 351.109(e) restates Commerce's expressed authority under section 777A(e)(2)(B) of the Act to calculate a single country-wide subsidy rate for all exporters and producers if it is not practicable to determine individual countervailable subsidy rates due to the large number of exporters or producers involved in the investigation or review.[49]

Section (f) of proposed § 351.109 would set forth the calculation of the all-others rate set forth for final determinations in sections 705(c)(5) and 735(c)(5) of the Act and generally

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United States. In determining if a sale is *bona fide*, Commerce may consider the factors listed in section 751(a)(2)(B)(iv) of the Act and §351.214(k).

[47] Although this provision would apply when Commerce selects respondents based on the largest exporters or producers of subject merchandise, it could also select further respondents when using a sampling methodology to select a respondent for individual examination, although in that case Commerce need not select additional exporters or producers based on the volume or value of imports.

[48] *See Oregon Steel Mills Inc. v. United States,* 862 F.2d 1541, 1545–46 (Fed. Cir. 1988) (recognizing that Congress intended to allow Commerce the authority to avoid the investigative burden associated with an administrative review in situations where the domestic industry has no continued interest in proceeding).

[49] *See, e.g.*, *Honey from Argentina: Preliminary Affirmative Countervailing Duty Determination and Alignment with Final Antidumping Determination on Honey from the People's Republic of China*, 66 FR 14521, (March 13, 2001) ("Commerce determined that it would not be practicable to investigate alleged countervailable subsidies received by individual honey producers and exporters in Argentina.") and *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*: *Certain Softwood Lumber Products from Canada*, 67 FR 15545, 15547 (April 2, 2002).

described for preliminary determinations in sections 703(d)(1)(A) and 733(d)(1)(A) of the Act. As the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act (SAA) explains, these provisions allow for Commerce to "calculate individual dumping margins for those firms selected for examination and an 'all others' rate to be applied to those firms not selected for examination."[50] According to the SAA, the goal of the "all others" rate is to reflect the actual dumping margin or countervailing subsidy rate of the non-selected respondents as accurately as possible.[51]

Proposed sections 351.109(f)(1)(i) and (ii) would set forth the general rule for determining the all-others rate as reflected in sections 705(c)(5)(A)(i) and 735(c)(5)(A)(i) of the Act. Those provisions state that, in general, the all-others rate will be equal to the weighted average of the dumping margins or countervailable subsidy rates calculated for those exporters and producers that are individually investigated, exclusive of any zero and *de minimis* margins, and any margins determined entirely on the basis of the facts available.[52]

However, Commerce has encountered two common scenarios in which the application of the general rule for determining the all-others rate would not be appropriate or would have negative consequences based on the facts on the record. Accordingly, Commerce proposes to codify these exceptions in new § 351.109(f)(2)(i) and (ii). In one scenario, if Commerce determines that only one examined respondent's countervailable subsidy rate or weighted-average dumping margin satisfies the criteria set forth in sections 705(c)(5) and 735(c)(5) of the Act, respectively, Commerce applies that countervailable subsidy rate or weighted-average

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[50] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316 (1994) (SAA) at 873, reprinted in 1994 U.S.C.C.A.N. 4040, 4200.
[51] *Id.*
[52] *See* sections 705(c)(5) and 735(c)(5) of the Act; *see also MacLean-Fogg Co. v. United States*, 753 F.3d 1237, 1239 (Fed. Cir. 2014) (recognizing that "{t}o establish the all-others rate, Commerce first discarded the AFA rate assigned to the three mandatory respondents—correctly so…").

dumping margin as the all-others rate.[53] That scenario and practice would be codified in § 351.109(f)(2)(i).[54]

In the other common scenario, Commerce calculates dumping margins or countervailable subsidy rates for two or more individually investigated exporters or producers and then determines that if it were to calculate an all-others rate using the actual, weighted-average dumping margins or countervailable subsidy rates based on the entities' proprietary information, the resulting all-others rate would inadvertently divulge each respondent's proprietary information to the other individually investigated exporter or producer. This can occur, for example, when Commerce determines the all-others rate by determining a weighted-average of the rates calculated for two exporters or producers, because each respondent can often figure out their competitor's proprietary information through the resulting weighted-average rate.[55]

Over time, Commerce has implemented a practice to address such a situation, which the agency proposes to codify in § 351.109(f)(2)(ii)(A)-(C). Specifically, Commerce first calculates the weighted average of the dumping margins or countervailable subsidy rates for the individually-investigated respondents using their reported data, including business proprietary data, then calculates a simple average of the individually-investigated respondents' dumping margins or countervailable subsidy rates, as well as a weighted-average dumping margin or countervailable subsidy rate based on the respondents' publicly-ranged data.[56] Once Commerce

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[53] *See Mid Continent Steel & Wire, Inc. v. United States*, 321 F. Supp. 3d 1313, 1321 (CIT 2018) ("Applying the statutory method, Commerce excluded the PRC-wide rate assigned to {a mandatory respondent} and relied on the only other calculated rate, in {the} segment, that was not zero, *de minimis*, or based entirely on facts available or AFA…").

[54] *Id*.

[55] *See MacLean-Fogg Co. v. United States*, 100 F. Supp. 3d 1349, 1360-61 (CIT 2015) (recognizing that Commerce's practice "is to take both averages and compare each to the actual weighted-average (using BPI available to the agency), in order to arrive at the nearest approximation of the all-others rate contemplated by" the statute.) (*MacLean-Fogg Co*.).

[56] *Id*.; *see, e.g*., *Aluminum Extrusions from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2010 and 2011*, 79 FR 634 (January 2, 2014), and accompanying IDM (*Aluminum Extrusions from the People's Republic of China; 2010 and 2011* IDM) at Comment 3; and *Certain Frozen Warmwater Shrimp from India: Preliminary Countervailing Duty Determination*, 78 FR 33344 (June 4, 2013), and accompanying PDM, unchanged in *Certain Frozen Warmwater Shrimp from India: Final Affirmative Countervailing Duty Determination*, 78 FR 50385 (August 19, 2013).

has both the simple average and publicly-ranged weighted-average margins or rates, Commerce compares them to the margins or rates calculated using the companies' proprietary information.[57] If the simple average is numerically closer to the weighted-average margin or rate using the proprietary information, Commerce would use the simple average for the all-others rate.[58] If the weighted-average margin or rate based on publicly-ranged information is closer to the weighted-average margin or rate based on proprietary data, then that margin or rate, instead, would be the margin or rate Commerce applies to the all-other exporters and producers.[59]

In addition, sections 705(c)(5)(A)(ii) and 735(c)(5)(A)(ii) of the Act provide for an exception to the general all-others rule, which would be reflected in proposed § 351.109(f)(2)(iii). Those provisions of the Act state that if the calculated rates for all selected respondents are zero, *de minimis*, or based entirely on facts available under section 776 of the Act, Commerce may use "any reasonable method to establish an all-others rate for exporters and producers not individually examined."[60] The Act and proposed regulation emphasize that one reasonable method Commerce may use under this exception includes "averaging the estimated weighted average dumping margins or countervailable subsidy rates determined for the individually investigated exporters and producers" using rates that are zero, *de minimis*, or based entirely on facts available.[61] The SAA provides that "the expected method is for Commerce to weight-average such rates to determine the non-selected respondents' rate."[62] However, the SAA also states that if the expected method "is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods."[63]

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[57] *See MacLean-Fogg Co.*, 100 F. Supp. 3d at 1360-61.
[58] *Id*.
[59] *Id*.
[60] Sections 705(c)(5)(A)(ii) and 735(c)(5)(A)(ii) of the Act.
[61] *Id.*
[62] *See* SAA at 873.
[63] *Id.*

Over the many years Commerce has applied its nonmarket economy country methodology, when the agency has determined that the nonmarket economy country entity has not participated in its proceedings or acted to the best of its ability in providing necessary information, Commerce has consistently applied a nonmarket economy country rate consisting of a single dumping margin applicable to all exporters and producers not receiving a "separate rate" in accordance with the facts available and adverse facts available provisions of sections 776(a) and (b) of the Act and current § 351.107(d).[64] Commerce has consistently explained that a nonmarket economy country entity is a singular entity, a nonmarket economy country rate is not an all-others rate, and the all-others rate provision in the Act does not apply in AD investigations covering nonmarket economy countries.[65] To provide clarity to the public, Commerce proposes § 351.109(f)(3), which would explain both that the rate determined for a nonmarket economy country entity is not an all-others rate and that unlike an all-others rate, which may not be increased or decreased in subsequent segments of an AD proceeding, a nonmarket economy country entity rate may be modified in subsequent segments of a proceeding if the nonmarket economy country entity is selected for examination.[66]

As explained above, the provisions in the Act that address the all-others rate calculation apply only to CVD and market economy country AD investigations. However, Commerce has a long-standing practice of looking to the all-others provision in the Act for guidance in determining a rate to apply to respondents that have not been individually examined in nonmarket economy country AD proceedings, market economy country AD administrative reviews, and CVD administrative reviews. Specifically, in nonmarket economy country AD investigations and administrative reviews, Commerce has taken guidance from the all-others rate

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[64] *See, e.g., 1,1,1,2-Tetrafluroethane from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 62597 (October 20, 2014), and accompanying IDM at Comment 1.
[65] *See Thuan An Prod. Trading & Serv. Co. v. United States*, 348 F. Supp. 3d 1340, 1349 (CIT 2018) (explaining that Commerce should have instead advanced the rationale "that the {nonmarket economy} entity is an individual entity, and therefore {} should be considered an individually investigated rate," rather than attempting to distinguish an {nonmarket economy} entity rate from an individually investigated rate and the all-others rate).
[66] *See, e.g., Aluminum Extrusions from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013*, 79 FR 78784 (December 31, 2014), and accompanying IDM at Comment 3.

provision to calculate a rate for non-selected companies who have satisfied Commerce's separate rate requirements but have not been individually investigated or examined during a POI or POR because, like market economy exporters or producers subject to an all-others rate, these companies will not be individually-examined during the relevant period of examination.[67] In other words, a company that demonstrates its entitlement to separate rate status in a nonmarket economy country AD investigation or review receives either an individual rate (as a mandatory or voluntary respondent) or a separate rate (if not selected for individual examination) based on a weighted-average of the rates calculated for the individually investigated or examined respondents.[68]

Similarly, in AD administrative reviews of market economy countries and CVD reviews, Commerce will normally apply the weighted-average margin or rate of the individually examined respondents to those exporters or producers not selected for individual examination, despite a request for individual review, because, like market economy exporters or producers subject to an all-others rate, those non-selected exporters or producers will not be individually examined during the relevant POR.[69]

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[67] *See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 FR 35245, (June 12, 2013), and accompanying IDM at Comment 4 (citing *Amanda Foods (Vietnam) Ltd. v. United States*, 647 F. Supp. 2d 1368, 1379 (CIT 2009) ("To determine the dumping margin for non-mandatory respondents in {nonmarket economy} cases (that is, to determine the 'separate rates' margin), Commerce normally relies on the 'all others rate' provision of {the statute}."). Commerce is now proposing to add a new regulation, § 351.108, which sets forth the separate rates requirements in this Proposed Rule.

[68] *See Viet I-Mei Frozen Foods Co. v. United States,* 839 F.3d 1099, 1102 (Fed. Cir. 2016) (affirming Commerce's practice of establishing differing treatment between the nonmarket economy entity rate and the separate rate respondents.); *see also Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1349 (Fed. Cir. 2016) (explaining that when all individually examined exporters are assigned *de minimis* margins or countervailable rates, the "expected method" is for Commerce to assign a separate rate by taking the average of the de minimis margins or countervailable subsidy rates assigned to the individually examined respondents).

[69] *See, e.g., Stainless Steel Bar from India: Final Results of Administrative Review of the Antidumping Duty Order; 2017– 2018*, 84 FR 56179, (October 21, 2019), and accompanying IDM at Comment 7 ("Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for companies that were not selected for individual review in an administrative review."); *see also Circular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Final Results of Countervailing Duty Administrative Review and Rescission of Countervailing Duty Administrative Review, in Part; Calendar Year 2017*, 84 FR 56173 (October 21, 2019), and accompanying IDM at 5 (explaining Commerce's application of the all-others rate in a CVD context).

Proposed § 351.109(g) would codify Commerce's practice of determining a dumping margin or countervailable subsidy rate to apply to respondents not individually investigated or examined under each of those scenarios, and would provide, in particular, that in each of these investigations and reviews, Commerce may use a simple average instead of a weighted-average in its calculations if the use of a weighted-average margin or rate would result in the release of one exporter's or producers' business proprietary information to another.[70]

Lastly, proposed § 351.109(h) covers the selection of voluntary respondents. Under section 782(a) of the Act, even when Commerce limits the number of respondents selected as mandatory respondents, an exporter or producer may still obtain its own margin or rate as a voluntary respondent if its voluntary respondent submissions are timely and the number of exporters or producers subject to an investigation or review is not so large that any additional individual examination of such exporters or producers would be unduly burdensome for Commerce and inhibit the timely completion of the investigation or review.[71] Although current § 351.204(d) references how a firm may request voluntary respondent status under section 782(a) of the Act, the regulation does not address the order in which a voluntary respondent may be selected or the filing deadlines applicable to voluntary respondents. Accordingly, in transferring the current voluntary respondent provisions from § 351.204(d) to proposed § 351.109(h), Commerce has proposed to add additional provisions covering voluntary respondents.

Specifically, as proposed, current § 351.204(d)(1)-(3) would be moved to new § 351.109(h)(1), (2) and (3)(i). In addition, Commerce has added two new provisions. First, § 351.109(h)(3)(ii) states that if more than one exporter or producer seeks voluntary respondent

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[70] *See, e.g.*, *Aluminum Extrusions from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2010 and 2011* IDM at Comment 3.

[71] *See* sections 782(a)(1)(A) and (B) of the Act; *see also* SAA at 843 ("Commerce may decline to analyze voluntary responses because it would be unduly burdensome and would preclude the completion of timely investigations or reviews."); *and Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 853 F. Supp. 2d 1352, 1365 (CIT 2012) (citing *Longkou Haimeng Machinery Co., Ltd. V. United States*, 581 F. Supp. 2d 1344, 1353 (CIT 2012) ("When Commerce can show that the burden of reviewing a voluntary respondent would exceed that presented in the typical antidumping or countervailing duty review, the court will not second guess Commerce's decision on how to allocate its resources.") (*Longkou Haimeng Machinery*)) (*Grobest & I-Mei Indus. (Vietnam*).

treatment, and Commerce determines to examine one or more voluntary respondents individually, it will select voluntary respondents based on the chronological order in which the requests were filed correctly on the record.[72] This approach is consistent with Commerce's current voluntary respondent selection policy.[73]

In addition, Commerce proposes adding § 351.109(h)(4), which addresses the timing of voluntary respondent submissions. The provision would explain that the deadlines for voluntary respondent submissions would generally be the same as deadlines for submissions by individually investigated respondents. Furthermore, it would provide that if there are two or more individually investigated respondents with different deadlines for a submission, such as when one gets an extension of time which is longer than the extension of time granted to another (or none at all), then the voluntary respondent will normally be required to file its submission to Commerce by the earliest deadline required of the respondents selected for individual examination.

**6. Revising References to Persons Examined, Treatment of Voluntary Respondents, and Exclusion from AD and CVD Orders – § 351.204**

Section 351.204 applies to certain general procedures and policies in an investigation once Commerce determines that a petition is sufficient under § 351.203. The current version includes paragraphs covering the period of investigation, § 351.204(b); the selection of persons to be examined, § 351.204(c); the treatment of voluntary respondents not selected for individual examination, § 351.204(d); and the exclusion of certain exporters and producers from an AD or CVD order, § 351.204(e).

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[72] If a voluntary respondent request is submitted on the record but is later determined to have been submitted incorrectly, then this provision would not apply to that exporter or producer and Commerce would select the next exporter or producer as a voluntary respondent which filed its voluntary respondent request correctly on the record.

[73] *See, e.g.,* Commerce Memorandum, "Administrative Review of the Countervailing Duty Order on Certain Softwood Lumber Products from Canada: Respondent Selection," dated April 26, 2022, (ACCESS Barcode 4235480-01), at 8-10 ("Commerce will select voluntary respondents based on the order in which the requests are received.").

Commerce proposes revising § 351.204 in accordance with both its proposed revisions of the cash deposit regulation, § 351.107, and the creation of a new respondent selection and all-others regulation, § 351.109, as discussed in greater detail elsewhere in this Proposed Rule.

Revising and simplifying § 351.204 is the logical outgrowth of the proposed revisions to part 351. Commerce may limit its examination of potential respondents not only in investigations, but in administrative reviews as well. Accordingly, it is reasonable to have the respondent selection provision appear in a regulation that applies to administrative reviews as well as investigations. Accordingly, Commerce proposes moving the parts of current § 351.204(c) that apply to both investigations and administrative reviews, including the waiver provision and the statutory reference to a single country-wide subsidy rate, to new § 351.109. Commerce proposes to retain language in current § 351.204(c) that applies only to investigations, while adding new language in that provision that references the more general respondent selection provision, § 351.109(c). Commerce also proposes to revise § 351.213(f) pertaining to administrative reviews to reflect similar respondent selection language for that segment of an AD or CVD proceeding.

Second, the same issue applies to the selection of voluntary respondents, pursuant to section 782(a) of the Act: Commerce may select voluntary respondents in both investigations and administrative reviews. Accordingly, Commerce proposes moving the general voluntary respondent selection provision from current § 351.204(d) to new § 351.109(h). Likewise, Commerce proposes to add a sentence to § 351.204(c) that references new § 351.109(h) and states that Commerce may determine to examine voluntary respondents in investigations. Similar language appears in revised § 351.213(f) to indicate that voluntary respondents may be selected in administrative reviews.

Third, with the revision of the cash deposit regulation, § 351.107, Commerce concludes that it would be logical to also revise and move current §§ 351.204(e)(1) through (3) to that regulation. Commerce proposes language in new § 351.107(c)(3) to address scenarios in which

Commerce would apply a producer/exporter cash deposit combination or combinations in excluding producers and exporters from AD or CVD investigations and orders as currently addressed in § 351.204(e)(1) through (3)).

With the changes being proposed to current § 351.204(d) and (e), Commerce therefore proposes renumbering § 351.204(e)(4) to § 351.204(d), retitling the subsection, "Requests for exclusions from countervailing duty orders based on investigations conducted on an aggregate basis" and removing § 351.204(e) entirely.

Finally, with these modifications to § 351.204(c) and (d), Commerce also proposes updating the heading of the regulation and updating the introductory paragraph, § 351.204(a), to reflect those changes. As proposed, the new heading would be "Period of investigation; requests for exclusions from countervailing duty orders based on investigations conducted on an aggregate basis." Revised paragraph (a), as proposed, would reference the rules regarding the period of investigation and exclusion requests for countervailing duty investigations conducted on an aggregate basis.

**7. Clarifying that Assessment Rates May Be Calculated on an *Ad Valorem* or a Per-Unit Basis – § 351.212(b)(ii)**

Section 731 of the Act directs Commerce to impose duties on imported merchandise "that is being, or likely to be, sold in the United States at less than fair value." Section 751(a)(2)(C) of the Act states that an AD margin "shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the determination and for {cash} deposits of estimated duties." The cash deposit rate is based on an estimated AD rate and applied to future entries, [74] whereas the assessment rate is based on the final, accurate AD margin for the relevant period and is applied to entries made during the period covered by an administrative review.[75]

[74] *See* section 773(d)(1)(B); *see also Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1342-44 (Fed. Cir. 2001) (*Koyo Seiko Co.*).
[75] *See* section 751(a)(2); *see also Koyo Seiko Co*., 258 F.3d at 1347-48.

The Act, however, does not require any particular method for calculating an assessment rate.[76] Commerce acknowledged this discretion in the *1997 Final Rule*, stating that "neither the Act nor the AD Agreement specifies whether sales or entries are to be reviewed, nor do they specify how {Commerce} must calculate the amount of duties to be assessed."[77] In calculating an assessment rate, the Federal Circuit in *Torrington* held that the Act simply requires that the difference between the foreign market value and United States price serve as the basis for assessed duties.[78]

Commerce's regulations codify its assessment calculation methodology. Currently, the regulation under § 351.212(b) broadly states that "the Secretary will normally calculate an assessment rate for each importer of subject merchandise covered by the review."[79] The regulations explain that the assessment rate is determined by "dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes."[80] This assessment rate method is also known as an *ad valorem*, or a percentage of value, basis.

Commerce also calculates an assessment rate on a per-unit basis, however, when an *ad valorem* basis will result in an under-collection of duties, such as when entered sales values are unknown, undervalued, systematically understated, or otherwise unreliable.[81] As explained above with respect to the proposed revised cash deposit regulation, § 351.107(c), units upon which an assessment rate may be calculated include, but are not limited to, weight, length, volume, packaging (such as the type and size of packaging), and individual units of the product

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[76] *See* section 751(a)(2) of the Act.
[77] *1997 Final Rule*, 62 FR at 27314 (internal citations omitted).
[78] *Torrington Co. v. United States*, 44 F.3d 1572, 1578 (Fed. Cir. 1995); *see also Koyo Seiko Co.*, 258 F.3d at 1346.
[79] 19 CFR § 351.212(b).
[80] *Id.*
[81] *See Certain Activated Carbon from the People's Republic of China* IDM at 34 (stating "the regulation, however, does not proscribe [Commerce] from resorting to other methods of calculating and assigning assessment and cash deposit rates, and the agency does so in certain circumstances . . . {Commerce} changed the cash deposit and assessment methodology from an ad valorem to a per-unit basis because the application of an ad valorem rate based on net U.S. price would yield an under-collection of duties due to Jacobi's undervaluing of its United States sales."); *see also 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China* IDM at Comment 5; *Wooden Bedroom Furniture from the People's Republic of China* IDM at Comment 17; and *Honey from the People's Republic of China* IDM at Comment 7.

itself. The CIT has affirmed this practice, holding that "although Commerce normally calculates assessment rates on an *ad valorem* basis, it has discretion to revise the assessment methodology and adopt a reasonable method for ensuring an accurate collection of total duties due."[82]

Commerce is therefore proposing dividing current § 351.212(b) into paragraphs (i) and (ii), the first paragraph applicable to assessment rates determined on an *ad valorem* basis and the second applicable to assessment rates determined on a per-unit basis.

**8. Recognizing that Commerce May Select Respondents and Voluntary Respondents Practice in Administrative Reviews – § 351.213(f)**

As discussed above, Commerce is proposing revisions to its regulations in § 351.109 to reflect its practice of limiting the number of exporters or producers examined when it is not practicable to examine each known exporter producer in both investigations and administrative reviews. Furthermore, Commerce is also proposing moving and revising provisions covering voluntary respondent selection from § 351.204(d), which covers only investigations, to § 351.109(h), because Commerce may select voluntary respondents in both investigations and administrative reviews, as affirmed by the CIT.[83]

In proposed and updated § 351.204(c), Commerce would acknowledge that in investigations, specifically, the agency may limit the number of exporters or producers examined, and, in accordance with section 782(a) of the Act, Commerce may also determine to examine voluntary respondents in investigations. Likewise, in § 351.214(f) similar proposed language would recognize that in administrative reviews, Commerce may both limit the number of exporters or producers examined and select voluntary respondents. The language proposed for both provisions references the criteria and procedures set forth in § 351.109(c), to limit

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[82] *See Wuhan Bee*, Slip Op. 2008-61 at 12.

[83] *See Qingdao Qihang Tyre Co. v. United States,* 308 F. Supp. 3d 1329, 1363 (CIT 2018) (affirming Commerce's determination in an administrative review to individually examine two respondents based on the statutory authority to examine the "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined."); *see also Grobest & I-Mei Indus. (Vietnam)*, 853 F. Supp. 2d at 1365 (citing *Longkou Haimeng Machinery Co.*, 581 F. Supp. 2d at 1353 ("When Commerce can show that the burden of reviewing a voluntary respondent would exceed that presented in the typical antidumping or countervailing duty review, the court will not second guess Commerce's decision on how to allocate its resources.").

selection of exporters and producers, and § 351.109(h), to select voluntary respondents, in investigations and administrative reviews.

As mentioned above, the current regulation does not address Commerce's respondent selection process during administrative reviews and the practicality of individually examining multiple respondents in an administrative review when faced with a large number of exporters and producers. Accordingly, the proposed changes to § 351.109 and § 351.213(f) would provide clarity on that issue. Furthermore, although current § 351.213(f) allows for the examination of voluntary respondents in administrative reviews, the reference to § 351.109(h) in the proposed revision would make the regulation consistent with the other aforementioned proposed changes to the regulations.

**9. Revising Header to Section 214 Identify Expedited Reviews Separately from New Shipper Reviews– § 351.214**

Commerce proposes modifying the heading of § 351.214, which currently reads "New shipper reviews under section 751(a)(2)(B) of the Act," by adding to it the phrase "and expedited reviews in countervailing duty proceedings." Section 751(a)(2)(B) of the Act provides Commerce the authority to determine dumping margins and countervailing duty rates for exporters and producers that did not export subject merchandise to the United States during the period of investigation, referred to as "new shipper reviews," and § 351.214 contains several provisions with respect to the conduct and administration of new shipper reviews. However, current paragraph (l) of § 351.214 does not relate to new shipper reviews but instead provides procedures for conducting expedited reviews of exporters not selected for individual examination in CVD investigations. Expedited reviews in CVD investigations are not derived from, or related to, section 751(a)(2)(B) of the Act. Accordingly, Commerce has determined that the revision of the section heading to reflect that a proceeding separate from new shipper reviews is also covered by § 351.214 would provide clarity.

In addition, the Federal Circuit recently held that the "individualized-determination provisions" of section 777A(e) of the Act, along with the "regulatory-implementation authority"

of section 103(a) of the URAA, explicitly provide Commerce with the authority to promulgate § 351.214(l).[84] The Court held that this regulatory provision "provides one procedure for giving effect to the primary policy of providing individual-company rate determinations" and that the "SAA itself makes the connection between the expedited-review process at issue" and the addition of section 777A(e) to the Act in the URAA.[85] Commerce proposes modifying the heading to § 351.214 to make it consistent with the holding in *COALITION v. U.S.*.

**10. Revising Requirements for Submissions of Rebuttal Factual Information; Modifying Deadlines Concerning the Submission of Information Pertaining to Factors of Production and Benchmarks for Measuring the Adequacy of Remuneration – § 301(b)(2), (c)(3)(i) and (c)(3)(ii)**

Commerce proposes to revise one of its reporting regulations, § 351.301(b)(2), to require greater detail from interested parties. Specifically, § 351.301(b)(2), explains that if factual information is being provided to rebut, clarify, or correct factual information on the record, the submitter must identify the information already on the record that is being rebutted, clarified, or corrected. Current § 351.301(b)(2) does not, however, instruct the submitter to summarize the information being provided under this paragraph or describe how that new factual information rebuts the information already on the record.[86] This omission creates a burden on both Commerce and interested parties to understand why the information being provided under this paragraph is being submitted and how it is particularly relevant to the information already on the record.

Accordingly, to provide clarity to all parties regarding the submission of factual information being provided to rebut, clarify, or correct information already on the record,

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[84] *Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negots. V. United States*, 66 F.4th 968, 977 (Fed. Cir. 2023) (*COALITION v. U.S.*).

[85] *Id*. (explaining that "{u}nder a heading, 'Company-Specific Subsidy Rates and Expedited Reviews,' the SAA states: 'Article 19.3 of the Subsidies Agreement provides that any exporter whose exports are subject to a CVD order, but which was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review to establish an individual CVD rate for that exporter.'" (citing SAA at 941). The Federal Circuit further noted that the SAA also states that "{s}everal changes must be made to the [Tariff] Act to implement the requirements of Article 19.3" and that one subsection of the SAA explained that the URAA "eliminates the presumption in favor of a single country-wide CVD rate and amends section 777A of the Act to establish a general rule in favor of individual CVD rates for each exporter or producer individually investigated." (citing SAA at 941)).

[86] *See Saha Thai Steel Pipe Pub. Co. Ltd. V. United States*, 663 F. Supp. 3d 1356, 1373 (CIT 2023).

Commerce is proposing to revise § 351.301(b)(2) to specify that the submitter must also provide a narrative summary explaining how the specific factual information being provided rebuts, clarifies, or corrects the identified factual information already on the record.

In addition, Commerce is proposing an additional modification to its reporting regulation, § 351.301, to update deadlines for filing certain information on the record.

Current § 351.301(c)(3)(i) and (ii) establish time limits for interested parties to submit factual information to value factors of production under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2) in AD and CVD investigations, administrative reviews, new shipper reviews, and changed circumstances reviews.

Currently, the submissions are due no later than 30 days before the scheduled dates of preliminary determinations and results of review. However, these submissions sometimes contain hundreds, if not thousands, of pages of information that Commerce needs to analyze in a short amount of time prior to issuing a preliminary determination or the preliminary results. The large volume of information often contained in these submissions makes it difficult for Commerce to meet its statutory deadlines to determine the appropriate surrogate values or benchmarks.

In addition, since the 30-day deadlines were codified, Commerce has experienced a large increase in AD and CVD proceedings and orders which it must administer. In order to effectively administer and enforce the AD and CVD laws, Commerce therefore proposes modifying these time limits to allow Commerce additional time to more fully analyze these voluminous submissions for purposes of its preliminary decisions.

Specifically, Commerce proposes revising § 351.301(c)(3)(i) to create both a subparagraph (A) and subparagraph (B) covering investigations. Under the proposal, Commerce would revise the time limit for parties to submit factual information to value factors of production under § 351.408(c) in AD investigations to no later than 60 days before the scheduled date of the preliminary determination and proposes revising § 351.301(c)(3)(i)(B) to increase the

time limit for parties to submit factual information to measure the adequacy of remuneration under § 351.511(a)(2) in CVD investigations to no later than 45 days before the scheduled date of the preliminary determination. Commerce recognizes that the statutory deadline for the issuance of a preliminary determination in a CVD investigation[87] is shorter than the preliminary determination in an AD investigation,[88] which is the reason the agency is proposing a change of 15 fewer days in the time limit for CVD investigations.

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

Commerce recognizes that in requiring such factual information to be submitted earlier in the proceeding, interested parties will have a shorter period of time in which to supply potential surrogate and benchmark information in AD and CVD proceedings. However, Commerce believes that the proposed deadlines will still be sufficient for interested parties to gather, prepare and submit that information, while also improving Commerce's ability to reach accurate and appropriate preliminary determinations in its proceedings.

**11. Allowing the Provision of Business Proprietary Information to CBP Employees Investigating Negligence, Gross Negligence, or Fraud -- § 351.306(a)(3)**

As amended in 2015, section 777(b)(1)(A)(ii) of the Act states that Commerce may disclose proprietary information "to an officer or employee of the United States Customs Service who is directly involved in conducting an investigation regarding negligence, gross negligence or fraud under this title." Current § 351.306(a)(3) states that Commerce may disclose business proprietary information to "an employee of U.S. Customs and Border Protection" involved in

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[87] *See* section 703(b)(1) (requiring Commerce to issue a preliminary CVD determination within 65 days after the date of initiation). *See also* § 351.205(b)(1).

[88] *See* section 733(b)(1)(A) (requiring Commerce ot issue a preliminary AD determination within 140 days after the date of initiation). *See also* 351.205(b)(1).

conducting "a fraud investigation." However, the Act now includes "negligence" and "gross negligence" investigations.[89]

Accordingly, Commerce is proposing amendments to § 351.306(a)(3) to expand the covered investigations to negligence and gross negligence investigations as well as fraud investigations. These proposed changes would bring § 351.306(a)(3) into conformity with section 777(b)(1)(A)(ii) of the Act as amended in 2015.

**12. Updating the Facts Available Regulations, Including Adding Language From the Trade Preferences Extension Act of 2015 -- § 351.308(g), (h), and (i)**

On June 29, 2015, the Trade Preferences Extension Act of 2015 (TPEA) was signed into law. Among other changes, TPEA amended provisions of section 776 of the Act,[90] which governs Commerce's authority to rely on facts otherwise available in conducting AD and CVD proceedings.

Current § 351.308 addresses Commerce's practices and procedures arising out of section 776 of the Act, but there are certain aspects of Commerce's practice, and sections of the 2015 amendments, that are not currently reflected in Commerce's regulations.

First, when applying facts available pursuant to section 776(a) of the Act, there are cases in which Commerce determines that information is missing or unreliable to the extent that the application of total facts available is warranted to all of a exporter's or producer's calculations and should be applied in determining the antidumping margin or countervailable subsidy rate as a whole.[91] However, in other cases, Commerce may determine that only certain information is missing or unreliable and, given the facts on the record, it is appropriate to apply only partial facts available to a portion of its antidumping or countervailing duty analysis and calculations for a particular exporter or producer.

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[89] *See* section 413(a) of the Trade Facilitation and Trade Enforcement Act of 2015 (Public Law 114-125), 130 Stat. 122 (2016).
[90] *See* TPEA of 2015, Pub. L. No. 114-27, 129 Stat. 362, 384 (2015), § 502, codified at 19 U.S.C. §1677(e).
[91] *See*, *e.g., Fine Denier Polyester Staple Fiber from India: Final Results of Antidumping Duty Administrative Review, 2018-2019*, 86 FR 29249 (June 1, 2021), and accompanying IDM at Comment 1.

The CIT and the Federal Circuit have upheld Commerce's practice to apply "partial" and "total" facts available under section 776 of the Act.[92] While the Act does not explicitly reference total or partial facts available,[93] courts have recognized and affirmed Commerce's authority to use partial facts available when there are discrete gaps in the information and total facts available when none of a party's information is available, useable, or reliable.[94] Accordingly, Commerce proposes adding § 351.308(g) to codify Commerce's long-standing practice to apply either partial or total facts available in implementing sections 776(a) and (b) of the Act.

In addition, Commerce also proposes adding paragraphs (h) and (i) to § 351.308 to reflect changes incorporated into section 776 of the Act by the TPEA. The TPEA amended section 776(c) of the Act to provide that when Commerce relies on information obtained in the course of an AD or CVD investigation or review pursuant to subsection (c)(1), Commerce is not required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding pursuant to subsection (c)(2).[95] Accordingly, Commerce proposes adding paragraph (h) to reflect that Commerce is not required to conduct a corroboration analysis when applying margins or rates derived from separate segments of the same proceeding pursuant to section 776(c)(2) of the Act.

Furthermore, the TPEA created section 776(d) of the Act, which addresses Commerce's authority to select from among the facts otherwise available when applying an adverse inference.[96] Sections 776(d)(1)(A)(i) and (ii) of the Act provide that when applying an adverse inference in a CVD proceeding, Commerce may use a countervailable subsidy rate applied for the same or a similar program in a CVD proceeding involving the same country and if none

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[92] *See, e.g.*, *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1308 (Fed. Cir. 2014) (*Mukand II*) (affirming Commerce's application of total adverse facts available when respondent's sales and cost data was unusable), *affirming* Slip Op. 13-00041 (CIT March 25, 2013); *Kawasaki Steel Corp. v. United States*, 110 F. Supp. 2d 1029, 1043 (CIT 2000) (affirming Commerce's application of partial adverse facts available with respect to certain information needed to calculate respondent's constructed export price).
[93] *See Mukand II*, Slip Op. 13-00041 (CIT March 25, 2013), *aff'd,* 767 F.3d 1300.
[94] *See id.*
[95] *See* section 776(c)(2) of the Act.
[96] *Id*.

exists, Commerce may use a countervailable subsidy rate for a subsidy program from a proceeding that Commerce considers reasonable. Furthermore, section 776(d)(1)(B) provides that when applying an adverse inference in AD proceedings, Commerce may use any dumping margin from any segment of the proceeding under the applicable antidumping order. In addition, when selecting from the subsidy rates or dumping margins specified in section 776(d)(1) of the Act, section 776(d)(2) of the Act authorizes Commerce to apply the highest rate or margin, based on the evaluation of the situation that resulted in Commerce applying an adverse inference.

Finally, sections 776(d)(3)(A) and (B) of the Act provide that when using an adverse inference in selecting among the facts otherwise available, Commerce is not required to estimate what the countervailable subsidy rate or dumping margin would have been if the interested party found to have failed to cooperate under section 776(b)(1) had cooperated nor to demonstrate that the countervailable subsidy rate or dumping margin reflects an alleged commercial reality of the interested party.

In light of these modifications made to section 776 of the Act in the TPEA, Commerce proposes adding § 351.308(i)(1), (2), and (3) to reflect the facts available language set forth in sections 776(d)(1), (2), and (3) of the Act.

**13. Revising Case Brief and Rebuttal Brief Regulation to Include Executive Summaries – § 351.309(c)(2) and (d)(2)**

Current § 351.309(c)(2) and (d)(2) of Commerce's regulations address the filing requirements of case briefs and rebuttal briefs, including an "encouragement" by the agency that parties "provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited." Such summaries were intended to enable the reader to quickly ascertain the main arguments presented by interested parties. However, since that language was codified in the regulation, Commerce has found that many such summaries submitted in briefs and rebuttal briefs have been so general as to be of limited use to interested parties and Commerce officials. Furthermore, the absence of shorter and more succinct summaries for each of the issues raised in interested parties' case and rebuttal briefs has resulted in Commerce

officials spending considerable time paraphrasing interested parties' briefs and arguments in shorter summation for use in final decision memoranda.

Therefore, starting in November 2023, Commerce revised the instructions it provided to interested parties in the "Public Comment" section of its notices of preliminary determination and preliminary results[97] to request that interested parties provide at the beginning of their briefs a public executive summary for each issue raised in those submissions, defining an "issue" as an argument that Commerce would normally address in comments in its final issues and decision memoranda. Furthermore, since November 2023, Commerce requested that interested parties limit their executive summary of each issue in briefs and rebuttal briefs to no more than 450 words (not including citations). Commerce explained in its preliminary notices that it has requested that parties submit such summaries so that those summaries can appear in Commerce's issues and decision memoranda.[98] This approach relieves the agency of the effort and time it takes to paraphrase interested parties' arguments and also helps assure interested parties that Commerce is reflecting their arguments accurately in the agency's issues and decision memoranda.

Commerce explained in those notices that it was, and is, Commerce's intent to use the executive summaries as the basis of the comment summaries included in the final decision memoranda that will accompany the final results of review.[99] However, there may be instances in which Commerce will need to revise an interested party's executive summary for purposes of context, simplicity, or clarity.[100]

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[97] *See, e.g., Thermal Paper from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review, 2021–2022*, 88 FR 83384, 83386 (November 29, 2023); *Refillable Stainless Steel Kegs from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Revie,; 2021–2022*, 88 FR 85230, 85231 (December 7, 2023); and *Stilbenic Optical Brightening Agents from Taiwan: Preliminary Results of Antidumping Duty Administrative Review, 2022*, 89 FR 7361, 7362 (February 2, 2024) (*Brightening Agents from Taiwan Preliminary Results*).

[98] *See, e.g., Brightening Agents from Taiwan Preliminary Results*, 89 FR at 7362.

[99] *See id.*, 89 FR at 7362.

[100] For example, Commerce may determine to remove or revise lengthy footnotes when it places executive summaries in its issues and decision memoranda if it determines that lengthy and argumentative footnotes were an attempt to avoid the word length restrictions for executive summaries requested in the regulation.

Consistent with that new policy, Commerce is proposing revising § 351.309(c)(2) and (d)(2) to request the inclusion of an executive summary for each argument raised in the brief and rebuttal brief. The regulation provides that executive summaries should be no more than 450 words in length, not counting supporting citations. With respect to supporting citations, the new regulatory language is clear that, in general, interested parties may include all relevant citations, including prior Commerce decisions and Federal Court holdings, without concern about the 450-word length.

In the past, Commerce has "encouraged" interested parties to include a general summary in their case and rebuttal brief. Commerce proposes replacing that term with the term "request" and eliminating the reference to a general summary. The revised provision would request that parties supply a table of contents listing each issue; a table of authorities, include statutes, regulations, administrative cases, dispute panel decisions, and court holdings cited; and an executive summary for each argument raised in the brief. The change from "encouraged" to "request" is intentional, as Commerce's ability to effectively administer that AD and CVD laws is improved when parties submit tables of contents, tables of authorities, and an executive summary for each argument raised in the brief.[101] In addition, the inclusion of a table of contents is consistent with Commerce's practice, and the inclusion on the list of administrative cases and dispute panel decisions to be cited in a table of authorities is intended to provide additional clarity, as those sources are frequently cited in briefs and rebuttal briefs.

Finally, Commerce has proposed removing from its list of requested (formerly encouraged) information the five-page summaries, for the reasons explained above. Commerce does not find that five-page summaries are generally helpful, although Commerce will not prohibit the submission of such summaries if interested parties wish to continue to supply them.

**14. Revising to Include Practice of Collapsing Affiliated Producers and Non-Producers – § 351.401(f)**

[101] For purposes of this Proposed Rule, Commerce is emphasizing that if interested parties fail to provide the succinct 450-word public executive summaries, pursuant to this revised provision, Commerce may request that those parties resubmit their entire brief or rebuttal brief with an executive summary.

When affiliated producers share ownership, management, or have intertwined operations, there is a significant potential for the manipulation of the prices or production of the subject merchandise. Commerce has a longstanding and court-affirmed practice of "collapsing" certain affiliated entities and treating them as a single entity for purposes of its AD calculations.[102] As currently written, § 351.401(f)(1) codifies Commerce's practice of collapsing affiliated producers who "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities" where "there is a significant potential for the manipulation of price or production." Section 351.401 (f)(2) identifies the factors Commerce may consider in determining whether there is significant potential for the manipulation of price or production.

By collapsing affiliated producers and calculating a single weighted-average dumping margin for the combined entity, the current regulation discourages producers subject to antidumping duties from shifting their production or sales to affiliated producers to evade those duties. [103]

However, affiliated non-producers such as exporters, importers, and producers can also manipulate and influence prices and costs through their mutual relationships.[104] Accordingly, to prevent manipulation of the prices and costs used in its dumping analysis, and prevent the evasion of duties, Commerce has in several AD proceedings collapsed non-producers with both producers and non-producers, and the CIT has affirmed Commerce's authority to do so.[105] Although the Act does not expressly address collapsing, the CIT has held that Commerce's

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[102] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil*, 69 FR 76910 (December 23, 2004), and accompanying IDM (*Shrimp from Brazil* IDM) at Comment 5; *see also Rebar Trade Action Coalition v. United States*, 398 F. Supp. 3d 1359, 1366-1371 (CIT 2019) (*Rebar Trade Action Coalition*); *Queen's Flowers de Colombia v. United States*, 981 F. Supp. 617, 622 (CIT 1997) (*Queen's Flowers*); and *Viraj Group. v. United States*, 476 F.3d 1349, 1355-58 (Fed. Cir. 2007).
[103] *See Rebar Trade Action Coalition*, 475 F. Supp. at 1368.
[104] *See Shrimp from Brazil* IDM at Comment 5.
[105] *See NACCO Materials Handling Group, Inc. v. United States*, 971 F. Supp. 586, 591-92 (CIT 1997) (*NAACO Materials*); *Queen's Flowers*, 981 F. Supp. at 617-622; *and Echjay Forgings*, 475 F. Supp. 3d. at 1360 (CIT 2020) (citing *Hontex Enterprises Inc. d/b/a Louisiana Packing Company v. United States of America*, 248 F. Supp. 2d. 1323 (CIT 2003)).

collapsing practice, as applied to both affiliated producers and non-producers, effectuates the basic purpose of the Act: to calculate accurate dumping margins and to prevent the evasion of duties.[106]

As such, Commerce proposes revising § 351.401(f) to explicitly address the ability of the agency to collapse producers and non-producers when it determines that there is a significant potential for the manipulation of prices or production between two or more affiliated parties.[107]

In practice, Commerce has found the (f)(2) factors in the current regulation instructive in determining whether to collapse non-producer affiliated parties. For example, applying the factors of § 351.401(f) relevant to non-producers, Commerce has collapsed producers with affiliated resellers and exporters.[108] Accordingly, Commerce proposes modifying § 351.401(f) to reflect Commerce's longstanding practice of collapsing affiliated parties, rather than only affiliated producers, by changing references to "affiliated producers" to "affiliated parties." Further, Commerce proposes moving discussion of whether affiliated parties have or will have access to production facilities for similar or identical products from paragraph (f)(1) to a newly created paragraph (f)(3). If applicable, paragraph (f)(3) would require Commerce to consider if any of those facilities would require substantial retooling in order to restructure manufacturing priorities. This modification would ensure that § 351.401(f) centers Commerce's collapsing analysis on whether there is a significant potential for manipulation of prices, production, or other commercial activities—a factor relevant to producers and non-producers alike.[109] Finally, paragraph (f)(2), with a few minor modifications, would continue to describe the factors Commerce may consider in determining whether there is a significant potential for manipulation.

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[106] *See Queen's Flowers*, 981 F. Supp. at 622.
[107] *See United States Steel Corp. v. United States*, 179 F. Supp. 3d 1114, 1135 (CIT 2016).
[108] *See Shrimp from Brazil* IDM at Comment 5; *see also Certain Welded Carbon Steel Standard Pipes and Tubes from India: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 33578, 33580-33581 (June 14, 2010), unchanged in *Certain Welded Carbon Steel Standard Pipes and Tubes from India: Final Results of Antidumping Duty Administrative Review*, 75 FR 69626 (November 15, 2010); and *Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review*, 70 FR 54361 (September 14, 2005), and accompanying IDM at Comment 9.
[109] *See Shrimp from Brazil* IDM at Comment 5; *see also Rebar Trade Action Coalition*, 475 F. Supp. at 1367.

**15. Addressing the Submission of Multinational Corporation Provision Allegations and Clarification that the Provision Does Not Apply to Nonmarket Economy Countries – § 351.404(g)**

Section 773(d) of the Act enumerates the factors necessary for Commerce to determine whether to apply the special rule for certain multinational corporations in determining normal value for purposes of its AD calculations. Current § 351.301(c) sets forth the time limits for submissions of various allegations, arguments, and factual information relevant to that determination, but it does not refer to allegations that the special rule for certain multinational corporations should be applied given the facts on the record. In the past, Commerce has articulated in its communications to outside parties that the deadlines of § 351.301(c)(2)(i) should apply to such allegations,[110] and Commerce is proposing to codify that understanding in new § 351.404(g)(1).

Under section 773(d) of the Act, the special rule for certain multinational corporations requires a determination concerning market viability and the basis for determining normal value. Current § 351.301(c)(2)(i) provides interested parties the deadline for submitting allegations regarding market viability in an antidumping investigation or administrative review. Proposed § 351.404(g)(1) would instruct interested parties to file multinational corporation provision allegations in accordance with the filing requirements set forth in § 351.301(c)(2)(i).

In addition, Commerce has previously determined that the special rule for certain multinational corporations does not apply when the non-exporting country at issue is a nonmarket economy[111] and, thus, normal value is determined using a factors of production

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[110] *See* Commerce's Letter, "Multinational Corporation Provision," dated April 9, 2021 (ACCESS barcode: 4108533-01) at 2 n. 9 (stating "Commerce intends to clarify in its initiation notices for subsequent proceedings that the applicable deadline for all interested parties to file an MNC allegation is established by 19 CFR 351.301(c)(2)(i).").

[111] *See, e.g., Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52065 (September 12, 2007) and accompanying IDM (Shrimp from Thailand IDM) at 37 (stating "the legislative history suggests that Congress was primarily concerned with situations where the home market was not viable and yet a respondent's low priced exports to the United States market was supported by higher priced sales of its affiliate in a third country market. This legislative concern, however, does not appear to encompass respondents from {nonmarket economy} countries. In {nonmarket economy} cases, the Department disregards home market prices and the respondent's cost of production and calculates {normal value} on the reported factors of production." (internal citations omitted)); *see also Certain*

methodology in accordance with 773(c) of the Act.[112] This is because section 773(d)(2) of the Act requires that section 773(a)(1)(C) of the Act apply in order for Commerce to use the statutory factors to determine whether to apply the special rule for certain multinational corporations, and section 773(a)(1)(C) provides that Commerce will determine normal value using third country sales and not the factors of production methodology statutorily required for nonmarket economies. The Federal Circuit, in *Ad Hoc Shrimp Trade Comm,* affirmed Commerce's interpretation of section 773(d)(2) of the Act as reasonable and in accordance with law.[113]

Thus, consistent with Commerce's interpretation of the Act, as affirmed by the Federal Circuit, Commerce is proposing new § 351.404(g)(2) which would state clearly that the special rule for multinational corporations will not apply where the non-exporting country at issue is a nonmarket economy country and normal value is determined using a factors of production methodology.

Commerce believes that these two additions to the regulations will provide greater detail to the public with respect to the submission of allegations to which the special rule for multinational corporations would apply, as well as the application of the special rule itself.

**16. Providing Criteria for Determining a Profit Rate Under the Constructed Value Profit Cap – § 405(a) and (b)(3)**

As set forth in § 351.405(a), pursuant to section 773(e) of the Act in certain circumstances Commerce may determine normal value by constructing a value based on the cost of manufacturing; selling, general and administrative expenses; and profit. In constructing such a value, the Act provides that Commerce should use the "actual amounts incurred and realized by

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*Frozen Warmwater Shrimp from the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 52049 (September 12, 2007), and accompanying IDM at Comment 12.

[112] In nonmarket economy cases, when there is "likely price distortion due to state involvement" and sales of merchandise do not reflect their fair value, Commerce is unable to determine normal value and must instead rely on a factors of production methodology in accordance with 773(c) of the Act. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 596 F.3d 1365,1369-71 (Fed. Cir. 2010) (*Ad Hoc Shrimp Trade Comm*.).

[113] *See Ad Hoc Shrimp Trade Comm*. 596 F.3d at 1369-73.

the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country."[114] However, there are times when the "actual data are not available with respect" to those production and sale amounts, and in those circumstances, section 773(e)(2)(B) of the Act establishes three alternative methods for calculating amounts for selling, general, and administrative expenses, and profits, in connection with the production and sale of a foreign like product, in those instances.[115] The Act provides Commerce with the discretion to select from any of the three alternative methods, depending on the information available on the record.[116]

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

The SAA states that "Commerce will develop this alternative through practice,"[117] and with respect to the "profit cap" exception set forth in this provision,[118] Commerce has done just that for over two decades. It has been Commerce's practice in determining the amount of profit normally realized by exporters or producers in connection with the sale, for consumption in the

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[114] Section 773(e)(2)(A) of the Act.
[115] *See* SAA at 840 ("At the outset, it should be emphasized, consistent with the Antidumping Agreement, new section 773(e)(2)(B) does not establish a hierarchy or preference among these alternative methods. Further, no one approach is necessarily appropriate for use in all cases").
[116] *Certain Steel Nails from the Republic of Korea: Final Determination of Sales at Less Than Fair Value,* 80 FR 28955 (May 20, 2015) (*Certain Steel Nails from Korea*), and accompanying IDM at Comment 4.
[117] SAA at 841.
[118] *Id*. ("The Administration also recognizes that where, due to the absence of data, Commerce cannot determine amounts for profit under alternatives (1) and (2) or a "profit cap" under alternative (3), it might have to apply alternative (3) on the basis of 'facts available.' This ensures that Commerce can use the alternative (3) when it cannot calculate the profit normally realized by other companies on sales of the same general category of products.").

foreign country, of merchandise that is in the general category as the subject merchandise for use in its constructed value calculations to consider four criteria: (1) the similarity of the potential surrogate companies' business operations and products to the respondent's business operations and products; (2) the extent to which the financial data of the surrogate company reflects sales in the home market and does not reflect sales to the United States; (3) the contemporaneity of the data to the period of investigation; and (4) the extent to which the customer base of the surrogate company and the respondent is similar.[119]

In elaborating the relevancy of each criterion, Commerce has explained that the greater the similarity in business operations, products, and customer base, the more likely that there is a greater correlation in the profit experience of the two companies.[120]

Concerning the extent to which U.S. sales are reflected in the surrogate's financial statements, because Commerce is typically comparing U.S. sales to a normal value from the home market or third country, Commerce has explained that it does not want to construct a normal value based on financial data that contains exclusively or predominantly U.S. sales.[121] Further, in accordance with section 773(e)(2)(B) of the Act generally, Commerce has explained that it seeks, to the extent possible, home market profit experience.[122]

Finally, with respect to the contemporaneity criteria, because markets change over time, Commerce has explained that the more current the data, the more reflective it believes that data would be of the market in which the respondent is operating.[123]

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[119] *See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel*, 66 FR 49349 (September 27, 2001), and accompanying IDM at Comment 8; *see also Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia*, 69 FR 20592 (April 16, 2004), and accompanying IDM at Comment 26.
[120] *See Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia*, 69 FR 20592 (April 16, 2004), and accompanying IDM at Comment 26.
[121] *Id*.
[122] *Id*.
[123] *Id*.

Commerce has considered those criteria in selecting the appropriate financial statements to determine constructed value profit under section 773(e)(2)(B)(iii) of the Act for many years.[124] Moreover, the Federal Circuit, in *Mid Continent Steel & Wire Inc.*, affirmed Commerce's framework, based on those four criteria, as a reasonable interpretation of section 773(e)(2)(B)(iii) of the Act.[125]

Accordingly, Commerce has determined that the public and the agency alike would benefit through the codification of this practice in its regulations. Therefore, Commerce is proposing a change to the last sentence of § 351.405(a) to indicate that the information that Commerce will consider in determining a constructed value and the addition of a new paragraph (3) to § 351.405(b), which would apply to determinations of "profit and selling, general and administrative expenses" to reflect the four criteria described above in selecting a value for CV profit under the "profit cap" exception set forth in section 773(e)(2)(B)(iii) of the Act.

**17. Revising Criteria for Determining Economic Comparability in Calculating Normal Value from Nonmarket Economy Countries– § 351.408(b)**

Section 773(c)(2)(B) of the Act states that when Commerce is conducting an antidumping analysis of a nonmarket economy country, it will include consideration of the price of merchandise "produced in one or more market economy countries that are at a level of economic development comparable to that of a nonmarket economy country." Furthermore, section 773(c)(4)(A) of the Act states that in valuing factors of production for a nonmarket economy country analysis, Commerce shall utilize, to the extent possible, "the prices or costs of factors of production in one or more market economy countries that are – (A) at a level of economic development comparable to that of a nonmarket economy country."

Current § 351.408(b) states that in determining whether a country is at a level of economic development comparable to the nonmarket economy under sections 773(c)(2)(B) and

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[124] *See, e.g., Certain Oil Country Tubular Goods from the Republic of Korean; Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41983 (July 18, 2014), and accompany IDM at Comment 1.

[125] *Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530, 542–43 (Fed. Cir. 2019) (concluding that Commerce's analysis applying the four-part framework was a reasonable interpretation of the statute).

773(c)(4)(A) of the Act, Commerce will "place primary emphasis on *per capita* GDP as the measure of economic comparability." However, Commerce's general practice has been to use *per capita* GNI instead of *per capita* GDP as the measure of economic comparability[126] because "while the two measures are very similar, *per capita* GNI is reported across almost all countries by an authoritative source (the World Bank)."[127] Commerce's use of GNI has been recognized and affirmed as reasonable by the CIT as a measure to determine economic comparability in multiple holdings.[128]

Commerce is now proposing to update § 351.408(b) to reflect that Commerce may consider either GNI or GDP in selecting potential surrogate countries. *Per capita* GNI measures the total income earned by the residents of a country, whether from domestic or foreign sources, divided by the average population of that country. *Per capita* GDP, on the other hand, measures the total value of goods and services produced within a country per person in a given year. This calculation provides insights into overall economic output and living standards of a population. Higher *per capita* GDP suggests a greater share of economic output available for each citizen, which can translate into improved living standards. GDP remains a widely recognized measure for assessing a population's economic well-being and quality of life.[129]

There are potential benefits to the use of either *per capita* GNI or *per capita* GDP. The use of *per capita* GNI as an aggregate economic indicator might be appropriate in some cases for the reasons explained in the *Surrogate Country Notice*. However, there may be other situations

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[126] *See Antidumping Methodologies in Proceedings Involving Nonmarket Economy Countries: Surrogate Country Selection and Separate Rates; Request for Comment*, 72 Fed. Reg. 13246, 13246 n.2 (Mar. 21, 2007) (*Surrogate Country Notice*).
[127] *Id.*
[128] *See, e.g.*, *Clearon Corp v. United States*, 38 CIT 1122, 1137-1140 (CIT July 24, 2014); *see also Tri Union Frozen Prods. v. United States*, 163 F. Supp. 3d. 1255, 1268, n. 8 (CIT 2016); and *Tianjin Wanhua Co. v. United States*, 253 F. Supp. 3d. 1318, 1322 (CIT 2017).
[129] For examples using *per capita* GDP, *see* World Economic Outlook: Navigating Global Divergences (October 2023), International Monetary Fund (*World Economic Outlook October 2023*), available at https://www.imf.org/en/Publications/WEO/Issues/2023/10/10/world-economic-outlook-october-2023; World Development Indicators, World Bank , available at https://databank.worldbank.org/indicator/NY.GDP.PCAP.CD/1ff4a498/Popular-Indicators#; GDP per capita, purchasing power parity (current international $) - OECD members, World Bank (*GDP per capita OECD member data*), available at https://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?locations=OE.

in which the use of *per capita* GDP might be a better measure of economic comparability. Accordingly, Commerce is proposing a modification to § 351.408(b) which allows the agency to place primary emphasis on either *per capita* GDP or *per capita* GNI since both options can be reasonably used to determine comparable economies, depending on the facts before the agency.

In addition, Commerce proposes that § 351.408(b) be further amended to allow Commerce to consider additional factors that relate to economic comparability: (1) the overall size and composition of economic activity in those countries, as measured by either GDP or GNI; (2) the composition and quantity of exports from those countries; (3) the availability, accessibility, and quality of data from those countries; and (4) additional factors which Commerce determines are appropriate to consider in light of unique factors and circumstances. Consideration of such examples may assist the agency in evaluating the economic similarities and differences between countries.

With respect to the first factor, Commerce believes that reviewing a country's overall size and composition of economic activity could reveal not only what a country produces and exports but might also provide a deeper understanding of its fundamental economic structure, development phase, and role in the global economy.[130]

With respect to countries' export compositions and quantities, such information could help Commerce identify economies with similar levels of development and industrial structures, as countries with similar types and quantities of exports will more likely than not be at a comparable economic level of development.[131] As such, consideration of such information might help Commerce provide comparisons that are most grounded in economic reality and enhance the chances that the selected surrogate countries possess similar underlying economic structures.

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[130] *See* Paul Krugman & Maurice Obstfeld, International Economics: Theory and Policy (5th ed. 2000), at 12-13, 66 (Ricardian model and Heckscher-Ohlin model showing the relationship between economic comparability and export patterns).

[131] *See id.* at 31, Table 2 (citing *2013 International Trade Statistics*, U.N.Y.B. ST/ESA/STAT/SER.G/62 vol. 1 (New York: United Nations, 2014), available at https://www.un-ilibrary.org/content/books/9789210566988/read).

Commerce has also proposed to include the availability, accessibility, and quality of data from potential surrogate countries as a factor to consider because it is Commerce's experience that sometimes the best sources of surrogate values for Commerce to use in its calculations are those from countries where data are easily available, accessible and of good quality.

Lastly, Commerce proposes that it consider additional economic factors as appropriate in light of unique circumstances. Such factors could include indicators such as purchasing power parity to account for differences in spending power between countries.[132] Other examples include regional indicators that would allow Commerce, when reasonable, to select a surrogate country or countries that are in the same geographic region as the nonmarket economy country or that are not going through temporary hyperinflationary periods. Consideration of these factors would assist Commerce in selecting appropriate surrogate countries when economy-wide or sector specific prices may be contributing to distorting economic conditions.

**18. Removing the Integral Linkage Specificity Provision, the Agricultural Exception to Specificity Rule and the Small- and Medium-Sized Businesses Exception to Specificity Rule -- § 351.502(d), (e) and (f). Revising and Moving the Disaster Relief Exception to Specificity Rule and Creating an Employment Assistance Programs Exception to Specificity Rule -- § 351.502(d) and (e).**

In order for Commerce to find benefits provided by a particular program to be countervailable, the program must provide benefits that are legally specific, that is, not broadly available or widely used but narrowly focused and used by discrete segments of an economy. Commerce is proposing multiple changes to its specificity regulation, § 351.502. First, the agency proposes to delete the integral linkage provision found at current § 351.502(d) pursuant to which Commerce may examine whether an investigated subsidy program is specific under section 771(5A)(D) of the Act by expanding its specificity analysis to programs other than the investigated subsidy program if the investigated subsidy program is "integrally linked" to other subsidy programs. The concept of integral linkage contained in § 351.502(d) was a discretionary

[132] Notably, both the World Bank and IMF use the *per capita* GDP purchasing power parity in some of their economic analyses. *See GDP per capita OECD member data*, and World Economic Outlook October 2023.

practice of Commerce at the time of its codification. There was, and is, no statutory requirement to expand the analysis of specificity under section 771(5A)(D) of the Act beyond the investigated subsidy program. Since § 351.502(d) was put into place, respondents have rarely invoked the integral linkage provision, and Commerce has rarely found two or more subsidy programs to be integrally linked.[133] For these reasons, Commerce proposes deleting the integral linkage provision found at current § 351.502(d).

Second, Commerce proposes to delete the agricultural exception found at current § 351.502(e) in order to ensure consistency with the specificity test set forth in the SAA.[134] Section 351.502(e) currently provides that Commerce will not regard a domestic subsidy as being specific under section 771(5A)(D) of the Act solely because the subsidy is limited to the agricultural sector. When current paragraph (e) was issued, Commerce explained that this exception for generally available agricultural subsidies was consistent with prior practice and that Commerce would find an agricultural subsidy to be countervailable only if it were specific *within* the agricultural sector, *e.g.*, a subsidy limited to livestock or livestock receive disproportionately large amounts of the subsidy.[135]

This regulation was based on Commerce's decisions in several cases during the 1980s, including *Asparagus from Mexico*,[136] *Fresh Cut Roses from Israel*,[137] and *Certain Fresh Cut Flowers from Mexico*.[138] In *Asparagus from Mexico*, Commerce determined that the provision of water to agricultural producers was not countervailable, explaining: "{p}referential rates are not provided to the producers of any one agricultural product" and "{w}e do not consider the provision of water at a uniform rate to all agricultural producers in this region to be a benefit,

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[133] *See, e.g., Countervailing Duties; Final Rule*, 63 FR 65348, 65357 (November 25, 1998) (*1998 Preamble*); *see also* the *Preamble* to *Countervailing Duties*: *Notice of Proposed Rulemaking and Request for Public Comments*, 54 FR 23366, 23368 (May 31, 1989). The 1989 Proposed Rules were never finalized.
[134] *See* SAA at 911-955.
[135] *See 1998 Preamble*, 63 FR at 65357-65358.
[136] *See Final Negative Countervailing Duty Determination*: *Fresh Asparagus from Mexico*, 48 FR 21618, 21621 (May 13, 1983) (*Asparagus from Mexico*).
[137] *See Fresh Cut Roses from Israel*: *Final Results of Administrative Review of Countervailing Duty Order*, 48 FR 36635, 36636 (August 12, 1983) (*Fresh Cut Roses from Israel*).
[138] *See Certain Fresh Cut Flowers from Mexico*, 49 FR 15007, 15008 (April 16, 1984) (*Certain Fresh Cut Flowers from Mexico*).

which would constitute a bounty or grant, because Commerce considers the agricultural sector to constitute more than a single group of industries within the meaning of the Act."[139] Commerce cited this finding in support of its determination that benefits from government-funded agricultural extension services were not countervailable in *Fresh Cut Roses from Israel*.[140] This practice of considering the agricultural sector to constitute more than a specific industry or group of industries was reaffirmed again in *Certain Fresh Cut Flowers from Mexico*, when Commerce determined that loans provided under a government-sponsored loan program known as the Funds Established with Relationship to Agricultural (FIRA) program were not countervailable because they were provided to the agricultural sector as a whole and thus not specific.[141] Specifically, Commerce elaborated that: "Producers of a wide variety of products including fruits and vegetables, livestock, grains, meat products, milk, and eggs are eligible for FIRA financing. Producers of agricultural tools may also receive financing under FIRA. FIRA loans are also provided to the fishing and the forestry industries."[142] Commerce also pointed out that "{a}pproximately one-third of Mexico's labor force is employed in agriculture. The FIRA program is generally available to, and used by, wide ranging and diverse industries that constitute a substantial portion of the Mexican economy."[143]

Commerce's conclusion in this regard on the application of the CVD law to loans provided to the agricultural sector as a whole was upheld by the CIT in *Roses Inc. v. United States*, where the Court held that "Commerce's determination that a group composed of all of agriculture, that is, whatever is not services or manufacturing, is not within the meaning of the statutory words 'industry or group of industries' is a reasonable interpretation of the statute."[144]

Therefore, this regulation codified Commerce's practice at the time as affirmed in the courts and informed by the global economic circumstances of the time – namely, that agriculture

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[139] *See Asparagus from Mexico*, 48 FR at 21621.
[140] *See Fresh Cut Roses from Israel*, 48 FR at 36636.
[141] *See Certain Fresh Cut Flowers from Mexico*, 49 FR at 15008.
[142] *Id.*
[143] *Id.*
[144] *See Roses Inc. v. United States*, 774 F Supp. 1376, 1383-1384 (CIT 1991).

accounted for a significant part of many countries' economies and employed sizable portions of the labor force such that the sector as a whole could not be considered a discrete segment of the economy for specificity purposes. However, those economic circumstances have changed in the forty years since the development of that practice.

The agricultural sector's share of economic output and employment has steadily decreased in recent decades, especially as technology has advanced and many countries have prioritized diversifying their economies in furtherance of economic development goals.[145] These broad global economic trends are reflected in data collected and published by international organizations. For example, World Bank data indicate that world employment in agriculture as a percentage of total employment decreased from over 43 percent in 1991 (the first year for which data are available) to just over 26 percent in 2021.[146] Commerce specifically highlighted the level of agricultural employment in *Certain Fresh Cut Flowers from Mexico*, noting that one-third of Mexico's labor force was employed in agriculture.[147] World Bank data also indicate that agriculture's share of total employment in Mexico fell from nearly 26 percent in 1991 to just over 12 percent in 2021.[148] Decreases of similar magnitude during the same period can be seen in broad "Middle income," "Least developed countries," and "Low and middle income" categories, as well as specifically in large economies such as China and India that Commerce examines often in CVD proceedings.[149] Similarly, World Bank data show that the value added

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[145] *See*, *e.g.*, Anderson, K., Globalization's effects on world agricultural trade, 1960-2050, *Philosophical Transactions of The Royal Society B* (2010), No. 365, at 3007-08, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2935114/pdf/rstb20100131.pdf; *see also* Felipe, J., Dacuycuy, C., *et. al*. , The Declining Share of Agricultural Employment in the People's Republic of China: How Fast?, *Asian Development Bank (ADB) Economics Working Paper Series* (2014), No. 419, at 3, available at https://www.adb.org/sites/default/files/publication/149676/ewp-419.pdf; and Cervantes-Godoy, D.), Aligning Agricultural and Rural Development Policies in the Context of Structural Change, *OECD Food, Agriculture and Fisheries Paper* (2022), No. 187, at 5, available at https://www.oecd-ilibrary.org/agriculture-and-food/aligning-agricultural-and-rural-development-policies-in-the-context-of-structural-change_1499398c-en;jsessionid=Vou3tl4a5mF09Msb_WUGWqSvi31NVlWRFqgFePau.ip-10-240-5-115; Gale Johnson, D., Agricultural economics, *Encyclopedia Britannica* (2023), available at https://www.britannica.com/money/agricultural-economics.

[146] *See Employment in agriculture (% of total employment) (modeled ILO estimate)*, World Bank, available at https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS?view=chart (*Employment in agriculture*).

[147] *See Certain Fresh Cut Flowers from Mexico*, 49 FR at 15008.

[148] *See Employment in agriculture*.

[149] *Id.*

of the agriculture, forestry, and fishing sectors as a percentage of GDP has steadily decreased since 1980, both in terms of broad categories (*e.g.*, "middle income countries") and with respect to large economies such as China and India.[150]

In reexamining the impetus for the agricultural exception within the context of the original purpose of the specificity test, and in light of changing economic circumstances around the world, we find that the exception is no longer valid. The SAA states that the "Administration intends to apply the specificity test in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy" and that "the specificity test was not intended to function as a loophole through which narrowly focused subsidies provided to or used by discrete segments of an economy could escape the purview of the CVD law."[151] Given the declining share of countries' economies accounted for by the agricultural sector, both in terms of GDP and employment, it is no longer the general rule that subsidies provided solely to the agricultural sector are "broadly available… throughout an economy."[152] Rather, in many cases and in many countries, the agricultural sector may comprise a small and shrinking segment of the economy, and in light of the original purpose of the specificity test, subsidies to such discrete segments in that economy should not be exempt from the remedies provided by the CVD law.

Commerce has reconsidered whether a broad and far-reaching exception for agricultural subsidies is consistent with the language on specificity explicitly set forth in the SAA. Moreover, a blanket specificity exception provided to agricultural subsidy programs denotes a conclusion by Commerce that every country that is subject to a CVD investigation has an identical or similar economy with respect to the role played by agriculture within the economy. Such a conclusion is in potential conflict with the specificity test in the SAA and the statutory

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[150] *See Agriculture, forestry, and fishing, value added (% of GDP)*, World Bank, available at https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?most_recent_year_desc=true&view=chart.
[151] *See* SAA at 929.
[152] *Id*.

language of section 771(5A)(D) of the Act, which requires that Commerce analyze specificity based upon "the jurisdiction of the authority providing the subsidy." Therefore, to ensure that Commerce's regulations remain consistent with CVD law and are properly adapting to changing economic realities, Commerce proposes removing the exception to the specificity rule for agricultural subsidies.

The proposed elimination of the agriculture exception to specificity does not mean that Commerce will always find agricultural subsidies to be specific; rather, under this proposal our analysis of whether an agricultural subsidy is specific would be conducted on a case-by-case basis based on a comprehensive examination of the specificity criteria enacted under section 771(5A)(D) of the Act within the framework of the specificity test set forth in the SAA.

Third, Commerce proposes to delete the small- and medium-sized business exception to the specificity rule found at current § 351.502(f), which provides that Commerce "will not regard a subsidy as being specific under section 771(5A)(D) of the Act solely because the subsidy is limited to small firms or small- or medium-sized firms (SMEs)." The specificity test discussed in the SAA indicates that Commerce will find not specific only those subsidy programs "which truly are broadly available and widely used throughout an economy." Therefore, Commerce proposes eliminating the specificity exception provided to SMEs under § 351.502(f) to ensure that there is no conflict between our regulations and the SAA.

A blanket specificity exception provided to SME subsidy programs denotes a conclusion by Commerce that every country that is subject to a CVD investigation has an identical or similar economy with respect to the role played by SMEs. Such a conclusion is in potential conflict with the SAA and the language of section 771(5A)(D) of the Act, which requires that Commerce analyze specificity based upon the "jurisdiction of the authority providing the subsidy" and makes clear that specificity can be found when a subsidy is limited to any "group" of enterprises or industries. Accordingly, Commerce has determined that it is appropriate to delete current §

351.502(f), as the specificity of SME subsidy programs should be determined on a case-by-case basis, pursuant to the language of the SAA and section 771(5A)(D) of the Act.

Fourth, Commerce proposes to update the disaster relief exception to the specificity rule and move it from § 351.502(g) to § 351.502(d). The current disaster relief regulation states that Commerce will not regard disaster relief as being specific under section 771(5A)(D) of the Act if such relief constitutes general assistance available to anyone in the area affected by the disaster. With the onset of the global Covid-19 pandemic, Commerce encountered certain government programs that provided Covid-19 relief to individuals and enterprises affected by the pandemic. Where the assistance was generally available to any individual or enterprise in the area affected by the pandemic, Commerce found the assistance to be not specific.

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

With the proposed elimination of the integral linkage specificity provision and specificity exemptions granted to agricultural subsidies and to subsidies to small- and medium-sized businesses, the amended disaster relief provision at § 351.502(g) would become § 351.502(d).

Fifth, and finally, Commerce proposes to create a new employment assistance program exception to the specificity rule at § 351.502(e). Under Commerce's current practice, the agency

does not generally find employment assistance programs that are created to promote the employment of certain classes or categories of workers or individuals to be specific.[153] Under this proposal, Commerce would regard employment assistance programs as being not specific under section 771(5A)(D) of the Act if such assistance is provided solely with respect to employment of general categories of workers, such as those based on age, gender, disability, veteran, and unemployment status, and is available to any individual with one or more of these characteristics without any industry restrictions.

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

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

**19. Modifying the Benefit Regulation to Include General Treatment of Contingent Liabilities and Assets - § 351.503(b)(3)**

Commerce is proposing to add a new paragraph to the benefit regulation at § 351.503(b)(3) to provide rules for the general treatment of contingent liabilities and assets that are not otherwise addressed in the regulations. Under current § 351.505(d), in the case of an interest-free loan for which the repayment obligation is contingent upon the company taking

[153] *See*, *e.g.*, *Certain Steel Nails from Korea the Republic of Korea: Final Negative Countervailing Duty Determination*, 80 FR 289966 (May 20, 2015) and accompanying IDM at 13.

some future action or achieving some goal in fulfillment of the terms of the loan, Commerce normally treats the outstanding balance of the loan as an interest-free short-term loan.

However, other types of contingencies exist which are not explicitly referenced in this loan regulation. Commerce has encountered hybrid programs which have elements of two or more types of financial contributions, and, thus, two or more types of benefits. For example, in India, a program provides for import duty waivers contingent upon future export performance of the recipient.[154] With respect to Korea, Commerce has investigated a research and development (R&D) grant program in which participating companies are required to repay 40 percent of the R&D grant if the R&D project is deemed by the government to be successful.[155] In these cases, Commerce treated the outstanding contingent liability of the import duty exemptions in India and the R&D grant in Korea as contingent liability interest-free loans within the meaning of § 351.505(d). In addition, under § 351.510, which covers direct and indirect taxes and import charges, the benefit from the deferral of indirect taxes and import charges when the final waiver of such taxes and charges is contingent on fulfillment of other criteria such as realizing an amount of export earnings is also calculated using the methodology described under § 351.505(d).

While the treatment of these contingent import duty exemptions and R&D grants under § 351.505(d) has never been a source of controversy, for purposes of clarity and flexibility the agency is proposing a separate paragraph under the benefit regulation to specifically provide for the treatment of contingent liabilities and assets that are not otherwise addressed in the regulations. As Commerce encounters ever more complicated government programs, the goal is to have a regulation that provides for the specific treatment of contingent liabilities to ensure that

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

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

there is no question that any government program that incorporates a contingent element falls within the purview of the CVD law and Commerce's regulations.

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

**20. Creating an Initiation Standard for Specificity Allegations Regarding Government Policy Banks; Addressing the Time of Receipt of Benefit and Allocation of Loan Benefit to a Particular Time Period; Modifying a Provision Regarding Contingent Liability Interest-Free Loans - § 351.505(a)(6)(iii), (b), (c), and (e)**

Section 351.505 applies to the procedures and policies pertaining to loans under the CVD law. Commerce proposes to make modifications to §§ 351.505(b), (c), and (e) and add new § 351.505(a)(6)(iii).

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

Commerce has found that information on the distribution of loans and data on the enterprises and industries that receive loans from government-owned policy banks is usually not published and, therefore, not reasonably available to U.S. petitioning industries. Thus, these

interested parties are hindered in their ability to make a specificity allegation under section 771(5A)(D)(iii) of the Act due to lack of transparency of these government-owned entities. It has been our experience that government-owned policy banks are normally established by laws and regulations which discuss the purposes of the policy banks, and these laws and regulations are usually publicly available; and, thus, would be available to U.S. petitioning industries.

The provision of, and access to, capital is a critical component to the growth and development of firms and industries. The control of the distribution or allocation of capital by the government has been shown to lead to a misallocation and distortion of resources within an economy.[156] Fundamentally, a subsidy is a distortion of the market process for allocating an economy's resources and this principal is an underlying foundation of Commerce's entire CVD methodology.[157]

Therefore, based on the lack of publicly available data with respect to the distribution of loans for most of the state-owned policy banks that have been the subject of subsidy allegations in the past, Commerce proposes the addition of another paragraph to the regulation, § 351.505(6)(iii), to address the initiation standard for an allegation of specificity for state-owned policy banks. Where loan distribution information for the state-owned policy bank is not reasonably available, under proposed § 351.505(6)(iii) an interested party would normally meet

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[156] *See, e.g.,* Shleifer, A., State versus Private Ownership, *National Bureau of Economic Research Working Paper 6665* at 19 (1998) available at https://www.nber.org/papers/w6665; Iannotta, G., Nocera, G., *et. al*., The Impact of Government Ownership on Bank Risk, *J. Fin. Intermediation* (2013), Vol. 22, Issue 2 at 152-176 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233564; Gonzalez-Garcia, J. and Grigoli, F., State-Owned Banks and Fiscal Discipline, *IMF Working Paper* (2013), WP/13/206 at 3, available at https://www.imf.org/en/Publications/WP/Issues/2016/12/31/State-Owned-Banks-and-Fiscal-Discipline-40982; Sapienza, P., The Effects of Government Ownership on Bank Lending, *J. of Fin. Economics* (2004), Vol. 72, Issue 2, at 357-384; La Porta, R., Lopez-De-Silanes, F., *et. al*., Government Ownership of Banks, *J. Finance* (2002), Vol. 57, No 1, at 265-301; Levy Yeyati, E., Micco, A, *et. al*., Should the Government Be In The Banking Business? The Role of State-Owned and Development Banks, *Inter-American Development Bank Working Paper #517* (2004) at 6, available at https://publications.iadb.org/en/publication/should-government-be-banking-business-role-state-owned-and-development-banks; Ijaz Khwaja, A., and Mian, A., Do Lenders Favor Politically Connected Firms? Rent Provision in an Emerging Financial Market, *Q. J. Economics* (2005), Vol. 120, Issue 4, at 1371-1411; Serdar Dinc, I., Politicians and Banks: Political Influences on Government-owned Banks in Emerging Markets, *J. Fin. Economics* (2005), at 453-479; Carvalho, D., The Real Effects of Government-Owned Banks: Evidence from an Emerging Market, *J. Finance* (2012), Vol. 69, issue 2, at 577-609; and Claessens, S., Feijen, E., *et. al*., Political Connections and Preferential Access to Finance: The Role of Campaign Contributions, *J. Fin. Economics* (2008), Vol. 88, Issue 3, at 554-580.

[157] *See Notice of Proposed Rulemaking and Request for Public Comments*, 54 FR 23366, 23367 (May 31, 1989).

the initiation threshold for specificity under the Act if the party sufficiently alleges that the bank provides loans pursuant to government policies or directives.

Commerce proposes a number of modifications to § 351.505(b) and (c) to establish a uniform standard with respect to the treatment of long-term loans. Commerce currently calculates the benefit for long-term loans using different methodologies depending on whether the long-term loan has a fixed interest rate, a variable interest rate, or a different repayment schedule. The proposal is intended to ensure consistency in the benefit calculation of long-term loans by focusing on the key aspect that the benefit in any given year is the difference between the amount of interest the firm paid on the investigated loan and the amount of interest that the firm would have paid on a comparable commercial loan. In addition, the use of a *comparable* commercial loan as defined under § 351.505(a) already appropriately adjusts for any differences in the government-provided loan based on whether the loan is fixed rate, variable rate, or with a term based on a different payment schedule.

Under this proposal, Commerce would modify and delete large parts of current § 351.505(c), specifically both § 351.505(c)(3) and § 351.505(c)(4). Sections 351.505(c)(3) and 351.505(c)(4) separately address long-term loans with different repayment schedules and long-term loans with variable interest rates. Commerce proposes deleting those provisions and adding a provision that indicates that, instead, Commerce would calculate the benefit conferred by any type of long-term loan in the same manner by taking the difference between what the recipient of the government loan would have paid on a comparable commercial loan and the actual amount the recipient paid on the government-provided loan during the POI/POR and allocating that benefit amount to the relevant sales during the POI/POR. Under the proposal, all long-term loans would be addressed solely in § 351.505(c)(2).

Commerce is also proposing modifying current § 351.505(b), which addresses the time of receipt of benefit for loans. That provision currently cites §§ 351.505(c)(3) and (4), so if those

provisions are deleted from the regulation, § 351.505(b) has to be modified to remove reference to those provisions.

In addition, Commerce proposes deleting sentences in § 351.505(c)(1) and § 351.505(c)(2) that state that in no event may the present value of the calculated benefit in the year of receipt of the loan exceed the principal of the loan. Commerce is also proposing to delete the same sentence with respect to the provision of contingent liability interest-free loans at (e)(1). Commerce proposes to delete these sentences because section 771(5)(E) of the Act does not provide a cap on the benefit a loan may confer. The existing regulation appears to be a holdover from the 1980s when Commerce would calculate a benefit from a loan by calculating a grant equivalent for the loan and then allocate that amount over the Average Useful Life (AUL) of a firm's renewable physical assets, a methodology that has since been abandoned by Commerce because the agency's experience has shown that it resulted in inaccurate measurements of loan benefits.

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

**21. Address the Treatment of Firms in Government Designated "Outside Customs Territory" Zones – § 351.509(a)(1) and 351.510(a)**

Commerce is proposing a modification to its regulations covering direct taxes and indirect taxes and import charges (other than export programs), § 351.509 and § 351.510. The modification to both provisions is intended to clarify Commerce's treatment of the exemption of

taxes and import charges in zones designated as being outside the customs territory of the country.

In the 2012 CVD investigation of *Steel Pipe from Vietnam*, Commerce determined that the exemption of import charges on capital assets into an export processing zone was not countervailable.[158] Commerce stated that the Government of Vietnam designated the respondent company as an export processing zone, and based upon that designation the operations of the company were outside the customs territory of the country.[159] Therefore, Commerce concluded that because the company was outside the customs territory of Vietnam, the exemption of import duties on capital goods did not provide a financial contribution in the form of revenue forgone.[160] However, upon further consideration of our decision in *Steel Pipe from Vietnam*, Commerce has concluded that its treatment of firms or zones that are designated as being "outside the customs territory" of a country in that case to be at odds with our long-term established practice, our regulations, and the purpose of the CVD statute.

Under § 351.102(a)(25), "government-provided" is a shorthand expression for any act or practice by a government being analyzed as a possible government subsidy. Critical to Commerce's analysis of whether a government act or practice constitutes a countervailable subsidy is a determination of what the situation of the firm would be in the absence of the government program. For example, § 351.509(a), which addresses direct taxes, states that a benefit exists to the extent that the tax paid by the firm is less than the tax the firm would have paid in the absence of the program; under § 351.510(a) regarding indirect taxes and import charges, a benefit exists to the extent that the taxes or an import charge paid by a firm as a result of the program are less than the taxes or import charges the firm would have paid in the absence of the program. Similarly, and under the benefit regulation at § 351.503(b), Commerce will

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[158] *See Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam: Final Negative Countervailing Duty Determination*, 77 FR 64471 (October 22, 2012), and accompanying IDM at Comment 3.
[159] *Id.*
[160] *Id.*

consider a benefit to be conferred by government programs when a firm pays less for its inputs (*e.g.,* money, a good or service) than it otherwise would pay or receives more revenues than it otherwise would earn in the absence of the government program.

The government designation of either a firm or a zone as being outside the customs territory constitutes a government act or program as defined within Commerce's regulations. By establishing areas in which it will not collect taxes or import charges on capital goods, the government has taken an explicit action to provide both a financial contribution and a benefit to a firm that is operating within the designated area. Absent the government action, the firm otherwise would have paid either direct taxes or import charges. These government actions provide incentives to exporters, and as the Supreme Court explained in *Zenith*, a purpose of the countervailing duty law and the imposition of countervailing duties is "to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments."[161]

Thus, to ensure the appropriate application of the CVD statute, Commerce proposes an amendment to both § 351.509(a)(1) and § 351.510(a)(1) to close a potential loophole through which foreign governments might provide a countervailable subsidy including a prohibited export subsidy. Commerce proposes including the underlined language within § 351.509(a)(1): "a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program, <u>including as a result of being located in an area designated by the government as being outside the customs territory of the country</u>" (emphasis added). For § 351.510(a), the amended language would read: "a benefit exists to the extent that the taxes or import charges paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program, <u>including as a result of being located in an area designated by the government as being outside the customs territory of the country</u>" (emphasis added). This new language would also be included in Commerce's proposed

[161] *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978).

new § 351.521(a)(1), discussed further below, that addresses indirect taxes and import charges on capital goods and equipment (export programs).

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

**22. Recognizing the Use of Sales from Government Run Auctions – § 351.511(a)(2)(i)**

Section 351.511 regulates how Commerce examines and determines if goods or services are being sold for less than adequate remuneration (LTAR) in accordance with section 771(5)(E)(iv) of the Act. Section 351.511(a)(2) defines "adequate remuneration" and describes the use of a market-determined benchmark price resulting from actual transactions in the country subject to the CVD proceeding for purposes of evaluating the adequacy of remuneration. Pursuant to the language of the current provision, under certain circumstances, an in-country, market-determined price could also include "actual sales from competitively run government auctions." Commerce is now proposing a modification to the regulation which would list the circumstances under which such auction prices may serve as a usable tier-one benchmark. Under this proposed change, Commerce would explain that for a government run auction to be "competitively run," the government auction must use "competitive bid procedures that are open without restriction on the use of the good or service;" it must be "open without restrictions to all bidders, including foreign enterprises, and protect the confidentiality of the bidders;" it must

account "for the substantial majority of the actual government provision of the good or service in the country in question;" and the winner of the government auction must be "based solely on price."

While the preamble to the current regulation provides some guidance on when Commerce would use actual sales from a government-run auction to evaluate adequate remuneration,[162] codifying a more defined set of auction criteria in § 351.511(a)(2)(i) would ensure consistency and clarity in the application of this regulation and better inform the public of the criteria that are used by Commerce in evaluating whether prices from a government-run auction can be used as an in-country, market-determined price for purposes of evaluating the adequacy of remuneration.

**23. Addition of the Purchase of Goods for More Than Adequate Remuneration Regulation – § 351.512**

When Commerce issued its current CVD regulations in 1998, it designated § 351.512 as "[reserved]."[163] Commerce explained that it did not have sufficient experience with respect to the government purchase of a good for more than adequate remuneration (MTAR) at the time; thus, it concluded that it was not appropriate then to set forth a standard with respect to its treatment of these types of financial contributions.[164] More than 25 years later, the issue of a subsidy in the form of the government purchase for more than adequate remuneration has come before Commerce in only a limited number of cases. Nonetheless, Commerce has developed certain methodologies with respect to this type of financial contribution through those cases, especially in regard to the situations in which the government is both a provider and a purchaser of the good at issue. In addition, important differences between the treatment of an MTAR and an LTAR analysis relating to the basis of a price comparison that should be set forth within a regulation have emerged. Accordingly, Commerce is proposing a regulation providing guidance on subsidies covering the purchase of a good for MTAR.

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[162] *See 1998 Preamble*, 63 FR at 65377.
[163] *Id*., 63 FR at 65412.
[164] *Id*., 63 FR at 65379.

First, proposed § 351.512(a)(1), would address the benefit conferred from the government purchase of a good, which is derived from the standard in section 771(5)(E)(iv) of the Act. Under that provision, in the case where goods are purchased by a government or a public body, a benefit would exist to the extent that such goods are purchased for more than adequate remuneration.

Next, proposed § 351.512(a)(2) would define "adequate remuneration" within the context of an analysis of a government's purchase of a good. The proposed standard for adequate remuneration for the purchase of a good is not as detailed as the definition of the provision of a good or service by a government under § 351.511(a)(2) because Commerce has had a much longer history and experience in addressing the provision of a good or service by a government. Though more limited, Commerce's experience is sufficient to inform a proposed general standard of adequate remuneration for a government's purchase of a good.

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

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

Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market or that market-determined in-country prices are otherwise not available, proposed § 351.512(a)(2)(i) would also state that Commerce will consider the use of world market prices as the comparison price for measuring the adequacy of remuneration. If there is useable information on the record for more than one world market price, Commerce would average the world market prices that are on the record absent record evidence that one or more of those world market prices are otherwise distorted.

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

Under proposed § 351.512(a)(2)(ii), if there are no market-determined domestic prices or world market prices available, then Commerce could measure the adequacy of remuneration by examining any premium provided to domestic suppliers of the good based on the government's procurement regulations and policies, those that are established in any bidding documents,[165] or any other methodology. This assessment could include comparing the costs of production,

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

including a reasonable profit margin, of the recipient to the price that is paid by the government for the purchased good.

Commerce recognizes that for certain products, such as enriched uranium, the primary purchasers in both the domestic and the world market are normally governments, government-owned entities, or government-controlled entities, or the purchase of such goods is highly controlled and regulated by the government.[166] In such markets Commerce would closely examine the bidding and purchase conditions in assessing whether the purchase price paid by the government is consistent with market principles, which may include an analysis of the costs of producing or processing that good.

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

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

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

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

Under proposed § 351.512(a)(3) Commerce proposes codifying its treatment of how it calculates a benefit when the government is both a provider and purchaser of the good, such as with electricity. In that situation, Commerce would normally measure the benefit to the recipient firm by comparing the price at which the government provided the good to the price at which the government purchased the same good from the firm. While Commerce has had limited experience with subsidies in the form of the government purchasing a good for MTAR, it has had numerous cases where the government is both the provider and purchaser of a good, *e.g.*, the government both provided and purchased electricity from a respondent, in our investigations and administrative reviews.[167]

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[167] *See, e.g.*, *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determination*, 81 FR 53439 (August 4, 2016), and accompanying IDM at 35-36; *Certain*

Section 771(5)(E) of the Act states that a benefit will normally be treated as conferred when there is a "benefit to the recipient." In other words, section 771(5)(E) of the Act provides the standard for determining the existence and amount of a benefit conferred through the provision of a subsidy and reflects the "benefit-to-the-recipient" standard which "long has been a fundamental basis for identifying and measuring subsidies under U.S. CVD practice."[168] Therefore, in situations where the government is acting on both sides of the transactions – both selling a good to, and purchasing that good from, a respondent – under proposed § 351.512(a)(3), Commerce would measure the benefit to the respondent by determining the difference between the price at which the government is selling the good to the company, and the price at which the government is purchasing that good from the company. In other words, under the "benefit-to-the-recipient" standard set forth within section 771(5)(E) of the Act, if a government provided a good to a company for three dollars and then purchased the identical good from the company for ten dollars, logic dictates that the benefit provided to the company by the government, all else being equal, would be seven dollars.

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

**24. Removing Reserved Regulation Regarding Import Substitution Subsidies - and Creating a Regulation to Address Indirect Taxes and Import Charges on Capital Goods and Equipment (Export Programs) - § 351.521**

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*Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017), and accompanying IDM at 159-74; and *Certain Uncoated Groundwood Paper from Canada: Final Affirmative Countervailing Duty Determination*, 83 FR 39414 (August 9, 2018), and accompanying IDM at 149-83.

[168] *See* SAA at 927.

Import substitution subsidies are defined as subsidies that are "contingent upon the use of domestic goods over imported goods, alone or as 1 of 2 or more conditions," in section 771(5A)(C) of the Act. When Commerce published its current CVD regulations in 1998, Commerce held in reserve § 351.521 for import substitution subsidies.[169] However, in the years in which that term has been defined in the Act, Commerce has had no issues with addressing and quantifying import substitution subsidies without an applicable regulation. Accordingly, Commerce is proposing to delete this reserved regulation as unnecessary.

Instead, Commerce is proposing new § 351.521, which would address Indirect Taxes and Import Charges on Capital Goods and Equipment (Export Programs). Commerce has found that programs that provide for an exemption from or reduction of indirect taxes and import charges on capital goods and equipment to be countervailable export subsidies and has had to address such subsidies under existing regulations on the treatment of direct taxes (§ 351.509); treatment of indirect taxes and import charges (other than export programs) (§ 351.510); and remission or drawback of import charges upon export (§ 351.519).[170] However, none of these current regulations directly addresses programs that provide an exemption from indirect taxes and import charges for exporters that purchase capital goods or equipment.

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

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[169] *See 1998 Preamble*, 63 FR at 65414.

[170] *See, e.g., Certain Frozen Warmwater Shrimp from Thailand: Final Negative Countervailing Duty Determination*, 78 FR 50379 (August 19, 2013) and accompanying IDM at 9.

address the exemption of indirect taxes and import charges on capital goods and equipment that are export-specific.

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

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

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

**25. Removing the Regulation Regarding Green Light and Green Box Subsidies Regulation - § 351.522**

Commerce proposes deleting the Green Light and Green Box subsidies provision found at current § 351.522 because the provisions are no longer relevant under U.S. law. Under section 771(5B)(G)(i) of the Act, the Green Light provisions under subparagraphs (B), (C), (D) and (E) lapsed 66 months after the WTO Agreement entered into force, *circa* 2000 and 2001, as these provisions were not extended pursuant to section 282(c) of the Uruguay Round Agreements Act.[171] Under section 771(5B)(G)(ii) of the Act, the provision for Green Box subsidies no longer applied at the end of the nine-year period beginning on January 1, 1995. Because the statutory authority to consider Green Light and Green Box subsidies ended approximately 25 years ago, Commerce proposes eliminating these obsolete provisions.

**26. Revising Commerce's Attribution of Subsidies to Products Where There are Corporations with Cross-Ownership and Trading Companies, and Creating a Subheading Regarding Subsidy Calculation in Economies with High Inflation - § 351.525(b), (c), and (d)**

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

When Commerce developed the current attribution rules for cross-owned companies 25 years ago, it had limited experience with the attribution of subsidies between affiliated companies. The practice of requiring information from cross-owned companies involved in the supply of an input product, a holding or parent company, or the production of subject merchandise evolved slowly for Commerce, and this practice led to the development of some of the attribution rules that are currently codified under § 351.525. It was essentially not until the

[171] *See* Uruguay Round Agreements Act (URAA), Public Law 103–465, 108 Stat. 4809 (1994).

results of investigations into steel products from various countries[172] that Commerce began to attribute to a respondent the subsidies that were provided to companies that were related to the respondent through cross-ownership.[173] In those investigations, Commerce required "complete responses for all related companies that conducted either of the following types of financial transactions: (a) Any transfer of funds (*e.g.,* grants, financial assets) or physical assets to the respondent, the benefits of which were still employed by the producer of the subject merchandise during the POI; or (b) Any assumption of debt or other financial obligation of the respondent (*e.g.*, loan payments, dividend payments, wage compensation) that the respondent would have had to pay during the POI."[174] Therefore, collecting subsidy information from parent companies and affiliated input suppliers was a relatively recent practice when Commerce was developing and codifying our current attribution rules.

In the ensuing years, Commerce has developed a detailed practice with respect to the treatment of cross-owned companies and the attribution to respondents of subsidies received by cross-owned companies. Based on this experience, Commerce proposes a number of changes to its attribution rules that are currently codified under § 351.525(b)(6).

As an initial matter, cross-ownership is defined under current § 351.525(b)(6)(vi), and Commerce is not proposing a modification to that paragraph, except for moving it to § 351.525(b)(6)(vii) in light of changes to other provisions.[175]

Next, proposed § 351.525(b)(6)(iii), which addresses holding or parent companies, would delete the section that states that if a holding company merely serves as a conduit for the transfer

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[172] *See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria*, 58 FR 37217, 37218 (July 9, 1993).

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

[174] *See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria*, 58 FR 37217, 37218 (July 9, 1993).

[175] Commerce notes that the standard set forth in the regulation is that cross-ownership will normally be met when there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. However, Commerce's experience since 1998 has shown that other factors, such as certain familial relationships, may, in particular circumstances, warrant a finding of cross-ownership, with or without a majority voting ownership interest. *See Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 FR 60642 (October 25, 2007). A finding of cross-ownership is an entity-specific determination.

of the subsidy from a government to a subsidiary, that Commerce will attribute the subsidy solely to the products sold by the subsidiary. This language would be redundant in light of proposed revisions to the attribution section on the transfer of subsidies between corporations with cross-ownership, as described below.

With respect to the cross-ownership attribution rule for input suppliers, § 351.525(b)(6)(iv), Commerce is proposing a number of changes in order to add more clarity with respect to the analysis of when an input is "primarily dedicated" to the production of a downstream product. In addition, Commerce has found that the examples provided in the 1998 preamble to the current regulations (semolina to pasta; trees to lumber; and plastic to automobiles)[176] have not assisted with respect to many of the input products that Commerce has encountered in its CVD cases. Moreover, the analysis of whether an input is primarily dedicated has been an issue in recent CIT holdings.[177] Therefore, Commerce proposes a number of factors that it would consider in its analysis of whether an input is primarily dedicated.

In § 351.525(b)(6)(iv)(A), Commerce proposes to add language to explicitly state that the attribution rule applies only to cross-owned corporations that produce the input, as opposed to cross-owned companies that procure the input from non-cross-owned companies and then provide that input to the respondent. To provide further clarity, Commerce has proposed to change the title of this attribution regulation from "input supplier" to "input producer." The definition of an input under this attribution regulation would cover the creation or generation of by-products as a result of the production operations of the cross-owned input producer. With these proposed changes to the regulation, Commerce is not intending to change its current

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

[177] *See*, *e.g., Kaptan Demir Celik Endustrisi Ve A.S. v. United States*, Court No. 21-00565, Slip-Op (CIT April 26, 2023); *Nucor Corporation v. United States*, Court No. 21-00182, Slip Op. 22-116 (CIT October 5, 2022); and *Gujarat Fluorochemicals Ltd. v. United States*, 617 F. Supp. 3d 1328, 1330 (CIT 2023).

practice that a primarily dedicated input does not have to be used directly in the production of subject merchandise but may be used as an input at earlier stages of production.

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

Whether an input product is primarily dedicated is a highly fact-intensive analysis of all of the information on the record; such information is usually business proprietary and thus

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

Since the publication of the current attribution rules, Commerce has increasingly faced more complex cross-ownership issues and corporate structures. Moreover, the transactions between these cross-owned corporate entities and their provision of "inputs" as defined and addressed within the CVD regulations have multiplied with increased complexities. Therefore, with an additional 25 years of experience in addressing transactions between cross-owned companies since the publication of the current attribution rules, Commerce has concluded that it is appropriate now to propose an additional attribution rule to cover the provision of certain "inputs" that are more than just input products used in the manufacture or production of downstream products, specifically cross-owned providers of electricity, natural gas or similar utility goods.

Under proposed revisions to § 351.525(b)(6)(v), titled "Providers of utility products," if there is cross-ownership between a company providing electricity, natural gas or other similar utility product and a producer of subject merchandise, Commerce would attribute subsidies received by that provider to the combined sales of that provider and the sales of products sold by the producer of subject merchandise if at least one of the following two conditions is met: a substantial percentage, normally defined as 25 percent or more, of the production of the electricity, natural gas, or other similar utility product by the cross-owned utility provider is provided to the producer of subject merchandise; or the producer of subject merchandise

purchases 25 percent or more of its electricity, natural gas, or other similar utility product from the cross-owned provider. Commerce has concluded that the criteria being developed for determining whether an input product is primarily dedicated to the production of downstream products is not particularly useful for utility products such as electricity and natural gas. Among other considerations, electricity and natural gas are not the same as a physical input into the production of downstream products but have emerged as goods or services that can effectively subsidize the production or manufacture of certain products. Therefore, a consistent standard of analysis for the attribution of utility products provided by a cross-owned corporation would assist the agency in effectuating the requirements of section 701(a) of the Act.

Section 771A of the Act provides standards for determining when an upstream subsidy results in a subsidy being provided to the production or manufacture of subject merchandise. However, the upstream subsidy provision applies to situations beyond those in which cross-ownership exists. This proposed regulation would focus on the provision of utility products between cross-owned companies in order to provide both clarity to the public and consistency of treatment among Commerce's cases. In proposing this standard, Commerce recognizes that in most economies, providers of goods such as electricity and natural gas are government-regulated public utilities and manufacturers require utility goods and services to conduct their operations. In Commerce's view, a utility company providing 25 percent of its output to one company indicates a significant level of dependency and dedication to one customer, and a company that purchases 25 percent of its energy needs from one supplier has also become engaged in a significant supplier relationship. Therefore, the Proposed Rule establishes a 25 percent threshold for attributing subsidies received by the cross-owned utility company and the producer of subject merchandise.

However, if the cross-owned utility company is an authority and there is an allegation that the government is providing the electricity or natural gas for less than adequate remuneration or that the private cross-owned utility company is entrusted or directed to provide electricity or

natural gas for less than adequate remuneration, Commerce would normally analyze these types of allegations under § 351.511, its regulation on the provision of a good or service.

Although the proposed regulation addresses only utility product providers, Commerce retains the authority to include subsidies received by certain cross-owned companies which are not utility product providers when it concludes the specific facts on the record warrant such inclusion.

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

Likewise, there may be situations in which Commerce determines that it is appropriate to include subsidies received by certain cross-owned service providers in its calculations. The preamble to the current CVD regulations refers to the situation in which a government provides a subsidy to a non-producing subsidiary such as a financial subsidiary and notes that consistent with Commerce's treatment of holding companies, the agency would attribute a subsidy to a non-producing subsidiary to the consolidated sales of the corporate group.[178] Commerce normally does not include cross-owned general service providers in the attribution of

[178] *See 1998 Preamble*, 63 FR at 65402.

subsidies.[179] Where cross-owned service providers provide critical inputs into the manufacture and production of subject merchandise, Commerce may include cross-owned service providers in the attribution of subsidies. In all cases, whether to include subsidies provided by cross-owned service providers in the attribution of subsidies is a case-specific determination.

For example, if there is cross-ownership with a company providing R&D, tolling, or engineering services directly related to the production or assembly of subject merchandise, Commerce may determine that it is appropriate to attribute subsidies received by the service provider to the combined sales of that provider and the producer of subject merchandise. In the case of a cross-owned company performing R&D for the respondent company or for the corporate group, Commerce might determine to include the subsidies provided by the government to that cross-owned R&D service provider. Similarly, if the respondent company has a cross-owned toller that assembles or manufactures the subject merchandise which is subsequently sold or exported by the respondent, Commerce might include subsidies provided by the government to that cross-owned toller.[180] With respect to engineering services, while Commerce will not include subsidies to companies that provide only general engineering services to a respondent, the agency might include subsidies to those service providers if the services are directly related to the manufacture, production or export of subject merchandise. For example, in *Fabricated Structural Steel from Canada*, Commerce included cross-owned companies that provided engineering drafting services because these services were critical to the production and manufacture of subject merchandise.[181] While the proposed revisions to § 351.525(b)(6) do not include subsidies to cross-owned providers of services or subsidies to cross-owned providers of land, employees, and manufacturing facilities, , the agency may attribute such subsidies in its CVD calculations where supported by the record.

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[179] *See, e.g., Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 17410 (March 26, 2012) and accompanying IDM at Comment 22.
[180] *See Certain Fabricated Structural Steel from Canada: Preliminary Negative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 84 FR 33232 (July 12, 2019), and accompanying PDM at section VI. Subsidies Valuation.
[181] *Id.*

Under the proposed language for the transfer of subsidies (formerly § 351.525(b)(6)(v), now § 351.525(b)(6)(vi)), if a cross-owned corporation received a subsidy and transferred it to a producer of subject merchandise, Commerce would attribute the subsidy only to products produced by the recipient of the transferred subsidy. Moreover, when the cross-owned corporation that transferred the subsidy could fall under two or more of the attribution rules under § 351.525(b)(6), the transferred subsidy would be attributed solely to the recipient of the transferred subsidy as set forth under § 351.525(b)(6)(vi). With these revisions to the transfer attribution rule, Commerce proposes to clarify and codify that when a cross-owned corporation transfers a subsidy, that subsidy will be attributed only to the recipient of the subsidy.

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

Furthermore, for cross-owned corporations that fall under proposed § 351.525(b)(6)(iv), Commerce will normally only request information or a questionnaire response for input producers that provide the input to the producer of subject merchandise during the POI or POR. Similarly, for cross-owned corporations that fall under proposed § 351.525(b)(6)(v), Commerce will normally only request information or a questionnaire response for cross-owned utility companies that provided electricity, natural gas or other utility product to the producer of subject merchandise during the POI or POR. In addition, for corporations producing subject merchandise under § 351.525(b)(6)(ii) that were cross-owned during the POI and POR, they must provide information and a questionnaire response covering the AUL of a firm's renewable physical assets even if one or more did not export subject merchandise to the United States during the POI or POR. Due to the ease of switching export shipments of subject merchandise between cross-owned corporations producing the subject merchandise and the potential for

evasion of a CVD order, Commerce will analyze subsidies conferred to all cross-owned corporations producing subject merchandise and will calculate one CVD rate for these cross-owned entities. Commerce will also attribute subsidies provided during the AUL to all holding or parent companies that are cross-owned with the producer of subject merchandise during the POI or POR. Finally, information on the transfer of non-recurring subsidies from a cross-owned company during the AUL must be reported, even if the company that transferred the subsidy to the producer of subject merchandise is no longer cross-owned during the POI or POR or has ceased operations.

Commerce also proposes two additions to the attribution rules under § 351.525(b) to codify two longstanding Commerce practices with respect to the attribution of subsidies to plants and factories and the tying of a subsidy. Under proposed § 351.525(b)(8), Commerce would not tie or attribute a subsidy on a plant- or factory-specific basis. Under proposed § 351.525(b)(9), a subsidy would normally be determined to be tied to a product or market when the authority providing the subsidy (1) was made aware of, or otherwise had knowledge of, the intended use of the subsidy and (2) acknowledged that intended use of the subsidy prior to, or current with, the bestowal of the subsidy. Commerce also proposes to modify § 351.525(b)(1) to reflect references to the above additions of paragraphs (8) and (9) to the regulation.

In the preamble to the current CVD regulations, Commerce responded to comments supporting a regulation to allow the agency to tie or attribute subsidies on a plant- or factory-specific basis by rejecting that proposal.[182] Commerce's practice from at least the time the current CVD regulations were published over 25 years ago has been consistent – subsidies will not be attributed or tied on a plant- or factory-specific basis. Commerce now proposes to codify this practice in its regulations.

Commerce's approach to tying goes back over 42 years. In *Certain Steel Products from Belgium*, Commerce stated that it determines that a grant is "tied when the intended use is known

[182] *See 1998 Preamble*, 63 FR at 65404.

to the subsidy giver and so acknowledged prior to or concurrent with the bestowal of the subsidy."[183] When Commerce examines whether a subsidy is tied to a product or market, it has consistently used this test and proposes to codify it in proposed § 351.525(b)(9).

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

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

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

Finally, as Commerce noted in the 1998 *Preamble*, if subsidies that are allegedly tied to a particular product are in fact provided to the overall operations of a company, Commerce would continue to attribute the subsidy to all products produced by the company.[184]

In addition to the aforementioned changes to § 351.525(b), and consistent with its authority to limit examinations and administer the CVD law, Commerce further proposes to add text to § 351.525(b)(1) that would explain that when record information and resource availability supports limiting the number of cross-owned corporations examined, Commerce may so limit its examination before conducting a subsidy attribution analysis under any subsidy attribution provisions.

For example, Commerce has determined in past cases that a limitation of examination was warranted when a respondent had a large number of cross-owned input suppliers and examination of each of those input suppliers would have been unduly burdensome based on the record information and its available resources. In such a situation, Commerce would have the discretion to limit the number of cross-owned input suppliers it may examine. This language is not intended to restrict the situations in which Commerce may determine that a limitation on examination of cross-owned corporations is appropriate or change Commerce's current practice of limiting examination of entities besides cross-owned corporations when appropriate under § 351.525.

The agency proposes to revise § 351.525(c), which pertains to trading companies. When Commerce codified its trading company practice in 1998 under § 351.525(c), trading companies were not selected as respondents in Commerce's investigations or administrative reviews. However, when Commerce started using CBP import data to identify the largest producers/exporters of subject merchandise for purposes of selecting respondents, Commerce discovered that in many cases the largest exporters were trading companies. Commerce used the current trading company regulation to cumulate the subsidies provided to the trading company

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[184] *See 1998 Preamble*, 63 FR at 65400.

with those provided to the producers from which the trading company has sourced the subject merchandise that it exported to the United States. [185] However, in order to provide consistency and clarity with respect to its cumulation methodology when a trading company is selected as a respondent, Commerce proposes codifying this methodology within its trading company regulation.

Thus, in proposed §§ 351.525(c)(i) through (iii), Commerce has included language stating that when the producer of subject merchandise exports through a trading company, Commerce will pro-rate the subsidy rate calculated for the trading company by using the ratio of the producer's total exports of subject merchandise to the United States sold through the trading company to the producer's total exports of subject merchandise to the United States and add the resultant rate to the producer's calculated subsidy rate. If the producer exports subject merchandise to the United States through more than one trading company, this calculation would be performed for each trading company and added, or cumulated, to the producer's calculated subsidy rate. Such an addition to the regulation would provide consistency in the application of the trading company regulation and provide clarity to the public with respect to this practice.[186]

With respect to proposed § 351.525(d), Commerce has observed instances where the country whose imports were the subject of investigation or review was experiencing high inflation during either the POI or POR or had experienced levels of high inflation during the AUL period of the firm's renewable physical assets when the government had provided large non-recurring subsidies such as equity infusions to the respondent company. In those cases,

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[185] Commerce's practice of cumulating subsidies provided to trading companies with the subsidies provided to the producer of subject merchandise began in 1984 with *the Final Affirmative Countervailing Duty Determination; Oil Country Tubular Goods from Korea*, 49 FR 46776, 46777 (November 28, 1984). When Commerce codified this practice in our current CVD regulations in 1998, Commerce did not set forth a detailed methodology but stated that the subsidy benefits provided to trading companies would be cumulated with the subsidy benefits provided to the producer of the subject merchandise. *See 1998 Preamble*, 63 FR at 65404. The Preamble to the trading company regulation did not provide guidance as to how these subsidy benefits were to be cumulated. *Id*. While this approach provided Commerce with some flexibility as to how the subsidy benefits provided to trading companies were to be cumulated with the subsidy benefits conferred to the producer of subject merchandise, this lack of clarity in the language of the regulation also led to inconsistencies in the application of the methodology.

[186] *See, e.g.*, *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 2019,* 87 FR 20821 (April 8, 2022), and the accompanying IDM at Comment 6.

Commerce addressed the high inflation rate in order to prevent distortions in the calculated *ad valorem* subsidy rate. However, the agency's treatment of high inflation has been inconsistent. For example, in cases on *CTL Plate from Mexico* in 2000, 2001, and 2004,[187] *Turkish Pasta*[188] in 2001, *Steel Wire Rod from Turkey*[189] in 2002, *Cold-Rolled Steel from Brazil*[190] in 2002, and *CTL Plate from Mexico Reviews*[191] in 2004, Commerce made adjustments to its subsidy calculations to account for periods of high inflation but did not do so in *Honey from Argentina*[192] in 2004 and *Biodiesel from Argentina*[193] in 2017.[194] Therefore, to clarify its practice and to improve consistency as to when the agency will adjust its subsidy calculations for high inflation, Commerce is proposing new paragraph § 351.525(d) to provide that Commerce would normally adjust its subsidy calculations for when inflation is higher than 25 percent per annum during the relevant period. Commerce has used a variety of methodologies to account for high inflation and proposed § 351.525(d) would allow for any of them to be used in the appropriate context. Consistent with *Steel Wire Rod from Turkey*, Commerce is defining "high inflation" as an annual inflation rate above 25 percent.

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

[188] *See Certain Pasta from Turkey: Final Results of Countervailing Duty Administrative Review*, 66 FR 64398 (December 13, 2001) and accompanying IDM at 3.

[189] *See Final Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Turkey*, 67 FR 55815 (August 30, 2002), and accompanying IDM at 3 (*Steel Wire Rod from Turkey*).

[190] *See Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products from Brazil*, 67 FR 621128 (October 3, 2002) and accompanying IDM (*Cold-Rolled Carbon Steel Flat Products from Brazil*) at 7.

[191] *See CTL Plate from Mexico 2000* IDM at 3-4; *see also CTL Plate from Mexico 2001* IDM at 5-6; and *CTL Plate from Mexico 2004* IDM at 4.

[192] *See Honey from Argentina: Final Results of Countervailing Duty Administrative Review*, 69 FR 29518 (May 24, 2004), and accompanying IDM (making no adjustments to account for high inflation).

[193] *See Biodiesel from the Republic of Argentina: Final Affirmative Countervailing Duty Determination*, 82 FR 53477 (November 16, 2017), and accompanying IDM (making no adjustments to account for high inflation).

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

In *Steel Wire Rod from Turkey*, the annual inflation rate in Turkey exceeded 25 percent during the POI. Therefore, to prevent any distortions in its calculated subsidy rate due to the high level of inflation, Commerce adopted a methodology to adjust for inflation during the POI. Adjusting the subsidy benefits and the sales figures for inflation neutralizes any potential distortion in Commerce's subsidy calculations caused by high inflation and the timing of the receipt of the subsidy. To calculate the *ad valorem* subsidy rates for each program Commerce indexed the benefits received in each month and the sales made in each month to the last year of the POI/POR to calculate inflation-adjusted values for benefits and the relevant sales denominators. In these high inflation calculation adjustments, Commerce used the changes in the Wholesale Price Index for Turkey as reported in the International Monetary Fund's (IMF's) International Financial Statistics. In other cases where a country was experiencing high inflation, the agency used government-published indexes that are used by companies to adjust their accounting records on a monthly basis in its analysis.[195]

Commerce has also investigated non-recurring subsidies, normally the provision of equity, where the provision of the subsidy occurred during a period within the AUL in which the country experienced high inflation. The issue before Commerce in those cases was how to account for the periods of high inflation in order to accurately calculate the benefit. In *Cold-Rolled Steel from Brazil,* Commerce found that from 1984 through 1994, Brazil experienced persistent high inflation.[196] There were no long-term fixed-rate commercial loans made in domestic currencies during those years with interest rates that could be used as discount rates. Commerce determined that the most reasonable way to account for the high inflation in the Brazilian economy through 1994, given the lack of an appropriate Brazilian currency discount rate, was to convert values of the equity infusions provided in Brazilian currency into U.S.

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[195] *See, e.g., Final Affirmative Countervailing Determination; Steel Wheels from Brazil*, 54 FR 15523, 15526 (April 18, 1989).
[196] *See, e.g.*, *Cold-Rolled Carbon Steel Flat Products from Brazil* at 7.

dollars.[197] If the date of receipt of the equity infusion was provided, Commerce applied the exchange rate applicable on the day the subsidies were received or, if that date was unavailable, the average exchange rate in the month the subsidies were received.[198] Then Commerce applied as the discount rate a contemporaneous long-term dollar lending rate in Brazil.[199] Therefore, for Commerce's discount rate, it used data for U.S. dollar loans in Brazil for long-term, non-guaranteed loans from private lenders, as published in the World Bank Debt Tables: External Finance for Developing Countries.[200]

In three reviews of *CTL Plate from Mexico*, Commerce determined, based on information from the Government of Mexico (GOM), that Mexico experienced significant inflation from 1983 through 1988 and significant, intermittent inflation during the period 1991 through 1997.[201] In accordance with past practice, because Commerce found significant inflation in Mexico and because the respondent AHMSA adjusted for inflation in its financial statements, Commerce made adjustments, where necessary, in each of those reviews to account for inflation in the benefit calculations.[202] Because Mexico experienced significant inflation during only a portion of the 15-year allocation period, had Commerce either indexed for the entire period or converted the non-recurring benefits into U.S. dollars at the time of receipt (*i.e.*, dollarization) for use in Commerce's calculations, such actions would have inflated the benefit from these infusions by adjusting for inflationary as well as non-inflationary periods. Thus, in the *CTL Plate from Mexico* [203] reviews, Commerce used a loan-based methodology instead to reflect the effects of intermittent high inflation.

The methodology Commerce used in the *CTL Plate from Mexico* reviews assumed that, in lieu of a government equity infusion/grant, a company would have had to take out a 15-year

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[197] *Id*.
[198] *Id*.
[199] *Id*.
[200] *Id*.
[201] *See CTL Plate from Mexico 2000* IDM at 3-4; *see also CTL Plate from Mexico 2001* IDM at 5-6; and *CTL Plate from Mexico 2004* IDM at 4.
[202] *Id*.
[203] *Id.*

loan that was rolled over each year at the prevailing nominal interest rate. The benefit in each year of the 15-year period equaled the principal plus interest payments associated with the loan at the nominal interest rate prevailing in that year. Because Commerce assumed that an equity infusion/grant given was equivalent to a 15-year loan at the current rate in the first year, a 14-year loan at current rates in the second year and so on, the benefit after the 15-year period would be zero, just as with Commerce's grant amortization methodology. Because nominal interest rates were used, the effects of inflation were already incorporated into the benefit. The use of this methodology had been upheld by the Federal Circuit in *British Steel III*.[204] Commerce used the loan-based methodology in the *CTL Plate from Mexico* reviews, described above, for all non-recurring, peso-denominated grants received since 1987.

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

**27. Removing Regulation Regarding Program-Wide Changes and Creating a Regulation Regarding Subsidy Extinguishment from Changes in Ownership - § 351.526**

Under current § 351.526, Commerce may take into account a program-wide change to lower the cash deposit rate from the subsidy rate that was calculated for the firm during the POI or POR in establishing an estimated countervailing duty cash deposit rate if certain conditions are met. While program-wide changes that result in the adjustment of the cash deposit rate are extremely rare, Commerce is proposing to eliminate the program-wide change regulation because it treats differently the interests of the interested parties by providing an avenue only for

[204] *British Steel plc v. United States*, 127 F.3d 1471 (Fed. Cir. 1997) (*British Steel III*).

respondent-interested parties to lower the cash deposit rate but no comparable avenue for the U.S. industry, a situation that Commerce has concluded is fundamentally unfair and at odds with the neutral application of the countervailing duty law. Moreover, there is nothing in the Act that supports or requires the practice of a recognizing program-wide change for this purpose. Indeed, section 705(c)(1)(B)(ii) of the Act indicates that the cash deposit rate shall be based on the estimated countervailable subsidy rate and makes no reference to exceptions for changes of any sort to such subsidy programs.

In proposing to delete this program and cease to adjust cash deposit rates to account for the termination of a subsidy program, whether the termination occurred during the POI, POR, or AUL, Commerce is not seeking to change its practice with respect to determining when an investigated program is terminated. Commerce would maintain its long-standing practice to find a program to be terminated only if the termination is effectuated by an official act, such as the enactment of a statute, regulation, or decree, or the termination date of the program is explicitly set forth in the statute, regulation, or decree that established the program.[205]

Moreover, Commerce would continue its practice of investigating terminated programs that potentially provided a benefit during the POI or POR. For example, if Commerce was reviewing a company during a POR with a calendar year of 2023, but during the underlying CVD investigation Commerce found that a program providing grants for the purchase of capital equipment was terminated in 2016, Commerce might still include this terminated program in the 2023 administrative review if the AUL, and therefore the benefit stream of the grant, lasted to or beyond the review period. Depending on the AUL, under this practice Commerce would

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[205] *See Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order*, 83 FR 35212 (July 25, 2018), and accompanying IDM at "Likelihood of Continuation or Recurrence of a Countervailable Subsidy" ("[I]n order to determine whether a program has been terminated, we will consider the legal method by which the government eliminated the program and whether the government is likely to reinstate the program. Commerce normally expects a program to be terminated by means of the same legal mechanism used to institute it. Where a subsidy is not bestowed pursuant to a statute, regulation or decree, Commerce may find no likelihood of continued or recurring subsidization if the subsidy in question was a one-time, company-specific occurrence that was not part of a broader government program.").

continue to include that program in all future administrative reviews until the non-recurring benefit was fully allocated.

In the place of the removed § 351.526, Commerce proposes adding a new regulation which would address subsidy extinguishment from changes in ownership. Section 771(5)(f) of the Act provides that a change in ownership of all or part of a foreign enterprise or the productive assess of a foreign enterprise does not, by itself, require a determination that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction. The SAA explained that "the term 'arm's-length transaction' means a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties." [206] In addition, the SAA stated that "[s]ection 771(5)(F) is being added to clarify that the sale of a firm at arm's length does not automatically, and in all cases, extinguish any prior subsidies conferred" because the "issue of the privatization of a state-owned firm can be extremely complex and multifaceted."[207]

Consistent with the Act and SAA, and against a broader background of domestic litigation and WTO dispute settlement findings, in 2003 Commerce published a modification to its change-in-ownership methodology for sales by a government to private buyers (*i.e.,* privatizations).[208] In a subsequent CVD proceeding in 2004 involving pasta from Italy, Commerce extended that methodology to address sales by a private seller to a private buyer

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[206] *See* SAA, at 258.
[207] *Id.* ("While it is the Administration's intent that Commerce retain the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies, Commerce must exercise this discretion carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied.").
[208] *See Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 FR 37125 (June 23, 2003) (Final Modification).

(private-to-private sales).[209] The agency has implemented the methodology set forth in Pasta From Italy in numerous CVD proceedings since.

Commerce therefore proposes to codify that methodology in proposed § 526(a), which would establish the presumption that non-recurring subsidies continue to benefit a recipient in full over an allocation period determined consistent with Commerce's regulations,[210] notwithstanding an intervening change in ownership. However, under proposed § 351.526(b), the recipient would be able to rebut the presumption of the existence of the subsidy by demonstrating with sufficient evidence that a change in ownership occurred in which the seller sold all (or substantially all) of its company assets, retained no control of the company and its assets, and, in the case of government-to-private sales, that the sale was either at an arm's length transaction for fair market value, or, in the case of a private-to-private sale, was an arm's-length transaction and no one demonstrated that the sale was not for fair market value.

Proposed § 351.526(b)(2) and (3) sets forth the factors Commerce would consider in determining whether the transactions at issue were conducted at arm's-length and for fair market value. In determining if the transactions were for fair market value, proposed § 351.526(b)(3)(ii) would set forth a non-exhaustive list of considerations including: (1) whether the seller performed or obtained an objective analysis in determining the appropriate sales price and implemented recommendations pursuant to an objective analysis for maximizing its return on the sale; (2) whether the seller imposed restrictions on foreign purchasers or purchased from other industries, overly burdensome or unreasonable bidder qualification requirements, or any other restrictions that artificially suppressed the demand for or the purchase price of the company; (3) whether the seller accepted the highest bid reflecting the full amount that the company or its assets were actually worth under the prevailing market conditions and whether the final purchase price was paid through monetary or close equivalent compensation; and (4) whether there were

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[209] *See Certain Pasta from Italy: Final Results of the Seventh Countervailing Duty Administrative Review*, 69 FR 70657 (December 7, 2004) (*Pasta from Italy*), and accompanying IDM at 2-5.
[210] *See* 19 CFR § 351.524.

price discounts or other inducements in exchange for promises of additional future investment that private, commercial sellers would not normally seek and, if so, whether such committed investment requirements were a barrier to entry or in any way distorted the value that bidders were willing to pay.

Proposed § 351.526(b)(4) states that Commerce would not find the presumption of continued benefits during the POR to be rebutted if an interested party has demonstrated that, at the time of the change in ownership, the broader market conditions necessary for the transaction price to accurately reflect the subsidy benefit were not present or were severely distorted by government action or inaction such that the transaction price was meaningfully different from what it would have been absent the distortive government action or inaction. Proposed § 351.526(b)(i) and (ii) would provide that Commerce may consider certain fundamental conditions and legal and fiscal incentives provided by the government in reaching this determination.

Finally, proposed § 351.526(c) addresses the situation in which an interested party has rebutted the presumption of continued benefits during the POR. In that case, the full amount of pre-transaction subsidy benefits, including the benefits of any concurrent subsidy meeting certain criteria, would be found to be extinguished and therefore not countervailable. Under proposed § 351.526(c)(2), concurrent subsidies would be defined as "subsidies given to facilitate, encourage, or that are otherwise bestowed concurrent with a change in ownership." The same provision provides three criteria that Commerce normally would consider in determining if the value of a concurrent subsidy has been fully reflected in the fair market value prices of an arm's-length change in ownership and is therefore fully extinguished.

**28. Modifications to Four Provisions to Address Cross-Reference Changes Pursuant to This Proposed Rule – §§ 351.104(a)(2)(iii), 351.214(1)(1), 351.214(l)(3)(iii), 351.301(c)(1), and 351.302(d)(1)(ii)**

Commerce proposes updating the following provisions to bring them into accordance with the proposed regulatory language:

- In § 351.104(a)(2)(iii), revise the citation from § 351.204(d) to § 351.109(h);
- In § 351.214(l)(1) revise the citation from § 351.204(d) to § 351.109(h);
- In § 351.214(l)(3)(iii), revise the citation from § 351.204(e)(1) to § 351.107(c)(3)(ii);
- In 351.301(c)(1), revise the citation from § 351.204(d)(2) to 351.109(h)(2);
- In § 351.302(d)(1)(ii), revise the citation from § 351.204(d)(2) to § 351.109(h)(2).

Classifications

*Executive Order 12866*

The Office of Management and Budget has determined that this proposed rule is significant for purposes of Executive Order 12866.

*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 of August 4, 1999, 64 FR 43255 (August 10, 1999)).

*Paperwork Reduction Act*

This proposed rule does not contain a collection of information subject to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

*Regulatory Flexibility Act*

The Chief Counsel for Regulation has certified to the Chief Counsel for Advocacy of the Small Business Administration under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the proposed rule would not have a significant economic impact on a substantial number of small business entities. A summary of the need for, objectives of, and legal basis for this rule is provided in the preamble and is not repeated here.

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. Enforcement and Compliance currently does not have information on the number of these entities that would be considered small under the Small

Business Administration's size standards for small businesses in the relevant industries. However, some of the entities may be considered small entities under the appropriate industry size standards. Although this proposed rule may indirectly impact small entities that are parties to individual AD and CVD proceedings, it would not have a significant economic impact on any such entities because the proposed rule clarifies and establishes streamlined procedures for administrative enforcement actions; it does not impose any significant costs on regulated entities. Therefore, the proposed rule would not have a significant economic impact on a substantial number of small entities. For this reason, an Initial Regulatory Flexibility Analysis is not required and one has not been prepared.

List of Subjects in 19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Confidential business information, Countervailing duties, Freedom of information, Investigations, Reporting and recordkeeping requirements.

Dated: July 3, 2024.

Ryan Majerus,
Deputy Assistant Secretary
for Policy and Negotiations,
performing the non-exclusive functions and duties
of the Assistant Secretary for Enforcement and Compliance.

For the reasons stated in the preamble, the U.S. Department of Commerce proposes to amend 19 CFR part 351 as follows:

**PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES**

1. The authority citation for 19 CFR part 351 continues to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.*

2. Revise the heading to Subpart A to read as follows:

**Subpart A -- Scope, Definitions, the Record of Proceedings, Cash Deposits, Nonmarket Economy Antidumping Rates, All-Others Rate, and Respondent Selection**

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3. In § 351.104, revise paragraphs (a)(2)(iii) and (a)(7) to read as follows:

**§ 351.104 Record of proceedings.**

(a) * * *

(2) * * *

(iii) In no case will the official record include any document that the Secretary rejects as untimely filed or any unsolicited questionnaire response unless the response is a voluntary response accepted under § 351.109(h) (see § 351.302(d)).

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(7) *Special rules for public versions of documents originating with the Department with no associated ACCESS barcode numbers.* Public versions of documents originating with Commerce in other segments or proceedings under paragraph (a)(6)(iii) through (xii) of this section but not associated with an ACCESS barcode number, including documents issued before the implementation of ACCESS, must be submitted on the record in their entirety to be considered by the Secretary in its analysis and determinations and are subject to the timing and

filing restrictions of § 351.301. Preliminary and final issues and decision memoranda issued by the Secretary in investigations and administrative reviews before the implementation of ACCESS pursuant to §§ 351.205, 210 and 213 may be cited in full without placing the memoranda on the record.

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4. Revise § 351.107to read as follows:

**§ 351.107 Cash deposit rates; producer/exporter combination rates**

(a) *Introduction*. Sections 703(d)(1)(B), 705(d), 733(d)(1)(B), and 735(c) of the Act direct the Secretary to order the posting of cash deposits, as determined in preliminary and final determinations of antidumping and countervailing duty investigations, and additional provisions of the Act, including section 751, direct the Secretary to establish a cash deposit rate in accordance with various reviews. This section covers the establishment of cash deposit rates and the instructions which the Secretary issues to U.S. Customs and Border Protection to collect those cash deposits.

(b) *In general*. The Secretary will instruct U.S. Customs and Border Protection to suspend liquidation of merchandise subject to an antidumping duty or countervailing duty proceeding and apply cash deposit rates determined in that proceeding to all imported merchandise for which a cash deposit rate was determined by the Secretary in proportion to the estimated value of the merchandise as reported to U.S. Customs and Border Protection on an *ad valorem* basis.

(c) *Exceptions*—(1) *Application of cash deposit rates on a per-unit basis*. If the Secretary determines that the information normally used to calculate an *ad valorem* cash deposit rate is not available or the use of an *ad valorem* cash deposit rate is otherwise not appropriate, the Secretary may instruct U.S. Customs and Border Protection to apply the cash deposit rate on a per-unit basis. Units to which a cash deposit rate may be applied include, but are not limited to, weight, length, volume, packaging, and individual units of the product itself.

(2) *Application of cash deposit rates to producer/exporter combinations.* The Secretary may instruct U.S. Customs and Border Protection to apply a determined cash deposit rate only to imported merchandise both produced by an identified producer and exported by an identified exporter if the Secretary determines that such an application is appropriate. Such an application is called a producer/exporter combination.

(i) *Example.* Exporter A exports to the United States subject merchandise produced by Producers W, X, and Y. In such a situation, the Secretary may establish a cash deposit rate applied to Exporter A that is limited to merchandise produced by Producers W, X, and Y. If Exporter A begins to export subject merchandise produced by Producer Z, that cash deposit rate would not apply to subject merchandise produced by Producer Z.

(ii) *In general.* The Secretary will instruct U.S. Customs and Border Protection to apply a cash deposit rate to a producer/exporter combination or combinations when the cash deposit rate is determined as follows:

(A) Pursuant to a new shipper review, in accordance with section 751(a)(2)(B) of the Act and § 351.214;

(B) Pursuant to an antidumping investigation of merchandise from a nonmarket economy country, in accordance with sections 733 and 735 of the Act and §§ 351.205 and 210, for merchandise exported by an examined exporter;

(C) Pursuant to scope, circumvention, and covered merchandise segments of the proceeding, in accordance with §§ 351.225(m), 351.226(m) and 351.227(m), when the Secretary makes a segment-specific determination on the basis of a producer/exporter combination; and

(D) Additional segments of a proceeding in which the Secretary determines that the application of a cash deposit rate to a producer/exporter combination is warranted based on facts on the record.

(3) *Exclusion from an antidumping or countervailing duty order*—(i) *Preliminary determinations*. In general, in accordance with sections 703(b) and 733(b) of the Act, if the Secretary makes an affirmative preliminary antidumping or countervailing duty determination and the Secretary preliminarily determines an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or *de minimis* for an investigated exporter or producer, the exporter or producer will not be excluded from the preliminary determination or the investigation. However, the Secretary will not instruct U.S. Customs and Border Protection to suspend liquidation of entries or collect cash deposits on the merchandise produced and exported from the producer/exporter combinations examined in the investigation and identified in the *Federal Register*, as the investigated combinations will not be subject to provisional measures under sections 703(d) or 733(d) of the Act.

(ii) *Final determinations*. In general, in accordance with sections 705(a), 735(a), 706(a), and 736(a) of the Act, if the Secretary makes an affirmative final determination, issues an antidumping or countervailing duty order and determines an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or *de minimis* for an investigated producer or exporter, the Secretary will exclude from the antidumping or countervailing duty order only merchandise produced and exported in the producer/exporter combinations examined in the investigation and identified in the *Federal Register*. An exclusion applicable to a producer/exporter combination shall not apply to resellers. Excluded producer/exporter combinations may include transactions in which the exporter is both the producer and exporter, transactions in which the producer's merchandise has been exported to the United States through multiple exporters individually examined in the investigation, and transactions in which the exporter has sourced from multiple producers identified in the investigation.

(iii) *Example.* If during the period of investigation, Exporter A exports to the United States subject merchandise produced by Producer X, based on an examination of Exporter A the Secretary may determine that the dumping margins with respect to the examined merchandise are *de minimis*. In that case, the Secretary would normally exclude only subject merchandise produced by Producer X and exported by Exporter A. If Exporter A began to export subject merchandise produced by Producer Y, that merchandise would be subject to the antidumping duty order.

(4) *Certification requirements.* If the Secretary determines that parties must maintain or provide a certification in accordance with § 351.228, the Secretary may instruct U.S. Customs and Border Protection to apply a cash deposit requirement that is based on the facts of the case and effectuates the administration and purpose of the certification.

(d) *The antidumping duty order cash deposit hierarchies*. (1) *In general.* If the Secretary has not previously established a combination cash deposit rate under paragraph (c)(2) of this section for the producer and exporter in question, the following will apply:

(i) *A market economy country proceeding*. In a proceeding covering merchandise produced in a market economy country:

(A) If the Secretary has established a current cash deposit rate for the exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the cash deposit rate established for the exporter to entries of the subject merchandise;

(B) If the Secretary has not established a current cash deposit rate for the exporter, but the Secretary has established a current cash deposit rate for the producer of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the cash deposit rate established for the producer of the subject merchandise to entries of the subject merchandise; and

(C) If the Secretary has not established a current cash deposit rate for either the producer or the exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border

Protection to apply the all-others rate determined in the investigation to entries of the subject merchandise, pursuant to section 735(c) of the Act and §351.109(f).

(ii) *A nonmarket economy country proceeding*. In a proceeding covering merchandise originating from a nonmarket economy country:

(A) If the Secretary has established a current separate cash deposit rate for the exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the cash deposit rate for the exporter to entries of the subject merchandise;

(B) If the Secretary has not established a current separate cash deposit rate for an exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the cash deposit rate determined by the Secretary for the nonmarket economy entity to entries of the subject merchandise, pursuant to § 351.108(b); and

(C) If the entries of subject merchandise were resold to the United States through a third-country reseller, the Secretary will normally instruct U.S. Customs and Border Protection to apply the current separate cash deposit rate applicable to the nonmarket economy country exporter (or the applicable producer/exporter combination, if warranted) that supplied the subject merchandise to the reseller to those entries of the subject merchandise.

(2) *Exception.* If the Secretary determines that an application of cash deposit rates other than that described in paragraph (d)(1) of this section to particular producers or exporters is warranted, the Secretary may instruct U.S. Customs and Border Protection to use an alternative methodology in applying those cash deposit rates to entries of subject merchandise.

(e) *The countervailing duty order cash deposit hierarchy.* (1) *In general.* If the Secretary has not previously established a combination cash deposit rate under paragraph (c)(2) of this section for the producer and exporter in question and the exporter and producer have differing cash deposit rates, the following will apply:

(i) If the Secretary has established current cash deposit rates for both the producer and the exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the higher of the two rates to the entries of subject merchandise;

(ii) If the Secretary has established a current cash deposit rate for the producer but not the exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the producer's cash deposit rate to entries of subject merchandise;

(iii) If the Secretary has established a current cash deposit rate for the exporter but not the producer of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the exporter's cash deposit rate to entries of subject merchandise; and

(iv) If the Secretary has not established current cash deposit rates for either the producer or the exporter of the subject merchandise, the Secretary will instruct U.S. Customs and Border Protection to apply the all-others rate determined in the investigation pursuant to section 705(c)(5) of the Act and § 351.109(f) to the entries of subject merchandise.

(2) *Exception.* If the Secretary determines that an application of cash deposit rates other than that described in paragraph (e)(1) of this section to particular producers or exporters is warranted, the Secretary may instruct U.S. Customs and Border Protection to use an alternative methodology in applying those cash deposit rates to the entries of subject merchandise.

(f) *Effective dates for amended preliminary and final determinations and results of review upon correction of a ministerial error.* If the Secretary amends an agency determination in accordance with sections 703, 705(e), 733 and 735(e) of the Act and §§ 351.224 (e) through (g):

(1) If the Secretary amends a preliminary or final determination in an investigation for a ministerial error and the amendment increases the dumping margin or countervailing duty rate, the new cash deposit rate will be effective to entries made on or after the date of publication of the amended determination;

(2) If the Secretary amends a preliminary or final determination in an investigation for a ministerial error and the amendment decreases the dumping margin or countervailing duty rate, the new cash deposit rate will be retroactive to the date of publication of the original preliminary or final determination, as applicable;

(3) If the Secretary amends the final results of an administrative review pursuant to a ministerial error, the effective date of the amended cash deposit rate will be retroactive to entries following the date of publication of the original final results of administrative review regardless of whether the antidumping duty margin or countervailing duty rate increases or decreases; and

(4) If the Secretary amends the final results of an investigation or administrative review pursuant to litigation involving alleged or disputed ministerial errors, the effective date of the amended cash deposit rate may differ from the effective dates resulting from the application of paragraphs (f)(1) through (f)(3) of this section and normally will be identified in a Federal Register notice.

5. Add § 351.108 to subpart A to read as follows:

**§ 351.108 Rates for entities from nonmarket economies in antidumping proceedings**

(a) *Introduction*. When the Secretary determines that a country is a nonmarket economy country in an antidumping proceeding pursuant to section 771(18) of the Act, the Secretary may determine that all entities located in that nonmarket economy country are subject to government control and thus part of a single, government-controlled entity. All entities determined by the Secretary to be part of the government-controlled entity will be assigned the antidumping cash deposit or assessment rate applied to the government-controlled entity. That rate is called the nonmarket economy entity rate.

(b) *Separate rates.* An entity may receive its own rate, separate from the nonmarket economy entity rate, if it demonstrates on the record to the Secretary that its particular activities operate sufficiently independent from government control to justify the application of a separate rate. In determining whether an entity operates its particular activities sufficiently independent

from government control to receive a separate rate, the Secretary will normally consider the following:

(1) *Government ownership and control.* When a government, at a national, provincial, or other level, holds an ownership share of an entity, either directly or indirectly, the level of ownership and other factors may indicate that the government exercises or has the potential to exercise control over an entity's general operations. No separate rate will be applied when the government either directly or indirectly holds:

(i) A majority ownership share (over fifty percent ownership) of an entity; or

(ii) An ownership interest in the entity of fifty percent or less and any one of the following criteria applies:

(A) The government's ownership share provides it with a disproportionately larger degree of influence or control over the entity's production and commercial decisions than the ownership share would normally entail, and the Secretary determines that the degree of influence or control is significant;

(B) The government has the authority to veto or control the entity's production and commercial decisions;

(C) Officials, employees, or representatives of the government have been appointed as officers of the entity, members of the board of directors, or other governing authorities in the entity that have the ability to make or influence production and commercial decisions for the entity; or

(D) The entity is obligated by law or its foundational documents, such as articles of incorporation, or other *de facto* requirements to maintain one or more officials, employees, or representatives of the government as officers, members of the board of directors, or other governing authorities in the entity that have the ability to make or influence production and commercial decisions for the entity.

(2) *Absence of de jure government control.* If an entity demonstrates that neither § 351.108(b)(1)(i) nor § 351.108(b)(1)(ii) applies to the entity, the entity must then demonstrate that the government has no control in law (*de jure)* of the entity's export activities. The following criteria may indicate the lack of government *de jure* control of the entity's export activities:

(i) The absence of a legal requirement that one or more officials, employees, or representatives of the government serve as officers of the entity, members of the board of directors, or other governing authorities in the entity that make or influence export activity decisions;

(ii) The absence of restrictive stipulations by the government associated with an entity's business and export licenses;

(iii) Legislative enactments decentralizing government control of entities; and

(iv) Other formal measures by the government decentralizing control of companies.

(3) *Absence of de facto government control*. If the entity demonstrates that §§ 351.108(b)(1)(i) and (ii) and (b)(2) do not apply to the entity, the entity must then demonstrate that the government has no control in fact (*de facto*) of the entity's export activities. The following criteria may indicate the lack of *de facto* government control of the entity's export activities:

(i) Whether the entity must maintain one or more officials, employees, or representatives of the government as officers, members of the board of directors, or other governing authorities in the entity which have the ability to make or influence export activity decisions;

(ii) Whether export prices are set by or are subject to the approval of a government agency;

(iii) Whether the entity has authority to negotiate and sign contracts and other agreements without government involvement;

(iv) Whether the entity has autonomy from the government in making decisions regarding the selection of its management;

(v) Whether the entity retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses; and

(vi) Whether there is any additional evidence on the record suggesting that the government has no direct or indirect influence over the entity's export activities.

(c) *Entities wholly owned by foreign entities incorporated and headquartered in a market economy.* In general, if the Secretary determines that an entity located in a nonmarket economy and subject to a nonmarket economy country antidumping proceeding is wholly owned by a foreign entity both incorporated and headquartered in a market economy country or countries, then the Secretary will consider the entity independent from control of the nonmarket economy government and an analysis under paragraph (b) of this section will not be necessary.

(d) *Separate Rate Applications and Certifications*. In order to demonstrate separate rate eligibility, an entity subject to a nonmarket economy country antidumping proceeding will be required to timely submit a separate rate application, as made available by the Secretary, or a separate rate certification, as applicable:

(1) In an antidumping investigation, the entity will normally file a separate rate application on the record of the investigation no later than fourteen days following publication of the notice of initiation in the Federal Register;

(2) In a new shipper review or an administrative review in which the entity has not been previously assigned a separate rate, the entity will normally file a separate rate application on the record no later than fourteen days following publication of the notice of initiation in the Federal Register. In both new shipper reviews and administrative reviews, documentary evidence of an entry of subject merchandise for which liquidation was suspended during the period of review must accompany the separate rate application.

(3) In an administrative review, if the entity has been previously assigned a separate rate in the proceeding, no later than fourteen days following publication of the notice of initiation in the Federal Register, the entity will instead file a certification on the record in which the entity certifies that it had entries of subject merchandise for which liquidation was suspended during the period of review and that it otherwise continues to meet the criteria for obtaining a separate rate. If the Secretary determined in a previous segment of the proceeding that certain exporters and producers should be treated as a single entity for purposes of the antidumping proceeding, then a certification filed under this paragraph must identify and certify that that the certification applies to all of the companies comprising that single entity.

(e) *Examined Respondents and Questionnaire Responses*. Entities that submit separate rate applications or certifications and are subsequently selected to be an examined respondent in an investigation or review by the Secretary must fully respond to the Secretary's questionnaires in order to be eligible for separate rate status.

* * * * *

6. Add § 351.109 to subpart A to read as follows:

**§ 351.109 Selection of examined respondents; single-country subsidy rate; calculating an all-others rate; calculating rates for unexamined respondents; voluntary respondents.**

(a) *Introduction*. Sections 777A(c)(2) and 777A(e)(2)(A) of the Act provide that when the Secretary determines in an antidumping or countervailing duty investigation or administrative review that it is not practicable to determine individual dumping margins or countervailable subsidy rates for all potential respondents, the Secretary may determine individual dumping margins or countervailable subsidy rates for a reasonable number of exporters or producers using certain criteria set out in the Act. This section sets forth those criteria, describes the methodology the Secretary generally applies to select examined producers and exporters, and provides the means by which the Secretary determines the "all-others rate" set forth in sections 705(c)(5) and 735(c)(5) of the Act, separate rates in nonmarket economy

antidumping proceedings, and review-specific margins or rates in administrative reviews. This section also addresses the treatment of voluntary respondents in accordance with section 782(a) of the Act.

(b) *Examining each known exporter or producer when practicable*. In an investigation or administrative review, the Secretary will determine, where practicable, an individual weighted-average dumping margin or individual countervailable subsidy rate for each known exporter or producer of the subject merchandise.

(c) *Limiting exporters or producers examined*. (1) *In general.* If the Secretary determines in an investigation or administrative review that it is not practicable to determine individual dumping margins or countervailable subsidy rates because of the large number of exporters or producers involved in the investigation or review, the Secretary may determine individual margins or rates for a reasonable number of exporters or producers, In accordance with sections 777A(c)(2) and 777A(e)(2)(A) of the Act, the Secretary will normally limit the examination to either a sample of exporters or producers that the Secretary determines is statistically valid based on record information or exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the Secretary determines can be reasonably examined.

(2) *Limiting examination to the largest exporters or producers*. In general, if the Secretary determines to limit the number of exporters or producers for individual examination, otherwise known as respondents, based on the largest volume of the subject merchandise from the exporting country that the Secretary determines can be reasonably examined, the Secretary will apply the following methodology:

(i) *Selecting the data source to determine the largest exporters or producers of subject merchandise*. The Secretary will normally select respondents based on data for entries of subject merchandise made during the relevant time period derived from U.S. Customs and Border Protection. If the Secretary determines that the use of the U.S. Customs and Border Protection

data source is not appropriate based on record information, the Secretary may use another reasonable means of selecting potential respondents in an investigation or review including, but not limited to, the use of quantity and value questionnaire responses derived from a list of possible exporters of subject merchandise.

(ii) *Selecting the largest exporters or producers of subject merchandise based on volume or value.* The Secretary will normally select the largest exporters or producers based on the volume of imports of subject merchandise. However, the Secretary may determine at times that volume data are unreliable or inconsistent, depending on the product at issue. In those situations, the Secretary may instead select the largest exporters of subject merchandise based on the value of the imported products instead of the volume of the imported products.

(iii) *Determining whether the number of exporters or producers is too large to make individual examination of each known exporter or producer of subject merchandise practicable.* The Secretary will determine on a case-specific basis whether the number of exporters or producers is too large to make individual examination of each known exporter or producer of subject merchandise practicable based on the potential exporters or producers identified in a petition, the exporters or producers identified in the data source considered in paragraph (c)(1) of this provision, or the exporters or producers for which an administrative review is requested. In determining whether the number of exporters or producers is too large to make individual examination of each known exporter or producer of subject merchandise practicable, the Secretary will normally consider:

(A) The amount of resources and detailed analysis which will be necessary to examine each potential respondent's information;

(B) The current and future workload of the office administering the antidumping or countervailing duty proceeding; and

(C) The Secretary's overall current resource availability.

(iv) *Determining the number of exporters or producers that can be reasonably examined*. In determining the number of exporters or producers (respondents) that can be reasonably examined on a case-specific basis, the Secretary will normally:

(A) Consider the total and relative volumes (or values) of entries of subject merchandise during the relevant period for each potential respondent derived from the data source considered in paragraph (c)(2) of this section;

(B) Rank the potential respondents by the total volume (or values) of entries into the United States during the relevant period; and

(C) Determine the number of exporters or producers the Secretary can reasonably examine, considering resource availability and statutory requirements, and select the exporters or producers with the largest volume (or values) of entries consistent with that number.

(v) *Selecting additional respondents for examination*. Once the Secretary has determined the number of exporters or producers that can be reasonably examined and has selected the potential respondents for examination, the Secretary will issue questionnaires to those selected exporters or producers. If a potential respondent does not respond to the questionnaires or elects to withdraw from participation in the segment of the proceeding soon after filing questionnaire responses, or the Secretary otherwise determines early in the segment of the proceeding that a selected exporter or producer is no longer participating in the investigation or administrative review or that the exporter's or producer's sales of subject merchandise are not *bona fide*, the Secretary may select the exporter or producer with the next largest volume or value of entries to replace the respondents initially selected by the Secretary for examination.

(d) *Waiver for certain selected respondents*. The Secretary may waive individual examination of an exporter or producer selected to be an examined respondent if both the selected respondent and the petitioner file waiver requests for that selected respondent no later than five days after the Secretary has selected respondents. If the Secretary provides such a waiver and previously selected the waived respondent in accordance with paragraph (c)(2) of this

section, the Secretary may select the respondent with the next largest volume or value of entries for examination to replace the initially selected respondent.

(e) *Single country-wide subsidy rate*. In accordance with 777A(e)(2)(B) of the Act, in limiting exporters or producers examined in countervailing duty proceedings, including countervailing duty investigations under sections 703(d)(1)(A)(ii) and 705 (c)(5)(B) of the Act, the Secretary may determine, in the alternative, a single country-wide subsidy rate to be applied to all exporters and producers.

(f) *Calculating the all-others rate*. In accordance with sections 705(c)(1)(B), 705(c)(5), 735(c)(1)(B)(i), and 735(c)(5) of the Act, if the Secretary makes an affirmative antidumping or countervailing duty determination, the Secretary will determine an estimated all-others rate as follows:

(1) *In general*. (i) For an antidumping proceeding involving a market economy country, the all-others rate will normally equal the weighted average of the estimated weighted-average dumping margins established for the individually investigated exporters or producers, excluding any zero and de minimis margins and any margins determined entirely under section 776 of the Act.

(ii) For a countervailing duty proceeding, the all-others rate will normally equal the weighted average of the countervailable subsidy rates established for the individually investigated exporters and producers, excluding any zero and de minimis countervailable subsidy rates and any rates determined entirely under section 776 of the Act.

(2) *Exceptions to the general rules for calculating the all-others rate*. The Secretary may determine not to apply the general rules provided in paragraph (f)(1) of this section:

(i) If the Secretary determines that only one individually investigated exporter or producer has a calculated weighted-average dumping margin or countervailable subsidy rate that is not zero, de minimis, or determined entirely under section 776 of the Act, the Secretary may

apply that weighted-average dumping margin or countervailable subsidy rate as the all-others rate.

(ii) If the Secretary determines that weight-averaging calculated dumping margins or countervailable subsidy rates established for individually investigated exporters or producers could result in the inadvertent release of proprietary information among the individually investigated exporters or producers, the Secretary may apply the following analysis:

(A) First, the Secretary will calculate the weighted-average dumping margin or countervailable subsidy rate for the individually investigated exporters or producers using their reported data, including business proprietary data;

(B) Second, the Secretary will calculate both a simple average of the individually investigated exporters' or producers' dumping margins or countervailable subsidy rates and a weighted- average dumping margin or countervailable subsidy rate using the individually investigated exporters' or producers' publicly-ranged data; and

(C) Third, the Secretary will compare the two averages calculated in paragraph (f)(2)(ii)(B) of this section with the weighted-average margin or rate determined in paragraph (f)(2)(ii)(A) of this section. The Secretary will apply, as the all-others rate, the average calculated in paragraph (f)(2)(ii)(B) of this section which is numerically the closest to the margin or rate calculated in paragraph (f)(2)(ii)(A) of this section.

(iii) If the estimated weighted average dumping margins or countervailable subsidy rates established for all individually investigated exporters and producers are zero, *de minimis*, or determined entirely under section 776 of the Act, the Secretary may use any reasonable method to establish an all-others rate for exporters and producers not individually examined, including averaging the estimated weighted average dumping margins or countervailable subsidy rates determined for the individually investigated exporters and producers.

(3) *A nonmarket economy country entity rate is not an all-others rate*. The all-others rate determined in a market economy antidumping investigation or countervailing duty investigation

may not be increased in subsequent segments of a proceeding. The rate determined for a nonmarket economy country entity determined in an investigation is not an all-others rate and may be modified in subsequent segments of a proceeding if selected for examination.

(g) *Calculating a rate for unexamined exporters and producers*. In determining a separate rate in an investigation or administrative review covering a nonmarket economy country pursuant to § 351.108(b), a margin for unexamined exporters and producers in an administrative review covering a market economy country, or a countervailable subsidy rate for unexamined exporters and producers in a countervailing duty administrative review, the Secretary will normally apply the methodology set forth in paragraphs (f)(1) and (2) of this section. If the Secretary determines that weight-averaging calculated dumping margins or countervailable subsidy rates established for individually investigated exporters or producers could result in the inadvertent release of proprietary information among the individually examined exporters or producers, then the Secretary may establish a separate rate, review-specific margin, or countervailable subsidy rate using a reasonable method other than the weight-averaging of dumping margins or countervailable rates, such as the use of a simple average of the calculated dumping margins or countervailable subsidy rates.

(h) *Voluntary respondents*—(1) *In general*. If the Secretary limits the number of exporters or producers to be individually examined under sections 777A(c)(2) or 777A(e)(2)(A) of the Act, the Secretary may choose to examine voluntary respondents (exporters or producers, other than those initially selected for individual examination) in accordance with section 782(a) of the Act.

(2) *Acceptance of voluntary respondents*. The Secretary will determine, as soon as practicable, whether to examine a voluntary respondent individually. A voluntary respondent accepted for individual examination under paragraph (h)(1) of this section will be subject to the same filing and timing requirements as an exporter or producer initially selected by the Secretary

for individual examination under sections 777A(c)(2) or 777A(e)(2)(A) of the Act, and, where applicable, the use of the facts available under section 776 of the Act and § 351.308.

(3) *Requests for voluntary treatment*. (i) An interested party seeking treatment as a voluntary respondent must so indicate by including as a title on the first page of the first submission, "Request for Voluntary Respondent Treatment."

(ii) If multiple exporters or producers seek voluntary respondent treatment and the Secretary determines to examine a voluntary respondent individually, the Secretary will select voluntary respondents in the chronological order in which complete requests were filed correctly on the record.

(4) *Timing of voluntary respondent submissions*. The deadlines for voluntary respondent submissions will generally be the same as the deadlines for submissions by individually investigated respondents. If there are two or more individually investigated respondents with different deadlines for a submission, such as when one respondent has received an extension and the other has not, voluntary respondents will normally be required to file their submissions with the Secretary by the earliest deadline of the individually investigated respondents.

7. In § 351.204:

a. Revise the section heading and paragraphs (a), (c), and (d); and

b. Remove paragraphs (e).

The revisions read as follows:

**§ 351.204 Period of investigation; requests for exclusions from countervailing duty orders based on investigations conducted on an aggregate basis.**

(a) *Introduction*. Because the Act does not specify the precise period of time that the Secretary should examine in an antidumping or countervailing duty investigation, this section

sets forth rules regarding the period of investigation ("POI"). In addition, this section covers exclusion requests in countervailing duty investigations conducted on an aggregate basis.

* * * * *

(c) *Limiting exporters or producers examined and voluntary respondents.* Once the Secretary has initiated the antidumping or countervailing duty investigation, the Secretary may determine that it is not practicable to examine each known exporter or producer. In accordance with § 351.109(c) the Secretary may select a limited number of exporters or producers to examine. Furthermore, in accordance with section 782(a) of the Act and § 351.109(h), the Secretary may determine to examine voluntary respondents.

(d) *Requests for exclusions from countervailing duty orders based on investigations conducted on an aggregate basis.* When the Secretary conducts a countervailing duty investigation on an aggregate basis under section 777A(e)(2)(B) of the Act, the Secretary will consider and investigate requests for exclusion to the extent practicable. An exporter or producer that desires exclusion from an order must submit:

(i) A certification by the exporter or producer that it received zero or *de minimis* net countervailable subsidies during the period of investigation;

(ii) If the exporter or producer received a countervailable subsidy, calculations demonstrating that the amount of net countervailable subsidies received was *de minimis* during the period of investigation;

(iii) If the exporter is not the producer of subject merchandise, certifications from the suppliers and producers of the subject merchandise that those persons received zero or *de minimis* net countervailable subsidies during the period of investigation; and

(iv) A certification from the government of the affected country that the government did not provide the exporter (or the exporter's supplier) or producer with more than *de minimis* net countervailable subsidies during the period of investigation.

8. In § 351.212 revise paragraph (b) to read as follows:

**§ 351.212 Assessment of antidumping and countervailing duties; provisional measures deposit cap; interest on certain overpayments and underpayments.**

*  *  *  *  *

(b) *Assessment of antidumping and countervailing duties as the result of a review*—(1) *Antidumping Duties*—(i) *In general.* If the Secretary has conducted a review of an antidumping duty order under § 351.213 (administrative review), § 351.214 (new shipper review), or § 351.214 (expedited antidumping review), the Secretary normally will calculate an assessment rate for each importer of subject merchandise covered by the review by dividing the dumping margin found on the subject merchandise examined by the estimated entered value of such merchandise for normal customs duty purposes on an *ad valorem* basis. If the resulting assessment rate is not zero or *de minimis*, the Secretary will then instruct U.S. Customs and Border Protection to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.

(ii) *Assessment on a per-unit basis*. If the Secretary determines that the information normally used to calculate an *ad valorem* assessment rate is not available or the use of an a*d valorem* rate is otherwise not appropriate, the Secretary may instruct U.S. Customs and Border Protection to assess duties on a per-unit basis. Units on which duties may be assessed include, but are not limited to, weight, length, volume, packaging, and individual units of the product itself.

*  *  *  *  *

9. In § 351.213, revise paragraph (f) to read as follows:

**§ 351.213 Administrative review of orders and suspension agreements under section 751(a)(1) of the Act.**

*  *  *  *  *

(f) *Limiting exporters or producers examined and voluntary respondents.* Once the Secretary has initiated an antidumping or countervailing duty administrative review, the

Secretary may determine that it is not practicable to examine each known exporter or producer. In accordance with § 351.109(c), the Secretary may select a limited number of exporters or producers to examine. Furthermore, in accordance with section 782(a) of the Act and § 351.109(h), the Secretary may determine to examine voluntary respondents.

* * * * *

10. In § 351.214, revise the section heading and paragraphs (l)(1) and (l)(3)(iii) to read as follows:

**351.214 New shipper reviews under section 751(a)(2)(B) of the Act; expedited reviews in countervailing duty proceedings.**

* * * * *

(l) * * *

(1) *Request for review*. If, in a countervailing duty investigation, the Secretary limited the number of exporters or producers to be individually examined under section 777A(e)(2)(A) of the Act, an exporter that the Secretary did not select for individual examination or that the Secretary did not accept as a voluntary respondent (see § 351.109(h)) 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:

* * * * *

(3) * * *

(iii) The Secretary may exclude from the countervailing duty order in question any exporter for which the Secretary determines an individual net countervailable subsidy rate of zero or *de minimis* (see § 351.107(c)(3)(ii)), provided that the Secretary has verified the information on which the exclusion is based.

* * * * *

11. In § 351.301, revise paragraphs (b)(2), (c)(1) and (c)(3) to read as follows:

**§ 351.301 Time limits for submission of factual information.**

* * * * *

(b) * * *

(2) If the factual information is being submitted to rebut, clarify, or correct factual information on the record, the submitter must provide a written explanation identifying the information which is already on the record that the factual information seeks to rebut, clarify or correct, including the name of the interested party that submitted the information and the date on which the information was submitted. The submitter must also provide a narrative summary explaining how the factual information provided under this paragraph rebuts, clarifies, or corrects the factual information already on the record.

(c) * * *

(1) *Factual information submitted in response to questionnaires*. During a proceeding, the Secretary may issue to any person questionnaires, which includes both initial and supplemental questionnaires. The Secretary will not consider or retain in the official record of the proceeding unsolicited questionnaire responses, except as provided under § 351.109(h)(2), or untimely filed questionnaire responses. The Secretary will reject any untimely filed or unsolicited questionnaire response and provide, to the extent practicable, written notice stating the reasons for rejection (see § 351.302(d)).

* * * * *

(3) * * *

(i) *Antidumping and countervailing duty investigations.* (A) All submissions of factual information to value factors of production under § 351.408(c) in an antidumping investigation are due no later than 60 days before the schedule date of the preliminary determination.

(B) All submissions of factual information to measure the adequacy of remuneration under § 351.511(a)(2) in a countervailing duty investigation are due no later than 45 days before the scheduled date of the preliminary determination.

(ii) *Administrative reviews, new shipper reviews, and changed circumstances reviews*. All submissions of factual information to value factors under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2) in administrative reviews, new shipper reviews and changed circumstances reviews are due no later than 60 days before the scheduled date of the preliminary results of review;

* * * * *

12. In § 351.302 revise paragraph (d)(1)(ii) to read as follows:

**§ 351.302 Extension of time limits; return of untimely filed or unsolicited material.**

* * * * *

(d) * * *

(1) * * *

(ii) Unsolicited questionnaire responses, except as provided for voluntary respondents under § 351.109(h)(2).

* * * * *

13. In § 351.306 revise paragraph (a)(3) to read as follows:

**§ 351.306 Use of business proprietary information.**

(a) ***

(3) An employee of U.S. Customs and Border Protection directly involved in conducting an investigation regarding negligence, gross negligence, or fraud relating to an antidumping or countervailing duty proceeding:

* * * * *

14. In § 351.308 add paragraphs (g) through (i) to read as follows:

**§ 351.308 Determinations on the basis of the facts available.**

*  *  *  *  *

(g) *Partial or total facts available.* In accordance with section 776(a) of the Act, if the Secretary determines to apply facts available, regardless of the use of an adverse inference under section 776(b) of the Act, the Secretary may apply facts available to only a portion of its antidumping or countervailing duty analysis and calculations, referred to as partial facts available, or to all of its analysis and calculations, referred to as total facts available, as appropriate on a case-specific basis.

(h) *Segment-specific dumping and countervailable subsidy rates.* If the Secretary has determined dumping margins or countervailable subsidy rates in separate segments of the same proceeding in which the Secretary is applying facts available, in accordance with section 776(c)(2) of the Act the Secretary may apply those margins or rates as facts available without being required to conduct a corroboration analysis.

(i) *Selection of adverse facts available.* If the Secretary determines to apply adverse facts available, in accordance with sections 776(d)(1), (2) and (3) of the Act the following applies:

(1) In an antidumping proceeding, the Secretary may use a dumping margin from any segment of the proceeding as adverse facts, including the highest dumping margin available. The Secretary may use the highest dumping margin available if the Secretary determines that such an application is warranted after evaluating the situation that resulted in an adverse inference;

(2) In a countervailing duty segment of the proceeding, the Secretary may use a countervailing subsidy rate applied to the same or similar program in a countervailing duty proceeding involving the same country or, if there is no same or similar program, use a countervailing subsidy rate from a proceeding that the Secretary determines is reasonable to use. In accordance with the hierarchy set forth in paragraph (j) of this section, the Secretary may use the highest countervailing duty rate available if the Secretary determines that such an application is warranted after evaluating the situation that resulted in an adverse inference; and

(3) In applying adverse facts available, the Secretary will not be required to:

(i) Estimate what a countervailable subsidy or dumping margin would have been if an interested party that was found to have failed to cooperate under section 776(b)(1) of the Act had cooperated; or

(ii) Demonstrate that the countervailable subsidy rate or dumping margin used by the Secretary as adverse facts available reflects an alleged "commercial reality" of the interested party.

*  *  *  *  *

15. In § 351.309 revise paragraphs (c)(2) and (d)(2) to read as follows:

**§ 351.309 Written argument.**

*  *  *  *  *

(c) ***.

(2) The case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results. As part of the case brief, parties are requested to provide the following:

(i) A table of contents listing each issue;

(ii) A table of authorities, including statutes, regulations, administrative cases, dispute panel decisions and court holdings cited; and

(iii) A public executive summary for each argument raised in the brief. Executive summaries should be no more than 450 words in length, not counting supporting citations.

*  *  *  *  *

(d) * * *

(2) The rebuttal brief may respond only to arguments raised in case briefs and should identify the arguments raised in case briefs and should identify the arguments to which it is responding. As part of the rebuttal brief, parties are requested to provide the following:

(i) A table of contents listing each issue;

(ii) A table of authorities, including statutes, regulations, administrative cases, dispute panel decisions and court holdings cited; and

(iii) A public executive summary for each argument raised in the rebuttal brief. Executive summaries should be no more than 450 words in length, not counting supporting citations.

* * * * *

16. In § 351.401, revise paragraph (f) to read as follows:

**§ 351.401 In general.**

* * * * *

(f) *Treatment of affiliated parties in antidumping proceedings.* (1) *In general.* In an antidumping proceeding under this part, the Secretary will normally treat two or more affiliated parties as a single entity if the Secretary concludes that there is a significant potential for manipulation of prices, production, or other commercial activities.

(2) *Significant potential for manipulation.* In identifying a significant potential for the manipulation of price, production or other commercial activities, the factors the Secretary may consider for all affiliated parties include:

(i) The level of common ownership;

(ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and

(ii) Whether operations are intertwined, such as through the sharing of sales and export information; involvement in production, pricing, and other commercial decisions; the sharing of facilities or employees; or significant transactions between the affiliated parties.

(3) *Additional considerations for affiliated parties with access to production facilities in determining the significant potential for manipulation.* In determining whether there is a significant potential for manipulation, if the Secretary determines that affiliated parties have, or

will have, access to production facilities for similar or identical products, the Secretary shall consider if any of those facilities would require substantial retooling in order to restructure manufacturing priorities.

*  *  *  *  *

17. In § 351.404 add paragraph (g) to read as follows:

**§ 351.404 Selection of the market to be used as the basis for normal value.**

*  *  *  *  *

(g) *Special rule for certain multinational corporations.* In the course of an antidumping investigation, if the Secretary determines that the factors listed in section 773(d) of the Act are present, the Secretary will apply the special rule for certain multinational corporations and determine the normal value of the subject merchandise by reference to the normal value at which the foreign like product is sold in substantial quantities from one or more facilities outside the exporting country. In making a determination under this provision, the following will apply:

(1) Interested parties alleging that the Secretary should apply the special rule for certain multinational corporations must submit the allegation in accordance with the filing requirements set forth in § 351.301(c)(2)(i).

(2) If the Secretary determines that the non-exporting country at issue is a nonmarket economy country and, in accordance with § 351.408, normal value is to be determined using a factors of production methodology, the Secretary will not apply the special rule for certain multinational corporations.

*  *  *  *  *

18. In § 351.405 revise paragraph (a) and add paragraph (b)(3) to read as follows:

**§ 351.405 Calculation of normal value based on constructed value.**

(a) *Introduction.* In certain circumstances, the Secretary may determine normal value by constructing a value based on the cost of manufacturing, selling, general and administrative expenses and profit. The Secretary may use constructed value as the basis for normal value

when: neither the home market nor a third country market is viable; sales below the cost of production are disregarded; sales outside the ordinary course of trade or sales for which the prices are otherwise unrepresentative are disregarded; sales used to establish a fictitious market are disregarded; no contemporaneous sales of comparable merchandise are available; or in other circumstances where the Secretary determines that home market or third country prices are inappropriate. (See section 773(e) and section 773(f) of the Act.) This section clarifies the meaning of certain terms and sets forth certain information which the Secretary will normally consider in determining a constructed value.

(b) * * *

(3) Under section 773(e)(2)(B)(iii) of the Act, the Secretary will normally consider the following criteria in selecting an amount for profit normally realized by exporters or producers (other than the exporter or producer under examination) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise:

(A) The similarity of the potential surrogate companies' business operations and products to the examined producer's or exporter's business operations and products;

(B) The extent to which the financial data of the surrogate company reflects sales in the home market and does not reflect sales to the United States;

(C) The contemporaneity of the surrogate company's data to the period of investigation or review; and

(D) The extent of similarity between the customer base of the surrogate company and the customer base of the examined producer or exporter.

19. In § 351.408 revise paragraph (b) to read as follows:

**§ 351.408 Calculation of normal value of merchandise from nonmarket economy countries.**

* * * * *

(b) *Economic comparability*. In determining whether market economy countries are at a level of economic development comparable to the nonmarket economy under sections 773(c)(2)(B) or 773(c)(4)(A) of the Act, the Secretary will place primary emphasis on either *per capita* gross domestic product (GDP) or *per capita* gross national income (GNI). As part of its analysis, the Secretary may also consider additional factors that relate to economic comparability, such as:

(1) The overall size and composition of economic activity in those countries as measured by either GDP or GNI;

(2) The composition and quantity of exports from those countries;

(3) The availability, accessibility, and quality of data from those countries; and

(4) Additional factors which are appropriate to consider in light of unique facts or circumstances.

* * * * *

20. In § 351.502:

a. Revise paragraphs (d) and (e); and

b. Remove paragraphs (f) and (g).

The revisions read as follows:

**§ 351.502 Specificity of domestic subsidies.**

* * * * *

(d) *Disaster relief*. The Secretary will not regard disaster relief including pandemic relief as being specific under section 771(5A)(D) of the Act if such relief constitutes general assistance available to anyone in the area affected by the disaster.

(e) *Employment assistance*. The Secretary will not regard employment assistance programs as being specific under section 771(5A)(D) if such assistance is provided solely with respect to employment of categories of workers such as those based on age, gender, disability,

long-term unemployment, veteran, rural or urban status and is available to everyone hired within those categories without any industry restrictions.

21. In § 351.503 add paragraph (b)(3) to read as follows:

**§ 351.503 Benefit.**

* * * * *

(b) * * *

(3) *Contingent liabilities and assets*. For the provision of a contingent liability or asset not otherwise addressed under a specific rule identified under paragraph (a) of this section, the Secretary will treat the balance or value of the contingent liability or assets as an interest-free provision of funds and will calculate the benefit using a short-term commercial interest rate.

* * * * *

22. In § 351.505:

a. Add paragraph (a)(6)(iii); and

b. Revise paragraphs (b), (c), and (e).

The additions read as follows:

**§ 351.505 Loans.**

(a) * * *

(6) * * *

(iii) *Initiation standard for government-owned policy banks*. An interested party will normally meet the initiation threshold for specificity under paragraph (a)(6)(ii)(A) of this section with respect to section 771(5A)(D) of the Act if the party can sufficiently allege that the government-owned policy bank provides loans pursuant to government policies or directives and loan distribution information for the bank is not reasonably available. A policy bank is a government-owned special purpose bank.

(b) *Time of receipt of benefit*. The Secretary normally will consider a benefit as having been received in the year in which the firm otherwise would have had to make a payment on the comparable commercial loan.

(c) *Allocation of benefit to a particular time period*. (1) *Short-term loans*. The Secretary will allocate (expense) the benefit from a short-term loan to the year(s) in which the firm is due to make interest payments on the loan.

(2) *Long-term loans*. The Secretary normally will calculate the subsidy amount to be assigned to a particular year by calculating the difference in interest payments for that year, i.e., the difference between the interest paid by the firm in that year on the government-provided loan and the interest the firm would have paid on the comparison loan.

*****

(e) *Contingent liability interest-free loans.* (1) *Treatment as loans*. In the case of an interest-free loan for which the repayment obligation is contingent upon the company taking some future action or achieving some goal in fulfillment of the loan's requirements, the Secretary normally will treat any balance on the loan outstanding during a year as an interest-free, short-term loan in accordance with paragraphs (a), (b), and (c)(1) of this section. However, if the event upon which repayment of the loan depends will occur at a point in time more than one year after the receipt of the contingent liability loan, the Secretary will use a long-term interest rate as the benchmark in accordance with paragraphs (a), (b), and (c)(2) of this section.

(2) *Treatment as grants*. If at any point in time the Secretary determines that the event upon which repayment depends is not a viable contingency or the loan recipient has met the contingent action or goal and the government has not taken action to collect repayment, the Secretary will treat the outstanding balance of the loan as a grant received in the year in which this condition manifests itself.

*  *  *  *  *

23. In § 351.509 revise paragraph (a)(1) to read as follows:

**§ 351.509 Direct taxes.**

(a)* * *

(1) *Exemption or remission of taxes*. In the case of a program that provides for a full or partial exemption or remission of a direct tax (for example, an income tax), or a reduction in the base used to calculate a direct tax, a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program, including as a result of being located in an area designated by the government as being outside the customs territory of the country.

*  *  *  *  *

24. In § 351.510 revise paragraph (a)(1) to read as follows:

**§ 351.510 Indirect taxes and import charges (other than export programs).**

(a)* * *

(1) *Exemption or remission of taxes*. In the case of a program other than an export program that provides for the full or partial exemption or remission of an indirect tax or an import charge, a benefit exists to the extent that the taxes or import charges paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program, including as a result of being located in an area designated by the government as being outside the customs territory of the country.

*  *  *  *  *

25. In § 351.511 revise paragraph (a)(2)(i) to read as follows:

**§ 351.511 Provision of goods or services.**

(a) * * *

(2) * * *

(i) *In general.* The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability. The Secretary may use actual sales from competitively run government auctions if the government auction:

(A) Uses competitive bid procedures that are open without restriction on the use of the good or service;

(B) Is open without restriction to all bidders, including foreign enterprises, and protects the confidentiality of the bidders;

(C) Accounts for the substantial majority of the actual government provision of the good or service in the country in question; and

(D) Determines the winner based solely on price.

* * * * *

26. Add § 351.512 to read as follows:

**§ 351.512 Purchase of goods.**

(a) *Benefit*—(1) *In general.* In the case where goods are purchased by the government from a firm, in accordance with section 771(5)(E)(iv) of the Act a benefit exists to the extent that such goods are purchased for more than adequate remuneration.

(2) *Adequate remuneration defined* – (i) *In general*. The Secretary will normally seek to measure the adequacy of remuneration by comparing the price paid to the firm for the good by the government to a market-determined price for the good based on actual transactions, including imports, between private parties in the country in question, but if such prices are not available, then to a world market price or prices for the good.

(ii) *Actual market-determined prices unavailable*. If there are no market-determined domestic or world market prices available, the Secretary may measure the adequacy of remuneration by analyzing any premium in the request for bid or government procurement regulations provided to domestic suppliers of the good or use any other methodology to assess whether the price paid to the firm for the good by the government is consistent with market principles.

(iii) *Use of ex-factory or ex-works price.* In measuring adequate remuneration under paragraph (a)(2)(i) or (ii) of this section, the Secretary will use an ex-factory or ex-works comparison price and price paid to the firm for the good by the government in order to measure the benefit conferred to the recipient within the meaning of section 771(5)(E) of the Act. The Secretary will, if necessary, adjust the comparison price and the price paid to the firm by the government to remove all delivery charges, import duties, and taxes to derive an ex-factory or ex-works price.

(3) *Exception when the government is both a provider and purchaser of the good.* When the government is both a provider and a purchaser of the good, such as electricity, the Secretary will normally measure the benefit to the recipient firm by comparing the price at which the government provided the good to the price at which the government purchased the same good from the firm.

(b) *Time of receipt of benefit.* In the case of the purchase of a good, the Secretary normally will consider a benefit as having been received as of the date on which the firm receives payment for the purchased good.

(c) *Allocation of benefit to a particular time period.* In the case of the purchase of a good, the Secretary will normally allocate (expense) the benefit to the year in which the benefit is considered to have been received under paragraph (b) of this section. However, if the Secretary considers this purchase to be for or tied to capital assets such as land, buildings, or capital equipment, the benefit will normally be allocated over time as defined in § 351.524(d)(2).

27. Add § 351.521 to read as follows:

**§ 351.521 Indirect taxes and import charges on capital goods and equipment (export programs).**

(a) *Benefit*. (1) *Exemption or remission of taxes and import charges*. In the case of a program determined to be an export subsidy that provides for the full or partial exemption or remission of an indirect tax or an import charge on the purchase or import of capital goods and equipment, a benefit exists to the extent that the taxes or import charges paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program, including as a result of being located in an area designated by the government as being outside the customs territory of the country.

(2) *Deferral of taxes and import charges*. In the case that the program provides for a deferral of indirect taxes or import charges, a benefit exists to the extent that appropriate interest charges are not collected. Normally, a deferral of indirect taxes or import charges will be treated as a government-provided loan in the amount of the taxes deferred, according to the methodology described in § 351.505. The Secretary will use a short-term interest rate as the benchmark for tax deferrals of one year or less. The Secretary will use a long-term interest rate as the benchmark for tax deferrals of more than one year.

(b) *Time of receipt of benefit*. (1) *Exemption or remission of taxes and import charges*. In the case of a full or partial exemption or remission of an indirect tax or import charge, the Secretary normally will consider the benefit as having been received at the time the recipient firm otherwise would be required to pay the indirect tax or import charge.

(2) *Deferral of taxes and import charges*. In the case of the deferral of an indirect tax or import charge of one year or less, the Secretary normally will consider the benefit as having been received on the date on which the deferred tax becomes due. In the case of a multi-year deferral, the Secretary normally will consider the benefit as having been received on the anniversary date(s) of the deferral.

(c) *Allocation of benefit to a particular time period*. The Secretary normally will allocate (expense) the benefit of a full or partial exemption, remission or deferral of taxes or import charges described in paragraph (a) of this section to the year in which the benefit is considered to have been received under paragraph (b) of this section.

**§ 351.522 [Removed and Reserved]**

28. Remove and reserve § 351.522.

29. In § 351.525:

a. Revise paragraph (b)(1);

b. Revise paragraphs (b)(6)(iii), (iv), (v), and (vi);

c. Add paragraphs (b)(6)(vii), (b)(8) and (9);

d. Revise paragraph (c); and

e. Add paragraph (d).

The revisions and additions read as follows:

**§ 351.525 Calculation of ad valorem subsidy rate and attribution of subsidy to a product.**

* * * * *

(b) ***

(1) *In general*. In attributing a subsidy to one or more products, the Secretary will apply the rules set forth in paragraphs (b)(2) through (9) of this section. The Secretary may determine to limit the number of cross-owned corporations examined under this section based on record information and resource availability.

(6) * * *

(iii) *Holding or parent companies*. If the firm that received a subsidy is a holding company, including a parent company with its own business operations, the Secretary will attribute the subsidy to the consolidated sales of the holding company and its subsidiaries.

(iv) *Input producer*—(A) *In general*. If there is cross-ownership between an input producer that supplies a downstream producer and production of the input product is primarily dedicated to production of the downstream products, the Secretary will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations).

(B) *Primarily dedicated*. In determining whether the input product is primarily dedicated to production of the downstream product, the Secretary will determine, as a threshold matter, whether the input could be used in the production of a downstream product including subject merchandise, regardless of whether the input is actually used for the production of subject merchandise. The Secretary may also consider the following factors, which are not in hierarchical order: whether the input is a link in the overall production chain; whether the input provider's business activities are focused on providing the input to the downstream producer; whether the input is a common input used in the production of a wide variety of products and industries; whether the downstream producers in the overall production chain are the primary users of the inputs produced by the input producer; whether the inputs produced by the input producer are primarily reserved for use by the downstream producer until the downstream producer's needs are met; whether the input producer is dependent on the downstream producers for the purchases of the input product; whether the downstream producers are dependent on the input producer for their supply of the input; the coordination, nature and extent of business activities between the input producer and the downstream producers whether directly between the input producer and the downstream producers or indirectly through other cross-owned

corporations; and any other factor deemed relevant by the Secretary based upon the case-specific facts.

(v) *Providers of utility products*. If there is cross-ownership between a corporation providing electricity, natural gas or other similar utility product and a producer of subject merchandise, the Secretary will attribute subsidies received by that provider to the combined sales of that provider and the sales of products sold by the producer of subject merchandise if at least one of the following two conditions are met:

(A) A substantial percentage, normally defined as 25 percent or more, of the production of the cross-owned utility provider is provided to the producer of subject merchandise, or

(B) The producer of subject merchandise purchases a substantial percentage, normally defined as 25 percent or more, of its electricity, natural gas, or other similar utility product from the cross-owned provider.

(vi) *Transfer of subsidy between corporations with cross-ownership*. If a cross-owned corporation received a subsidy and transferred the subsidy to a producer of subject merchandise, the Secretary will only attribute the subsidy to products produced by the recipient of the transferred subsidy. When the cross-owned corporation that transferred the subsidy could fall under two or more of the paragraphs under paragraph (b)(6) of this section the transferred subsidy will be attributed solely under this paragraph.

(vii) *Cross-ownership defined*. Cross-ownership exists between two or more corporations when one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. Normally, this standard will be met when there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations.

* * * * *

(8) *Attribution of subsidies to plants or factories.* The Secretary will not tie or attribute a subsidy on a plant- or factory-specific basis.

(9) *General standard for finding tying*. A subsidy will normally be determined to be tied to a product or market when the authority providing the subsidy was made aware of, or otherwise had knowledge of, the intended use of the subsidy and acknowledged that intended use of the subsidy prior to, or concurrent with, the bestowal of the subsidy.

(c) *Trading companies*—(1) *In general*. Benefits from subsidies provided to a trading company that exports subject merchandise shall be cumulated with benefits from subsidies provided to the firm which is producing subject merchandise that is sold through the trading company, regardless of whether the trading company and the producing firm are affiliated.

(2) *The individually examined respondent exports through trading company*. To cumulate subsidies when the trading company is not individually examined as a respondent, the Secretary will pro-rate the subsidy rate calculated for the trading company by using the ratio of the producer's total exports of subject merchandise to the United States sold through the trading company divided by producer's total exports of subject merchandise to the United States and add the resultant rate onto the producer's calculated subsidy rate.

(3) *The individually examined respondent is a trading company*. To cumulate subsidies when the trading company is individually examined as a respondent, the Secretary will pro-rate the subsidy rate calculated for the producer(s) by the ratio of the producer's sales of subject merchandise to the United States purchased or sourced by the trading company to total sales to the United States of subject merchandise from all selected producers sourced by the respondent trading company and add the resultant rates to the trading company's calculated subsidy rate.

(d) *Ad valorem subsidy rate in countries with high inflation.* For countries experiencing an inflation rate greater than 25 percent *per annum* during the relevant period, the Secretary will normally adjust the benefit amount (numerator) and the sales data (denominator) to account for the rate of inflation during the relevant period of investigation or review in calculating the *ad valorem* subsidy rate.

30. Revise § 351.526 to read as follows:

**§ 351.526 Subsidy extinguishment from changes in ownership.**

(a) *In general*. The Secretary will normally presume that non-recurring subsidies continue to benefit a recipient in full over an allocation period determined consistent with §§ 351.507(d), 351.508(c)(1), or 351.524, notwithstanding an intervening change in ownership.

(b) *Rebutting the presumption of subsidy continuation notwithstanding a change in ownership*.

(1) An interested party may rebut the presumption in paragraph (a) of this section by demonstrating with sufficient evidence that, during the allocation period, a change in ownership occurred in which the seller sold its ownership of all or substantially all of a company or its assets, retaining no control of the company or its assets, and

(i) In the case of a government-to-private sale, that the sale was an arm's-length transaction for fair market value, or

(ii) In the case of a private-to-private sale, that the sale was an arm's-length transaction, unless a party demonstrates that the sale was not for fair market value.

(2) *Arm's-length*. In determining whether the evidence presented in paragraph (b)(1) of this section demonstrates that the transaction was conducted at arm's length, the Secretary will be guided by the SAA, which defines an arm's-length transaction as a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties.

(3) *Fair Market Value*. (i) In determining whether the evidence presented by parties pursuant to paragraph (b)(1) of this section demonstrates that the transaction was for fair market value, the Secretary will determine whether the seller, including in the case of a privatization through the government in its capacity as seller, acted in a manner consistent with the normal

sales practices of private, commercial sellers in that country, taking into account evidence regarding whether the seller failed to maximize its return on what it sold.

(ii) In making the determination under paragraph (b)(3)(i) of this section, the Secretary may consider, inter alia, information regarding comparable benchmark prices as well as information regarding the process through which the sale was made. The following is a non-exhaustive list of specific considerations that the Secretary may find to be relevant in this regard:

(A) *Objective analysis*. Whether the seller performed or obtained an objective analysis in determining the appropriate sales price and, if so, whether it implemented the recommendations of such objective analysis for maximizing its return on the sale, including in regard to the sales price recommended in the analysis;

(B) *Artificial barriers to entry*. Whether the seller imposed restrictions on foreign purchasers or purchasers from other industries, overly burdensome or unreasonable bidder qualification requirements, or any other restrictions that artificially suppressed the demand for, or the purchase price of, the company;

(C) *Highest bid*. Whether the seller accepted the highest bid, reflecting the full amount that the company or its assets (including the value of any subsidy benefits) were actually worth under the prevailing market conditions and whether the final purchase price was paid through monetary or close equivalent compensation; and

(D) *Committed investment*. Whether there were price discounts or other inducements in exchange for promises of additional future investment that private, commercial sellers would not normally seek (for example, retaining redundant workers or unwanted capacity) and, if so, whether such committed investment requirements were a barrier to entry or in any way distorted the value that bidders were willing to pay for what was being sold.

(4) *Market distortion*. Information presented under paragraphs (b)(2) and (3) of this section notwithstanding, the Secretary will not find the presumption in paragraph (a) of this

section to be rebutted if an interested party has demonstrated that, at the time of the change in ownership, the broader market conditions necessary for the transaction price to accurately reflect the subsidy benefit were not present or were severely distorted by government action or inaction such that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action or inaction. In assessing such claims, the Secretary may consider, among other things, the following factors:

(i) *Fundamental conditions*. Whether the fundamental requirements for a properly functioning market are sufficiently present in the economy in general as well as in the particular industry or sector, including, for example, free interplay of supply and demand, broad-based and equal access to information, sufficient safeguards against collusive behavior, and effective operation of the rule of law; and

(ii) *Legal and fiscal incentives*. Whether the government has used the prerogatives of government in a special or targeted way that makes possible or otherwise significantly distorts the terms of a change in ownership in a way that a private seller could not. Examples of such incentives include, but are not limited to, the following:

(A) Special tax or duty rates that make the sale more attractive to potential purchasers;

(B) Regulatory exemptions particular to the privatization (or to privatizations generally) affecting worker retention or environmental remediation; or

(C) Subsidization or support of other companies to an extent that severely distorts the normal market signals regarding company and asset values in the industry in question.

(c) *Subsidy benefit extinguishment*. (1) *In general.* If the Secretary determines that any evidence presented by interested parties under paragraph (b) of this section rebuts the presumption under paragraph (a) of this section, the full amount of pre-transaction subsidy benefits, including the benefit of any concurrent subsidy meeting the criteria in paragraph (c)(2) of this section, will be found to be extinguished and therefore not countervailable. Absent such a finding, the Secretary will not find that a change in ownership extinguishes subsidy benefits.

(2) *Concurrent subsidies.* For purposes of paragraph (c)(1) of this section, concurrent subsidies are those subsidies given to facilitate or encourage or that are otherwise bestowed concurrent with a change in ownership. The Secretary will normally consider the value of a concurrent subsidy to be fully reflected in the fair market value price of an arm's-length change in ownership and, therefore, to be fully extinguished in such a transaction under paragraph (c)(1) of this section, if the following criteria are met:

(i) The nature and value of the concurrent subsidies are fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders,

(ii) The concurrent subsidies are bestowed prior to the sale, and

(iii) There is no evidence otherwise on the record demonstrating that the concurrent subsidies are not fully reflected in the transaction price.

[FR Doc. 2024-15086 Filed: 7/11/2024 8:45 am; Publication Date: 7/12/2024]