



DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 230424-0112]

RIN 0625-AB23

Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws

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

ACTION: Proposed rule; request for comments.

SUMMARY: Pursuant to its authority under Title VII of the Tariff Act of 1930, as amended (the Act), the U.S. Department of Commerce (Commerce) proposes to amend its regulations to enhance, improve and strengthen its enforcement of trade remedies through the administration of antidumping duty (AD) and countervailing duty (CVD) laws. In this proposed rule, Commerce would revise many of its procedures, codify many areas of its practice, and enhance certain areas of its methodologies and analyses to address price and cost distortions in different capacities.

Commerce is seeking public comment on these proposed revisions to the AD and CVD regulations.

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 Lisa W. Wang, 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 ECCcommunications@trade.gov or to Ariela Garvett, Senior Advisor, at Ariela.Garvett@trade.gov. Inquiries may also be made of the E&C Communications office during normal business hours at (202) 482-0063.

FOR FURTHER INFORMATION CONTACT: Scott McBride, Associate Deputy Chief Counsel, at (202) 482-6292, Ian McInerney, Attorney, at (202) 482-2327, Hendricks Valenzuela, Attorney, at (202) 482-3558, or Brishailah Brown, Attorney, at (202) 482-5051.

SUPPLEMENTARY INFORMATION:

General Background

Title VII of the Act vests Commerce with authority to administer the AD/CVD trade remedy laws. In particular, 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). 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.¹

On September 20, 2021, Commerce revised its scope regulations (19 CFR 351.225) and issued new circumvention (19 CFR 351.226) and covered merchandise (19 CFR 351.227) regulations. *See Scope and Circumvention Final Rule*, 86 FR 52300 (September 20, 2021). *See also Scope and Circumvention Proposed Rule*, 85 FR 49472 (August 13, 2020) (hereinafter “Scope and Circumvention Final Rule” and “Scope and Circumvention Proposed Rule”).

The revised and new regulations became effective November 4, 2021.² We have subsequently identified some corrections and improvements to the scope, circumvention, and covered merchandise referral regulations. On November 28, 2022, Commerce issued a proposed regulation which provided some technical amendments to those regulatory provisions.³ This proposed rule provides additional substantive amendments to those provisions.

On November 18, 2022, Commerce issued an advanced notice of proposed rulemaking, indicating that it was considering issuing a regulation that would address the steps taken by Commerce to determine the existence of a particular market situation (PMS) that distorts the costs of production. *Determining the Existence of a Particular Market Situation That Distorts Costs of Production; Advanced Notice of Proposed Rulemaking*, 87 FR 69234 (November 18, 2022) (hereinafter “PMS ANPR”). Commerce requested public comment for 30 days in response to three questions which it posed in that notice, and received 19 comments.

¹ A countervailable subsidy is further defined under section 771(5)(B) of the Act as existing when: a government or any public entity within the territory of a country provides a financial contribution; provides any form of income or price support; or makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments; and a benefit is thereby conferred. To be countervailable, a subsidy must be specific within the meaning of section 771(5A) of the Act.

² *Id.*

³ *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings: Proposed Rule*, 87 FR 72916, 72921-27 (November 28, 2022). A final rule to those regulatory proposals is forthcoming.

Explanation of the Proposed Rule

We are proposing several modifications to the AD and CVD regulations to clarify and bring them into conformity with our practice and procedures, as well as to enhance and strengthen other regulatory provisions to enforce the trade remedy laws more effectively. The proposed changes are summarized here and discussed in greater detail below. We invite comments on these proposed regulatory changes and clarifications, including suggestions to improve these proposed regulations.

- Modify section 104 to clarify that references, citations, and hyperlinks to most documents provided in a submission do not incorporate the underlying referenced information on to the official record. The modification also explains the exception and the documents that meet the exception to this rule. This clarification is necessary because some interested parties over time have failed to put information on the official record such as website printouts and academic literature, creating confusion and inefficiencies.
- Modify sections 225, 226, 227, 301 and 306 to update and address scope, circumvention and covered merchandise issues that have arisen since Commerce amended and created those regulations in 2021. This includes addressing merchandise commercially produced, but not yet imported; the acceptance of pre-initiation submissions in response to scope applications and circumvention inquiry requests; the revision of time limits if Commerce seeks clarification on a scope application or circumvention inquiry request; clarification of when section 301 does and does not apply to such proceedings; a clarification of when “continue to suspend” language applies to entries pre-initiation in scope and covered merchandise proceedings; revisions to allow the sharing of information between AD and CVD segments when scope, circumvention, or covered merchandise inquiries for companion orders are conducted on the AD segment; providing greater detail on the

- application of scope clarifications; and allowing for extensions for initiation and preliminary circumvention determinations.
- Modify section 301 to allow Commerce to place previous analysis and calculation memoranda from other segments or proceedings on the record after written arguments have been submitted without being required to allow other parties to submit new factual information in response. Interested parties may still submit arguments as to the relevance of the agency analysis and calculation memoranda, but the submission of new factual information so late in the segment created unreasonable administrative burdens on the agency.
 - Modify section 301 to address notices of subsequent authority submitted on the record and allow for the filing of responsive arguments and factual information.
 - Modify section 308 to include the CVD adverse facts available hierarchy.
 - Modify sections 408 and 511, and create new section 529, to address foreign government inactions that benefit foreign producers. This includes codifying Commerce's practice of determining that countervailable subsidies are conferred by certain unpaid or deferred fees, fines, and penalties. It also addresses the consideration of evidence on the record of weak, ineffective, or nonexistent property, intellectual property, human rights, labor, and environmental protections and the impact that the lack of such protections has on the prices and costs of products in selecting surrogate values and benchmarks.
 - Create a new section 416 to address a determination of the existence of a PMS, including a PMS such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade. This regulation takes into consideration the comments received from the public in response to the *PMS ANPR* and addresses the elements that Commerce may consider in determining if a market situation exists that likely distorts the cost of

production and if the market situation is particular. It also provides 12 examples of scenarios in which Commerce might determine the existence of a PMS which distorts the cost of production and indicates that allegations of a PMS must be accompanied on the record by relevant information reasonably available to the interested party making the allegation.

- Modify sections 503, 505, 507, 508, 509, 520, and 525 to provide guidance to the public by incorporating our long-standing practices into the regulations. This includes addressing subsidies provided to support compliance with government-imposed mandates; treatment of outstanding loans as grants after three years of no payments of interest and principal; the use of an outside investor standard in determining the benefit of an equity infusion; the allocation period in measuring the benefit of an equity infusion; the allocation period in measuring the benefit of debt forgiveness; the treatment of certain income tax subsidy benefits as not tied with respect to particular markets or products; the use of a five-year period to determine if the premium rates charged on export insurance are inadequate to cover long-term operating costs and losses; and the use of alternative methodologies in attributing export subsidies and domestic subsidies to certain products exported and/or sold by a firm.

1. References, Citations, and Hyperlinks Made in a Submission Do Not Place the Referenced Underlying Information on the Official Record – § 351.104(a)(1)

Section 516A(b)(2) of the Act provides a definition of Commerce’s administrative record in AD/CVD proceedings and § 351.104(a)(1) describes in greater detail the information contained on the official record. Nonetheless, interested parties sometimes make the mistake of merely citing sources, or placing Uniform Resource Locator (URL) website information, or hyperlinks, in their submissions to Commerce, and then later presuming the information contained at the source documents is considered part of the record. This becomes a problem, for example, when parties submit their case briefs and rebuttal briefs on the record, pursuant to §

351.309, and quote from, or otherwise rely on, information or data derived from the cited sources that were never submitted on the official record. Commerce at that point has one of two choices – either reject the submissions as containing untimely filed new factual information or inquire further with the parties to put additional information on the record. In light of the statutory and regulatory time limits by which Commerce must abide, gathering further information is often not a reasonable or viable option, particularly at such a late stage in the segment of the proceeding.

Therefore, Commerce is proposing that additional language be added to § 351.104(a)(1) to reflect its long-standing interpretation of the official record; expressly articulating that for the vast majority of source materials, mere citations and references, including hyperlinks and website URLs, do not incorporate the information located at the cited sources onto the official record. This is true whether the citation is to sources such as textbooks, academic or economic studies, foreign laws, newspaper articles, or websites of foreign governments, businesses, or organizations.⁴ If an interested party wishes to submit information on the record, it must submit the actual source material in a timely manner, and not merely share internet links or citations to those sources in its questionnaire responses, submissions, briefs, or rebuttal briefs. Placement of such information on the record is the responsibility of the interested party and it is not Commerce's obligation to search for the information referenced by the links and citations. Commerce does not have the resources or time to independently gather such external data or information.

Notably, there are a few limited exceptions to this understanding of the official record which Commerce adopted through its practice over the years. Commerce therefore also proposes identifying in the regulation those exceptions, all of which relate to certain publicly available sources. Commerce expects that, by including such information in the regulation, interested

⁴ Information on websites can, and frequently does, change. At the time a weblink is placed on the record, the website might contain certain information, but later in the segment of the proceeding, that website and the information contained on it might change. We therefore emphasize that if interested parties wish to submit on the official record information derived from a website, they must make copies of each page and submit those copies on the record in a timely fashion.

parties will better understand those limited exceptions, and may rely on those specified references and citations in making their arguments in those specific circumstances.

Specifically, parties may cite U.S. statutory and regulatory language, as well as publicly available U.S. court decisions and orders, without submitting copies of those legal sources on the record. Likewise, copies of certain U.S. legislative history sources, such as the Statement of Administrative Action,⁵ and specific World Trade Organization international trade agreements identified in the regulation need not be submitted on the official record for Commerce to consider arguments pertaining to those sources. Finally, Commerce and the ITC publish determinations in the *Federal Register*, as well as public decision memoranda/reports which are adopted by those *Federal Register* notices, and copies of those determinations, memoranda, and reports need not be submitted on the record.⁶

To be clear, the Commerce-authored “Issues and Decision Memoranda” adopted by *Federal Register* notices are not the separate calculation and analysis memoranda that Commerce frequently uses in its proceedings. Calculation and analysis memoranda, which include, for example, initiation checklists, respondent selection memoranda, new subsidy allegation memoranda, and affiliation/collapsing memoranda from other proceedings or other segments of the same proceeding, are not on the record before Commerce unless they have been placed on the record by Commerce or one of the interested parties to the proceeding.

⁵ See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol. 1 (1994) (SAA).

⁶ Commerce’s preliminary and final issues and decision memoranda and ITC preliminary and final injury reports are unique among documents that are unpublished in the *Federal Register* but can be incorporated on the record by citation. For example, “Final Results of Remand Redetermination,” issued pursuant to court orders or under direction by a United States Mexico Canada Agreement dispute panel, preliminary and final section 129 determinations, issued pursuant to 19 U.S.C. 3538 (section 129 of the Uruguay Round Agreements Act) and the direction of the United States Trade Representative, and scope rulings, issued pursuant to § 351.225, are not published in the *Federal Register*. Accordingly, each of those Commerce determinations cannot be incorporated onto the record of another segment merely by citation under the § 351.104(a)(1) exception. Thus, remand redeterminations, section 129 determinations, and scope rulings must each be submitted on the official record of another segment or proceeding for Commerce to consider the contents and analysis of those determinations in that segment or proceeding. On the other hand, for example, if *only* the outcome of a section 129 determination is being referenced, (and not the parties’ arguments, the facts, or Commerce’s analysis), then the notice which Commerce publishes in the *Federal Register* at the very end of the section 129 segment that summarizes the ultimate results of the section 129 process can be cited for that limited purpose, because that conclusion has been published in the *Federal Register*. See, e.g., *Implementation of Determinations Pursuant to Section 129 of the Uruguay Round Agreements Act*, 81 FR 37180 (June 9, 2018).

In sum, the language being proposed to include in § 351.104(a)(1) explains that if parties cite sources without submitting the source data or information on the record, unless Commerce or another interested party placed the information on the record or the information meets one of the articulated exceptions, Commerce will not consider the underlying information to be part of the official record and will not consider that underlying information in its analysis.

2. *Conducting Scope Inquiries of Merchandise Not Yet Imported, but Commercially Produced and Sold – § 351.225(c)(1)*

It is Commerce’s practice to allow parties, including importers of non-subject merchandise, to request a scope ruling, even if the product at issue is not yet imported, provided the product is in actual production. This language was codified in § 351.225(c)(1) (“An interested party may submit a scope ruling application requesting that the Secretary conduct a scope inquiry to determine whether a product, *which is or has been in actual production by the time of the filing of the application*, is covered by the scope of an order.”) (emphasis added). The benefit of allowing a scope ruling in that situation are twofold. First, it does not require an exporter and importer to expend the time and resources to ship and import its commercially traded merchandise to the United States for the sole purpose of getting a scope ruling. Second, it does not require Commerce to expend the time and resources to make a scope determination on a product that the company may decide to never export to the United States again, depending on the outcome of the agency’s scope ruling.

The phrase “actual production” is not defined in the regulation. However, under Commerce’s practice, for a product to be “actually” produced, it must be commercially manufactured and sold, *i.e.*, produced for sale in a market and then subsequently purchased.⁷

⁷ See, e.g., Commerce’s Letters, Second Unacuna Scope Inquiry Rejection Letter, dated December 23, 2014 (ACCESS barcode: 3249258-01) (“{Commerce} does not consider prototypes or models of merchandise to be ‘actually in production.’ For merchandise to be ‘actually in production,’ it has to be commercially produced – in other words, produced for sale in a market. That market could be the home market or a third country market, but in either case, it has to be produced for sale”); and “RNG International, Inc.’s Scope Inquiry: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People’s Republic of China,” dated March 15, 2022 (ACCESS barcode: 4221972-01) (“Commerce does not consider prototypes or models of merchandise to be ‘in actual production.’ For merchandise to be ‘in actual production,’ it must be commercially produced – in other

That market could be the home market or a third country market, but in either case, it must be produced for sale and then sold in that market. In other words, the agency will not consider samples, prototypes, or mere models of merchandise to be “actually in production.” The policy reasons for that interpretation are clear: Commerce is under no obligation to issue a scope ruling for a product that may never be commercially produced, sold, or exported, and it would be unreasonable for the agency to devote time and resources to reviewing a product that is neither traded domestically nor internationally. As Commerce acknowledged in the Preamble to the *Scope and Circumvention Final Rule*, “Commerce sometimes conducts scope inquiries on merchandise that is already in commercial production but has not yet been exported to the United States”⁸

For consistency with Commerce’s practice and because it would not be sensible to expend agency resources on a product which may never realistically enter the commerce of United States and become “subject” to an AD or CVD order, Commerce proposes certain revisions to § 351.225(c)(1). Commerce proposes adding language to § 351.225(c)(1) that indicates that if a product has not been imported into the United States, the scope applicant must provide additional evidence that the product was actually produced and sold. In addition, Commerce proposes adding a new provision, paragraph (c)(2)(x), to § 351.225, to direct an applicant to provide such evidence under this scenario.

3. *Allowing Pre-Initiation Submissions in Response to Scope Ruling Applications and Circumvention Inquiry Requests – §§ 351.225(c)(3) and 351.226(c)(3)*

The regulations under §§ 351.225, 351.226, and 351.227 currently do not provide guidance or procedures for pre-initiation submissions from interested parties other than the applicant in a scope inquiry and the requester in a circumvention inquiry. We indicated in the Preamble to the *Scope and Circumvention Final Rule* that we anticipated that after a scope ruling

words, produced for sale in a market. That market could be the home market or a third country market, but in either case, it must be produced for sale”).

⁸ See *Scope and Circumvention Final Rule*, 86 FR 52314.

application has been submitted to the record, parties will have the opportunity to challenge the adequacy of the application before a decision is made to initiate or not initiate.⁹ Subsequent to the revision of § 351.225 and creation of § 351.226, we discovered that the lack of guidance in the regulations with respect to such submissions has created some confusion. Accordingly, we have determined to revise the regulations in §§ 351.225(c)(3) and 351.226(c)(3) to provide interested parties, other than the applicant or requestor, a clear opportunity to submit comments to Commerce on the adequacy of the application or request, within 10 days after the submission of the application or request.

Notably, the factors we consider in initiating a scope inquiry differ from a circumvention inquiry, in that we normally do not look at, for example, patterns of trade in most scope cases in determining whether to initiate a scope ruling. Because a circumvention inquiry often requires Commerce to review such additional information, we further propose that for circumvention inquiries, specifically, interested parties also be permitted to submit new factual information regarding the adequacy of the circumvention inquiry request with their comments, and then allow the requestor five days after the submission of the new factual information, to have an opportunity to submit comments and factual information to rebut, clarify, or correct the interested parties' new factual information. It is our expectation that, by allowing for both comments and new factual information in this manner, the record will be even more detailed for Commerce in determining whether the criteria needed to initiate a circumvention inquiry are satisfied.

4. *Time Limit Revisions If Commerce Seeks Clarification on the Application or Request – §§ 351.225(d)(1) introductory text and (d)(1)(ii) and (iii), as well as §§ 351.226(d)(1) introductory text and (d)(1)(ii) and (iii)*

The regulations currently allow for Commerce only to reject or accept a scope application

⁹ *Id.*, 86 FR 52316 (explaining that parties will “have an opportunity to file arguments with Commerce before initiation”).

or circumvention inquiry request. However, there are instances in which the application or request may be generally acceptable, but Commerce still needs clarification on one or more aspects of the submission. We propose revising and adding provisions to both the scope and circumvention regulations to revise the time limitation for initiation if Commerce seeks clarification from the applicant or requestor and the applicant or requestor, in turn, provides responses to Commerce's requests for further information. Specifically, we would revise §§ 351.225(d)(1) introductory text and 351.226(d)(1)(ii) to allow for Commerce's decision to initiate or not initiate an inquiry to be made within 30 days after the submission of the applicant's or requestor's timely response to Commerce's questions. Under the current regulations, if Commerce does not reject a scope ruling application or initiate a scope inquiry within 31 days after the filing of the application, the application will be deemed accepted and the scope inquiry will be deemed initiated.¹⁰ Likewise, a new § 351.225(d)(1)(iii) would be added to the scope regulations to allow for deemed initiation of a scope inquiry 31 days after the applicant's timely response to Commerce's questions were submitted with the agency. Further, a new § 351.226(d)(1)(iii) would be added to the circumvention regulations to clarify that Commerce will make its decision to initiate or not initiate a circumvention inquiry after it receives the requestor's timely response to Commerce's questions.

It is Commerce's expectation that such a proposed change to the regulations, basing the initiation deadline on timely responses to the questions issued by Commerce seeking clarification of the application or circumvention inquiry request, instead of the date of submission of the application or request itself, will ensure a fair and more efficient process.

5. *Clarifying What Provisions under §§ 351.225, 351.226, and 351.227 are the "Otherwise Specified" Procedures in which §§ 351.301 through 351.308 and 351.312 through 351.313 Do Not Apply – §§ 351.225(f), 351.226(f), and 351.227(d)*

Current §§ 351.301 through 351.308 and 351.312 and 351.313, generally, outline the procedures for the submission and use of factual information in Commerce proceedings. In

¹⁰ See § 351.225(d)(1)(ii).

particular, § 351.301 establishes the time limits for submissions of factual information. When Commerce issued its scope, circumvention, and covered merchandise regulations in the *Scope and Circumvention Final Rule*, Commerce included several new timing provisions that were intended to supplant certain provisions of § 351.301. Commerce intended to specify separate and distinct time limits for scope inquiries, circumvention inquiries, and covered merchandise referrals. Specifically, §§ 351.225, 351.226, and 351.227 all contain the same clause, “{u}nless otherwise specified, the procedures as described in subpart C of this part (§§ 351.301 through 351.308 and 351.312 through 351.313) apply to this section.”¹¹ Within §§ 351.225, 351.226, and 351.227, other time limitations have been specified for the submission of questionnaire responses and other documents. However, Commerce did not, in those provisions, specifically indicate where § 351.301 did not apply. Accordingly, we propose clarifying this matter in the regulations.

Specifically, Commerce proposes adding a new clause to §§ 351.225(f), 351.226(f), and 351.227(d) that expressly states that the time limits in these regulations are distinct and separate from the procedures outlined in § 351.301. For example: “{t}he procedures as described in subpart C of this part (§§ 351.301 through 351.308 and 351.312 through 351.313) do not apply to this paragraph, but are unique to scope ruling inquiries.” These changes will clarify which time limitations apply across scope inquiries, circumvention inquiries, and scope clarifications, respectively.¹²

¹¹ See §§ 351.225(a), 351.226(a), and 351.227(a).

¹² Section 351.302(b) allows Commerce to extend “any time limit,” “unless expressly precluded by statute,” for “good cause,” and Commerce is not intending to modify that authority through this revision to its regulations. “Good cause,” is not a defined set of circumstances, and is determined on a case-by-case basis. We note that in the *Scope and Circumvention Proposed Rule*, 85 FR 49496, proposed §351.225(e)(1) stated that “Situations in which good cause has been demonstrated may include, but are not limited to” two examples, while in the final version of § 351.225(e)(2), it stated that “Situations in which good cause has been demonstrated may include,” followed by the same examples, with no explanation of why the “but are not limited to” distinguishing language was removed. See *Scope and Circumvention Final Rule*, 86 FR 52375. To be clear, it was not Commerce’s intention by adjusting the language between the *Proposed* and *Final Scope and Circumvention Rules* to suggest that the two examples of “good cause” found in § 351.225(e)(2) are exhaustive, which is evidenced by the continued use of the permissive phrase “may include.” It continues to be Commerce’s understanding that any time the “good cause” standard appears in the AD and CVD regulations, a determination of “good cause” is left to the discretion of Commerce, based on the facts before it in a given case.

6. *Clarifying Continued Suspension of Liquidation with respect to Certain Segments of Commerce's Proceedings – §§ 351.225(l)(1) and 351.227(l)(1)*

In scope and covered merchandise inquiries, if Commerce has issued a final determination in an administrative review, pursuant to § 351.212(b), or a rescission notice, pursuant to § 351.213(d), or automatic liquidation instructions are forthcoming, in accordance with § 351.212(c), and around the same time period Commerce determines to initiate a scope inquiry or covered merchandise inquiry, the current regulations do not indicate whether, upon initiation of the scope or covered merchandise segment of the proceeding, the suspension of liquidation of entries covered by the final determination, automatic liquidation instructions, or rescissions should be “continued” as that term is used in §§ 351.225(l)(1) and 351.227(l)(1). This issue arises if U.S. Customs and Border Protection (CBP) has not yet liquidated those entries, in accordance with 19 CFR part 159, when Commerce issues its suspension instructions under §§ 351.225(l)(1) and 351.227(l)(1).¹³ We, therefore, propose modifications to those two provisions to explain that suspension of such entries should continue, as well as suspension of any other entries suspended by CBP in administering the AD and CVD laws and not yet liquidated, pending the completion of the scope or covered merchandise inquiries.

7. *Record Issues in Scope, Circumvention, and Covered Merchandise Inquiries for Companion AD and CVD Orders – § 351.104(a); § 351.306(b); §§ 351.225(m)(2), 351.226(m)(2), and 351.227(m)(2)*

Current paragraphs (m)(2) of §§ 351.225, 351.226, and 351.227 generally provide that if there are companion AD and CVD orders covering the same merchandise from the same country of origin, the application/request/referral pertaining to both orders must be placed only on the record of the AD proceeding. Further, if Commerce initiates an inquiry, it will conduct a single inquiry with respect to the product at issue for both orders only on the record of the AD proceeding. Once Commerce issues a final scope ruling/circumvention determination/covered

¹³ At this time, Commerce does not believe a similar adjustment to § 351.226(l)(1) is appropriate because the nature of a circumvention inquiry is such that merchandise which would have been covered by the aforementioned assessment instructions would not meet the description of non-subject merchandise that is allegedly circumventing an AD or CVD order.

merchandise determination on the record of the AD proceeding, Commerce will include a copy of that final determination on the record of the CVD proceeding. The purpose of these regulations was to address the issue of differing administrative records related to the same scope/circumvention/covered merchandise determination.¹⁴ However, since the regulations were issued, Commerce identified an issue which must be addressed.

Under Commerce's current practice, APO authorized representatives may use business proprietary information (BPI) from a previous segment and submit that information in certain subsequent segments within the same proceeding.¹⁵ However, parties may not use BPI from a previous AD segment in a subsequent CVD proceeding, nor BPI from a previous CVD segment in a subsequent AD proceeding.¹⁶ Therefore, it would not be possible for a party to submit relevant BPI from a previous CVD segment on the AD record that serves as the official record for the single inquiry covering both AD and CVD companion orders. This may inhibit interested parties from providing (and relying on) another party's BPI in support of their positions in a scope, circumvention, or covered merchandise inquiry. Likewise, there might be information which is on the record of the AD segment during the scope, circumvention, or covered merchandise inquiry which might prove to be helpful in future segments under the CVD order, but the current prohibition against using BPI from other proceedings would prevent Commerce from using and relying on such data.

To address these concerns, Commerce proposes amending § 351.306(b) to permit cross-order sharing of BPI between companion orders when paragraphs (m)(2) of § 351.225, § 351.226, or § 351.227 are invoked. Such language would allow for certain relevant BPI from a previous CVD scope, circumvention, or covered merchandise inquiry segment to be placed on the AD record of the scope, circumvention, or covered merchandise inquiry that is covering both

¹⁴ See *Scope and Circumvention Proposed Rule*, 85 FR 49484 ("By limiting the scope inquiry only to the record of one proceeding, the chances of incomplete records, or confusing records being filed with courts on appeal, should be lessened").

¹⁵ See *Antidumping and Countervailing Duty Proceedings: Administrative Protective Order Procedures; Procedures for Imposing Sanctions for Violation of a Protective Order*, 63 FR 24391, 24398 (May 4, 1998).

¹⁶ *Id.*, 63 FR 24399.

companion orders under § 351.225(m)(2), § 351.226(m)(2), or § 351.227(m)(2). Likewise, it would also allow BPI from the AD record during a scope, circumvention, or covered merchandise inquiry to be submitted in subsequent CVD segments.

In addition, to help further clarify that the AD segment record is intended to be the official record of the scope, circumvention, or covered merchandise inquiry in the event of litigation, we propose adding new language to § 351.104(a) which explains that the record of the AD segment will normally be the official record for scope, circumvention, and covered merchandise segments covering companion AD and CVD orders.

For clarification of the information under §§ 351.225(m) and 351.226(m) that should be specifically on the AD record and CVD records, when there are companion orders affected by a scope or circumvention determination, we are proposing a revision of the opening sentence in paragraph (m)(2) of both provisions that states that scope ruling applications and circumvention inquiry requests are to be submitted on the records of both proceedings, but once they are received, Commerce will notify interested parties that all subsequent submissions must be submitted only on the record of the AD proceeding. This allows for an opening of the CVD segment, but then makes it clear that interested parties must subsequently file all their submissions on the AD segment, and not on the record of the CVD segment, for the remainder of the segment of the proceeding.

Commerce also proposes removing extraneous language about contacting CBP that was included in § 351.227(m) that was not included in §§ 351.225(m) and 351.226(m) and is unnecessary.

Finally, Commerce proposes adding at the end of §§ 351.225(m)(2), 351.226(m)(2), and 351.227(m)(2) language that says that in addition to a final scope ruling, circumvention determination, or covered merchandise determination being placed on the CVD record, a copy of the preliminary scope ruling, circumvention determination, or covered merchandise

determination, if applicable, as well as “all relevant instructions to the Customs Service,” will also be placed on the CVD record at that time.

8. *Providing Greater Detail on Scope Clarifications, Including Its Ability to Address the Governmental Exception Provision of Section 771(20)(B) of the Act – § 351.225(q)*

Historically, Commerce has used scope clarifications in investigations and after an order is issued in different ways, as we explained in the Preambles to both the *Scope and Circumvention Proposed Rule* and *Scope and Circumvention Final Rule*.¹⁷ A scope clarification is not intended to be a scope ruling, by which Commerce applies an analysis under § 351.225(k) to determine if something is covered by an AD or CVD order. Instead, scope clarifications are means by which Commerce otherwise addresses other scope-related items in any segment of the proceeding. For example, current § 351.225(q) provides an example in which Commerce, based on its previous scope determinations and rulings, may provide an interpretation of specific language in the scope of an order and reflect that interpretation in the form of an interpretive footnote to the scope when the scope is published or set forth in instructions to CBP.

Although this is one means by which Commerce may use a scope clarification post-order, there are other instances in which Commerce has been faced with scope-related questions and Commerce has determined to address those questions in the form of a scope clarification. Accordingly, Commerce proposes modifying this provision to extend its description to be more comprehensive and illustrative.

For example, section 771(20)(B) of the Act states that merchandise which is subject to the scope of an order (and therefore a scope inquiry and scope ruling would be unnecessary) may be treated as not subject to the imposition of ADs or CVDs. In sum, it creates an exception to the imposition of ADs or CVDs for merchandise that is imported by, or for the use of, the U.S. Department of Defense. To qualify for this exception the subject merchandise must: (1) be acquired in accordance with a memorandum of understanding between the U.S. Department of

¹⁷ See *Scope and Circumvention Proposed Rule*, 85 FR 49480-81, n. 51; and *Scope and Circumvention Final Rule*, 86 FR 52336-37.

Defense and a country; and (2) have no substantial nonmilitary use.¹⁸ Commerce has addressed this provision infrequently, and only in the context of ongoing administrative reviews. Still, a scope clarification, by its nature, would be the appropriate means by which Commerce could address the U.S. Department of Defense exception.

In another example, at times, Harmonized Tariff Schedule (HTS) classifications have been updated and those updates have removed or revised HTS classification subheadings that were set forth in an AD or CVD order.¹⁹ For a variety of reasons, Commerce might find it appropriate to clarify that an existing scope, which identified HTS classifications that no longer exist, applies to the updated and revised HTS classifications. One means to do this would be through a scope clarification.

Likewise, the written description of the scope may include references to various industry standards which may be revised or updated at some point. Again, Commerce could issue a scope clarification under § 351.225(q) to clarify which standards apply after such revisions or updates.

A scope clarification can also assist in clarifying the country of origin of a product. For example, if Commerce previously issued a country of origin determination (in an investigation or review), in which it described, as part of its analysis, that that the “essential characteristics were imparted” in producing the subject merchandise at one stage of the production of the subject merchandise under § 351.225(j)(2), and that the country of origin was established at that stage, it is possible that in a subsequent segment of the proceeding the record might reflect that parties did some processing to the merchandise immediately before, in, or after that generally-described stage in a third country, but the exact line of where the identified production stage begins and ends is under debate. Under such a scenario, if there is a question from the parties or CBP as to

¹⁸ See section 771(20)(B) of the Act.

¹⁹ See, e.g., *Polyethylene Retail Carrier Bags from Indonesia, Malaysia, the People’s Republic of China, Taiwan, Thailand, and the Socialist Republic of Vietnam: Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders*, 86 FR 35478 (July 6, 2021), and accompanying Issues and Decision Memorandum (IDM) at 3; see also *53-Foot Domestic Dry Containers from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value; Final Negative Determination of Critical Circumstances*, 80 FR 21203 (April 17, 2015), and accompanying IDM at 23, n. 121.

whether that processing was understood to be included in, or separate from, the described “essential characteristics” stage, Commerce could clarify the issue in a scope clarification. In other words, rather than conducting a new country of origin analysis, under such a scenario Commerce would be interpreting and clarifying its previous country of origin determination. Commerce could then issue a memo addressing this issue and issue instructions to CBP reflecting the results of its scope clarification.

Notably, scope clarifications can take different forms, such as the aforementioned footnote to the scope, a memorandum in the context of an ongoing segment of the proceeding, such as an administrative review, or even in a standalone “Notice of Scope Clarification” that would be published in the *Federal Register*. Moreover, these examples are not exhaustive, but we do expect that it would be helpful to identify them in our proposed regulations to provide greater clarity and certainty in this area of the AD and CVD laws.

Accordingly, Commerce proposes changes to § 351.225(q) that explain that scope clarifications can serve a broader purpose than the purpose narrowly articulated in the *Scope and Circumvention Final Rule*.

9. *Extensions of Initiation and Preliminary Determination Time Limits – § 351.226(d)(1) and (e)(1)*

After issuing § 351.226 in the *Scope and Circumvention Final Rule*, Commerce experienced certain timing difficulties with respect to the initiation of circumvention inquiries and issuing of preliminary circumvention determinations, under § 351.226(d)(1) and (e)(1), in some of its proceedings.

For initiations specifically, § 351.226(d)(1) allows Commerce a maximum of only 45 days, fully extended, in which to determine to initiate or not initiate a circumvention inquiry. However, given the complexity of certain cases and certain circumvention requests and the need to consider certain factors, such as, for example, whether there are patterns of trade, increases in imports, and potential affiliations between producers and exporters with those assembling merchandise under sections 781(a)(3) and (b)(3) of the Act, 45 days has proven to be insufficient

time for Commerce to consider all of the relevant information on the record in many cases. In particular, it has proven most difficult when parties submitted new factual information on the record to challenge the adequacy of a circumvention inquiry request.

As we explain above, we have concluded that it would be beneficial to allow interested parties to submit both comments and new factual information in response to a circumvention inquiry request, and to allow the requestor to respond to such submissions with further responsive factual information. In accordance with that proposed modification to the regulations, Commerce proposes amending § 351.226(d)(1) to provide for three scenarios. First, Commerce will be required to make a determination to initiate or not initiate within 30 days after the submission of the request if Commerce is able to make such a determination based on the record evidence. Second, if it is not practicable to make such a determination in 30 days, and no party has submitted new factual information on the record in response to the circumvention request, then Commerce may extend its determination by an additional 15 days – to the current maximum of 45 days after submission of the request. Third, if the 30-day deadline proves to be impractical and interested parties have submitted new factual information on the record in response to the circumvention request, then Commerce will be permitted to extend the 30-day deadline by another 30 days – to a maximum of 60 days after the submission of the request in which to make a determination to initiate or not initiate a circumvention inquiry. We expect this timeline will provide Commerce with a better opportunity to make an informed decision as to whether the standards to initiate a circumvention inquiry have been met.²⁰

In addition to proposing an extension to the time limits for initiation, we also propose that the regulation be amended to allow for the extension of preliminary circumvention determinations. Section 351.226(e)(1) provides a deadline of no later than 150 days from the

²⁰ We note that we also propose amending the regulation at § 351.226(d)(1)(ii) so that if Commerce issues questionnaires to the requestor seeking clarification on certain issues, the deadlines described herein will be triggered off of the submission of the timely submitted responses to Commerce's questions, and not the submission of the circumvention inquiry request.

date of publication of the notice of initiation for the publication of the preliminary circumvention determination. Although the Act does not prohibit Commerce from extending preliminary circumvention determinations, no language was included in the regulation to expressly allow for an extension. Given the complexity of certain circumvention inquiries, we have determined that it is reasonable for Commerce to normally be able to extend the deadline for issuing a preliminary circumvention determination. Accordingly, Commerce proposes amending § 351.226(e)(1) to allow for a preliminary determination extension of up to 90 days (to provide a deadline of no later than 240 days from the date of publication of the notice of initiation) if Commerce concludes that an extension is warranted. Such a modification would not alter the maximum deadline for a final circumvention determination of 365 days, set forth in § 351.226(e)(2).

10. Procedures for Commerce to Place Previous Analysis and Calculation Memoranda from Other Segments or Proceedings on the Record after Written Arguments have been Submitted but Before the Final Determination or Results has been Issued – § 351.301(c)(4)

Pursuant to § 351.301(c)(4), Commerce may place new factual information on the record at any time, and when it does so, interested parties are permitted one opportunity to submit arguments and new factual information to “rebut, clarify, or correct” the factual information Commerce placed on the record, by a date set by Commerce. Throughout most of a segment of a proceeding, this regulation works as it should. However, since this regulation was issued, Commerce has on multiple occasions experienced a particular problem with this provision at the end of some of its segments, and that problem created unnecessary burdens for the agency in completing segments of its proceedings.

Specifically, in certain segments, after parties have submitted briefs and rebuttal briefs, in accordance with § 351.309, arguing that Commerce should take certain actions, Commerce has determined after consideration of those written arguments that in another proceeding, or segment of the same proceeding, it addressed the arguments now before it, in whole or in part. To explain how it addressed that issue or argument in the prior segment or proceeding, Commerce needed to

rely on a calculation or analysis memorandum from that other segment or proceeding, and because calculation and analysis memoranda are new factual information, Commerce placed the memoranda on the record of the ongoing segment. Accordingly, consistent with § 351.301(c)(4), certain interested parties not only submitted arguments on the record challenging the applicability and relevance of the agency memoranda, but also submitted additional new factual information on the record, and Commerce was required to address both its previous practice, as well as the new factual information, whether or not directly applicable and responsive, in the final results or determination.

The benefit for Commerce to be able to place its former analysis and calculation memoranda on the record in response to arguments raised in the written arguments is evident, as is the opportunity for parties to argue why those former analysis and calculation memoranda are relevant or irrelevant. On the other hand, it is a significant burden on Commerce's time and resources to prepare and provide a meaningful response to new factual information placed on the record for the first time so late in the proceeding, and provides serious administrative and technical difficulties for the agency in issuing a timely and complete final determination or results.

For this reason, Commerce is proposing a modification to § 351.301(c)(4). Specifically, we are proposing that § 351.301(c)(4) be divided into two paragraphs: one paragraph applicable under the current procedures to nearly all submissions in a segment of a proceeding and one paragraph applicable specifically only after written arguments have been submitted to Commerce and Commerce subsequently determines, after considering those written arguments, that an agency analysis or calculation memorandum issued in another segment or proceeding is relevant to the ongoing segment. In that narrow situation, proposed § 351.301(c)(4)(ii) states that Commerce will identify on the record the issue to which the memorandum it is placing on the record appears to be relevant, and interested parties will subsequently have an opportunity to provide comments addressing the relevance of the memoranda and Commerce's analysis in the

other segment to the issue to the agency. Interested parties will be able to argue that the facts and analysis in the memoranda are distinguishable from the facts and issues before Commerce in the immediate case, for example, but the regulation also makes clear under this narrow exception to the overall provision, that such comments on the agency calculation or analysis memorandum will not be permitted to be accompanied by new factual information.

11. Notices of Subsequent Authority – § 351.301(c)(6)

At times while a segment is ongoing, a Federal court, such as the U.S. Court of International Trade (CIT) or U.S. Court of Appeals for the Federal Circuit (Federal Circuit), may issue a decision that an interested party believes is directly applicable to an issue currently before Commerce. Likewise, Commerce may address the issue, or a similar issue, in another segment or proceeding, and again, the interested party might believe that determination is directly applicable to the current segment. In those situations, a party might submit on the record of an ongoing proceeding a Notice of Subsequent Authority.

Our existing regulations do not address the timing of the submission of responsive comments and new factual information to the filing of a Notice of Subsequent Authority. Commerce is therefore proposing an addition to § 351.301, a paragraph (c)(6), which provides that interested parties have five days after the Notice has been submitted to provide responsive comments and factual information to rebut or clarify the Notice.

Furthermore, we recognize that when Commerce is in the last few weeks of the segment and is actively preparing the final determination or results, if a Notice of Subsequent Authority is submitted too close to the statutory deadline for the final determination or results, Commerce may not have enough time administratively to consider the arguments raised in the Notice and address them in the final determination or results.

Accordingly, we propose that § 351.301(c)(6) indicate that for Commerce to consider and address a Notice of Subsequent Authority in a final determination or results, it must be submitted with the agency no later than 30 days before the deadline for issuing the final determination or

results. Likewise, for Commerce to consider responsive comments or factual information to the Notice of Subsequent Authority, responsive submissions must be filed no later than 25 days before the deadline for issuing the final determination or results.

Furthermore, to be assured that a Notice of Subsequent Authority is sufficiently complete for Commerce to consider, proposed § 351.301(c)(6) also explains that the Notice must identify the court decision or agency determination that is alleged to be authoritative to the issue before Commerce, provide the date the decision or determination was issued, explain the relevance of that decision or determination to the issue before Commerce, and be accompanied by a complete copy of the court decision or agency determination. Again, to be assured that Commerce has all the information that it needs to address the matter raised in the Notice of Subsequent Authority in its final determination or results, the regulation also requires that responsive comments directly address the contents of the Notice of Subsequent Authority and explain how the comments and accompanying information rebut or clarify the Notice.

12. The Countervailing Duty Adverse Facts Available Hierarchy – § 351.308(g)

Section 776(d) of the Act provides that, in circumstances in which Commerce is applying adverse facts available in selecting a program rate, pursuant to sections 776(a) and (b) of the Act, Commerce may use a countervailable subsidy rate determined for the same or similar program in CVD proceedings involving the same country, or, if there is no same or similar program, Commerce may, instead, use a countervailable subsidy rate for a subsidy program from a proceeding that Commerce considers reasonable to use, including the highest of such rates. Commerce developed its practice of applying our current hierarchy in selecting adverse facts available rates in CVD proceedings over many years, even before it was codified into the Act, to effectuate the statutory purpose of section 776(b) of the Act to induce respondents to provide Commerce with complete and accurate information in CVD proceedings in a timely manner.²¹

²¹ See *Hyundai Steel Co. v. United States*, 319 F.Supp.3d 1327, 1354 (CIT 2018) (quoting *Timken Co. v. United States*, 354 F.3d 1345 (Fed. Cir. 2004)) (“Commerce may employ adverse inferences about the missing information

We believe clarifying the hierarchy in our AD/CVD regulations would be beneficial to those who participate in Commerce's CVD proceedings.

Accordingly, we are proposing that we outline the hierarchical analysis that Commerce will normally use in selecting a countervailable subsidy rate on the basis of facts otherwise available in a CVD proceeding in § 351.308, by adding a new paragraph (g). Section 351.308(g), as proposed, describes the different hierarchical steps and analyses that apply to CVD investigations and CVD administrative reviews, and sets forth certain guidelines and principles governing the application of these hierarchical analyses, consistent with Commerce's long-standing practice.

13. Foreign Government Inaction that Benefits Foreign Producers:

13 (a) Calculation of Normal Value of Merchandise from Non-market Economy Countries – § 351.408

13 (b) Determination of Particular Market Situation – § 351.416

13 (c) Provision of Goods or Services – § 351.511

13 (d) Certain Fees, Fines, and Penalties – § 351.529

There are different means by which governments or other public entities benefit industries within their borders. One way is through direct subsidization, such as when a government takes certain actions to provide a subsidy to a firm within its borders, such as a grant,²² a loan,²³ or a loan guarantee.²⁴ Another means by which a government may provide a subsidy is through *inaction* – when the government fails to enforce its regulations, requirements, or obligations by not collecting a fee, a fine, or a penalty that the government should have

to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully”) (internal quotations and citations omitted); *see also Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2104) (“The purpose of (section 776(a) and (b) of the Act), according to the (SAA) ... is to encourage future cooperation by ‘ensur{ing} that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.’” (quoting the SAA at 870) and explaining that an adverse rate was selected not “to punish” a party in a CVD proceeding, “but rather to provide a remedy” for the government’s “failure to cooperate”).

²² *See* § 351.504.

²³ *See* § 351.505.

²⁴ *See* § 351.506.

otherwise collected under those regulations, requirements, or obligations. In that circumstance, the result is that the government has forgone revenue it was otherwise due, therefore benefiting the party not paying the fee, fine, or penalty. A government may also provide a subsidy by carving out circumstances where money, not related to tax revenues, is not due, therefore reducing foreign producers' cost of complying with regulatory requirements. Such inaction can be considered a financial contribution pursuant to section 771(5)(D)(ii) of the Act. There are many examples of a government providing benefits to parties through inaction. For example, a firm might have owed certain fees to the government for management of waste disposal, certain fines for violations of occupational safety and health standards in its facility, or certain penalties for non-compliance with other labor laws and regulations, yet the firm never paid the applicable fines or fees. A government may also have failed to take any action to collect fees, fines or penalties that were otherwise due in the first place. In both scenarios, it is Commerce's long-standing practice to treat unpaid and deferred fees, fines, and penalties as a countervailable subsidy, no matter if the government took efforts to seek payment, or otherwise recognized that no payment had been made or indicated to the company that it was permitting a payment to be deferred.²⁵

We recognize that every country retains discretion to pursue its own priorities, whether through directed efforts to assist in the economic success of its domestic industries, such as subsidies and government assistance, or by implementing and enforcing certain laws, policies and standards for the public welfare.²⁶ However, we also recognize that when governments take little or no action to implement or enforce such laws, policies, and standards, benefits may accrue

²⁵ See, e.g., *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, and Intent to Rescind Review in Part*; 2020, 87 FR 33720 (June 3, 2022), and accompanying Preliminary Decision Memorandum (PDM) at 17 (finding port usage fee exemptions provide a financial contribution in the form of revenue forgone, as described under section 771(5)(D)(ii) of the Act), unchanged in *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*; 2020, 87 FR 74597 (December 6, 2022), and accompanying IDM at 9; see also *AK Steel Corp. v. United States*, 192 F.3d 1367, 1382 (Fed. Cir. 1999) (sustaining Commerce's determination to treat the exemption from dockyard fees as a countervailable benefit).

²⁶ See Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 14 Harv. Int'l L.J. 47, 58 (1993).

to a company in a way that provides the company with a financial advantage over its competitors. We have, therefore, determined that it is important to issue a regulation under proposed § 351.529, titled “Certain Fees, Fines, and Penalties,” which incorporates our long-standing practice covering unpaid or deferred fees, fines, and penalties. We note that the proposed addition of this regulatory provision is not intended to preclude Commerce from examining such fees, fines, penalties, and similar government measures as alternative forms of financial contributions under other provisions of the statute and regulations, where the facts in those instances indicate other legal and analytical approaches are appropriate.

Proposed paragraph (a) under § 351.529 explains that a financial contribution exists if Commerce determines that a fee, fine, or penalty which is otherwise due, has been forgone or not collected within the meaning of section 771(5)(D)(ii) of the Act, with or without evidence on the record that the government took efforts to seek payment or acknowledged nonpayment or deferral. As we have noted, this countervailable subsidy encompasses instances of government inaction, where it is that inaction which evinces the existence of the financial contribution.

Proposed paragraph (b) explains that if the government has exempted or remitted a fee, fine, or penalty, in part or in full, and Commerce determines that it is revenue which has been forgone or not collected in paragraph (a), a benefit exists to the extent that the fee, fine, or penalty paid by the party is less than if the government had not exempted or remitted that fee, fine, or penalty. Likewise, also under proposed paragraph (b), if Commerce determines that payment of the fee, fine, or penalty was deferred, it will determine that a benefit exists to the extent that appropriate interest charges were not collected, and the deferral will normally be treated as a government loan in the amount of the payments deferred, according to the methodology described in § 351.505. The language for determining the benefit for nonpayment or deferral is similar to other revenue forgone benefit regulations, such as § 351.509, covering direct taxes, and § 351.510, covering indirect taxes and import charges (other than export programs).

In addition to the non-collection of payment for fees, fines, or penalties, or deferring such payments, there are other means by which foreign governments can assist foreign producers and suppliers, to the disadvantage of their foreign competitors, through inaction – by allowing those producers and suppliers to avoid certain compliance costs which would otherwise apply.

Government inaction and failure to enforce property (including intellectual property), human rights, labor, and environmental protections lowers the cost of production for firms in their jurisdiction.²⁷ This is because such firms are not paying a “cost of compliance” for which firms operating in other jurisdictions are responsible to meet regulatory standards.²⁸ The economics literature explains this in terms of externalities and public goods, identifying the fact that firms base their decisions almost exclusively on direct cost and profitability considerations, largely ignoring the indirect societal costs of their production decisions.²⁹

For example, foreign government environmental laws, policies, and standards might be weak, ineffective, or even nonexistent, allowing producers to dump toxic waste into the local water supply, or spew corrosive smog into nearby neighborhoods, which may enable producers to produce merchandise at costs lower than would be possible if the environmental laws were in place and effectively enforced. In other words, if a government does not require companies to mitigate the environmental impact of production, either through investing resources to avoid or minimize the environmental impacts, or by paying compensation for such impacts, their costs of production will be lower.³⁰ Of course, with lower costs, the foreign producers would also be able to take those cost savings and “race to the bottom” – charging their purchasers lower prices for their merchandise than their foreign competitors would be able to charge, all else being equal.

²⁷ See OECD, *OECD Regulatory Policy Outlook 2018: Glossary*, <https://www.oecd-ilibrary.org/sites/9789264303072-51-en/index.html?itemId=/content/component/9789264303072-51-en>, accessed February 2, 2021.

²⁸ *Id.*

²⁹ See International Monetary Fund (Thomas Helbling), “Externalities: Prices Do Not Capture All Costs,” *Finance & Development* (date unspecified); see also Coase, Ronald, “The Problem of Social Cost,” *Journal of Law and Economics*, 3 (1): 1-44 (1960); Cornes, Richard, and Todd Sandler, *The Theory of Externalities, Public Goods, and Club Goods*, Cambridge University Press (1986); and Paul Samuelson, “Diagrammatic Exposition of a Theory of Public Expenditure,” *The Review of Economics and Statistics*, 37 (4): 350-56 (1955).

³⁰ See The World Bank, *International Trade and Climate Change: Economic, Legal, and Institutional Perspectives* (2008), at 30-31.

In another example, failure by foreign governments to implement or enforce labor and human rights protection laws would allow for unsafe and unhealthy working conditions, slave or forced labor, child labor, and even human trafficking. This would allow companies to avoid paying costs associated with preventing or mitigating such adverse labor and human rights impacts and thereby reduce their costs of production.³¹

Similarly, if a producer incorporates certain technology into its production of merchandise which is subject to patent protections in the foreign country or abroad, but the foreign government does not act to enforce the intellectual property rights of the patent owner, absent the need to pay usage or licensing fees, the producer might enjoy a windfall not available to international competitors who, by law, are required to honor the rights of the patent owner and pay such fees. Put another way, companies would be able to use the knowledge others create without the high fixed costs of creating that knowledge themselves, or without paying the creator of the knowledge for its use, allowing the foreign producers to enjoy lower costs of production than they would if the intellectual property rights were properly enforced.³² Again, with lower and distorted production costs, the foreign producer in that scenario would be able to charge its customers less, all else being equal, than producers from countries in which intellectual property rights are respected and enforced.

Likewise, an unrelated entity might forcefully take over a company's factory or inventory in violation of the producer's property and real property rights, while the national government takes no action to prevent such usurpation. The result of such a forced transfer of managerial control could result in the price of the producer's merchandise being lowered to unprofitable levels.

³¹ See United Nations Human Rights Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights* (2012), at 5 and 40; and International Labor Organization, *The benefits of International Labour Standards*, <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm>, accessed January 30, 2023.

³² See World Intellectual Property Organization, *The Economics of Intellectual Property* (January 2009), at 2.

These examples of foreign government inaction could result in costs and prices that are unreasonably suppressed and create an unlevel playing field between producers and suppliers in countries in which governments provide weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, and environmental protections, and producers and suppliers in countries in which the governments provide and enforce such protections. When such standards are not enforced, the lack of enforcement does more than merely lower firms' production costs. Lower production costs can enable firms to lower prices for their products, which enable these firms to gain market share to the disadvantage of foreign competitors, including U.S. businesses, who pay such costs of compliance. For this reason, we propose to make certain modifications to the AD/CVD regulations to address this concern.

First, we proposed a modification to § 351.511(a), which applies to a CVD analysis covering the provision of goods or services. Under that provision, Commerce investigates whether goods or services are provided for less than adequate remuneration by the government.³³ In determining the adequacy of remuneration, Commerce is directed by the regulation to compare the “government price of the good or service to a market-determined price for the good or service.”³⁴ We believe that the lower and distorted prices that may result from the above-mentioned types of government inaction may, in some circumstances, not allow for appropriate comparisons.

For example, in selecting a benchmark under § 351.511(a)(2), if Commerce determines that parties have demonstrated, with sufficient information, that the above-mentioned types of government inaction distorted certain potential benchmark prices, Commerce may determine that those prices are unusable and should be excluded from consideration as a benchmark.

Historically, Commerce has rejected certain world market prices from its averaging exercise when evidence on the record supported a determination that certain “factors affecting

³³ See section 771(5)(D)(iii) of the Act; and § 351.511.

³⁴ See § 351.511(a)(2)(i).

comparability” existed that undermined the use of prices from a specific country,³⁵ and the CIT has affirmed this practice, holding that Commerce’s “method of calculating a world market price” was “reasonable,” and that “Commerce need not conduct an average where the prices to be included are not consistently reported or otherwise would have a distortive effect.”³⁶

As explained above, one of the main purposes of the trade remedy laws is to ensure a level playing field between U.S. producers and their foreign competitors. To achieve that goal in the context of a less than adequate remuneration analysis, it is appropriate to use benchmark prices pursuant to § 351.511(a)(2) that are not distorted due to government action or, in some cases, inaction.

For purposes of determining a benchmark under § 351.511(a)(2), in light of the fact that government inaction in certain matters can result in distorted prices, we therefore propose to add a provision to § 351.511(a)(2) which states that when parties have demonstrated, with sufficient information, that there is a likely impact on prices of that input as a result of weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, or environmental protections, we may exclude such prices from our benchmark analysis. It is important to note that this will not be an exercise Commerce intends to conduct in its analysis of every potential benchmark, but only when a party provides Commerce with sufficient evidence on the record which shows that a government’s inaction in enforcing, for example, environmental or labor protections, is likely to result in unreasonably suppressed prices, and therefore, those prices should be excluded from the benchmark.³⁷ If such arguments and evidence are provided to the

³⁵ Commerce explained in issuing the regulation in 1998 that rather than reject world market prices for not being comparable, it might, in specific circumstances, adjust world market prices for ADs and CVDs in those countries. However, it indicated that such an adjustment would only be made “to reflect a determination of dumping or subsidization made by the importing country with respect to the input product imported from the country from which the world market price is derived.” See *Countervailing Duties; Final Rules*, 63 FR 65348 (November 25, 1998) (*CVD Preamble*).

³⁶ See *Rebar Trade Action Coalition v. United States*, 398 F. Supp. 3d 1374, 1383 (August 8, 2019), affirming *Steel Concrete Reinforcing Bar from the Republic of Turkey, Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2015*, 83 FR 16051 (April 13, 2018), and accompanying IDM.

³⁷ The inclusion of consideration of government inaction with respect to property (including intellectual property), human rights, labor, or environmental protections in § 351.511(a)(2) is in no way intended to modify Commerce’s practice to consider foreign government actions or other relevant market conditions in accepting or rejecting proposed benchmarks.

agency, Commerce will consider that information and, where appropriate, exclude the use of prices from that country for that input in its benchmark calculation where Commerce determines that such practices likely render such prices unreliable and unreasonable.

Turning from the CVD law to the AD law, in selecting a surrogate value in determining normal value for non-market economy AD investigations and administrative reviews, Commerce is proposing a change to § 351.408 to provide that Commerce may consider weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, or environmental protections in its analysis, should interested parties raise the issue and submit information on the record in support of their claims.³⁸

Section 773(c)(1) of the Act states that in investigations and administrative reviews concerning non-market economy countries, Commerce should apply surrogate values from a market economy to a company's factors of production in determining normal value. The provision states that Commerce should select surrogate values based "on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." Generally, Commerce applies its standard factor valuation test, which is found in § 351.408(c), to determine appropriate surrogate values. However, Commerce proposes additional considerations in light of its practice and analysis over the last few years, especially in light of challenges to Commerce's use of certain labor values before the CIT,³⁹ in which the CIT directed Commerce to reconsider further its

³⁸ In addition to the consideration of government inaction on property (including intellectual property), human rights, labor, or environmental protections, we have included three additional considerations for disregarding proposed surrogate values in proposed § 351.408(d)(1) which were added to the Act in 2015 as section 773(c)(5), pursuant to the Trade Preferences Extension Act (TPEA). See TPEA of 2015, Pub. L. 114-27, 129 Stat. 362 (July 29, 2015); see also *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015) (*TPEA Dates Notice*). Section 773(c)(5) of the Act states that Commerce may "disregard price or cost values without further investigation if the administering authority has determined that broadly available export subsidies existed." It also states that Commerce may disregard proposed surrogate values if "particular instances of subsidization occurred with respect to those price or cost values." Finally, it states that Commerce may disregard proposed surrogate values "if those price or cost values were subject to an antidumping order."

³⁹ See, e.g., *Ad Hoc Shrimp Trade Action Comm. v. United States*, 219 F. Supp. 3d 1286, 1292 (CIT 2017) (citing *Final Results of Redetermination Pursuant to Court Remand, Ad Hoc Shrimp Trade Action Committee v. United States*, Court No. 15-00279, Slip Op. 17-27 (CIT March 16, 2017), dated June 6, 2017, available at

standard consideration of an appropriate labor value for purposes of its surrogate value analysis. In those cases, on remand, Commerce addressed in detail the fact that there may be certain elements that impact the costs of production, yet those elements are not addressed in Commerce's current factor valuation test. In each remand, Commerce determined that it had the authority to reject the use of certain surrogate values as inappropriate, outside of its standard factor valuation test, and in each case the court affirmed Commerce's redetermination in that regard.

For the reasons described above with respect to foreign government inaction, we have concluded that it would be beneficial to Commerce and the public to include this additional potential analysis in the AD regulations. We, therefore, propose adding paragraphs (d)(1) and (2) to § 351.408 which states that Commerce may disregard a particular surrogate value if it concludes that weak, ineffective, or nonexistent environmental, property (including intellectual property), labor, or human rights protections undermine the appropriateness of using a particular surrogate value in Commerce's analysis. Because such an analysis could be resource intensive, however, we are also proposing that such an analysis be applied only if the surrogate value at issue involves a significant input⁴⁰ or labor, and only if that proposed surrogate value is sourced

<https://access.trade.gov/resources/remands/17-27.pdf>, *aff'd Ad Hoc Shrimp Trade Action Comm. v. United States*, 234 F. Supp. 3d 1315, 1320 (CIT 2017)); *see also Final Results of Redetermination Pursuant to Court Remand, Tri Union Frozen Products Inc. et al. v. United States*, Consol. Court No. 14-00249, Slip Op. 17071 (CIT June 13, 2017), dated July 25, 2017, at 8-9, available at <https://access.trade.gov/resources/remands/17-71.pdf>, *aff'd Tri Union Frozen Prods., Inc. v. United States*, 254 F. Supp. 3d 1290 (CIT 2017), *aff'd Tri Union Frozen Products, Inc. v. United States*, 741 Fed. Appx. 801 (Fed. Cir. 2018) (collectively, *Tri Union Frozen*); *Refillable Stainless Steel Kegs from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 84 FR 57010 (October 24, 2019), and accompanying IDM at 35; and *Final Results of Redetermination Pursuant to Court Remand, New American Keg v. United States*, Slip Op. 21-30 (March 23, 2021), dated July 7, 2021, at 3 (citing *Tri Union Frozen*), available at <https://access.trade.gov/resources/remands/21-30.pdf>.

⁴⁰ Commerce has not defined the term "significant" for purposes of its usage in the term "significant input" for purposes of these regulations. This is because we have found that an input might at times be the most expensive input in producing subject merchandise, and therefore distortions in the cost of the input have a direct effect on the cost of production, while at other times the value of the input may be small in the overall cost structure of the subject merchandise, but the importance or uniqueness of the input to the function or existence of the product makes it significant.

from a single surrogate country or an average of values derived from a limited number of countries.⁴¹

Section 773(c)(4) of the Act provides that, in valuing factors of production, Commerce will “utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the non-market economy country and (B) significant producers of comparable merchandise.”

There may be times in which the administrative record reflects that all of the potential surrogate values for a particular input that come from a country at a level of economic development as the subject country and/or from a country that is a significant producer of comparable merchandise might not be appropriate to use as a surrogate value because of weak, ineffective, or nonexistent environmental, property (including intellectual property), labor, or human rights protections. In that case, if there are also alternative options on the record from countries that are not at a level of economic development comparable to the subject country and/or are not significant producers of comparable merchandise, we will consider those alternatives and might determine that the use of the comparable/significant producer valuations should not be used under the “extent possible” language of the Act. We therefore propose adding paragraphs (d)(3) and (4) to § 351.408 to allow for uses of potential surrogate values from other sources on the record in that situation.

Finally, we also propose including consideration of weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, and environmental protections that lower and distort costs of production as examples of a particular market situation, under proposed § 351.416. We discuss those examples below in describing the proposed particular market situation regulation.

⁴¹ Commerce anticipates that the phrase “limited number” will normally involve averaged values that are sourced from no more than three countries.

14. Regulation for Determining the Existence of a Particular Market Situation – § 351.416

On November 18, 2022, Commerce solicited comments from the public with respect to its cost-based PMS practice.⁴² As Commerce explained in its solicitation, in the TPEA, section 771(15) of the Act was amended to provide that Commerce consider sales to be outside the “ordinary course of trade” when there are situations in which Commerce “determines that the particular market situation prevents a proper comparison with the export price or constructed export price.”⁴³ Further, section 773(e) of the Act was amended to provide that in determining the “costs of material and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade,” for determining constructed value, “if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade,” Commerce “may use another calculation methodology under this subtitle or any other calculation methodology.”⁴⁴ As Commerce explained in the *PMS ANPR*, application of the cost-based PMS provisions in AD law has been complicated by the fact that the Act does not: “(1) define a particular market situation (‘PMS’), (2) identify the information which Commerce should consider in determining the existence of a PMS that ‘does not accurately reflect the costs of production in the ordinary course of trade,’ or (3) provide Commerce with guidance as to the information which Commerce should consider in determining if a market situation is, or is not, ‘particular.’”⁴⁵

Commerce explained in the *PMS ANPR* that in 2022, the Federal Circuit issued a decision which provided Commerce with some guidance on factors which Commerce should continue to consider in determining whether a cost-based PMS exists and how to adjust for that

⁴² See *PMS ANPR*.

⁴³ See the TPEA; see also *TPEA Dates Notice*, 80 FR 46793.

⁴⁴ See sections 771(15) and 773(e) of the Act.

⁴⁵ See *PMS ANPR*, 87 FR 69234.

cost-based PMS.⁴⁶ In light of that decision, Commerce determined that it was appropriate to issue regulations explaining the procedures to determine if a cost-based PMS exists, and other matters related to a PMS determination.

The Federal Circuit held in *NEXTEEL* that Commerce’s finding that a cost-based PMS existed in Korea during the period of review was unsupported by substantial evidence.⁴⁷ In analyzing Commerce’s PMS determination, the Federal Circuit appeared to reach at least four conclusions.

- (1) A cost-based PMS must cause costs to deviate from what they would have otherwise been in the ordinary course of trade.⁴⁸
- (2) A cost-based PMS must be particular to certain producers or exporters, inputs, or the market where the inputs are manufactured, during the relevant period.⁴⁹
- (3) If the cost-based PMS involves a countervailable subsidy, Commerce’s analysis should not be conclusory, but analyze if a subsidy existed during the period of review and indicate that the countervailable subsidy “affected” the costs of producing the subject merchandise or the prices and costs of an input into the cost of production.⁵⁰
- (4) Finally, Commerce is not required to precisely quantify a distortion in costs by the PMS to find the existence of a PMS, but if Commerce is able to quantify the distortion, such a quantification may help support a finding of the existence of a PMS.⁵¹

In light of the Federal Circuit’s holding and analysis in *NEXTEEL*, as well as our experience in administering the PMS provision over the past several years, we determined that it was appropriate to revisit Commerce’s approach to analyzing and determining the existence of a

⁴⁶ *Id.*

⁴⁷ See *NEXTEEL Co. v. United States*, 28 F.4th 1226 (Fed. Cir. 2022) (*NEXTEEL*).

⁴⁸ *Id.*, 28 F.4th at 1234.

⁴⁹ *Id.*, 28 F.4th at 1234 and 1236.

⁵⁰ *Id.*, 28 F.4th at 1235-36.

⁵¹ *Id.*, 28 F.4th at 1234.

PMS that distorts costs of production.⁵² Therefore, the PMS ANPR requested public comment and, in particular, information on the following: (1) identify information which they believe Commerce should consider in determining if a PMS exists which distorts the costs of production if that information is reasonably available and relevant to the PMS allegation; (2) identify information which they believe Commerce should not be required to consider when determining if a PMS exists; and (3) provide comments on adjustments which Commerce may make to its calculations when it determines the existence of a PMS, but the record before it does not allow for the precise quantification of cost distortions.⁵³ We received 19 submissions providing responses to our questions, and offering additional suggestions and other views and arguments.

After considering Commerce's practice, the Federal Circuit's analysis in *NEXTEEL*, and the submissions we received in response to the *PMS ANPR*, we propose that we issue a new regulation – “§ 351.416 Determination of a particular market situation.” The proposed regulation has multiple paragraphs. The first proposed paragraph, (a), defines the two types of PMS identified in the statute – a PMS that prevents a proper comparison of sales prices in the home country market with U.S. export prices and constructed export prices (a “sales-based PMS”), and a PMS that distorts the costs of production of the merchandise subject to an investigation, suspension agreement, or an AD order (a “cost-based PMS”).

Proposed paragraph (b) of § 351.416 explains that an interested party making an allegation of a PMS must support that allegation on the record with information that is relevant to the allegation and reasonably available to that interested party. Commerce recognizes that sometimes importers and domestic producers, for example, may not have access to foreign prices and costs; thus, Commerce will expect that they provide only evidence with their claim that is reasonably available. That being said, if they are alleging the existence of a PMS that was alleged and/or analyzed in a previous segment of the same proceeding, the proposed regulation

⁵² See *PMS ANPR*, 87 FR 69235.

⁵³ *Id.*

also explains that they must identify the facts and arguments in the submission which are distinguishable from the previous segment. It is a burden on both the agency and other parties when an allegation is submitted in a segment and the alleging party does not indicate where the facts or claims diverge from previous allegations before Commerce.

Proposed paragraph (c) of § 351.416 addresses a sales-based PMS, and in proposed § 351.416(c)(1) provides examples of such particular market situations in the home market. Furthermore, proposed § 351.416(c)(2) explains that similar government actions and inactions in a third country to those examples may prevent third country prices from being properly compared to export prices and constructed export prices. Finally, in proposed § 351.416(c)(3), the proposed regulation explains that when Commerce determines that a circumstance or set of circumstances prevents a proper comparison between foreign market sales prices and export prices or constructed export prices, Commerce may conclude that it is necessary to determine normal value by using a constructed value, in accordance with section 773(e) of the Act and § 351.405.

The remainder of proposed § 351.416 addresses a cost-based PMS analysis. Proposed paragraph (d) of § 351.416 explains that the first step in Commerce's analysis is to determine if the record information supports a determination that a market situation exists. Commerce will review the record information to determine if a distinct circumstance, or set of circumstances, exists that distorts the cost of production, such that: (1) the costs of materials and fabrication do not accurately reflect the cost of production in the ordinary course of trade; and (2) the record evidence reflects that the distinct circumstance or set of circumstances being alleged likely contributed to the distortion in prices or costs of a significant input, or the costs of production. This analysis is usually qualitative, rather than quantitative, in nature, although sometimes a market situation can be shown through a quantitative analysis – such as the nonpayment of trade remedies upon importation in a foreign country, or the reimbursement by a foreign government for the payment of trade remedies. In either case, whether Commerce's analysis is solely

qualitative or both qualitative and quantitative, paragraph (d)(2) of proposed § 351.416 explains that Commerce will consider all relevant information submitted on the record by interested parties, and provides some examples of information that Commerce has determined to be especially helpful in its analysis of alleged market situations: (1) comparisons of prices with and without the existence of the market situations; (2) detailed reports and documentation issued by foreign governments, market analysis organizations, or academic institutions that analyze government and nongovernmental programs and actions and conclude that considerably lower prices for a significant⁵⁴ input into the production of subject merchandise would likely result; (3) similar reports that analyze, instead, price deviations for significant inputs and conclude that such deviations resulted, in whole or in part, from certain government or nongovernmental actions; and (4) Commerce's previous determinations, whether they be preliminary, final, or in a remand redetermination, that information on the record did, or did not, support the existence of the alleged PMS. Commerce also includes an additional type of information on the list, (5), which is unique to allegations of a market situation due to weak, ineffective, or nonexistent property, intellectual property, human rights, labor, and environmental protections, in that pursuant to such an allegation, Commerce will consider information derived from other countries where those protections are allegedly effectively enforced to determine if the lack of protections in the subject country contributed to cost distortions.

In requesting information from the public in the *PMS ANPR*,⁵⁵ Commerce not only requested comments on the type of information that would be helpful to consider in most PMS analyses, but also requested comments on information that Commerce would not be required to

⁵⁴ As noted above, Commerce has intentionally not defined the term "significant" for purposes of its usage in the term "significant input" in these regulations. This is because we have found that an input might at times be the most expensive input, while at other times the value of the input may be small but the importance or uniqueness of the input to the function or existence of the product makes it significant. For example, the cost of a unique microchip in manufacturing an electronic device might be relatively inexpensive in comparison to other inputs into the production of the device, but because of the importance of the microchip to the functions of the device, if the cost of the microchip is suddenly reduced by two-thirds, the considerable change in price might have out-sized effects on the overall cost of production of the device. We would find that such an input in that scenario is also a "significant" input.

⁵⁵ See *PMS ANPR*, 87 FR 69235.

consider, as a rule, in every case involving a cost-based PMS analysis.⁵⁶ The reason behind this question is one of administrability and practicability. It has been our experience that some parties will provide information to Commerce that may seem relevant, but does not assist the agency's analysis. To save all parties involved time and effort, we have therefore determined to propose that Commerce not be required to consider four types of information and associated arguments in every cost-based PMS analysis.⁵⁷

For the first example of information that we will not be required to consider as part of our analysis in most of our cost-based PMS cases, in paragraph (d)(3) of proposed § 351.416, we describe an argument in which a party claims that because the interested party alleging the existence of a PMS is unable to provide data on the record precisely quantifying the distortions of prices or costs in the market of the subject country, that inability to quantify the distortions with precision should prohibit a finding of a PMS. We do not find the lack of precision in the quantifiable data relating to the distortion of costs to be fatal to a PMS determination. Accordingly, we have proposed in the regulation that we will not normally consider challenges to the precision of such quantifiable data in our cost-based PMS analysis. As we explain above, the Federal Circuit in *NEXTEEL* explicitly stated that Commerce is not required to precisely quantify a distortion in costs by the PMS to find the existence of a PMS.⁵⁸ This is logical because often Commerce has information on the record that shows certain governmental or nongovernmental actions (or inactions) that are likely to have an impact on the costs of production of subject merchandise in the market of the subject country, given the nature of the action or inaction and the product at issue, but no party has quantified, with precision, that impact. In such a case, the record might reflect that it is reasonable to determine that a PMS exists from the evidence before Commerce, but some interested parties would argue that we

⁵⁶ *Id.*

⁵⁷ This is not to say that Commerce is prohibited from considering such information and arguments, but we propose that Commerce be not required in most cases to consider data that, based on the agency's experience, are not helpful to the PMS analysis.

⁵⁸ See *NEXTEEL*, 28 F.4th at 1234.

nonetheless should be prohibited from making such a determination because of the absence of precise quantifiable data. Although Commerce has the authority to consider such an argument, such an argument is typically unhelpful to our analysis. We therefore propose that Commerce would not be required to consider such an argument in its PMS analysis.

Second, we propose that Commerce would not be required to consider speculative costs or prices. In the event that an interested party speculates what the costs of the subject merchandise, or prices or costs of a significant input into the production of subject merchandise, would be absent the alleged market situation, or its contributing circumstances, without objective documentation to support such speculation, we would not be required to consider such speculative costs or prices in our analysis. Although Commerce need not use precise quantifiable data to find the existence of a PMS, Commerce also should not rely on mere hypotheticals and speculations, with no objective data to support such claims. Accordingly, we propose that Commerce not be required to address proffered costs and prices in its PMS analysis if those costs and prices are not supported by independent and government studies, former Commerce cost-based PMS determinations, or certain other economic information.

Third, we proposed that Commerce not be required to consider information about actions taken or not taken by governments, state enterprises, or other public entities in other market economy countries in comparison with the actions taken or not taken by the government of the subject country. In general, actions taken by each government that might distort costs within its own borders have no bearing on the market-distorting actions taken by governments in other countries. An exception is when Commerce is considering whether government inaction in providing certain protections distorts the costs of production in the subject country, in which case Commerce might find certain actions taken by other governments in other countries to be informative and potentially beneficial. In such cases, if a government provides weak, ineffective, or nonexistent property, intellectual property, human rights, labor, or environmental protections to a producer of subject merchandise or a supplier of significant inputs into the

production of subject merchandise, the lack of such protections might distort the costs of production, but the only potential way to identify such distortions is to consider the protections granted by other governments to similar industries in other countries and the costs of production for those similar industries under such governmental protections. Therefore, we propose that Commerce would not normally be required to consider the actions or inactions of governments of countries other than the subject country in our analysis, except when there are alleged market situations involving government failures to implement or enforce certain protections.

Finally, we propose that Commerce would not be required to consider references to historical policies and previous actions taken by the government of the subject country with respect to the subject merchandise or a significant input into the production. Parties sometimes claim that because an export restriction, or other market-distorting policy or practice, has existed for many years in the subject country, the costs resulting from those actions or policies are now part of the “ordinary course of trade” for that country, and thus Commerce cannot determine that such actions or policies “distort” costs. We do not find such a claim to be persuasive. As the proposed regulation states, “the pre-existence of government actions or inactions, or other circumstances, does not make those situations market-based or nullify the distortion of costs during the relevant period of investigation or review.” We find that actions taken by a foreign government that are not in accordance with general market principles or otherwise result in price suppression will normally distort costs of production and will continue to distort costs of production every year they are in effect. Therefore, we propose that Commerce not be required to consider such unreasonable claims and information in its market situation analysis.

When Commerce determines the existence of a market situation in the subject country such that the cost of materials and fabrication or other processing does not accurately reflect the cost of production in the ordinary course of trade, proposed paragraph (e) of § 351.416 requires that Commerce next consider if that market situation is particular. Under proposed paragraph (e)(1) of § 351.416, a market situation is particular if the resulting distortions in prices or costs

impact only certain products or certain parties in the subject country. The distinction turns on whether the situation impacts a “particular market,” or all market activity in the country. If it impacts all market activity in a country in some way, Commerce must determine whether the market situation impacts certain parties or products to a greater extent than others, and is therefore still “particular” for purposes of a PMS analysis, or if the impact is generally spread uniformly among the country as a whole. In response to the numerous comments which we received from outside parties on this issue, proposed paragraph (e)(1) of § 351.416 also makes clear that: (1) a market situation may be considered particular even if a large number of distinct products or parties are affected; (2) a market situation can exist in multiple countries and still be considered “particular” for purposes of a PMS analysis if Commerce determines that the market situation distorts the costs of only certain products or affects only certain parties in the subject country; and (3) a market situation can be determined to be particular in several distinct circumstances, and can be particular to certain products, importers, producers, exporters, purchasers, users, enterprises, or industries, either individually or in combination with other entities. It is important to emphasize that although this list of particular entities that might be affected by a PMS is not exhaustive, multiple outside parties requested that Commerce emphasize in its regulations that for a market situation to be particular, it need not be “unique” or excessively narrow in its application. We agree with those concerns, and believe the language in the proposed regulation, including the list of particular entities that might be affected by potential market situations, will provide clarity in that regard.

Just as the regulations under proposed paragraph (d)(2) of § 351.416 list information which Commerce normally will consider helpful in determining if a market situation exists that distorts the costs of production, proposed paragraph (e)(2) lists information which Commerce will likely find helpful in determining if a market situation is particular. Specifically, the provision states that Commerce may consider all relevant information submitted on the record by interested parties including, but not limited to, the size and nature of the market situation, the

volume of merchandise potentially impacted by the price or cost distortions resulting from the market situation, and the number and nature of the potential entities affected by those price or cost distortions.

We recognize that each type of PMS is distinct and different from others and, therefore, the factors Commerce considers in its particularity analyses will largely vary from market situation to situation. For example, if Commerce determines that a particular company has been permitted to produce subject merchandise without providing effective pollution controls or labor, health, and safety protections, the analysis Commerce will conduct to determine if such a circumstance is particular will be different from an analysis of a country-wide non-countervailable subsidy that benefits producers of certain aluminum products. For this reason, in these proposed regulations, we have refrained from identifying information which should not be required as part of our particularity analysis, because data which are important to determine if one market situation is particular might in fact be unimportant for another.

In the *PMS ANPR* we also requested “comments on adjustments which Commerce may make to its calculations when it determines the existence of a PMS, but the record before it does not allow for the quantification of cost distortions.”⁵⁹ As a matter of clarification, the Federal Circuit held in *NEXTEEL* that nothing “in the statute requires Commerce to quantify the distortion *precisely*.”⁶⁰ Accordingly, under proposed paragraph (f) of § 351.416, if Commerce is “unable to precisely quantify distortions in costs based on record information,” then Commerce may use any reasonable methodology to adjust its calculations based on the relevant information available. This proposed language was developed after consideration of the many adjustments suggested by outside parties including previously calculated CVD rates, regression analysis models, a benchmarking analysis, and the use of surrogate values. Although we agree that each of these suggested adjustments to Commerce’s cost calculations might be warranted in certain

⁵⁹ See *PMS ANPR*, 87 FR 69235.

⁶⁰ See *NEXTEEL*, 28 F.4th at 1235 (emphasis added).

circumstances, we propose that, as a general matter, when a PMS cannot be precisely quantified, Commerce may use a methodology to adjust its calculations that is reasonable based on the facts in the record before it.

Many commenters on the *PMS ANPR* also indicated that it would be beneficial to both Commerce and the public if the regulations provided examples of particular market situations that distort, or contribute to the distortion of, the costs of production in the subject country. Therefore, proposed paragraph (g) provides 12 examples of potential particular market situations that alone, or in conjunction with other examples, may be addressed by Commerce in its AD calculations.

In two of the examples (examples six and seven), a foreign government does not require an importer, producer, or exporter of the subject merchandise to pay duties or taxes associated with certain trade remedies for a significant input, or the foreign government rebates the duties or taxes paid by those parties.⁶¹ Because in both of those examples the market distortion can be precisely quantified by the unpaid or rebated duties, those examples do not require further analysis.

Each of the remaining 10 examples requires that Commerce: (1) identify the potential market situation; (2) analyze and determine if the potential market situation likely contributes to cost or price distortions (and is therefore, in fact, a market situation); (3) analyze and determine whether the market situation is particular; and (4) assess whether the cost or price distortions “can be addressed in the Secretary’s calculations of the costs of production.”

The first five examples apply only when the alleged PMS contributes to price or cost distortions of a significant input into the production of subject merchandise in the subject country. The first example involves the concern of global overcapacity; regardless of the impact

⁶¹ For example, Commerce has found the nonpayment of ADs and safeguard measures to be a PMS. *See, e.g., Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017-2018*, 84 FR 64041 (November 20, 2019), and accompanying IDM at Comment 2.

of such overcapacity of the significant input on other countries, if the supply of the input is excessive enough to contribute to distortions of the price or cost of that input in the subject country, Commerce may address that overcapacity through its calculations.

On the other hand, the second, third, fourth, and fifth examples pertain to circumstances involving the foreign government; specifically market situations in which: (A) the foreign government, a state-owned enterprise or other public entity is the predominant producer of a significant input; (B) the foreign government, a state-owned enterprise, or other public entity intervenes in the market for a significant input; (C) the foreign government limits exports of a significant input; and (D) the foreign government imposes export taxes on a significant input.

Four of the remaining examples involve government, state-owned enterprise, or other public entity actions or inactions that contribute to distortions to either the price or the cost of a significant input into the production of subject merchandise, or directly to the overall cost of production of the subject merchandise itself. The eighth and ninth examples pertain to market situations in which those entities either provide direct financial assistance or other support to producers or exporters of the subject merchandise or significant inputs,⁶² or otherwise influences the production of subject merchandise or significant inputs through indirect actions, such as domestic-content and technology transfer requirements. The tenth and eleventh examples pertain to government inaction, in which the foreign government or other public entity provides weak or ineffective property, intellectual property, human rights, labor, or environmental protections, which contribute to distortions in the costs of production of the subject merchandise or price or cost of significant inputs, or provides no protections whatsoever, and again, the result is the likely distortion of the costs of production of the subject merchandise or price or cost distortions of a significant input.

⁶² To be clear, government assistance may take the form of a subsidy, whether countervailable or not, but may also take other forms. A countervailable subsidy requires that the subsidy be a financial contribution that provides a benefit and is specific. *See* sections 771(5) and (5A) of the Act. However, government assistance need not be countervailable to distort cost of production. Therefore, Commerce may consider if non-countervailable government assistance satisfies the criteria of a cost-based PMS.

Finally, the last example involves no government involvement, but instead pertains to business relationships between producers and input suppliers, such as strategic alliances or noncompetitive arrangements, in which the prices of the significant inputs are not determined in accordance with market-based principles, and those relationships likely contribute as well to distortions in the costs of production.

As we explain above, there are many types of distinct circumstances and sets of circumstances that may distort the costs of production in a subject country, and many combinations of potential products and parties that may be particularly impacted by those situations. Accordingly, although we believe these 12 examples are illustrative and helpful, we wish to make clear that the list of examples in proposed paragraph (g) of § 351.416 is not intended to be exhaustive.

Finally, we acknowledge in proposed paragraph (h) of § 351.416 that when Commerce determines the existence of a cost-based PMS, it is possible that in some cases that Commerce may conclude that the cost-based PMS contributes to the existence of a price-based PMS, in accordance with section 771(15) of the Act. We expect that including this provision in the regulation will provide additional clarity to our enforcement of both types of particular market situations addressed in the Act.

The proposed regulation does not include a “cost-based improper comparison” provision as suggested by some commenters, in which Commerce would presume as a matter of course that when it determines that there is a cost-based PMS that distorts the market to a certain degree, a proper comparison between foreign market prices and U.S. prices would automatically no longer be possible and Commerce would therefore determine normal value using a constructed value. Even in hypothetical situations in which a cost-based PMS is so distortive that it alone could lead to an improper comparison of prices between markets, Commerce would still need to consider the facts of the record before it, in the first instance, before reaching such a conclusion. We do not believe that it would be appropriate for the proposed regulations to incorporate such a

presumption as to Commerce's conclusions on such a matter, and therefore the proposed regulation does not contain such a presumption.

Commerce considered certain other suggestions by commenters and, although many were helpful and relevant, we have declined to include them in this proposed rule. For example, one commenter suggested that Commerce expand its consideration of government assistance in its cost-based PMS analysis to include transnational subsidies, *i.e.*, subsidies conferred by the government of a country that is not the exporting country in which the class or kind of merchandise is produced, exported, or sold. As we have not, to date, applied a cost-based PMS analysis in any investigation or administrative review to transnational subsidies, and believe that such an application in the first instance would require analysis and consideration of the program and facts unique to that program, we do not consider it appropriate to incorporate such an analysis into the proposed regulations.

In addition, we have not incorporated submission deadlines in the proposed § 351.416, but do want to emphasize that moving the deadline for the sales-based PMS allegation later in the proceeding, as suggested by some commenters, would make it more difficult for the agency to determine if a PMS exists that prevents a proper comparison of foreign market prices and U.S. prices. Thus, although we continue to have the ability to set time limits outside of these regulations in our investigations and administrative reviews, we have not proposed and do not intend to modify either of the deadlines for submitting a sales-based or cost-based PMS allegation.

Furthermore, this proposed rule does not incorporate a general "rebuttable presumption" in its regulations, as suggested by commenters, that reflects that, when Commerce determines that a cost-based PMS exists in the subject country such that the cost of materials and fabrication or other processing does not accurately reflect the cost of production in the ordinary course of trade in a particular segment of a proceeding, in future segments of the same proceeding Commerce would presume that the distortion of costs and a PMS continues to exist until a

producer or exporter provides affirmative evidence that rebuts that presumption and shows that costs are no longer being distorted by the PMS. Commerce considered whether such a general presumption should exist only for those interested parties who were actually reviewed when Commerce found a PMS to exist in the first place, whether the presumption should apply to all potential parties impacted by a PMS in a given AD investigation or administrative review, or whether the presumption should apply to all future parties potentially impacted by a PMS under a given AD order. There was even a comment that Commerce should “carry” a PMS determination “across cases” such that an affirmative PMS finding in a particular market in one case would establish the existence of a PMS in that same market in other cases involving different merchandise unless new information is placed on the record of those other cases that contradicts that presumption.

Commenters frequently emphasized that, as with Commerce’s non-market economy presumption, under section 773(c) of the Act, a finding of a cost-based PMS is also an acknowledgement that there are “non-market principles” at play, and therefore, like the non-market economy presumption, when Commerce finds a cost-based PMS to exist, the burden to prove that it no longer exists in future segments should lie with the alleged recipients and beneficiaries of the cost-based PMS and not with Commerce.

This proposed rule does not include a general cost-based PMS rebuttable presumption because, unlike a non-market economy designation, which applies to the entire economy, a cost-based PMS is focused on a distinct circumstance or set of circumstances, and may be particular to certain products or individuals one year, and then not apply to those products or individuals in the subsequent years. In fact, it is our observation that it is not uncommon for the existence of a PMS to change from period to period. Although “non-market principles” can be at play in finding that a PMS distorts costs, and some particular market situations may reliably continue from year to year, given the wide variety of types of particular market situations, the multiple possible PMS beneficiaries, and the constantly changing nature of certain cost-based particular

market situations, we determine that incorporating a general and overarching rebuttable presumption into these regulations for all cost-based particular market situations is inappropriate at this time.

Finally, there were several comments on the appropriate analysis which Commerce should apply in determining if a PMS is distorting the cost of production. There were certain commenters that suggested that if Commerce qualitatively determines the existence of a market situation, Commerce should presume from that conclusion that distortions in prices or costs are caused by the PMS. On the other hand, there were commenters that suggested that Commerce must prove a “causal link” between a PMS and cost distortions to prove that the costs do not accurately reflect the cost of production in the ordinary course of trade. One commenter even suggested that a cost-based PMS can *only* exist if it is so distortive as to create a price-based PMS that prevents a proper comparison, while other commenters expressed concerns with Commerce’s description in its *PMS ANPR* of the Federal Circuit’s analysis in *NEXTEEL* with respect to countervailable subsidies, suggesting that Commerce incorrectly claimed that the Federal Circuit required a “pass-through” analysis for Commerce to find the existence of a PMS under those circumstances.

In considering comments on the appropriate standard that Commerce should apply in determining whether a PMS is distorting the cost of production, we recognize the real-world complexities and effects of particular market situations in concluding that a direct cause and effect analysis is simply not realistic or appropriate. For example, prices for specific inputs might not be publicly available for comparison purposes, or it might be impossible to precisely quantify the distortive effects of unenforced intellectual property protections, the failure to impose environmental protections, the use of slave or forced labor, or the imposition of domestic content or technology transfer requirements. Unquestionably, all these circumstances could contribute to market distorting situations, but adopting a direct “cause and effect” or “pass through” analysis would allow many of those market-distorting situations to avoid being

addressed as a PMS. Accordingly, we have not adopted a “cause and effect” standard in this proposed rule to identify the impact of a PMS on cost (and input price) distortions.

On the other hand, neither have we adopted a presumption that all potential cost-based particular market situations distort costs absent information on the record that would support a claim of such distortion or suggest that an impact on costs or prices occurred or might be occurring. We do not believe such a presumption would be reasonable given the fact-intensive nature of PMS determinations.

Accordingly, under proposed paragraph (g) of § 351.416 Commerce will consider, on a case-by-case basis, all relevant information on the record pertaining to an alleged cost-based PMS and determine whether it is more likely than not that the alleged market situation is contributing to the distortion of prices or costs in the subject country. Using this “likely to contribute to price or cost distortions standard,” Commerce will take into consideration both the nature and details of an alleged PMS, as well as information relative to the costs of production of the subject merchandise or prices and costs of a significant input into the production of the subject merchandise. We believe that such a standard reflects the reality of a cost-based PMS analysis, while still being tied to the relevant evidence on the record pertaining to possible cost or price distortions.⁶³

With respect to the Federal Circuit’s analysis in *NEXTEEL*, Commerce determined in an antidumping administrative review that the Korean government provided subsidies to producers of hot-rolled steel flat products in Korea, and that those subsidies distorted the market costs of Korean hot-rolled coil (HRC), a significant input into the production of the merchandise under review. Indeed, Commerce concluded in the administrative review that because HRC, as an

⁶³ We emphasize that our PMS analysis is based on record evidence. Although Commerce does not believe the application of a direct cause-and-effect analysis to particular market situations would satisfy the purpose of the legislation, and could in fact allow programs to go unaddressed that otherwise impact and suppress the costs of production, substantial evidence on the record still must support a determination that a PMS was more likely than not to contribute to distortions in the prices or costs of significant inputs or the cost of producing the subject merchandise. Therefore, Commerce may only find the existence of a PMS if the parties have submitted sufficient record information to demonstrate that the market situation exists, there has been a distortion in costs, and the market situation has more likely than not contributed to that distortion in costs.

input, constituted approximately 80 percent of the cost of the subject merchandise, any distortions to the cost of HRC would have a significant impact on the overall production costs of that merchandise. In determining the existence of the countervailable subsidy, Commerce relied on its determination in the preceding investigation, which was based on application of adverse facts available, pursuant to sections 776(a) and (b) of the Act. The Federal Circuit, upon review of the record before it, and the remand redeterminations issued by Commerce in the litigation, concluded that even after the agency provided more analysis on remand, “the record evidence is at best mixed on whether significant Korean government subsidies existed during the period of review.”⁶⁴ Further, after explaining that Commerce was required to show the subsidies “affected the price of the input” to the extent that they “did ‘not accurately reflect the cost of production in the ordinary course of trade,’ 19 U.S.C. § 1677b(e),” the Federal Circuit explained that Commerce had neither made a “finding that any subsidies were passed through to the prices of HRC,” or, referencing back to the particularity requirement, “that they affected Korean OCTG producers any more than OCTG producers elsewhere.”⁶⁵

We agree with the commenters who have explained that the Federal Circuit in this decision was not claiming that Commerce was obligated to apply a “pass-through” analysis every time it analyzes a countervailable subsidy to determine if that subsidy has also resulted in a cost-based PMS. We do not believe that the Federal Circuit’s statement was intended to create a new obligation for Commerce to apply to allegations that a countervailable subsidy creates a cost-based PMS. Further, there is nothing in the Act, legislative history, or even in the facts of the administrative review which was before the Court in *NEXTEEL* that would suggest that Commerce is required to conduct an analysis which it would not normally even be required to apply in a CVD investigation or administrative review.

⁶⁴ See *NEXTEEL*, 28 F.4th at 1235.

⁶⁵ *Id.*, 28 F.4th at 1235-36.

However, it is evident that the Federal Circuit did not believe that the conclusory nature of Commerce’s analysis of the alleged PMS in the case before it, which was associated with countervailable subsidies to Korean HRC producers, was an adequate basis to determine the existence of that particular cost-based PMS.⁶⁶ The Federal Circuit mentioned that evidence was “at best mixed” of the continued existence of the subsidies at issue during the period of review, but also highlighted that there was essentially no analysis of the alleged effects of those subsidies on the input at issue, Korean HRC. In light of the Federal Circuit’s expressed concerns in *NEXTEEL*, we propose these regulations to provide a less conclusory and more methodical analysis when examining if a subsidy-based PMS exists. Accordingly, we believe that for most alleged cost-based particular market situations, the incorporation of a “likely to contribute to price or cost distortions” step in Commerce’s PMS analysis, separate and removed from the identification of the market situation is not only reasonable, but satisfies the Federal Circuit’s emphasis that an objective analysis determine if a PMS “affects” prices or costs.

15. Benefit – § 351.503

This proposed rule includes a proposed amendment involving Commerce’s CVD benefit regulation at § 351.503. We are proposing that we divide paragraph (c) of § 351.503 into two paragraphs. The first paragraph would incorporate existing paragraph (c), with an additional explanation that Commerce is not required to consider whether there has been any change in a firm’s behavior because of a subsidy.

The proposed second paragraph would be new and would explain that when the government provides assistance to a firm to comply with certain government regulations, requirements, or obligations, Commerce will normally only measure the benefit of the subsidy and will not be required to also consider the compliance costs themselves. This proposed paragraph is not intended to change existing § 351.503, which is based on the statutory language

within sections 771(5)(C) and 771(6) of the Act and was originally explained by examples in the CVD Preamble explicitly demonstrating this point.⁶⁷ However, we are proposing this additional language for clarity on the issue of compliance costs so that parties will understand that if the firm accrues additional costs through compliance with government obligations, those costs need not be part of Commerce's benefit analysis of the subsidy.

16. Loans – § 351.505

With respect to Commerce's CVD loan regulation, we propose moving current § 351.505(d) to a new § 351.505(e) and adding a new provision in paragraph (d) titled "Treatment of outstanding loans as grants after three years of no payments of interest or principal."

Proposed new § 351.505(d) addresses loans upon which there have been no payments of interest and principal over a long period of time. Our current practice is that when we examine these types of loans in which there have been no payments of either interest or principal over an extended period of time we treat them as interest-free loans. It is evident, however, that if the foreign government or a government-owned bank has not collected interest or principal payments on an outstanding loan after a three-year period, the foreign government made a decision to simply not collect that interest or principal at all. We therefore propose that, if no interest and principal payments have been made to the government or a government-owned bank on a loan for three years, Commerce would normally treat the outstanding loan as a grant. To ensure consistency with section 771(5)(E)(ii) of the Act, we also propose that we would not treat this type of loan as a grant if the respondent can demonstrate that this nonpayment of interest and

⁶⁷ See *CVD Preamble*, 63 FR 65361.

principal is consistent with the terms of a comparable commercial loan that it could obtain on the market.

We propose a three-year period as the triggering time period for treating a loan as a grant. We considered standard practices for the period in which banks write off bad debt; however, these practices did not provide sufficient administrative and public clarity and guidance for purposes of the CVD regulations. For example, according to a survey by the Bank for International Settlements, most jurisdictions do not prescribe a timeline for the write-off of loans, leaving this to the discretion of banks.⁶⁸ According to the World Bank Group, loans are usually written off if there are no realistic prospects of recovery.⁶⁹ International Financial Reporting Standards (IFRS) 9 requires a whole or partial write-off if “an entity has no reasonable expectations of recovering the contractual cash flows on a financial asset.”⁷⁰ According to the *Financial Accounting Manual for Federal Reserve Banks, January 2017* at Chapter 81.02, a bank should recognize an allowance for loan loss when it is probable that the bank will be unable to collect all amounts due, including both the contractual interest and principal payments under the loan agreement. Therefore, we propose a three-year period of nonpayment of interest and principal on the outstanding loan to identify when an outstanding loan would be treated as a grant. As noted, respondents may demonstrate that the loan should not be treated as a grant by showing that they could obtain a comparable loan with these terms of nonpayment.

⁶⁸ See *Non-Performing Loan Write-Offs: Practices in the CESEE Region*, Policy Brief – September 2019, World Bank Group, at 4.

⁶⁹ *Id.* at 2.

⁷⁰ *Id.*

17. Equity – § 351.507

For Commerce’s equity regulation, we propose moving current § 351.507(c), with minor modifications, to a new § 351.507(d) and adding a new provision in paragraph (c) titled “Outside investor standard.”

The proposed investor standard would codify our long-standing practice in which the analysis of equity is conducted with respect to whether an outside private investor would make an equity investment into that firm under its usual investment practice, not whether a private investor who has already invested would continue to invest. Although not explicitly discussed in the *CVD Preamble*, in our analysis as to whether a firm is equityworthy, Commerce makes a distinction therein between “inside” shareholders and private “outside” investors.⁷¹ The *CVD Preamble* states that under the *1989 Proposed Regulations*,⁷² an equityworthy firm was one that showed “an ability to generate a reasonable rate of return within a reasonable period of time,” and in 1998 Commerce codified that understanding in § 351.507(a)(4)(i).⁷³

This standard has long been part of Commerce’s practice. For example, in 1986, in *Groundfish from Canada*,⁷⁴ Commerce found that the company, Fishery Products International Limited (FPIL), was unequityworthy at the time of its reorganization. Although one private investor exchanged debt for an equivalent amount of equity in FPIL at the time of the government equity infusion, we did not consider that transaction to be an appropriate gauge by which to measure the government’s infusion because, at that time, it seemed that the private investor’s only chance for recovering the money it had already loaned to FPIL was to help it reorganize. Therefore, Commerce recognized that in *Groundfish from Canada* there may be motivations of an inside investor or lender to provide additional equity into a firm to keep the firm from failing in an attempt to recover a previous investment.

⁷¹ See *CVD Preamble*, 63 FR 65373.

⁷² *Id.* (referencing *Notice of Proposed Rulemaking and Request for Public Comments (Countervailing Duties)*, 54 FR 23366 (May 31, 1989) (*1989 Proposed Regulations*)).

⁷³ *Id.*

⁷⁴ See *Final Affirmative Countervailing Duty Determination; Certain Fresh Atlantic Groundfish from Canada*, 51 FR 10041, 10047 (March 24, 1986) (*Groundfish from Canada*).

Also in 1986, Commerce explained in *Stainless Plate from the United Kingdom*⁷⁵ that examining past investments and sunk costs may be useful tools for corporate management in deciding how long to operate a loss-incurring company, or in evaluating proposed projects, but they are not relevant to the reasonable investor test used in our analysis of equityworthiness.⁷⁶

Commerce provided further explanation regarding the outside investor standard in the 1989 CVD investigation of *Steel Wheels from Brazil*.⁷⁷ Commerce explicitly stated that we do not examine equityworthiness based on the motivations of an owner-investor. Commerce explained that a rational investor does not let the value of past investments affect present or future decisions. The decision to invest is dependent only on the marginal return expected from each additional equity investment and these investments should not be affected by past investments or sunk costs.

Subsequently, in 1993, within the General Issues Appendix attached to the *Steel Products from Austria* CVD final determination, Commerce provided further elaboration on the standard and prospective nature of Commerce's equityworthy analysis with respect to similar insider investor arguments raised by various respondents.⁷⁸ Commerce stated that the fact that an inside investor may be influenced by other considerations extending beyond the attractiveness of the particular investment cannot be permitted to determine whether or not a subsidy arises out of that new investment. Consequently, the absence or presence of previous investments, and the status of those investments in terms of whether they have generated profits or losses, are extraneous considerations when looking at the equityworthiness of potential additional investments in a firm.

⁷⁵ See *Stainless Steel Plate from the United Kingdom; Final Results of Countervailing Administrative Review*, 51 FR 44656 (December 11, 1986) (*Stainless Plate from the United Kingdom*).

⁷⁶ See *Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria*, 58 FR 37217, 37225 (July 9, 1993) (*Steel Products from Austria*), at the General Issues Appendix.

⁷⁷ See *Final Affirmative Countervailing Duty Determination; Steel Wheels from Brazil*, 54 FR 15523, 15529-30 (April 18, 1989) (*Steel Wheels from Brazil*), at Comment 10.

⁷⁸ See *Steel Products from Austria*, 58 FR 37225 (General Issues Appendix).

Nearly two decades later, in 2012, in *Refrigerators from Korea*, Commerce did not rely on the equity investments made by private investors that participated with the government in a conversion of debt into equity as a benchmark for measuring equityworthiness.⁷⁹ Commerce explained that the requirement for making an equityworthiness determination pursuant to § 351.507(a)(4) is to determine whether a reasonable private investor, at the time the government-provided equity infusion was made, would invest in a firm based on the firm's ability to generate a reasonable rate of return within a reasonable time. The private investors that participated with the government in the debt-to-equity conversions were existing creditors attempting to mitigate their losses from non-performing loans; they were not considering whether or not to purchase shares based on the projected rates of return. Commerce concluded its analysis of the issue by stating that the standard for determining whether a firm is equityworthy is not whether a private investor who already has invested in the firm would continue to invest, but rather whether an outside private investor would make an equity investment.⁸⁰

In nearly 40 years of case precedent, in Commerce's analyses of whether a company is equityworthy and whether an equity investment by the government or an authority provides a benefit, Commerce normally examines the investment from the perspective of whether an outside private investor would make that investment, not from the perspective of whether an investor who already has invested in the firm would continue to make new investments. The actions of a private investor that already has equity or debt in a company that is subject to an equityworthiness examination would be considered from the perspective of a new private investor making an initial investment in the firm and not from the perspective of an owner, shareholder, or creditor of the firm. Accordingly, we have reflected that standard in the proposed modification to the regulation.

⁷⁹ See *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 17410 (March 26, 2012) (*Refrigerators from Korea*), and accompanying IDM at Comment 26.

⁸⁰ *Id.*

The other proposed change to the equity regulation is to modify the allocation period of the benefit. Currently, the benefit conferred by equity will be allocated over the same time period as a non-recurring subsidy under § 351.524(d), which is the average useful life (AUL) of assets. This standard works well for the vast majority of the cases in which Commerce finds a countervailable equity benefit. However, there are cases such as *DRAMs from Korea*⁸¹ where this regulatory standard can lead to a result that appears to be inconsistent with the purpose of the CVD law to provide relief to the domestic industry from unfair and distortive foreign government subsidies.

In *DRAMs from Korea*, Commerce investigated a massive government-led bailout and debt restructuring of the semiconductor manufacturer Hynix Semiconductor, Inc. (Hynix) that was implemented in 2001, to prevent the company's financial collapse. An essential part of this 2001 government-led bailout of Hynix was the conversion of existing debt into equity and the forgiveness of debt. While Commerce found that this massive government bailout provided countervailable subsidies to Hynix in the form of both debt-to-equity conversion and debt forgiveness, the AUL for the dynamic random access memory semiconductors industry was only five years. Therefore, due to the five-year AUL period, the determination that this massive 2001 government bailout of Hynix provided countervailable subsidies to Hynix provided relief to the U.S. industry for only two years after the issuance of the CVD order.

As the administering authority, we have concluded that a situation like that in *DRAMs from Korea*, where a massive countervailable government bailout of a firm or industry will be offset by CVDs for only such a limited period, is unreasonable. Therefore, we propose to modify § 351.507 to state that the benefit conferred by an equity infusion shall be allocated over

⁸¹ See *Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 FR 37122 (June 23, 2003) (*DRAMs from Korea*), and accompanying IDM at Comment 8.

a period of 12 years, or the same period as a non-recurring subsidy under § 351.524(d), whichever is longer.

We have chosen the allocation period of 12 years in accordance with an analysis of Commerce’s CVD measures from 1995 to 2020, conducted by the Congressional Research Service in 2021.⁸² According to the Congressional Research Service, the vast majority of U.S. CVD measures during that period were applied to four industries: (1) Base Metals; (2) Products of Chemical and Allied Industries; (3) Resins, Plastics, and Rubber; and (4) Machinery and Electrical Equipment.⁸³ Looking to the Modified Accelerated Cost Recovery Asset Life Table,⁸⁴ we determined that those four industries fall under five asset classes, which, when averaged, results in a 12-year class life of asset. Put another way, the AUL for the vast majority of products subject to CVD measures since 1995 has been 12 years. We have concluded that 12 years is a reasonable allocation period for purposes of our CVD calculations on average, and accordingly, have incorporated that allocation period into our regulations.

We expect that a provision such as this will provide equitable relief to the domestic industry from the harm caused by certain foreign government countervailable subsidies and have proposed a similar modification to the debt forgiveness regulation.

18. Debt Forgiveness – § 351.508

For the debt forgiveness regulation, we propose a modification to § 351.508(c), which currently allocates the benefit of debt forgiveness over the same period of time as a non-recurring subsidy under § 351.524(d). The modification to paragraph (c) would measure the allocation by that period, or over a period of 12 years, whichever allocation period is longer.

The current standard, tied to the AUL of assets, works well for the vast majority of the cases in which Commerce finds a countervailable equity benefit. However, there are cases such

⁸² See *Trade Remedies: Countervailing Duties*, Congressional Research Service, R46882, dated August 23, 2021, at 15, Figure 5 “CVD Measures By Sector.”

⁸³ *Id.*

⁸⁴ See Internal Revenue Service Publication 946 (2021), Table B-2, the Modified Accelerated Cost Recovery Asset Life Table.

as *DRAMs from Korea*,⁸⁵ as discussed above, where this regulatory standard leads to a result that appears to be inconsistent with the purpose of the CVD law to provide relief to the domestic industry from unfair and distortive foreign government subsidies.

Therefore, we propose modifying § 351.508(c) of our CVD regulations to state that Commerce will treat the benefit from debt forgiveness as a non-recurring subsidy, and will allocate the benefit to a particular period in accordance with § 351.524(d), or over 12 years, whichever is longer. We explain above why the use of 12 years, which is based on an average of the AULs for the vast majority of products covered by U.S. CVD measures, is reasonable and appropriate. We expect that such a provision will provide equitable relief to the domestic industry from the harm caused by certain foreign government countervailable subsidies. As noted above, this proposed change to the allocation period for a debt forgiveness subsidy is similar to the proposed change to the equity regulation modification of the allocation period of the benefit.

19. Direct Taxes – § 351.509

For purposes of the CVD regulation addressing direct taxes, we propose adding a new paragraph (d), which addresses income tax-related subsidies that are untied to particular products or markets. In the *CVD Preamble*, Commerce stated that we consider certain subsidies such as payments for plant closures, equity infusions, debt forgiveness, and debt-to-equity conversions, not to be tied to certain products or markets because they benefit all production.⁸⁶ Commerce also stated in the *CVD Preamble* that we recognized that there may be scenarios where the attribution rules that are set forth under § 351.525 do not precisely fit the facts of a particular case, and that we are “extremely sensitive to potential circumvention of the countervailing duty law.”⁸⁷ Moreover, Commerce concluded that if subsidies allegedly tied to a particular product are in fact provided to the overall operations of a company, Commerce will

⁸⁵ See *DRAMs from Korea*, 68 FR 37122 and accompanying IDM.

⁸⁶ See *CVD Preamble*, 63 FR 65400.

⁸⁷ *Id.*

attribute the subsidy over sales of all products by the company.⁸⁸ In addition, in the years following the issuance of the current CVD regulations, Commerce determined with respect to a tying claim of tax credits that tax credits reduce a firm's overall tax liability which benefits all of the firm's domestic production and sales.⁸⁹

Therefore, based on the language in the *CVD Preamble* and our experience since the issuance of the current CVD regulations, propose to add a provision to the CVD regulations that, if a program provides for a full or partial exemption, reduction, credit, or remission of an income tax, we will normally consider any benefit not to be tied with respect to a particular market under § 351.525(b)(4) or to a particular product under § 351.525(b)(5). In accordance with this provision, even if subsidies are allegedly tied to a particular product, if they in fact benefit the overall operations of a firm, we will attribute the subsidy to all sales of all the firm's products.

To be clear, these types of direct tax programs reduce or eliminate income taxes paid by a firm. Income taxes are based on a firm's total taxable income which is comprised of the overall tax liability generated from all the firm's domestic production and sales. Thus, these types of direct tax programs benefit the domestic production of a firm overall.

Furthermore, we emphasize that the codification of this practice under § 351.509(d) will not impact the attribution standards for export subsidies and domestic subsidies that are set forth under § 351.525(b)(2) and (3). The determination of whether a program is an export subsidy or domestic subsidy is made solely under the specificity section of the statute at sections 771(5A)(B) and (D) of the Act; therefore, the attribution of export subsidies and domestic subsidies is based on the specificity of a subsidy, not with respect to the standard of whether a benefit from a countervailable subsidy is tied or untied.

20. Export Insurance – § 351.520

With respect to export insurance, we propose a modification to § 351.520(a) to include a

⁸⁸ *Id.*

⁸⁹ See *Large Residential Washers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 75975 (December 26, 2012) (*Washers from Korea*), and accompanying IDM.

period of time, normally five years, over which Commerce may examine whether premium rates charged were inadequate to cover the long-term operating costs and losses of the program. If they were inadequate to cover such costs and losses during that period of time, then Commerce may determine that a benefit exists.

As Commerce explained in the *CVD Preamble*,⁹⁰ this standard of benefit for export insurance is based on paragraph (j) of the Illustrative List.⁹¹ In the *CVD Preamble*, Commerce stated that in determining whether the premiums charged under an export insurance program covered the long-term operating costs and losses of the program, we anticipated that we would continue to make that determination based on the five-year rule.⁹² Since 1998, when the current CVD regulations were published, we have consistently applied a period of five years to analyze whether the premiums charged under an export insurance program are adequate to cover the long-term operating costs and losses of the program.⁹³ Therefore, we are proposing to amend § 351.520(a) to include the five-year period considered in Commerce’s standard export insurance benefit analysis.

Accordingly, any allegation made with respect to an export insurance program should be based on a five-year period to satisfy Commerce’s standard benefit analysis for this program.

21. Calculation of Ad Valorem Subsidy Rate and Attribution of Subsidy to a Product – § 351.525

Commerce proposes a minor change to the language within paragraphs (b)(2) and (3) of § 351.525, which concern the attribution of an export subsidy and a domestic subsidy. Currently under existing § 351.525(b)(2), when Commerce determines that a subsidy is specific within the

⁹⁰ See *CVD Preamble*, 63 FR 65385.

⁹¹ See Illustrative List of Export Subsidies, annexed to the 1994 World Trade Organization Agreement on Subsidies and Countervailing Measures as Annex I (Illustrative List); see also SAA at 928 (“Unlike existing section 771(5)(A)(i), new section 771(5) does not incorporate the Illustrative List of Export Subsidies into the statute. The Illustrative List, an annex to the Tokyo Round Code, continues in modified form as Annex I to the Subsidies Agreement. However, the Illustrative List has no direct application to the CVD portion of the Subsidies Agreement It is the Administration’s intent that Commerce adhere to the Illustrative List except where the List is inconsistent with the principles set forth in the implementing bill”).

⁹² See *CVD Preamble*, 63 FR 65385.

⁹³ See, e.g., *Washers from Korea*, 77 FR 75975; and *Refrigerators from Korea*, 77 FR 17410.

meaning of sections 771(5A)(A) and (B) of the Act, because the subsidy is in law or fact contingent on export performance, alone or as one of two or more conditions, Commerce will attribute that export subsidy only to products exported by the firm.

Similarly, when Commerce determines that a subsidy program is specific as a domestic subsidy as defined within the meaning of section 771(5A)(D) of the Act, then under existing § 351.525(b)(3), Commerce will attribute that domestic subsidy to all products sold by the firm, including products that are exported.

As currently written, both § 351.525(b)(2) and (3) use the language “the Secretary will,” without condition. Under the proposed amendment, the language used in both paragraphs (b)(2) and (3) of § 351.525 will be changed to “the Secretary will normally.” The change to this section of the regulation would not change our established practice of allocating an export subsidy only to products exported by the firm and allocating domestic subsidies to all products sold by the firm, including exports. The insertion of the word “normally” into both paragraphs (b)(2) and (3) would merely ensure that there is no perceived conflict with the language in paragraphs (b)(2) and (3) and the language in § 351.525(b)(7) that allows Commerce to attribute a subsidy to multinational production under extremely limited circumstances. In addition, the proposed insertion of the word “normally” into both paragraphs (b)(2) and (3) of § 351.525 indicates a provision of Commerce’s discretion.

Commerce recognizes that, over time, governments have developed more complicated and unique subsidy programs around the world, and therefore at some point in the future Commerce may encounter a unique type of subsidy program that warrants an allocation of an export or domestic subsidy in a manner that is otherwise not contemplated by the language of existing § 351.525(b)(2) and (3). Accordingly, we expect that the insertion of the word “normally,” as proposed, in the regulation would acknowledge that Commerce retains the flexibility to address the CVD law in a manner that is consistent with the Act, no matter how new or unique the foreign subsidy harming the U.S. industry. By including such language, we

would better ensure that the CVD law is applied effectively.

22. *Transnational Subsidies – § 351.527*

Finally, Commerce proposes eliminating the current transnational subsidies regulation, but reserving the provision for future consideration. When the current provision was adopted, Commerce explained in the preamble to its regulations that it believed “neither the successorship of section 701 for Subsidies Code members, nor the repeal of section 303 by the {Uruguay Round Agreements Act}, eliminated the transnational subsidies rule,” on which it indicated current § 351.527 was based.⁹⁴ Commerce also stated at that time that, based on its “past administrative experience,” “the government of a country normally provides subsidies for the general purpose of promoting the economic and social health of that country and its people, and for the specific purpose of supporting, assisting or encouraging domestic manufacturing or production and related activities (including, for example, social policy activities such as the employment of its people).”⁹⁵ Commerce’s understanding at the time was that a government “would not normally be motivated to promote, at what would be considerable cost to its own taxpayers, manufacturing or production or higher employment in foreign countries.”⁹⁶

Since § 351.527 was adopted, Commerce has observed through its administrative experiences that instances in which a government provides a subsidy that benefits foreign production are far more prevalent. Consequently, the assumptions underlying our interpretation of section 701 of the Act have changed. We now believe that our past interpretation of section 701 of the Act was overly restrictive. A limitation on Commerce’s ability to countervail subsidies only if those subsidies were provided to entities of a country solely by the government of that country, when subsidies from other foreign governments would otherwise be determined countervailable under the CVD law and could prove injurious to producers of the domestic like

⁹⁴ *CVD Preamble*, 63 FR 65404-65405.

⁹⁵ *Countervailing Duties, Proposed Rule*, 62 FR 8818, 8847 (Feb. 27, 1997) (referencing the subsidy attribution regulation covering multinational firms).

⁹⁶ *See Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria*, 58 FR 37217, 37231 (Jul. 9, 1993).

product, is inconsistent with the very purpose of the CVD law, and we do not believe that the language of section 701 of the Act requires such a restrictive interpretation. Accordingly, we are proposing to eliminate the current regulation preventing consideration of allegations of transnational subsidies, and instead reserve the provision for future consideration.

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 will not have a significant economic impact on any such entities because the proposed rule applies to administrative enforcement actions, only clarifying and establishing streamlined procedures; 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 business 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: April 25, 2023.

Lisa W. Wang,
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.*; and 19 U.S.C. 3538.

2. In § 351.104, revise paragraph (a)(1) to read as follows:

§ 351.104 Record of proceedings.

(a) * * *

(1) *In general.* The Secretary will maintain an official record of each antidumping and countervailing duty proceeding. The Secretary will include in the official record all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding. The official record will include government memoranda pertaining to the proceeding, memoranda of ex parte meetings, determinations, notices published in the *Federal Register*, and transcripts of hearings. The official record will contain material that is public, business proprietary, privileged, and classified. With limited and enumerated exceptions, mere citations to hyperlinks, website Uniform Resource Locators, or other sources of information do not constitute placement of the information from those sources on the official record. To be considered part of the official record, the information itself must be placed on the record. The limited exceptions are as follows: United States statutes and regulations, published legislative history, United States court decisions and orders, certain notices of the Secretary and Commission published in the *Federal Register*, as well as decision memoranda and reports adopted by those notices, and the agreements identified in § 351.101(a). For purposes of section 516A(b)(2) of the Act, the record is the official record of each segment of the proceeding. For a scope, circumvention, or covered merchandise inquiry pertaining to companion antidumping and countervailing duty orders conducted on the record of the antidumping duty segment of the proceeding, pursuant to §§ 351.225, 352.226, and 351.227, the record of the antidumping duty segment of the proceeding normally will be the official record.

* * * * *

3. In § 351.225:
 - a. Revise paragraph (c)(1);
 - b. Add paragraphs (c)(2)(x) and (c)(3);
 - c. Revise paragraphs (d)(1) introductory text and (d)(1)(ii);
 - d. Add paragraph (d)(1)(iii);

e. Add introductory text to paragraph (f); and

f. Revise paragraphs (l)(1), (m)(2), and (q).

The revisions and additions read as follows:

§ 351.225 Scope rulings.

* * * * *

(c) * * *

(1) *Contents.* An interested party may submit a scope ruling application requesting that the Secretary conduct a scope inquiry to determine whether a product, which is or has been in actual production by the time of the filing of the application, is covered by the scope of an order. If the product at issue has not been imported into the United States, the applicant must provide evidence that the product has been commercially produced and sold. The Secretary will make available a scope ruling application, which the applicant must fully complete and serve in accordance with the requirements of paragraph (n) of this section.

(2) * * *

(x) If the product has not been imported into the United States as of the date of the filing of the scope ruling application:

(A) A statement that the product has been commercially produced;

(B) A description of the countries in which the product is sold; and

(C) Relevant documentation which reflects the details surrounding the production and sale of that product in countries other than the United States.

(3) *Comments on the adequacy of the request.* Within 10 days after the filing of a scope ruling application under paragraph (c)(1) of this section, an interested party other than the applicant is permitted one opportunity to submit comments regarding the adequacy of the scope ruling application.

* * * * *

(d) * * *

(1) *Initiation of a scope inquiry based on a scope ruling application.* Except as provided under paragraph (d)(1)(ii) or (d)(2) of this section, within 30 days after the filing of a scope ruling application, the Secretary will determine whether to accept or reject the scope ruling application.

* * * * *

(ii) If the Secretary issues questions to the applicant seeking clarification with respect to one or more aspects of a scope ruling application, the Secretary will determine whether or not to initiate within 30 days after the applicant files a timely response to the Secretary's questions.

(iii) If the Secretary does not reject the scope ruling application or initiate the scope inquiry within 31 days after the filing of the application or the receipt of a timely response to the Secretary's questions, the application will be deemed accepted and the scope inquiry will be deemed initiated.

* * * * *

(f) *Scope inquiry procedures.* The procedures described in subpart C of this part (§§ 351.301 through 351.308 and 351.312 through 351.313) do not apply to this paragraph (f).

* * * * *

(1) * * *

(1) When the Secretary initiates a scope inquiry under paragraph (b) or (d) of this section, the Secretary will notify the Customs Service of the initiation and direct the Customs Service to continue the suspension of liquidation of entries of products subject to the scope inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order. Such suspension shall include, but shall not be limited to, entries covered by the final results of administrative review of an antidumping or countervailing duty order (pursuant to § 351.212(b)), automatic assessment (pursuant to § 351.212(c)), a rescinded administrative review (pursuant to § 351.213(d)), and any other entries already suspended by the Customs Service under the

antidumping and countervailing duty laws which have not yet been liquidated in accordance with 19 CFR part 159.

* * * * *

(m) * * *

(2) *Companion antidumping and countervailing duty orders.* If there are companion antidumping and countervailing duty orders covering the same merchandise from the same country of origin, the requesting interested party under paragraph (c) of this section must file the scope ruling application pertaining to both orders on the records of both the antidumping duty and countervailing duty proceedings. If the Secretary accepts the scope applications on both records under paragraph (d) of this section, the Secretary will notify the requesting interested party that all subsequent filings should be filed only on the record of the antidumping duty proceeding. If the Secretary determines to initiate a scope inquiry under paragraph (b) or (d) of this section, the Secretary will initiate and conduct a single inquiry with respect to the product at issue for both orders only on the record of the antidumping duty proceeding. Once the Secretary issues a final scope ruling on the record of the antidumping duty proceeding, the Secretary will include on the record of the countervailing duty proceeding a copy of that scope ruling, a copy of the preliminary scope ruling, if one had been issued, and all relevant instructions to the Customs Service.

* * * * *

(q) *Scope clarifications.* The Secretary may issue a scope clarification at any time which provides an interpretation of specific language in the scope of an order and addresses other scope-related issues.

(1) Examples of scope clarifications include, but are not limited to, the following:

(i) Whether a product is covered or excluded by the scope of an order based on previous scope determinations covering the same or similar products;

(ii) Whether a product covered by the scope of an order is not subject to the imposition of antidumping or countervailing duties pursuant to a statutory exception to the trade remedy laws, such as the limited governmental importation exception set forth in section 771(20)(B) of the Act;

(iii) Whether language or descriptors in the scope of an order that are subsequently updated, revised, or replaced, continue to apply to the product at issue. This includes modifications to the language in the scope of an order pursuant to litigation or a changed circumstances review under section 751(b) of the Act, and changes to descriptors such as Harmonized Tariff Schedule classifications and identified industrial standards; and

(iv) Whether certain third country processing is included in the stage of production where the Secretary has determined that the essential component of the product is produced or where the essential characteristics of the product are imparted, pursuant to paragraph (j)(2) of this section, in a previous country-of-origin analysis.

(2) Examples of the forms taken by scope clarifications include, but are not limited to, the following:

(i) An interpretive footnote to the scope when the scope is published or issued in instructions to the Customs Service;

(ii) A memorandum in the context of an ongoing segment of a proceeding; and

(iii) A Notice of Scope Clarification published in the *Federal Register*.

4. In § 351.226:

- a. Add paragraph (c)(3);
- b. Revise paragraphs (d)(1) introductory text and (d)(1)(ii);
- c. Add paragraph (d)(1)(iii);
- d. Revise paragraph (e)(1);
- e. Add introductory text to paragraph (f); and
- f. Revise paragraph (m)(2).

The additions and revisions read as follows:

§ 351.226 Circumvention inquiries.

* * * * *

(c) * * *

(3) *Comments and information on the adequacy of the request.* Within 10 days after the filing of a circumvention inquiry request under paragraph (c)(1) of this section, an interested party other than the requestor is permitted one opportunity to submit comments and new factual information regarding the adequacy of the circumvention inquiry request. Within five days after the filing of new factual information in support of adequacy comments, the requestor is permitted one opportunity to submit comments and factual information to rebut, clarify, or correct that factual information.

(d) * * *

(1) *Initiation of a circumvention inquiry.* Except as provided under paragraphs (d)(1)(ii) and (d)(2) of this section, within 30 days after the filing of a request for a circumvention inquiry, the Secretary will determine whether to accept or reject the request and whether to initiate or not initiate a circumvention inquiry. If it is not practicable to make such determinations within 30 days, the Secretary may extend the 30-day deadline by an additional 15 days if no interested party has filed new factual information in response to the circumvention request, pursuant to paragraph (c)(3) of this section. If interested parties have filed new factual information pursuant

to paragraph (c)(3) of this section, the Secretary may extend the 30-day deadline by an additional 30 days.

* * * * *

(ii) If the Secretary issues questions to the requestor seeking clarification with respect to one or more aspects of a circumvention inquiry request, the Secretary will determine whether or not to initiate within 30 days after the requestor files a timely response to the Secretary's questions.

(iii) If the Secretary determines that a request for a circumvention inquiry satisfies the requirements of paragraph (c) of this section, the Secretary will accept the request and initiate a circumvention inquiry. The Secretary will publish a notice of initiation in the *Federal Register*.

(e) * * *

(1) *Preliminary determination.* The Secretary will issue a preliminary determination under paragraph (g)(1) of this section no later than 150 days after the date of publication of the notice of initiation of paragraph (b) or (d) of this section. If the Secretary concludes that an extension of the preliminary determination is warranted, the Secretary may extend that deadline by no more than 90 days.

* * * * *

(f) *Circumvention inquiry procedures.* The procedures described in subpart C of this part (§§ 351.301 through 351.308 and 351.312 through 351.313) do not apply to this paragraph (f).

* * * * *

(m) * * *

(2) *Companion antidumping and countervailing duty orders.* If there are companion antidumping and countervailing duty orders covering the same merchandise from the same country of origin, the requesting interested party under paragraph (c) of this section must file the request pertaining to both orders on the record of both the antidumping duty and countervailing duty segments of the proceeding. If the Secretary accepts the circumvention requests on both

records under paragraph (d) of this section, the Secretary will notify the requesting interested party that all subsequent filings should be filed only on the record of the antidumping duty proceeding. If the Secretary determines to initiate a circumvention inquiry under paragraph (b) or (d) of this section, the Secretary will initiate and conduct a single inquiry with respect to the product at issue for both orders only on the record of the antidumping duty proceeding. Once the Secretary issues a final circumvention determination on the record of the antidumping duty proceeding, the Secretary will include on the record of the countervailing duty proceeding a copy of that determination, a copy of the preliminary circumvention determination, and all relevant instructions to the Customs Service.

* * * * *

5. In § 351.227:

- a. Add introductory text to paragraph (d); and
- b. Revise paragraphs (l)(1) and (m)(2).

The addition and revisions read as follows:

§ 351.227 Covered merchandise referrals.

* * * * *

(d) *Covered merchandise inquiry procedures.* The procedures described in subpart C of this part (§§ 351.301 through 351.308 and 351.312 through 351.313) do not apply to this paragraph (d).

* * * * *

(1) * * *

(1) When the Secretary publishes a notice of initiation of a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary will notify the Customs Service of the initiation and direct the Customs Service to continue the suspension of liquidation of entries of products subject to the covered merchandise inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were

determined to be covered by the scope of the order. Such suspension shall include, but shall not be limited to, entries covered by a final results of administrative review of an antidumping or countervailing duty order (pursuant to § 351.212(b)), automatic assessment (pursuant to § 351.212(c)), a rescinded administrative review (pursuant to § 351.213(d)), and any other entries already suspended by the Customs Service under the antidumping and countervailing duty laws which have not yet been liquidated in accordance with 19 CFR part 159.

* * * * *

(m) * * *

(2) *Companion antidumping and countervailing duty orders.* If there are companion antidumping and countervailing duty orders covering the same merchandise from the same country of origin, and the Secretary determines to initiate a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary will initiate and conduct a single inquiry with respect to the product at issue only on the record of the antidumping duty proceeding. Once the Secretary issues a final covered merchandise determination on the record of the antidumping duty proceeding, the Secretary will include on the record of the countervailing duty proceeding a copy of that determination, a copy of the preliminary covered merchandise determination, if one was issued, and all relevant instructions to the Customs Service.

* * * * *

6. In § 351.301, revise paragraph (c)(4) and add paragraph (c)(6) as follows:

§ 351.301 Time limits for submissions of factual information.

* * * * *

(c) * * *

(4) *Factual information placed on the record of the proceeding by the Secretary.* The Secretary may place factual information on the record of the proceeding at any time.

(i) *In general.* For most factual information placed on the record by the Secretary, an interested party is permitted one opportunity to submit factual information to rebut, clarify, or

correct factual information placed on the record of the proceeding by the Secretary by a date specified by the Secretary.

(ii) *Agency memoranda from other segments or proceedings following the submission of written arguments.* If, following the submission of written arguments by interested parties, pursuant to § 351.309, the Secretary determines that an agency analysis or calculation memorandum issued by the Secretary in another segment or proceeding is relevant to the ongoing segment of the proceeding, and places the public version of that memorandum on the record of the ongoing segment of the proceeding, the Secretary will identify on the record the issue to which the memorandum is relevant. Interested parties will have one opportunity to provide comments addressing the relevance of the agency analysis or calculation memorandum to the ongoing segment of the proceeding by a date specified by the Secretary. Such response comments shall not be accompanied by new factual information.

* * * * *

(6) *Notices of subsequent authority – (i) In general.* If a United States Federal court issues a decision, or the Secretary in another segment or proceeding issues a determination, that an interested party believes is directly relevant to an issue in an ongoing segment of the proceeding, that interested party may submit a Notice of Subsequent Authority with the Secretary. Responsive comments and factual information to rebut or clarify the Notice of Subsequent Authority must be submitted by interested parties no later than five days after the submission of a Notice of Subsequent Authority.

(ii) *Timing restrictions for consideration.* The Secretary will only be required to consider and address a Notice of Subsequent Authority in its final determinations or results of administrative review that is submitted 30 days or more before the deadline for issuing the final determination or results, and rebuttal submissions filed 25 days or more before that same deadline.

(iii) *Contents of a notice of subsequent authority and responsive submissions.* A

Notice of Subsequent Authority must identify the Federal court decision or determination by the Secretary in another segment or proceeding that is alleged to be authoritative to an issue in the ongoing segment of the proceeding, provide the date the decision or determination was issued, explain the relevance of that decision or determination to an issue in the ongoing segment of the proceeding, and be accompanied by a complete copy of the Federal court decision or agency determination. Responsive comments must directly address the contents of the Notice of Subsequent Authority and must explain how the responsive comments and any accompanying factual information rebut or clarify the Notice of Subsequent Authority.

7. In § 351.306, revise paragraph (b) to read as follows:

§ 351.306 Use of business proprietary information.

* * * * *

(b) *By an authorized applicant.* An authorized applicant may retain business proprietary information for the time authorized by the terms of the administrative protective order (APO).

(1) An authorized applicant may use business proprietary information for purposes of the segment of the proceeding in which the information was submitted.

(2) If business proprietary information that was submitted to a segment of the proceeding is relevant to an issue in a different segment of the same proceeding, an authorized applicant may place such information on the record of the subsequent segment as authorized by the APO of the segment where the business proprietary information was submitted.

(3) If business proprietary information that was submitted to a countervailing duty segment of the proceeding is relevant to a subsequent scope, circumvention, or covered merchandise inquiry conducted on the record of the companion antidumping duty segment of the proceeding pursuant to § 351.225(m)(2), § 351.226(m)(2), or § 351.227(m)(2), an authorized applicant may place such information on the record of the companion antidumping duty segment

of the proceeding as authorized by the APO of the countervailing duty segment where the business proprietary information was submitted.

(4) If business proprietary information that was submitted to a scope, circumvention, or covered merchandise inquiry conducted on the record of a companion antidumping duty segment of the proceeding pursuant to § 351.225(m)(2), § 351.226(m)(2), or § 351.227(m)(2) is relevant to a subsequent countervailing duty segment of the proceeding, an authorized applicant may place such information on the record of the companion countervailing duty segment of the proceeding as authorized by the APO of the antidumping duty segment where the business proprietary information was submitted.

* * * * *

8. In § 351.308, add paragraph (g) to read as follows:

§ 351.308 Determinations on the basis of facts available.

* * * * *

(g) *Adverse facts available hierarchy in countervailing duty proceedings.* In accordance with sections 776(d)(1)(A) and 776(d)(2) of the Act, when the Secretary applies an adverse inference in selecting a countervailable subsidy rate on the basis of facts otherwise available in a countervailing duty proceeding, the Secretary will normally select the highest program rate available using a hierarchical analysis as follows:

(1) For investigations, conducted pursuant to section 701 of the Act, the hierarchy will be applied in the following sequence:

(i) If there are cooperating respondents in the investigation, the Secretary will determine if a cooperating respondent used an identical program in the investigation and apply the highest calculated above-zero rate for the identical program;

(ii) If no rate exists which the Secretary is able to apply under paragraph (g)(1)(i) of this section, the Secretary will determine if an identical program was used in another countervailing

duty proceeding involving the same country and apply the highest calculated above-*de minimis* rate for the identical program;

(iii) If no rate exists which the Secretary is able to apply under paragraph (g)(1)(ii) of this section, the Secretary will determine if there is a similar or comparable program in any countervailing duty proceeding involving the same country and apply the highest calculated above-*de minimis* rate for the similar or comparable program; and

(iv) If no rate exists which the Secretary is able to apply under paragraph (g)(1)(iii) of this section, the Secretary will apply the highest calculated above-*de minimis* rate from any non-company-specific program in a countervailing duty proceeding involving the same country that the Secretary considers the company's industry could possibly use.

(2) For administrative reviews, conducted pursuant to section 751 of the Act, the hierarchy will be applied in the following sequence:

(i) The Secretary will determine if an identical program has been used in any segment of the proceeding and apply the highest calculated above-*de minimis* rate for any respondent for the identical program;

(ii) If no rate exists which the Secretary is able to apply under paragraph (g)(2)(i) of this section, the Secretary will determine if there is a similar or comparable program within any segment of the same proceeding and apply the highest calculated above-*de minimis* rate for the similar or comparable program;

(iii) If no rate exists which the Secretary is able to apply under paragraph (g)(2)(ii) of this section, the Secretary will determine if there is an identical program in any countervailing duty proceeding involving the same country and apply the highest calculated above-*de minimis* rate for the identical program or, if there is no identical program or above-*de minimis* rate available, determine if there is a similar or comparable program in any countervailing duty proceeding involving the same country and apply the highest calculated above-*de minimis* rate for the similar or comparable program; and

(iv) If no rate exists which the Secretary is able to apply under paragraph (g)(2)(iii) of this section, the Secretary will apply the highest calculated rate for any non-company-specific program from any countervailing duty proceeding involving the same country that the Secretary considers the company's industry could possibly use.

(3) When the Secretary uses an adverse facts available countervailing duty hierarchy, the following will apply:

(i) The Secretary will treat rates less than 0.5 percent as *de minimis*;

(ii) The Secretary will normally determine a program to be a similar or comparable program based on the Secretary's treatment of the program's benefit;

(iii) The Secretary will normally select the highest program rate available in accordance with the hierarchical sequence, unless the Secretary determines that such a rate is otherwise inappropriate; and

(iv) When applicable, the Secretary will determine an adverse facts available rate selected using the hierarchy to be corroborated in accordance with section 776(c)(1) of the Act.

9. In § 351.408, add paragraph (d) to read as follows:

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

* * * * *

(d) *A determination that certain surrogate value information is not otherwise appropriate—(1) In general.* Notwithstanding the factors considered under paragraph (c) of this section, the Secretary may disregard a proposed market economy country value for consideration as a surrogate value if the Secretary determines that evidence on the record reflects that the use of such a value would be inappropriate.

(i) In accordance with section 773(c)(5), the Secretary may disregard a proposed surrogate value if that value is derived from a country that provides broadly available export

subsidies, if particular instances of subsidization occurred with respect to that proposed surrogate value, or if that proposed surrogate value was subject to an antidumping order.

(ii) In addition, the Secretary may disregard a proposed surrogate value if that value is derived from a facility, party, industry, intra-country region or a country with weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, or environmental protections.

(2) Requirements to disregard a proposed surrogate value based on weak, ineffective, or nonexistent protections. For purposes of paragraph (d)(1)(ii) of this section, the Secretary will only consider disregarding a proposed market economy country value as a surrogate value of production if the Secretary determines the following:

(i) The proposed surrogate value at issue is for a significant input or labor;

(ii) The proposed surrogate value is derived from one country or an average of values from a limited number of countries; and

(iii) The information on the record supports a claim that the identified weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, or environmental protections undermine the appropriateness of using that value as a surrogate value.

(3) The use of a surrogate value located in a country which is not at a level of economic development comparable to that of the nonmarket economy. If the Secretary determines, pursuant to this section, after reviewing all proposed values on the record derived from market economy countries which are at a level of economic development comparable to the nonmarket economy, that no such proposed value is appropriate to value a specific factor of production, the Secretary may use a value on the record derived from a market economy country which is not at a level of economic development comparable to that of the nonmarket economy country as a surrogate to value that specific factor of production.

(4) The use of a surrogate value not located in a country which is a significant producer of comparable merchandise. If the Secretary determines, pursuant to this section, after

reviewing all proposed surrogate values on the record derived from market economy countries which are significant producers of merchandise comparable to the subject merchandise, that no such proposed value is appropriate to value a specific factor of production, the Secretary may use a value on the record derived from a market economy country which is not a significant producer of merchandise comparable to the subject merchandise as a surrogate to value that specific factor of production.

10. Add § 351.416 to read as follows:

§ 351.416 Determination of a particular market situation.

(a) *In general.* A particular market situation is a distinct circumstance or set of circumstances that does the following, as determined by the Secretary:

(1) Prevents a proper comparison of sales prices in the home market or third country market with export prices and constructed export prices; or

(2) Distorts the cost of production of the merchandise subject to an investigation, suspension agreement, or an antidumping duty order.

(b) *Information reasonably available to the interested party alleging the existence of a particular market situation.* When an interested party files a timely allegation as to the existence of a particular market situation in an antidumping duty proceeding, relevant information reasonably available to that interested party supporting the claim must accompany the allegation. If the particular market situation being alleged is similar to an allegation of a particular market situation made in a previous segment of the same proceeding, the interested party must identify in the filing the facts and arguments which are distinct from those provided in the previous segment.

(c) *A determination that a particular market situation that prevents a proper comparison of prices exists.* The Secretary may find that a particular market situation exists that prevents the proper comparison of prices, identified in paragraph (a)(1) of this section, when a circumstance or set of circumstances prevent or do not permit a proper comparison between sales prices in the

home market or third country of the foreign like product and export prices or constructed export prices of the subject merchandise for purposes of an antidumping analysis.

(1) *Examples of particular market situations that prevent a proper comparison in the home market.* Examples of a distinct circumstance or set of circumstances that may prevent a proper comparison of prices in the home market, and are therefore particular market situations, include, but are not limited to, the following:

- (i) The imposition of an export tax on subject merchandise;
- (ii) Limitations on exports of subject merchandise from the subject country;
- (iii) The issuance and enforcement of anticompetitive regulations that confer a unique status on favored producers or that create barriers to new entrants to an industry; and
- (iv) Direct government control over pricing of subject merchandise to such an extent that home market prices for subject merchandise cannot be considered competitively set.

(2) *Examples of particular market situations in a third country that may not permit a proper comparison of prices.* The Secretary may determine that third country prices cannot be properly compared to export prices or constructed export prices for reasons similar to those listed in paragraph (c)(1) of this section.

(3) *The prevention of a proper comparison of prices may warrant use of constructed value.* If the Secretary determines that a particular market situation prevents or does not permit a proper comparison of sales prices in the home market or third country with export prices or constructed export prices, the Secretary may conclude that it is necessary to determine normal value by constructing a value in accordance with section 773(e) of the Act and § 351.405.

(d) *A determination that a market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade--(1) In general.* For purposes of this paragraph (d)(1), the Secretary will determine that a distinct circumstance or set of circumstances is a market situation such that the cost of materials and fabrication or other processing of any kind does not accurately reflect

the cost of production in the ordinary course of trade, if the Secretary determines that the costs of producing subject merchandise or the prices or costs for a significant input (or inputs) used in the production of the subject merchandise are not in accordance with market-based principles, or are distorted, and that it is likely that the distinct circumstance or set of circumstances contributed to the fact that those prices or costs are not in accordance with market-based principles or are distorted.

(2) Information the Secretary may consider in determining the existence of a market situation. In determining whether a market situation exists in the subject country such that the cost of materials and fabrication or other processing does not accurately reflect the cost of production in the ordinary course of trade, the Secretary may consider all relevant information placed on the record by interested parties, including, but not limited to, the following:

(i) Comparisons of prices paid for significant inputs used to produce the subject merchandise under the alleged market situation to prices paid for the same input under market-based circumstances, either in the home country or elsewhere;

(ii) Detailed reports and other documentation issued by foreign governments or independent international, analytical or academic organizations indicating considerably lower prices for a significant input in the subject country would likely result from governmental or nongovernmental actions or inactions taken in the subject country or other countries;

(iii) Detailed reports and other documentation issued by foreign governments or independent international, analytical or academic organizations indicating that prices for a significant input have deviated from a fair market value within the subject country, as a result, in part or in whole, of governmental or nongovernmental actions or inactions;

(iv) Agency determinations or results in which the Secretary determined record evidence did or did not support the existence of the alleged particular market situation with regard to the same or similar merchandise in the subject country in previous proceedings or segments of the same proceeding; and

(v) Information that property (including intellectual property), human rights, labor, or environmental protections in the subject country are weak, ineffective, or nonexistent, those protections exist and are effectively enforced in other countries, and that the ineffective enforcement or lack of protections may contribute to distortions in cost of production of subject merchandise or prices or costs of a significant input into the production of subject merchandise in the subject country.

(3) *No restrictions based on lack of precise quantifiable data, hypothetical prices or actions of governments and industries in other market economies.* In determining whether a market situation exists in the subject country such that the cost of materials and fabrication or other processing does not accurately reflect the cost of production in the ordinary course of trade, the Secretary will not be required to consider the following information and associated arguments:

(i) The lack of precision in the quantifiable data relating to the distortion of prices or costs in the subject country;

(ii) The speculated costs of the subject merchandise, or the speculated prices or costs of a significant input into the production of subject merchandise, unsupported by objective data, that a party claims would hypothetically exist in the subject country absent the alleged particular market situation or its contributing circumstances;

(iii) The actions taken or not taken by governments, state enterprises, or other public entities in other market economy countries in comparison with the actions taken or not taken by the government, state enterprise, or other public entity of the subject country, with the exception of information associated with the allegations addressed in paragraph (d)(2)(v) of this section; and

(iv) The existence of historical policies and previous actions taken or not taken by the government or industry in the subject country with respect to the subject merchandise or a significant input into the production of subject merchandise, because the pre-existence of

government actions or inactions, or other circumstances, does not make those situations market-based or nullify the distortion of costs during the relevant period of investigation or review.

(e) *A determination that a market situation that does not accurately reflect the cost of production in the ordinary course of trade is particular--*(1) *In general.* For a market situation that does not accurately reflect the cost of production in the ordinary course of trade to be considered particular, the Secretary must determine that it is likely that the distinct circumstance or set of circumstances which contributed to distortions in prices or costs impact only certain products or certain parties in the subject country. In reaching this determination, the following applies:

(i) A particular market situation may exist even if a large number of distinct products or parties are impacted by the circumstance or set of circumstances;

(ii) The same or similar market situations can exist in multiple countries or markets and still be considered particular for purposes of this provision if the Secretary determines that a market situation exists which distorts cost of production for certain products or parties specifically in the subject country; and

(iii) There are varied circumstances in which a market situation in a subject country can be determined to be particular, including a market situation that distorts the cost of production for certain products or for certain importers, producers, exporters, purchasers, users, enterprises, or industries, individually or in combination with other entities.

(2) *Information the Secretary may consider in determining if a market situation is particular.* In determining if a market situation in the subject country is particular in accordance with paragraph (e)(1) of this section, the Secretary may consider all relevant information placed on the record by interested parties, including, but not limited to, the following:

(i) The size and nature of the market situation;

(ii) The volume of merchandise potentially impacted by the price or cost distortions resulting from the market situation; and

(iii) The number and nature of the entities potentially affected by the price or cost distortions resulting from a market situation.

(f) *Adjusting for a particular market situation that does not accurately reflect the cost of production in the ordinary course of trade.* If the Secretary determines a particular market situation exists in the subject country such that the cost of materials and fabrication or other processing does not accurately reflect the cost of production in the ordinary course of trade, in accordance with sections 771(15) and 773(e) of the Act, the Secretary may address distortions to the cost of production in its calculations. If the Secretary is unable to precisely quantify such distortions in the cost of production, based on record information, after consideration of the relevant information that is available, it may use any reasonable methodology to determine an appropriate adjustment to its calculations.

(g) *Examples of particular market situations that may not accurately reflect the cost of production in the ordinary course of trade.* Examples of particular market situations which may distort, or contribute to the distortion of, the cost of production of subject merchandise in the subject country alone, or in conjunction with others, include, but are not limited to, the following:

(1) A significant input into the production of subject merchandise is produced in such amounts that there is considerably more supply than demand in international markets for the input; the record reflects that, regardless of the impact of such overcapacity of the significant input on other countries, such overcapacity is likely to contribute to distortions of the price or cost of that input in the subject country; and those distortions can be addressed by the Secretary in its calculations of the cost of production;

(2) A government, state-owned enterprise, or other public entity in the subject country owns or controls the predominant producer or supplier of a significant input used in the production of subject merchandise; such ownership or control of the producer or supplier is

likely to contribute to price or cost distortions of that input in the subject country; and those distortions can be addressed in the Secretary's calculations of the cost of production;

(3) A government, state-owned enterprise, or other public entity in the subject country intervenes in the market for a significant input into the production of subject merchandise; such intervention is likely to contribute to price or cost distortions of that input in the subject country; and those distortions can be addressed in the Secretary's calculations of the cost of production;

(4) A government in the subject country limits exports of a significant input into the production of subject merchandise; such export limitations are likely to contribute to price or cost distortions of that input in the subject country; and those distortions can be addressed in the Secretary's calculations of the cost of production;

(5) A government in the subject country imposes export taxes on a significant input into the production of subject merchandise; such taxes are likely to contribute to price or cost distortions of that input in the subject country; and those distortions can be addressed in the Secretary's calculations of the cost of production;

(6) A government in the subject country exempts an importer, producer or exporter of the subject merchandise from paying duties or taxes associated with trade remedies established by the government relating to a significant input into the production of subject merchandise;

(7) A government in the subject country rebates duties or taxes paid by an importer, producer or exporter of the subject merchandise associated with trade remedies established by the government related to a significant input into the production of subject merchandise;

(8) A government, state-owned enterprise, or other public entity in the subject country provides financial assistance or other support to the producer or exporter of the subject merchandise, or to a producer or supplier of a significant input into the production of the subject merchandise; such assistance or support is likely to contribute to cost distortions of the subject merchandise or distortions in the price or cost of a significant input into the production of subject

merchandise in the subject country; and those distortions can be addressed by the Secretary in its calculations of the cost of production;

(9) A government, state-owned enterprise, or other public entity in the subject country takes actions which otherwise influence the production of the subject merchandise or a significant input into the production of subject merchandise, such as domestic-content and technology transfer requirements; those actions are likely to contribute to cost distortions of the subject merchandise or distortions in the price or cost of a significant input into the production of subject merchandise in the subject country; and such distortions can be addressed in the Secretary's calculations of the cost of production;

(10) A government or other public entity in the subject country does not enforce its property (including intellectual property), human rights, labor, or environmental protection laws and policies, or those laws and policies are otherwise shown to be ineffective with respect to a either a producer or exporter of the subject merchandise, or to a producer or supplier of a significant input into the production of the subject merchandise in the subject country; the lack of enforcement or effectiveness of such laws and policies is likely to contribute to cost distortions of the subject merchandise or distortions in the price or cost of a significant input into the production of subject merchandise; and those distortions can be addressed in the Secretary's calculations of the cost of production;

(11) A government or other public entity does not implement property (including intellectual property), human rights, labor, or environmental protection laws and policies; the absence of such laws and policies is likely to contribute to cost distortions of the subject merchandise, or distortions in the price or cost of a significant input into the production of subject merchandise in the subject country; and those distortions can be addressed by the Secretary in its calculations of the cost of production; and

(12) A business relationship between one or more producers of the subject merchandise and suppliers of significant inputs to the production of the subject merchandise is such that prices

of the inputs are not determined in accordance with market-based principles, such as through a strategic alliance or noncompetitive arrangement; such a relationship is likely to contribute to cost distortions of the subject merchandise or distortions in the price or cost of a significant input into the production of subject merchandise in the subject country; and such distortions can be addressed in the Secretary's calculations of the cost of production.

(h) *A particular market situation that does not accurately reflect the cost of production in the ordinary course of trade may contribute to a particular market situation that prevents or does not permit a proper comparison of prices.* If the Secretary determines that a particular market situation exists that does not accurately reflect the cost of production in the ordinary course of trade, the Secretary may consider whether this particular market situation contributes to the circumstance or set of circumstances that prevent, or do not permit, a proper comparison of home market or third country sales prices with export prices or constructed export prices, in accordance with section 771(15) of the Act.

11. In § 351.503, revise paragraph (c) to read as follows:

§ 351.503 Benefit.

* * * * *

(c) *Distinction from effect of subsidy – (1) In general.* In determining whether a benefit is conferred, the Secretary is not required to consider the effect or impact of the government action on the firm's performance, including its costs, prices, output, or whether the firm's behavior is otherwise altered.

(2) *Subsidy provided to support compliance with a government-imposed mandate.* When a government provides assistance to a firm to comply with a government regulation, requirement or obligation, the Secretary, in measuring the benefit from the subsidy, will not consider whether the firm incurred a cost in complying with the government-imposed regulation, requirement or obligation.

* * * * *

12. In § 351.505, revise paragraph (d) and add paragraph (e) to read as follows:

§ 351.505 Loans.

* * * * *

(d) *Treatment of outstanding loans as grant after three years of no payments of interest or principal.* With the exception of debt forgiveness tied to a particular loan and contingent liability interest-free loans, addressed in § 351.508 and paragraph (e) of this section, the Secretary will normally treat a loan as a grant if no payments of interest and principal have been made in three years unless the loan recipient can demonstrate that nonpayment is consistent with the terms of a comparable commercial loan it could obtain on the market.

(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. In 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.

(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, the Secretary will treat the

outstanding balance of the loan as a grant received in the year in which this condition manifests itself.

13. In § 351.507, revise paragraph (c) and add paragraph (d) to read as follows:

§ 351.507 Equity.

* * * * *

(c) *Outside investor standard.* Any analysis made under paragraph (a) of this section will be based upon the standard of a new private investor. The Secretary normally will consider whether an outside private investor, under its usual investment practice, would make an equity investment in the firm, and not whether a private investor who has already invested in the firm would continue to invest in the firm.

(d) *Allocation of benefit to a particular time period.* The benefit conferred by an equity infusion shall be allocated over a period of 12 years or the same time period as a non-recurring subsidy under § 351.524(d), whichever is longer.

14. In § 351.508, revise paragraph (c)(1) to read as follows:

§ 351.508 Debt forgiveness.

* * * * *

(c) * * *

(1) *In general.* The Secretary will treat the benefit determined under paragraph (a) of this section as a non-recurring subsidy and will allocate the benefit to a particular year in accordance with § 351.524(d), or over a period of 12 years, whichever is longer.

* * * * *

15. In § 351.509, add paragraph (d) to read as follows:

§ 351.509 Direct taxes.

* * * * *

(d) *Benefit not tied to particular markets or products.* If a program provides for a full or partial exemption, reduction, credit or remission of an income tax, the Secretary normally will consider any benefit to be not tied with respect to a particular market under § 351.525(b)(4) or to a particular product under § 351.525(b)(5).

16. In § 351.511, add paragraph (a)(2)(v) to read as follows:

§ 351.511 Provision of goods or services.

(a) * * *

(2) * * *

(v) *Exclusion of certain prices.* In measuring the adequacy of remuneration under this section, if parties have demonstrated, with sufficient information, that certain prices are derived from countries with weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, or environmental protections, and that the lack of such protections would likely impact such prices, the Secretary may exclude those prices from its analysis.

* * * * *

17. In § 351.520, revise paragraph (a)(1) to read as follows:

§ 351.520 Export insurance.

(a) * * *

(1) In *general*. In the case of export insurance, a benefit exists if the premium rates charged are inadequate to cover the long-term operating costs and losses of the program normally over a five-year period.

* * * * *

18. In § 351.525, revise paragraphs (b)(2) and (3) to read as follows:

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

* * * * *

(b) * * *

(2) *Export subsidies.* The Secretary will normally attribute an export subsidy only to products exported by a firm.

(3) *Domestic subsidies.* The Secretary will normally attribute a domestic subsidy to all products sold by a firm, including products that are exported.

* * * * *

§ 351.527 [Removed and Reserved]

19. Remove and reserve § 351.527.

20. Add § 351.529 to read as follows:

§ 351.529 Certain fees, fines, and penalties.

(a) *Financial contribution.* When determining if a fee, fine, or penalty that is otherwise due, has been forgone or not collected, within the meaning of section 771(5)(D)(ii) of the Act, the Secretary may conclude that a financial contribution exists if information on the record demonstrates that payment was otherwise required and was not made, in full or in part. In making such a determination, the Secretary will not be required to consider whether the government took efforts to seek payment or grant deferral, or otherwise acknowledged nonpayment, of the fee, fine, or penalty.

(b) *Benefit.* If the Secretary determines that the government has exempted or remitted in part or in full, a fee, fine, or penalty under paragraph (a) of this section, a benefit exists to the extent that the fee, fine or penalty paid by a party is less than if the government had not exempted or remitted that fee, fine, or penalty. Further, if the government is determined to have deferred the payment of the fee, fine, or penalty, in part or in full, a benefit exists to the extent that appropriate interest charges are not collected. Normally, a deferral of payment of fees, fines, or penalties will be treated as a government provided loan in the amount of the payments deferred, according to the methodology described in § 351.505.

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