ORTA ANADOLU İHRACATÇI BİRLİKLERİ GENEL SEKRETERLİĞİ

Sayı: 70430465-TİM.OAİB.GSK.İDARİ.2024/963-5067 Ankara, 25/04/2024
Konu: ABD- TPÖ Soruşturmalarının Yürütülmesine Yönelik Mevzuat Değişiklikleri

Sayın Üyemiz,

Ticaret Bakanlığı İthalat Genel Müdürlüğünden alınan bir yazıda, Vaşington Ticaret Müşavirliğimizden alınan bir yazıya atfen, 9 Mayıs 2023 tarihinde ABD Ticaret Bakanlığı Uluslararası Ticaret İdaresi'nin (ITA), anti-damping (AD) ve telafi edici vergi (CVD) yasalarının uygulanmasını iyileştirmek, güçlendirmek ve geliştirmek için 19 CFR Bölüm 351'de değişiklik yapılmasına yönelik bir dizi öneriyi ilgili tarafların görüşüne sunduğu, 2023 Mayıs ayında sunulan tasarıda bazı değişiklikleri de içeren yeni düzenlemeleri ise bir örneği ekte yer alan 25 Mart 2024 tarihli ABD Resmi Gazetesi'nde yayımlamış olduğu (https://www.federalregister.gov/documents/2024/03/25/2024-05509/regulations-improving-and-strengthening-the-enforcement-of-trade-remedies-through-the-administration) ve söz konusu değişikliklerin **24 Nisan 2024** tarihi itibariyle yürürlüğe gireceği belirtilmektedir.

Aynı yazıda devamla, bahse konu değişiklikler kapsamında öne çıkan bazı hususlar aşağıda gibi sunulmuştur:

· ITA, üretim maliyetleri hesaplamasında, ilk defa, işçi hakları, çevre, mülkiyet veya fikri mülkiyet haklarının korunup korunmadığını, bunları korumaya yönelik yasaların varlığını ve korumacı niteliğini dikkate alabilecektir. Örneğin, iş güvenliği kanunlarına uymak zorunda olmayan bir yabancı üreticinin üretim maliyetlerinin düşük olması yönündeki kanaatler hesaplamalara yansıtılabilecektir. Buna ilaveten, çevre/işçi hakları veya fikri mülkiyet haklarını ihlal eden firmalardan bu çerçevede tahsil edilmeyen cezalar da sübvansiyon soruşturmaları çerçevesinde devlet tarafından sağlanan finansal katkı olarak nitelendirilebilecektir.

· Tartışmalara konu olan bir diğer değişiklik, ulus ötesi sübvansiyon (transnational subsidy) hükmünün kaldırılmasıdır. Daha önce bu hüküm çerçevesinde, soruşturmaya konu ülkedeki üreticilere üçüncü bir ülke tarafından sağlanmakta olan sübvansiyonlar telafi edilebilir sayılmazken, hükmün kaldırılması sonucunda üçüncü ülke sübvansiyonlarının telafi edilebilir bulunmasının önü açılmıştır. AB'nin Hindistan ve Endonezya'ya yönelik soğuk saç soruşturmasında, eldeki mevcut verilerle Endonezya için uyguladığı marj hesaplamasına benzer bir yolla, Çin'in Bir Kuşak, Bir Yol Projesi gibi üçüncü ülkelerde sağlamış olduğu sübvansiyonların marj hesaplamalarına dahil edilmesi mümkün olacaktır.

· Maliyetleri bozan özellikli piyasa koşullarının (PMS) bulunması durumunda belirli unsurları dikkate alma yönünde değişiklikler getirilmiştir. Borcun affı yoluyla sağlanan sübvansiyonlar tekrarlanmayan (non-recurring) sübvansiyon addedilecektir.

· İlgili tarafların kayda geçirecekleri bilgilere yönelik yeni zamanlama ve alıntılama gereklilikleri getirilmiş olup, ITA'nın daha önce vermiş olduğu kararlara atıf yapılırken ACCESS barkodlarının kullanılması vb. değişikliklerin, ilgili soru formu cevaplarının oluşturulması bakımından önem arz ettiği değerlendirilmektedir.

Bilgilerine sunulur.

S. Tansel KÜNBİ
Genel Sekreter A.
Şube Müdürü

Ek: ABD Resmi Gazetesi Nüshası

S. Tansel Künbi tarafından 5070 sayılı kanun gereğince güvenli elektronik imza ile imzalanmıştır.

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DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 240307–0075]

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: Final rule.

SUMMARY: Pursuant to its authority under the Tariff Act of 1930, as amended (the Act), the U.S. Department of Commerce (Commerce) is amending its regulations to enhance, improve and strengthen its enforcement and administration of the antidumping duty (AD) and countervailing duty (CVD) laws. Specifically, Commerce is revising some of its procedures, codifying certain areas of its practice, and enhancing certain areas of its methodologies and analyses to address price and cost distortions, as well as certain countervailable subsidies, in different capacities.

DATES: These amendments are effective April 24, 2024.

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 Ariela Garvett, Senior Advisor, at *Ariela.Garvett@trade.gov*.

SUPPLEMENTARY INFORMATION:

General Background

On May 9, 2023, Commerce proposed amendments to its existing regulations, 19 CFR part 351, to improve, strengthen and enhance its enforcement of the AD and CVD laws.[1] Relevant to this final rule are the AD/CVD statutory and regulatory provisions in general, as well as those pertaining to filing requirements, scope, circumvention, and covered merchandise inquiries, the use of new factual information, the CVD facts available hierarchy, surrogate value and CVD benchmark selections, particular market situations (PMS), and certain types of countervailable subsidies, which we summarize below.

Title VII of the Act vests Commerce with authority to administer the AD/CVD 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 the U.S. International Trade Commission (ITC) finds material injury or threat of material injury to that industry in the United States. 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 when the ITC finds that material injury or threat of material injury to that industry in the United States.[2]

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) (*Scope and Circumvention Final Rule*). *See also Scope and Circumvention Proposed Rule,* 85 FR 49472 (August 13, 2020) (*Scope and Circumvention Proposed Rule*). These revised and new regulations became effective November 4, 2021. On September 29, 2023, after publication of the May 2023 *Proposed Rule,* Commerce identified some technical issues in those scope, circumvention, and covered merchandise referral regulations, and amended those regulations to address those issues.[3] We have incorporated those changes into these final revised regulations.

As we explained throughout the preamble to the *Proposed Rule,* the purpose of these modifications and additions to our regulations is to improve, strengthen and enhance the enforcement and administration of the AD/CVD laws, make such enforcement and administration more efficient, and to address factors which distort costs and prices—factors that make the ''playing field'' less ''level'' for domestic interested parties and can contribute to unfair trade. In order to achieve the purpose of those regulations, Commerce may at times need to request further documentation from interested parties that clarifies the record to better understand the facts of a particular case. Other times, Commerce may need to extend the deadline to issue a determination so that its decision is fully informed and complete. To address unfair trade adequately and appropriately, Commerce may need to remove unnecessary restrictions in its regulations to address updated challenges, like the agency's withdrawal of the prohibitive transnational subsidies regulation. Commerce recognizes that in the year 2024, there are complexities and challenges in international trade which did not exist, or did not exist in the same manner or to the same degree, when previous regulations were issued. Accordingly, Commerce has determined that revisions and updates to Commerce's trade remedy regulations are warranted.

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 therefore proposed adding clarification on this point to § 351.104(a)(1) in the *Proposed Rule.*[4] Commerce also proposed listing documents which do not need to be

[1] *See Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws,* 88 FR 29850 (May 9, 2023) (*Proposed Rule*).

[2] 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.

[3] *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069, 67077–78 (September 29, 2023) (*APO and Service Final Rule*).

[4] *See Proposed Rule,* 88 FR 29852–53.

placed on the record, but can merely be cited, in the *Proposed Rule*.[5] We received a large number of comments on these proposals, and as we describe in greater detail below, we have revised § 351.104 to provide greater clarity on these issues.[6]

In the *Proposed Rule,* Commerce proposed language to be added to the regulations addressing scope, circumvention, and covered merchandise inquiries pertaining to filing deadlines, clarification requests, merchandise not yet imported but commercially-produced and sold, extensions of time, regulatory restrictions covering new factual information, and scope clarifications.[7] Commerce subsequently received comments from several interested parties on each of its suggestions. In response to those comments, for the reasons we explain below, Commerce has made certain modifications to its final regulations—primarily on the language pertaining to scope clarifications.

There are times when interested parties seek to file Notices of Subsequent Authority with Commerce, in which a party argues in a given segment of a proceeding that a new Federal court or Commerce decision supports, contradicts, or undermines particular arguments before the agency. However, Commerce's current regulations do not address the timing for submitting Notices of Subsequent Authority, responsive comments to a Notice of Subsequent Authority, and new factual information regarding the filing of a Notice of Subsequent Authority, nor the content requirements of a Notice of Subsequent Authority. Commerce, therefore, proposed an addition to § 351.301, at paragraph (c)(6), to provide guidance for future Notices of Subsequent Authority.[8] We received comments on that proposal, and as we describe in greater detail below, we have provided some additional language to clarify this provision in response to those comments.

Section 776(d) of the Act provides that in circumstances in which Commerce is applying adverse facts available (AFA) in selecting a program rate pursuant to sections 776(a) and (b) of the Act, it may use a countervailable subsidy rate determined for the same or similar program in a CVD proceeding involving the same country. Alternatively, 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 its current hierarchy in selecting AFA rates in CVD proceedings over many years, preceding its codification 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. For purposes of these regulations, Commerce chose to codify that hierarchy in a new paragraph of § 351.308.[9] We received comments on that proposal in response to the *Proposed Rule,* and in response to those comments we have modified certain language pertaining to the CVD hierarchy in investigations.

In the *Proposed Rule,* Commerce acknowledged that both government action and government inaction can benefit producers or exporters.[10] For example, when a government issues a fee, fine, or penalty to a company, yet never collects the payment, that revenue forgone is considered a financial contribution pursuant to section 771(5)(D)(ii) of the Act. Accordingly, Commerce proposed a new regulation at § 351.529, which codifies its practice in countervailing such a subsidy.[11] In addition, Commerce proposed considering nonexistent, weak, or ineffective property (including intellectual property), human rights, labor, and environmental protections which may distort costs of production in selecting surrogate values in accordance with section 773(c)(1) of the Act in § 351.408.[12] Likewise, in determining if a product has been sold for less than adequate remuneration, Commerce proposed considering the distortive effect of those same factors on prices and costs in selecting a benchmark country price or prices, in § 351.511.[13] Finally, Commerce proposed that those factors might be the foundation of a cost-based PMS, and proposed two examples in the *Proposed Rule* to reflect those factors, to be codified in § 351.416.[14] We received numerous comments on those proposals, and although we have made no changes to the fees, fines, and penalties and less than adequate remuneration proposed regulations, and only minor edits to the surrogate value proposed regulation, we have made some changes to the PMS regulation, for the reasons provided.

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 PMS that distorts the costs of production. *See 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 received 19 comments in response to that notice and addressed or incorporated many of those comments into its proposed regulation at § 351.416 in the *Proposed Rule.*[15] In addition, Commerce proposed regulatory provisions addressing both a sales-based PMS, as well as a cost-based PMS.[16] Its proposed regulation described information that Commerce would normally consider in determining the existence of a PMS, set forth information that Commerce would not be required to consider in every case, and explained that under certain factual situations, Commerce could determine that a cost-based PMS contributed to the existence of a sales-based PMS.[17] In addition, Commerce set forth 12 examples of circumstances that reflect a PMS that is likely to result in a distortion to costs.[18] The PMS regulation was the primary issue Commerce received comments on in response to the *Proposed Rule,* and for the reasons described below, Commerce has revised some of the language throughout § 351.416 for clarity and consistency in response to many of those comments.

In addition, Commerce proposed modifications to several of its CVD regulations, including those covering benefit (§ 351.503), loans (§ 351.505), equity (§ 351.507), debt forgiveness (§ 351.508), direct taxes (§ 351.509), export insurance (§ 351.520), and the attribution of subsidies to products in its CVD calculations (§ 351.525). We received several comments in response

[5] *Id.*

[6] Commerce also proposed a change to § 351.301(c)(4), which deals with the use of record information as well. However, the comments Commerce received were overwhelmingly opposed to such a change. Accordingly, Commerce is not making a change to the existing provision as proposed.

[7] *See Proposed Rule,* 88 FR 29853–57.

[8] *Id.,* 88 FR 29857.

[9] *Id.,* 88 FR 29858.

[10] *Id.,* 88 FR 29858–61.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.,* 88 FR 29861–67.

[16] *Id.*

[17] *Id.*

[18] *Id.*

to some of those regulation changes and have made some revisions to certain regulations in response, as set forth below.

Finally, in awareness of changes in the world economy, Commerce proposed eliminating the current regulation prohibiting the countervailing of certain transnational subsidies, § 351.527, and instead reserving it for future consideration.[19] We received numerous comments on this change to our regulations as well and have determined to make no changes from the *Proposed Rule,* for the reasons explained below.

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

In the *Proposed Rule,* Commerce invited the public to submit comments.[20] Commerce received 53 submissions from interested parties providing comments, including domestic producers, domestic industrial users, exporters, importers, foreign governments, and foreign entities. We have determined to make certain modifications to the *Proposed Rule* in response to certain issues and concerns raised in those submissions. We considered the merits of each submission and analyzed the legal and policy arguments in light of both our past practice, as well as our desire to improve, strengthen, and enhance the administration and enforcement of our AD/CVD laws.

The preamble to the *Proposed Rule* provides background, analysis, and explanation which are relevant to these regulations. With some modifications, as noted, this final rule would codify those proposed on May 9, 2023. Accordingly, to the extent that parties wish to have a greater understanding of these regulations, we encourage not only considering the preamble of these final regulations, but also a review of the analysis and explanations in the preamble to the *Proposed Rule.*

In drafting this final rule, Commerce carefully considered each of the comments received. The following sections generally contain a brief discussion of each regulatory provision(s), a summary of the comments we received, and Commerce's responses to those comments. In addition, these sections contain explanations of changes Commerce made to the *Proposed Rule,* either in response to comments or that it deemed appropriate for conforming, clarifying, or providing additional public benefit.

1. Commerce has revised § 351.104(a)(1) and added § 351.104(a)(3) through (7) to clarify the information sources that may be cited in submissions without placing them on the official record and the information sources that must be placed on the official record for Commerce to consider them.

In the *Proposed Rule,* Commerce explained that it was updating § 351.104(a), which describes in detail the information contained on the official record, to reflect Commerce's long-standing interpretation that mere citations and references (*e.g.,* hyperlinks and website URLs) do not incorporate the information located at the cited sources onto the official record. Commerce explained that this was 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.[21] Commerce explained that if an interested party wished to submit information on the record, it would be required to 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.

Commerce also explained, however, that there are exceptions to this rule which it adopted over the years, and set forth those exceptions in the proposed regulations at § 351.104(a)(1). Specifically, Commerce identified the following as sources which parties could cite and rely upon, without placing the sources on the record: U.S. statutes and regulations; published U.S. legislative history; U.S. court decisions and orders; certain notices of the Secretary and ITC published in the **Federal Register**, as well as decision memoranda and reports adopted by those notices; and the agreements identified in § 351.101(a).[22]

Commerce explained that Commerce-authored ''Issues and Decision Memoranda,'' included in that list of excepted citation sources, were adopted by **Federal Register** notices and were ''not the separate calculation and analysis memoranda that Commerce frequently uses in its proceedings.''[23] Commerce stated in the preamble that ''{c}alculation and analysis memoranda'' included ''initiation checklists, respondent selection memoranda, new subsidy allegation memoranda, and affiliation/collapsing memoranda from other proceedings or other segments of the same proceeding.'' Commerce provided that all of those documents would not be considered to be on the official record ''unless they have been placed on the record by Commerce or one of the interested parties to the proceeding.''[24] Furthermore, Commerce explained that remand redeterminations, determinations issued pursuant to section 129 of the Uruguay Round Agreements Act (URAA) (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.[25]

A. The revised regulation addresses documents not originating with Commerce, published in the ***Federal Register****, containing proprietary information, or not associated with an ACCESS barcode number.*

Commerce received several comments on both the proposed regulation language, as well as Commerce's description of its practice in the preamble to the *Proposed Rule.* One commenter expressed concerns with Commerce's restrictions on citations and references (*e.g.,* hyperlinks and website URLs) to documents not originating with Commerce. That commenter suggested that if documents and information (*e.g.,* academic publications) were previously placed on the record in other segments or proceedings, then parties should be able to cite those documents using Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS) barcode numbers, without placing the sources anew on the record of the immediate segment. However, there is no question that factual information that has been filed by interested parties with Commerce originating outside of the agency meets the definition of factual information under § 351.102(b)(21). Furthermore, § 351.301(c) requires that new factual information be submitted on each

[19] *Id.,* 88 FR 29870.

[20] *Id.,* 88 FR 29850–51.

[21] *Id.,* 88 FR 29852–53. Commerce provided reasons that such an update to the regulation was necessary, including to avoid the time and resources it takes for Commerce to make filers remove submissions from the record and resubmit them without arguments relying on websites and URLs. Another reason for the policy is that 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 therein might change.

[22] *Id.,* 88 FR 29871.

[23] *Id.,* 88 FR 29853.

[24] *Id.*

[25] *Id.*

segment of the record under specific deadlines and in a certain form. Accordingly, as each segment is composed of a separate record, and information from outside of the agency should be placed on the record for consideration, we will continue to maintain that requirement as it applies to documents not originating with Commerce.

Certain commenters also expressed concerns that Commerce's list of documents that it allows to be cited without placing the information on the record was incomplete. Specifically, one party pointed out that Commerce frequently allows citations to dictionary definitions without requiring them to be separately placed on the record. Another commenter noted that parties frequently cite World Trade Organization (WTO) panel and appellate body (hereinafter the Panel and Appellate Body, respectively) decisions, as well as North American Free Trade Agreement dispute Panel decisions, without submitting those decisions on the record. That party also suggested that Commerce should allow for all Federal Government determinations and notices published in the **Federal Register** (*e.g.,* Presidential proclamations, Executive orders, and United States Trade Representative (USTR) section 301 determinations, *etc.*) to be cited without submitting them on the record. We agree with all of those comments and have modified the proposed regulation to include references to dictionary definitions, dispute settlement determinations arising out of international agreements cited in § 351.101 (§ 351.104(a)(3)(ii)), and **Federal Register** citations in general (§ 351.104(a)(5)).

In addition, one party suggested that Commerce should also include various U.S. Customs and Border Protection (CBP) rulings, including those pertaining to the Harmonized Tariff Schedule of the United States (HTSUS), on the list of documents not subject to the requirements of § 351.301. Many such rulings are on the CBP website, but it is as time consuming for Commerce as it is for the interested parties to research the rulings of other agencies not published in the **Federal Register**. Accordingly, because interested parties bear the burden to provide sources not originating with Commerce or published in the **Federal Register** on the record, we have decided not to include CBP rulings or unpublished determinations of any other agency, except for the ITC in AD and CVD proceedings, on the list of sources excluded from the filing and timing requirements of § 351.301.

In revising the proposed regulations at § 351.104(a) for this final rule, Commerce has included new paragraphs (a)(3) through (7) to further clarify which documents may be cited without submitting information on the record under § 351.301. Specifically, Commerce has revised § 351.104(a)(1) to largely reflect the current regulatory language, but adds language that states that scope, circumvention, or covered merchandise inquiries will be conducted on the record of the AD segment of a proceeding when there are companion orders.

Commerce has made no changes to § 351.104(a)(2) but has added an additional paragraph (a)(3) which specifically addresses ''filing requirements for documents not originating with the Department.'' This provision clarifies that if a document does not originate with Commerce, it must be placed on the record, with the exception of the aforementioned list of citations Commerce has historically permitted to be cited without submitting such documents on the record. Notably, the reference to Commerce memoranda and **Federal Register** notices and determinations initially referenced in the *Proposed Rule* has been removed from this listing because it is addressed elsewhere in the revised regulation. This provision explains that unless a document not originating with Commerce appears on the list of exceptions, the procedural and timing requirements of § 351.301 apply.[26] It also explains that each citation must be cited in full, and that Commerce may decline to consider information sources in its analysis or determination if those citations are not cited in full.

In the new § 351.104(a)(4), Commerce has clarified that even though parties may take proprietary, privileged, and classified information from other segments of the same proceeding and place them on the record of another segment, they cannot do so with mere citations. All documents, even those originating with Commerce, which contain business proprietary information must be placed on the official record in their entirety in accordance with the filing and timing restrictions of § 351.301.

Furthermore, new § 351.104(a)(5) clarifies that all of Commerce's **Federal Register** notifications and determinations may be cited by parties in submissions on the record without the requirement that they be submitted on the official record, as long as those notices and determinations are cited in full. If they are not cited in full, Commerce may decline to consider those notifications or determinations in its analysis. This is consistent with Commerce's longstanding practice, and the provision states clearly that the procedural and timing requirements of § 351.301 do not apply to such documents.

Finally, § 351.104(a)(7) states that public versions of documents originating with Commerce from other segments or proceedings, but which are not associated with an ACCESS barcode number for whatever reason, including those documents issued before ACCESS was established, must be filed on the record in their entirety to be considered by Commerce in its analysis. Otherwise, the record would be incomplete because other interested parties would not have access to the cited documents. Therefore, the provision explains that the procedural and timing requirements of § 351.301 apply to such documents.

B. Public versions of unpublished documents originating with Commerce and associated with an ACCESS barcode number.

The record issue which foreign exporters, foreign governments, U.S. importers, U.S. consumers, and domestic industries all agreed upon involved Commerce's treatment of unpublished Commerce determinations associated with an ACCESS barcode number. Every commenter on Commerce's treatment of the record in the *Proposed Rule* disagreed with Commerce that public versions of draft and final remand redeterminations, preliminary and final section 129 determination memoranda, and scope ruling memoranda from other segments and proceedings, that are associated with an ACCESS barcode number, should be required to be placed on the administrative record of the segment before it. Several commenters claimed that those sources do not meet the five definitions of ''factual information'' in § 351.102(b)(21), and therefore, should not be subject to the filing and timing requirements for new factual information in § 351.301.

Instead, those commenters claimed that each of these documents is an agency legal determination that should be treated like other agency legal determination documents which are unpublished but are not required to be submitted on the record of other segments or proceedings (*e.g.,* preliminary decision memoranda and final issues and decision memoranda in investigations and administrative reviews). They suggested that the mere

[26] We note that the term ''the Department'' has been applied for these provisions to clarify application to documents authored by all Commerce employees distinct from the Secretary's determinations.

fact that those particular documents were not published in the **Federal Register** does not make them any less agency legal determinations.

With respect to remand redeterminations in particular, some commenters expressed confusion with how Commerce could conclude that agency determinations issued pursuant to a Federal court proceeding and then eventually affirmed and discussed in a public Federal court holding could be treated as ''new factual information,'' incapable of citation and reference in a subsequent Commerce proceeding without submitting it on the segment of an administrative record. One commenter pointed out that all remand redeterminations are publicly available on the Public Access to Court Electronic Records (PACER) website,[27] as well as on ACCESS, and courts are free to consider documents from both sources, which the commenter stated undercut a claim that this information was ''new'' or merely ''factual.''

In addition to those documents, however, all commenters expressed concerns that the issue was much more extensive than just those three examples. They suggested that every unpublished public analysis document originating with Commerce and associated with an ACCESS barcode number should be citable without submitting the agency analysis document on the record. The commenters expressed concerns that there was no factual or legal distinction between other AD or CVD analysis memoranda and the preliminary and final issues and decision memoranda which Commerce has permitted to be cited in arguments, briefs, and rebuttal briefs without requiring them to be submitted on each record. The commenters noted that ACCESS is Commerce's filing system and Commerce analysis teams have the ability to retrieve any of the cited documents from any segment instantly, as long as they have the appropriate barcode number. Therefore, they suggested that Commerce should provide a uniform citation for all submitters in using an ACCESS barcode in their filings and apply that to all Commerce-authored documents.

To the extent that Commerce explained in the *Proposed Rule* that preliminary and final issues and decision memoranda could be cited without placement on the record because those were adopted by reference in a published **Federal Register** document, several commenters stated their belief that there was no rational legal distinction between those incorporated by a **Federal Register** document and those not incorporated by a **Federal Register** document. However, even if there was a legal distinction between the two types of memoranda based on reference in the **Federal Register**, many commenters pointed out that Commerce frequently cites many of its other analysis memoranda, such as post-preliminary memoranda and new subsidy allegation memoranda in **Federal Register** documents, yet the record information policy described in the *Proposed Rule* would not allow any of those to be cited without submitting them on the record.

Some commenters claimed that Commerce's historical treatment of citations to various public and unpublished analysis memoranda was, at times, inconsistent. In addition, they suggested that Commerce was incorrect in treating any of those analysis memoranda as new facts because just as the five definitions of ''factual information'' in § 351.102(b)(21) do not apply to remand redeterminations, section 129 determination memoranda, and scope rulings, they equally do not apply to the rest of Commerce's other public analysis memoranda. They acknowledged that each of those public memoranda analyze facts, just like the aforementioned preliminary and final issues and decision memoranda, but also recognized that the more important aspect of those memoranda was that Commerce was making an analysis of those facts and issuing policy and legal determinations based on those facts. They expressed concerns that nothing in § 351.102(b)(21) suggests that the new factual information regulations were intended to apply to Commerce analysis and calculation memoranda, and nothing in the regulation was drafted with the intent of prohibiting parties from citing past Commerce practice and relying on that practice for support of arguments before the agency. In short, several of the commenters stated that none of these memoranda are ''factual information,'' but are instead the very basis for Commerce's policies and practices, and therefore, interested parties should be able to cite them in all documents, including briefs and rebuttal briefs, without having to submit them on the record under certain timelines and certain procedures as ''new factual information,'' pursuant to § 351.301.

One commenter pointed out that in Commerce's 1997 regulations, in responding to comments on § 351.301, Commerce described the information which could be relied upon in briefs and rebuttal briefs, and stated that in ''making their arguments, parties may use factual information already on the record or may draw on information in the public realm to highlight any perceived inaccuracies . . . .'' [28] That commenter noted that all of the public memoranda issued by Commerce are in the public realm, and therefore, consistent with its previous comments, Commerce should allow all of its public analysis memoranda from other segments and proceedings to be cited without being required to submit those memoranda on the record prior to the drafting and submission of briefs and rebuttal briefs. Another commenter agreed with this idea, noting that public versions of Commerce's documents are ''just as available to the public as Commerce's issues and decision memoranda'' because anyone with an ACCESS account can obtain those documents.

Furthermore, several commenters found the approach described by Commerce in the *Proposed Rule* to agency-authored documents to be problematic with respect to post-preliminary determination and results documents. Some commenters expressed concerns that adopting a wholesale rule that prohibits parties from demonstrating in a case or rebuttal brief that Commerce has taken a position in a preliminary determination or administrative results that is inconsistent with the agency's position in another segment or proceeding would result in Commerce being unable to address inconsistencies in its approach across reviews and likely lead to increased judicial oversight. Yet another commenter explained that interested parties are confronted with a predicament when they prepare case briefs, because, at the time that they answered Commerce's questionnaires, they did not include in their submissions all relevant Commerce memoranda that would aid Commerce in its decision-making process. Therefore, because Commerce prohibits citations to other relevant Commerce public determination memoranda in briefs and rebuttal briefs, interested parties cannot provide Commerce with necessary public references that would better inform Commerce's final determinations. In addition, certain commenters argued that the alleged ''new'' rule forced interested parties to identify and submit all relevant memoranda 30 days prior to a preliminary determination or results,

[27] *See Public Access to Court Electronic Records,* available at *https://pacer.uscourts.gov.*

[28] *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27295, 27332 (May 19, 1997).

even if it later became evident that it might be beneficial to the agency for the interested parties to cite to other Commerce memoranda. Such restrictions, they stated, would lead to unnecessary inconsistencies in Commerce's policies and practice.

Finally, another commenter expressed concerns that Commerce's proposal is unlawful because it would deprive interested parties of a transparent process and, for importers in particular, it would deprive them of their due process rights under the Fifth Amendment of the United States Constitution. That commenter suggested that Commerce's proposal contradicts fundamental principle of transparency in administrative law, citing *Slater Steels Corps.* v. *United States,* 279 F. Supp. 2d 1370, 1379 (CIT 2003) and *MacLean-Fogg Co.* v. *United States,* 100 F. Supp. 3d 1349, 1362 (CIT 2015) for the concept that there is a fundamental public interest in transparency in government. That commenter explained that all of the public versions of Commerce-originated documents at issue, including calculation and analysis memoranda, are publicly available, and Commerce's issues and decision memoranda frequently rely on such documents to complete the rationale underlying the agency's determinations. The commenter noted that in *Chefline Corp.* v. *United States,* 219 F. Supp. 2d 1303, 1309 (CIT 2002), the U.S. Court of International Trade (CIT) recognized that when ''credible evidence from outside the record indicates a significant error in the agency's determination,'' it would take judicial notice of that information. Thus, the commenter advocated that Commerce allow parties to cite past analysis documents in their briefs and rebuttal briefs and avoid the inevitable litigation which would otherwise follow under the approach suggested in the *Proposed Rule.*

In addition, that commenter expressed concerns that Commerce's proposed changes to its regulation would also violate an importer's due process rights under the Fifth Amendment. It stated that a fundamental requirement of due process is for parties to have the ''opportunity to be heard at a meaningful time and in a meaningful manner,'' citing *Mathews* v. *Eldridge,* 424 U.S. 319, 332 (1976) and *Young* v. *Dep't of Housing and Urban Dev.,* 706 F. 3d 1372, 1376 (Fed. Cir. 2013). Further, the commenter pointed to a U.S. Court of Appeals for the Federal Circuit's (Federal Circuit) holding which held that ''the arbitrary administration of law is subject to judicial intervention'' and that parties are ''due a fair and honest process'' (*NEC Corp* v. *United* States, 151 F. 3d 1361, 1370–71 (Fed. Cir. 1998)). The commenter explained that the relevant deadlines for the submission of factual information occur prior to Commerce's preliminary determinations, but that in many instances, Commerce's reasoning or methodological choices are not clear until it releases its preliminary determination. The commenter explained that if an interested party is prohibited from referencing a publicly available document in its case brief unless that document has already been submitted on the record or is a preliminary or final issues and decision memorandum, it is caught in an unfortunate situation because interested parties could not know if certain memoranda were relevant until after the preliminary determination or results were issued, after the deadline for submitting information on the record had passed. Thus, according to that commenter, this is a clear deprivation of those parties' due process rights to be heard in a meaningful manner.

Commerce's Response:

In response to all of the above comments, Commerce has decided to make a substantial revision to its regulations. Pursuant to § 351.104(a)(6), interested parties may, in all submissions, cite certain public preliminary and final issues and decision memoranda in the following segments, without the timing and filing restrictions of § 351.301, as long as they are fully cited and accompanied by an ACCESS barcode number in the citation: investigations, pursuant to §§ 351.205 and 351.210; administrative reviews, pursuant to § 351.213; new shipper reviews, pursuant to § 351.214; changed circumstances reviews, pursuant to § 351.216; sunset reviews, pursuant to § 351.218; and circumvention inquiries, pursuant to § 351.226. Commerce has historically allowed all of these documents to be cited without requiring them to be placed on the record of other segments or proceedings, and Commerce will codify that practice in these regulations.

In addition, the same citation allowance will also be applied to public versions of preliminary and final scope rulings pursuant to § 351.225, and covered merchandise inquiries pursuant to § 351.227, draft and final redeterminations on remand, and draft and final redeterminations issued pursuant to section 129 of the URAA. After consideration of the arguments pertaining to scope rulings, remand redeterminations, and section 129 determinations from multiple commenters, we agree that those documents should also be able to be cited without the requirement that those documents be placed on the administrative record. Like the other documents listed above, they are statutory and regulatory public and final determinations made by Commerce in individual segments of a proceeding.

Furthermore, Commerce has determined that four additional types of documents argued by interested parties should also be able to be cited without the requirement that those documents be placed on the administrative record: initiation decision documents, such as initiation checklists; memoranda which describe and analyze new subsidy allegations; scope memoranda issued in an investigation; and post-preliminary determination or results memoranda which address issues for the first time after the preliminary determination or results has been issued and before the final determination or results is issued. In the first two types of documents, Commerce is making a determination to initiate, or not initiate, based on certain information, while in the third document Commerce is conducting an analysis on whether a product is, or is not covered by the scope of an investigation. Finally, in the fourth document, Commerce is making a determination for the first time upon which parties may file comments. We find each of these documents serves a unique purpose in the agency's proceedings and is largely self-contained (*i.e.,* they do not require Commerce employees to look outside of the four corners of the document to understand the analysis). Accordingly, we determine that Commerce and interested parties should be able to cite to those documents in other segments or proceedings without separately placing them on the record.

We emphasize that all citations must be cited in full. Commerce can only consider and rely on a cited information source if it is able to retrieve that information source, which may not be possible if the citation to the information source is incomplete. Furthermore, we also emphasize that unlike in past cases, the regulations will now require that all of these document citations include reference to the associated ACCESS barcode numbers. The inclusion of the associated ACCESS barcode numbers in the citation is an additional requirement from what was permitted before, but one that most commenters indicated would be an improvement for parties both outside and within Commerce to easily retrieve the documents and consider them in making preliminary and final determinations. If the citations are not

cited in full, including the associated ACCESS barcode numbers, the regulation states that Commerce may decline to consider the cited information sources in its analysis or determination.

With respect to the other public documents authored by Commerce and argued by the comments, it is important to stress that the conduct of an administrative proceeding is a time-intensive, resource-intensive, and fact-intensive endeavor. Although several commenters stated that collapsing memoranda or calculation memoranda, for example, taken from other segments or other proceedings are not ''factual information'' under the regulatory definition of the term in § 351.102(b)(21), we disagree with that assessment. A collapsing determination, under § 351.104(f) requires that Commerce first determine if two entities were affiliated during a particular period of investigation or review, and then determine whether there is a significant potential for the manipulation of prices or production between the two entities such that they should be treated as one collapsed entity. Likewise, when Commerce issues calculation memoranda, its calculations are based upon the record and data before it in that particular segment of a proceeding. Thus, although we agree with the commenters who noted that each collapsing and calculation memoranda is a legal analysis and decision by the agency, each of those memoranda also reflect conclusions based on the facts unique to the segment of the proceeding in which they were issued. Each document is publicly available, accessible on ACCESS, potentially relevant to a segment or proceeding before Commerce, and contains factual information being introduced on the record of the ongoing segment or proceeding for the first time.

When Commerce employees are considering such submissions on the record, they frequently must review the record of the segment from which the memoranda at issue originated and review further information on those records pertaining to those agency decisions to understand the broader facts and context in which the decisions at issue were made by the agency. It is a time-consuming exercise and, depending on the complexity of the facts and the record of the other segment or proceeding, can be difficult and may require that Commerce employees put even more documents from those other segments or proceedings on the record. This problem becomes even more profound when one recognizes that there are dozens of decision memoranda issued by Commerce on a monthly basis in various segments, with some of those documents being more descriptive of the facts under consideration and self-contained than others. Accordingly, for many decision memoranda not listed in § 351.104(a)(6), Commerce has determined that it would be best to continue its practice of requiring interested parties pointing to those analysis and decision memoranda from other segments and proceedings to submit those documents on the record of the segment to which the parties are arguing that those memoranda are relevant. We appreciate that some interested parties explained that it would be easier for them to simply cite all public Commerce decision memoranda, but their points do not take into consideration the time and effort Commerce employees already devote to analyzing the information placed on the record unique to the segment before the agency. If Commerce were required to independently review the details and context of the records of numerous additional segments in each case, it would quickly become unmanageable.

In response to the arguments that Commerce has tried to prohibit references to past practices and policies in issuing these regulations (*i.e.,* deprived interested parties of a transparent process or deprive importers of their due process rights under the Fifth Amendment of the United States Constitution) we disagree. Commerce believes, in fact, that there is no support for such contentions. Interested parties may, in fact, cite all of Commerce's public decision memoranda from other segments and proceedings and rely on those memoranda for purposes of their arguments in every case. There is no regulation that restricts such citation or argument, and nothing in the *Proposed Rule* suggested that Commerce would prevent reliance on such documents in any given segment. These regulations merely require that when interested parties cite public documents originating with Commerce, and where those documents are not listed under § 351.104(a)(6), then the interested party must submit a copy of that public decision document on the record of the segment in which it is participating. If the interested party is already citing that document to support its claims, then the interested party will naturally have access to the document and should be easily able to take the additional step and submit the document on the record of the segment at issue. If anything, Commerce concludes that this additional step creates a procedure which is more, and not less, transparent, than the practice advocated by the commenters, and in no way deprives importers or any other party of their due process rights under the Fifth Amendment of the United States Constitution.

Finally, with respect to the statements made by commenters on post-preliminary determination and results submissions, we recognize that parties may cite any of the documents listed in section § 351.104(a)(6) to argue that Commerce acted inconsistently with its practices or procedures in a preliminary Commerce determination. There is no question that collapsing and calculation memoranda, for example, from other segments might provide greater factual detail on certain policies or practices, as suggested by some of the commenters. However, it is the very factual specificity of the data in such documents which we believe also warrants the provision of such documents and data on the record for consideration in accordance with the timing and filing requirements of § 351.301. The inclusion of such documents on the record allows analysts and interested parties to consider that information in detail in determining the relevance of those previous Commerce decisions to the facts on the record before the agency.

2. Commerce will not revise § 351.301(c)(4), as proposed.

Section 351.301(c) is the provision in Commerce's regulations that provides timelines and procedures for parties to place new factual information on the official record, and allows other interested parties the opportunity to respond to those submissions. Section 351.301(c)(4), in particular, pertains to Commerce and its ability to submit new factual information on the record. In light of multiple cases in which parties have filed unrelated and irrelevant new factual information on the record in response to Commerce's placement of a calculation document on the record, Commerce proposed an exception to § 351.301(c)(4) in the *Proposed Rule,* which would allow Commerce to place a calculation or analysis memorandum from another segment or proceeding on the record to clarify its practice in response to the parties' arguments in their briefs and rebuttal briefs, while interested parties could respond with comments, but not with further new factual information.[29]

Commenters were universally opposed to Commerce's proposal to amend § 351.301(c)(4) and to allow the agency to place agency analysis and calculation memoranda on the record in

[29] *See Proposed Rule,* 88 FR 29857.

response to arguments made in briefs and rebuttal briefs without allowing interested parties an opportunity to submit other agency analyses or calculation memoranda in response. Certain commenters expressed concerns that merely allowing responsive arguments, but not responsive evidence, would severely limit interested parties' ability to meaningfully respond to the documents placed on the record by Commerce, and would prohibit interested parties from being able to provide additional information showing that Commerce's past practice and policies were inconsistent with that being claimed by the agency, or, at minimum, clarifying minute distinctions between cases in which those policies and practices were applied.

Several other commenters clarified that they were not opposed to a restriction on unrelated, irrelevant, and non-responsive factual information from interested parties, and some even indicated they would support such limited restrictions, but those commenters stated that a wholesale prohibition on responsive factual information was unreasonable.

Commerce's Response:

In light of the comments received by Commerce in response to the *Proposed Rule* on both the proposed changes to §§ 351.104(a) and 351.301(c)(4), Commerce has determined that it agrees that the regulation change, as proposed, would not provide interested parties with sufficient opportunity to respond to information placed by Commerce on the record late in a segment of a proceeding. Accordingly, Commerce will not adopt the changes proposed to § 351.301(c)(4) in the *Proposed Rule.*

3. Commerce has made certain revisions to the proposed amendments to §§ 351.225, 351.226, and 351.227.

A. Commerce will accept responsive arguments pre-initiation in scope and circumvention inquiries in §§ 351.225(c)(3) and 351.226(c)(3), and allow responsive factual information pre-initiation in circumvention inquiries.

In 2021, Commerce revised its regulations covering scope inquiries at § 351.225 and created new regulations addressing circumvention inquiries pursuant to section 781 of the Act.[30] The revisions were extensive, and the reasons behind many of the changes were numerous. One of the significant changes was the requirement that if an interested party requested a scope ruling, the party must file a standardized scope application. Section 351.225(c) provides a listing of all of the required information for a scope ruling,[31] and § 351.226(c) largely incorporates the same requirements for a circumvention inquiry request.[32] Commerce explained in the *Scope and Circumvention Final Rule* that it hoped that by listing criteria and standardizing the filing requirements in scope and circumvention inquiries, it would accelerate the process by allowing all of the information necessary to initiate to be submitted on the record at once, rather than requiring Commerce to issue supplemental questionnaires and ask for further information, both before and after initiation.

In the *Proposed Rule,* Commerce noted that in the *Scope and Circumvention Final Rule,* Commerce had indicated that parties would have an opportunity to challenge the adequacy or veracity of a scope ruling application or circumvention inquiry request. However, such an opportunity was never codified in §§ 351.225 and 351.226.[33] Commerce's experience since the issuance of the scope and circumvention rules was that it would be beneficial to the agency to allow ''interested parties, other than the applicant or a 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.'' [34] Thus, such a change to the regulation was proposed.

Furthermore, Commerce explained that the factors considered in a circumvention inquiry differ from a scope inquiry in that, for example, circumvention inquiries frequently require Commerce to consider if there were patterns of trade. Thus, Commerce explained in the *Proposed Rule* that Commerce was also proposing that in circumvention inquiries specifically, responsive new factual information could be provided in that 10-day time period and that the party alleging circumvention could respond five days afterwards with comments and new factual information to rebut, clarify, or correct the interested parties' new factual information. Commerce explained that it expected ''that by allowing for both comments and new factual information in this manner,'' the record would contain even greater amounts of information so that the agency could determine if the criteria to initiate were satisfied.[35]

Commerce received several comments on these proposals. Some commenters opposed allowing interested parties to file comments on a scope application pre-initiation in scope inquiries and comments on a circumvention inquiry request and new factual information pre-initiation in circumvention inquiries. They complained that the procedure would be burdensome and slow the process down for initiation, when in fact, the new and revised regulations were intended to speed up the process for scope and circumvention inquiries. They commented that the proposed regulation changes would lead to a mini-investigation in each case and create an adversarial process before the case was ever even initiated, and that the very purpose of a scope or circumvention inquiry is to gather information and to make a determination on the basis of the record—not to conduct such an analysis pre-initiation. Some commenters even pointed to a proposed bill pending before Congress that would prohibit Commerce from accepting any unsolicited communications from any person other than an interested party requesting a circumvention inquiry pre-initiation and suggested that Commerce should act in accordance with that proposed legislation and codify the prohibition of all such submissions. Overwhelmingly, the main concern from those opposed to the consideration of additional information before initiation was that it would slow the process down.

In the alternative, some parties suggested that if Commerce continues to accept comments and new factual information before initiation, the date for such filings should not be due 10 days after filing of a scope ruling application or circumvention inquiry request, but instead after the administrative protective order (APO) is established. They explained that this would give responsive submitting parties more adequate time to review a scope ruling application or circumvention inquiry request.

Commerce's Response:

Commerce has made no changes to the proposed §§ 351.225(c)(3) and 351.226(c)(3) and will permit the submission of arguments and information as provided in those regulatory provisions. Since 2021, Commerce has conducted scope and circumvention inquiries in which interested parties have indicated to Commerce that information in a scope

[30] *See Scope and Circumvention Final Rule,* 86 FR 52300 (September 20, 2021) (*Scope and Circumvention Final Rule*).

[31] *Id.,* 86 FR 52313–15.

[32] *Id.,* 86 FR 52339–41.

[33] *See Proposed Rule,* 88 FR 29853, n. 9.

[34] *Id.,* 88 FR 29853.

[35] *Id.*

ruling application or circumvention inquiry request was not accurate or was missing key information, and it became evident that the regulations did not adequately provide a means for such concerns to be raised and considered in a timely fashion. These changes remedy that problem. We believe allowing interested parties to file comments 10 days after the filing of a scope application to address the adequacy of the application, and file comments and new factual information 10 days after the filing of a circumvention inquiry request to address the adequacy of that inquiry request, is consistent with current practice, is fair to all interested parties, and better informs Commerce so that the agency does not initiate a scope inquiry or circumvention inquiry on inaccurate or incomplete data. To the extent that the bill before Congress proposed that Commerce should be prohibited from considering information which would better inform the agency in determining to initiate a segment, Commerce is in no way bound by that proposed legislation and must prepare regulations which we believe best serve the parties and the government.

To the extent that parties are concerned that this will slow down the initiation process, it is the agency's belief that for scope ruling applications, it should make no difference. If Commerce does not initiate a scope inquiry or reject a scope application within 31 days, it will be deemed initiated pursuant to § 351.225(d)(1). For circumvention inquiry requests, it is possible that the addition of new factual information may delay initiation by a few days, as we explained in the *Proposed Rule* and describe further below, but we believe that greater amounts of information filed in a timely fashion will assist the agency in making an informed and fair decision to initiate, or not initiate, a circumvention inquiry.

Finally, we will continue to require the date for filing responsive arguments, and in circumvention inquiries, new factual information, to be 10 days from the filing of the application or request. The date of issuance of the APO will differ from case to case, and one of the purposes of these regulations is to standardize procedures and bring predictability to scope and circumvention inquiries. We believe that 10 days from the date of submission on the record is adequate time for interested parties to consider if there are reasons to be concerned about the completeness or veracity of an application or circumvention inquiry request, and if so, to raise those concerns with Commerce on the record.

B. Commerce may request clarifications from a scope ruling applicant or circumvention inquiry requestor, reset the initiation deadline from the date of filing a complete response to the clarification request, and extend the deadline for initiating a circumvention inquiry by 30 days if an interested party has filed new factual information in response to the circumvention inquiry request, in the §§ 351.225(d)(1) introductory text and (d)(1)(ii) and (iii) and 351.226(d)(1) introductory text and (d)(1)(ii) and (iii).

Commerce explained in the *Proposed Rule* that one issue which has arisen several times since the 2021 scope and circumvention regulations were issued is that there have been proceedings in which Commerce wished to seek clarification on one or more aspects of a submission, but the regulation only permitted initiation or rejection of an application.[36] Frequently, Commerce may only seek answers, for example, to less than a page of questions, and it is an inefficient use of the agency's, scope applicants', and circumvention inquiry requesters' time to reject a submission, and then have the requesters resubmit everything with just the answers to those few questions added to the application or request. Commerce, therefore, proposed a modification to its scope and circumvention inquiry regulations to reset the 30-day deadline to start after a party files a timely response to a clarification request by Commerce.

In addition, Commerce recognized that by allowing parties to submit new factual information in response to a circumvention inquiry request and allowing requesters to respond with new factual information on surrebuttal, the additional data may require Commerce to extend beyond the normal allowance of up to an additional 15 days if it is not practicable for Commerce to initiate within 30 days. Accordingly, Commerce proposed up to an additional 15-day extension in that scenario, to allow a combined extension of no more than 30 days beyond the original 30-day deadline if new factual information was submitted on the record pre-initiation.[37]

Commerce received several comments on these provisions. Most of the commenters expressed a frustration that while the 2021 regulations had created procedures in scope and circumvention inquiries that would lead to 30-day initiations in scope inquiries, and no more than 45-day initiations in circumvention inquiries, the addition of allowing Commerce to seek clarification, and then resetting the 30-day clock after a timely response to the clarification request, seemed to undermine, or at least slow down, much of that expedient process. For that reason, a few commenters objected to Commerce being able to seek clarification, while others requested that Commerce limit its ability to request clarification pre-initiation to a single request.

Likewise, several commenters objected to Commerce allowing for an additional 15-day extension to initiate circumvention inquiries if new factual information had been submitted on the record in response to a scope application or circumvention inquiry request. They commented that this would extend the period even further than the scope and circumvention regulations anticipated when they were issued and would be unnecessary and impractical. One commenter expressed concerns that by extending the deadline from 30 days to 60 days, it was an open invitation to exporters to ship additional circumventing merchandise to the United States, to the detriment of domestic producers, because those entries would not be covered by a subsequent circumvention finding. They suggested that the best defense to prevent further circumventing merchandise from being exported to the United States would be to allow for no extensions and no additional information on the record pre-initiation.

One commenter expressed disagreement with those commenters opposed to allowing Commerce to seek clarification. That commenter stated that it is a waste of time for Commerce and applicants or requestors to refile because of a few small issues, which could have quickly been resolved and provided to the agency upon request if given an opportunity. That commenter explained that, in the past, foreign exporters and importers took advantage of rejected circumvention inquiry requests and shipped additional products to the United States before domestic producers could refile their submissions with necessary supplemental information (thereby allowing their merchandise shipped pre-initiation from being covered by an affirmative circumvention finding).

Another commenter suggested that if Commerce retains its ability to seek clarification from scope ruling applicants or circumvention inquiry requestors, Commerce should revise the regulation to allow interested parties to submit comments on the adequacy of the responses to Commerce's requests for clarification 10 days after they are

[36] *See Proposed Rule,* 88 FR 29854.

[37] *Id.,* 88 FR 29856.

submitted or 10 days after an APO has been established, whichever is latest.

Commerce's Response:

Commerce explained in the *Proposed Rule* that it is both fair and more efficient to allow the agency to seek clarifications and reset the 10-day deadline rather than reject a scope ruling application or circumvention inquiry request outright, when the agency just needs a limited amount of clarifying information. It is evident that the greatest concern from many commenters is that Commerce will use the ability to seek comments as a *de facto* way to grant extensions and delay scope and circumvention inquiries. That is not the purpose or intention of that provision. If a scope ruling application is generally incomplete and inadequate, Commerce will reject it. However, if Commerce determines that it needs additional information to supplement one or two sections of an application, for example, or it needs to understand responses to a limited number of questions, Commerce should be able to seek those answers without rejecting the scope application or circumvention inquiry request. The purpose of these modifications to the regulation is not to let the ''exception become the rule'' in this regard—we agree that one of the purposes of the standardization and the addition of express requirements in the scope and circumvention regulations was to accelerate the process of initiating and conducting scope and circumvention inquiries. The ability to seek clarification should not be interpreted as a means for anyone to inhibit that purpose.

Furthermore, the commenters that opposed allowing for an additional 15 days to consider whether or not to initiate a circumvention inquiry expressed little understanding of the time and resources it takes for an agency to consider record information and determine whether initiation is warranted. We understand the desire of some commenters for a speedy process, but as we explained above, we do not believe that Commerce should ignore or prohibit facts and arguments in circumvention cases that might undermine the accuracy or completeness of a circumvention inquiry request. Commerce's determinations are based on record information, and it is important that when the agency initiates a scope or circumvention inquiry, it does so based on accurate and, when possible, complete information.

We therefore continue to find that it is advisable for Commerce to seek clarifications from applicants or requestors pre-initiation, when necessary. Further, we find that allowing for an extra 15 days for the agency to review and analyze new factual responsive information on the record pre-initiation is not unreasonable.

Commerce does not, however, agree that the agency should allow other parties to submit further, new factual information and arguments on the record after a party files a timely submission in response to Commerce's request for clarification, as suggested by some commenters. If the facts are simple, then Commerce may be able to initiate quickly after receiving the responses or reject the application or request quickly as well. In other words, Commerce may not need, or want, 30 full days after the timely clarification response has been filed to initiate a scope or circumvention inquiry. If Commerce was required to allow parties to provide additional submissions after a clarification has been requested and a response has been filed, we believe that there would be too much of a possibility of unnecessary delay—the concern expressed by most of the commenters on this issue. This would be true whether the deadline is after the submission of the response or, as some commenters suggested, after the APO has been established. Therefore, we have not codified an additional layer of comments and submission of new facts following the receipt of clarification responses on the record, pre-initiation.

Finally, we note that on September 29, 2023, Commerce revised the language of §§ 351.225(d) and 351.226(d) with some small changes.[38] The new language does not conflict with this revised addition to the regulation, and Commerce is merging the two sets of textual revisions together in the final regulation.

C. Commerce agrees that the proposed provisions under §§ 351.225(f), 351.226(f), and 351.227(d) should be revised to reflect that only the filing and timing restrictions set forth in § 351.301(c) do not apply to the filing deadlines set forth in the scope, circumvention, and covered merchandise regulations.

In §§ 351.225(a), 351.226(a), and 351.227(a), each provision states that ''unless otherwise specified, the procedures as described in subpart C of this part (§§ 351.301 through 351.308 and 351.312 through 351.313) apply to this section.'' There were outstanding questions as what procedures were ''otherwise specified'' in Commerce's 2021 regulations, and in the *Proposed Rule,* Commerce proposed that §§ 351.225(f), 351.226(f), and 351.227(d) be amended to incorporate language that stated that none of the procedures described in subpart C applied to the scope, circumvention and covered merchandise filing deadlines and procedures.[39]

Three commenters pointed out that the language proposed by Commerce inadvertently covered too many regulatory provisions, because there was no reason to believe that the timing and filing provisions of §§ 351.225, 351.226, and 351.227 intended to forgo, for example, the formatting requirements of § 351.303, or the rules pertaining to treatment of, access to, and use of business proprietary information under § 351.306. Those commenters suggested that, in fact, Commerce intended only to state that § 351.301(c) does not apply to those regulations, because that is the general regulatory provision that sets forth filing and timing restrictions for submissions of factual information in AD and CVD inquiries.

Commerce's Response:

We agree with the commenters who stated that Commerce intended only for the filing and timing restrictions of § 351.301(c) to be inapplicable to the scope, circumvention, and covered merchandise regulations. Accordingly, we have revised the proposed language in §§ 351.225(f) and 351.226(f) to state that ''The filing and timing restrictions of § 351.301(c) do not apply to this paragraph (f), and factual information submitted inconsistent with the terms of this paragraph may be rejected as unsolicited and untimely,'' and revised the proposed language in § 351.227(d) to state that ''the filing and timing restrictions of § 351.301(c) do not apply to this paragraph (d), and factual information submitted inconsistent with the terms of this paragraph may be rejected as unsolicited and untimely.'' With respect to § 351.301(b), Commerce expects that the types of factual information submitted under §§ 351.225(f), 351.226(f), and 351.227(d) will normally be covered by § 351.102(b)(21)(i) and (ii). Accordingly, the written explanation requirements of § 351.301(b) will continue to apply to those regulations.

D. Commerce will continue to allow for extensions to preliminary circumvention determinations up to 90 days in § 351.226(e)(1).

Section 351.226(e)(1) states that a preliminary circumvention determination will be issued no more than 150 days after the publication of the notice of initiation and does not

[38] *See APO and Service Final Rule,* 88 FR 67077–78.

[39] *See Proposed Rule,* 88 FR 29854.

expressly provide for the opportunity of an extension. Furthermore, § 351.226(l)(2)(ii) provides that if Commerce preliminarily determines that merchandise was circumventing an AD or CVD order during a given period of time, and the merchandise was not being suspended pursuant to those orders, Commerce will normally direct CBP to suspend liquidation of all entries of the merchandise entered on or after initiation and collect cash deposits on those entries. The preamble to the *Scope and Circumvention Final Rule* explains the reason for this sequence. In summary, Commerce determined that in most cases, the publication of the initiation of a circumvention inquiry in the **Federal Register** would be sufficient notice for producers, exporters, and importers that their non-subject merchandise might subsequently be determined to be subject to an order through a circumvention determination.[40] Thus, rather than direct suspension starting at the date of an affirmative preliminary determination, the regulation provides that normally Commerce will direct suspension, and the collection of cash deposits, to be applied retroactively to entries on or after initiation—thereby preventing parties from quickly shipping merchandise after initiation to the United States in avoidance of potential future ADs or CVDs.

In the *Proposed Rule,* Commerce explained that given the complexity of certain circumvention inquiries, it was reasonable to expressly provide for an extension to the issuance of a preliminary circumvention determination.[41] Commerce determined that a 90-day extension, for a deadline of no more than 240 days from the date of publication of the notice of initiation, was a reasonable extension amount, and emphasized that this would not alter the maximum deadline for issuing a final circumvention determination of 365 days.[42]

Multiple commenters objected to Commerce's addition of an extension allowance to § 351.226(e)(1). They expressed concerns that because no suspension and collection of cash deposits would commence for entries not already suspended under the AD or CVD orders until a preliminary determination was issued, that any extension of a preliminary determination would provide circumventing parties with a longer time in which they could benefit from duty-free entry and possibly evade the payment of ADs or CVDs altogether. The commenters suggested that Commerce's ability to extend a preliminary circumvention determination was unnecessary and that allowing for an extension largely undermined the remedy provided in the *Scope and Circumvention Final Rule* in § 351.226(l)(2)(ii), perpetuating ongoing harm to domestic producers. In particular, some commenters expressed concerns that extending a preliminary circumvention determination by three months could, in fact, guarantee that many entries which entered earlier in the period of the inquiry, and were the foundation of a circumvention allegation, would be liquidated without regard to any ADs or CVDs, defeating the very purpose of a circumvention inquiry and determination.

In the alternative, some commenters suggested that if Commerce continues to allow for an extension of a preliminary circumvention determination, then it should limit such an extension to only 45 days, rather than 90 days. Others proposed that Commerce should limit an extension to 50 days, to allow for no more than 200 days before issuance of a preliminary determination after publication of the initiation **Federal Register** notice. Those commenters also suggested that Commerce should consider revising its regulations under § 351.226(l), and permit suspension of liquidation of entries in every circumvention inquiry starting immediately at initiation, rather than waiting for a preliminary affirmative circumvention determination, thereby mitigating the significant risk of merchandise being liquidated as entered before Commerce issues its preliminary determination.

Commerce's Response:

Since Commerce issued its *Scope and Circumvention Final Rule* in 2021, Commerce has found good cause to extend multiple preliminary circumvention determinations pursuant to § 351.302(b). This is because circumvention inquiries can be extremely complicated. For example, in analyzing if merchandise was assembled or completed in a third country in circumvention of AD or CVD orders, Commerce must consider the five factors which establish if there was circumvention, the factors which inform Commerce if a process of assembly or completion is minor or insignificant, an analysis of patterns of trade, a determination of affiliations, and consideration of increases in imports of particular merchandise into the foreign country.[43] If there are multiple parties involved, such analyses require that Commerce request a large amount of information from the interested parties, and then analyze all of that data on the administrative record. It has been the agency's experience that in many circumvention inquiries, 150 days is simply not enough time for Commerce to gather sufficient information, conduct such an analysis, and make a preliminary determination.

We appreciate that parties are concerned that extending a preliminary determination could possibly allow more entries of merchandise to be liquidated without regard to ADs or CVDs than if Commerce issued its preliminary circumvention determination earlier. However, the presumption behind that complaint is that Commerce would be able to adequately gather all of the necessary information and conduct the necessary analysis of all of the statutory and regulatory criteria needed in a preliminary circumvention determination within 150 days in every circumvention inquiry. Given the complexity and number of circumvention determinations, not to mention other AD and CVD proceedings demanding resources and time from Enforcement and Compliance teams, we stress that such a presumption is mistaken.

Our experience has shown that there will be some circumvention inquiries which do not require more time, or at least not an additional 90 days, to complete a preliminary circumvention determination. For example, a circumvention inquiry with a single producer or exporter conducted pursuant to a minor alterations allegation under section 781(c) of the Act might not require Commerce gather as much information or conduct such a lengthy analysis as, for example, a further assembly or completed circumvention allegation under section 781(a) of the Act, in a case involving multiple producers or exporters. It is a case-by-case determination, but ultimately, Commerce needs the flexibility to extend its preliminary circumvention determination when the strains on the record and the agency's resources require such an extension.

Furthermore, we continue to believe that Commerce should not direct CBP to suspend liquidation and collect cash deposits on non-subject merchandise not already suspended until it has made an affirmative circumvention determination, as reflected in § 351.226(l)(2)(ii), for all of the reasons

[40] *See Scope and Circumvention Final Rule,* 86 FR 52344–50.

[41] *See Proposed Rule,* 88 FR 29856.

[42] *Id.,* 88 FR 29856–57.

[43] *See* sections 781(b)(1), (2), and (3) of the Act.

provided in the *Scope and Circumvention Final Rule.* Therefore, we have made no changes to § 351.226(l).

In addition, although we appreciate why some commenters have suggested that Commerce reduce the 90-day extension allowance to 45 or 50 days, we continue to believe that a 90-day allowance remains appropriate. Just because the 90-day allowance exists in the regulation does not mean that Commerce will always extend up to the full 90 days. Furthermore, regardless of the length of the extension, § 351.226(e)(2) still requires Commerce to issue its final circumvention determination no later than 365 days from the date Commerce published the initiation notice in the **Federal Register**.

Finally, we must emphasize that even if some additional entries might be liquidated without regard to ADs or CVDs if Commerce extends a preliminary circumvention determination, that extension will not ''undermine'' the circumvention law or defeat the very purpose of a circumvention inquiry and determination, as some commenters alleged. Commerce will continue to direct CBP to continue to suspend entries which are already suspended at initiation under § 351.226(l)(1). Further, Commerce will continue to direct CBP to suspend entries of, and collect cash deposits on, merchandise covered by an affirmative circumvention determination retroactively to the date of initiation, in accordance with § 351.226(l)(2)(ii). That means that even if the period in which Commerce made its preliminary determination was extended, the effect of that decision will only reach further back to cover more entries that have not yet been liquidated. Accordingly, most of the remedy available without the extension provision in § 351.226(e)(1) will remain in place with the addition of the extension provision to § 351.226(e)(1), and the benefit will be that Commerce will be able to conduct its inquiry, complete its preliminary analysis, and enter a preliminary circumvention determination consistent with its statutory and regulatory obligations.

E. Commerce will continue to codify its practice that it will only conduct a scope ruling of merchandise not yet imported if it has been historically commercially produced and sold in § 351.225(c)(1) and (c)(2)(x).

Commerce explained in the *Proposed Rule* that although it will conduct scope inquiries of merchandise not yet imported into the United States, under its practice, it will only do so if that merchandise has been commercially produced and sold.[44] Commerce proposed to codify that practice in § 351.225(c)(1) and (c)(2)(x).

Some commenters were critical of Commerce's practice and the codification of that practice in the regulations. They expressed concerns that the ''heightened standard'' would place an unreasonable burden on applicants. They suggested that Commerce should clarify that scope ruling applicants need only be required to provide evidence available to them, and not be required in every case to prove that a product has been commercially produced and sold because sometimes scope applicants may not have access to such information. They pointed out that the initial language of § 351.225(c)(2) actually provides that all of the information required in the application is based on language that states, ''to the extent reasonably available to the applicant.'' [45] Their concern was that that language proposed for § 351.225(c)(1) states that the applicant ''must provide evidence that the product has been commercially produced and sold,'' with no ''reasonably available'' language attached to it.[46]

Commerce's Response:

It is Commerce's practice to require evidence that merchandise which has not yet been imported into the United States was commercially produced and sold in other foreign markets before Commerce will initiate a scope inquiry on that merchandise. We have therefore not changed the language in § 351.225(c)(1) as proposed in the *Proposed Rule.* As some of the commenters pointed out, there are many areas in our law in which Commerce will consider allegations and complaints based on information which is reasonably available to the party making the allegation or claim. In this case, however, Commerce is extending a service to review merchandise which has not yet even entered the United States stream of trade. In providing such a service, it is therefore critical that Commerce not expend its time and resources on sample sales, prototypes, or mere models of merchandise not yet commercially produced. It is also critical that Commerce not expend its time or resources on merchandise which has never been commercially sold and might never be commercially sold in the United States in the future. Accordingly, the requirement that applicants provide evidence of both of these factors is reasonable and Commerce will not revise its practice or the proposed evidentiary standard in this final rule.

With respect to the language set forth in proposed § 351.225(c)(2)(x), although it falls under the introductory language of paragraph (c)(2), like all of the other elements requesting information from scope ruling applicants, we wish to be clear that if an applicant is unable to provide (1) a statement that the product has been commercially produced, (2) a description of the countries in which the product is sold, or has been sold, and (3) relevant documentation which reflects the details surrounding the production and sale of that product in countries other than the United States, then Commerce will not conduct a scope inquiry of that merchandise. We have made one minor change, however, from the *Proposed Rule* to § 351.225(c)(2)(x)(B), that allows evidence of countries in which merchandise is either currently being sold, or evidence of countries in which the merchandise ''has been sold'' in the past. Although the contemporaneity of such sales would be important, there is no requirement under Commerce's practice that the sales must be currently made in other countries.

F. Commerce has modified its scope clarification regulation, § 351.225(q), in response to the comments received.

Section 351.225(q) was added to the regulations in the *Scope and Circumvention Final Rule* and Commerce explained in the *Proposed Rule* that it was intended to codify Commerce's historical usage of such clarifications to address scope-related issues not addressed by scope rulings.[47] The current regulation provides an example in which, after Commerce has previously issued repeated interpretations of particular language in a scope, Commerce issues a scope clarification that takes the form of an interpretive footnote to the scope when the scope is published or set forth in instructions to CBP. However, Commerce explained in the *Proposed Rule* that this was not the only situation in which Commerce issues a scope clarification post-order, and it determined that the regulation would benefit by setting forth other instances in the regulation in which a scope clarification would be appropriate. Further, Commerce provided examples in which a scope clarification could take different forms (*e.g.,* **Federal Register** notices, memoranda in the context of an

[44] *See Proposed Rule,* 88 FR 29853.

[45] *See* § 351.225(c)(2).

[46] *See Proposed Rule,* 88 FR 29871.

[47] *Id.,* 88 FR 29855–56.

ongoing segment, and the aforementioned interpretive footnote).[48]

Commerce received a few comments on the proposed changes to § 351.225(q), primarily concerned with the breadth and reach of the language of the provision. Commenters expressed concerns that Commerce was trying to avoid the disciplines of the scope ruling regulation requirements through the scope clarification provision. Commenters worried that the provision was trying to avoid notice and comment, due process protections, and essentially issue scope rulings without a fulsome analysis. Some commented that the current language was sufficient, while others questioned even the current (*i.e.,* unmodified) language of the provision, challenging the clause in § 351.225(q) which states that scope clarifications can be used to clarify ''whether a product is covered or excluded by the scope of an order at issue based on previous scope determinations covering the same or similar products'' [49] and asking how that analysis differs from the analysis conducted under § 351.225(k)(1)(i)(C).

Some commenters suggested that all scope clarifications should be published in the **Federal Register**, or that, at minimum, Commerce should include all scope clarifications in the quarterly notice of scope rulings published in the **Federal Register** in accordance with § 351.225(o). They also objected to the fact that it is Commerce's practice to issue scope clarifications in the context of ongoing segments, instead of conducting a separate segment, like a scope ruling, and allowing parties outside of the segment to comment on a clarification. They stated that scope clarifications, by their nature, are not company-specific and could affect the trading community broadly.

Other commenters requested that Commerce explain in greater detail its authority to interpret a scope through a scope clarification, and one commenter protested Commerce's reference to the four scenarios set forth in the proposed regulation as just examples, and its statement in the *Proposed Rule* preamble that ''these examples are not exhaustive.'' [50] That commenter expressed concerns that such broad language provided uncertainty to the parties and, again, suggested that Commerce was trying to evade the disciplines of a scope ruling analysis under § 351.225(k) through scope clarifications.

Commerce's Response:

Commerce has considered the comments raised by the commenters and concluded that the language of § 351.225(q) should be narrowed and revised to better reflect the purpose and form of a scope clarification.

To begin, Commerce has the statutory and regulatory authority as the administrator of the trade remedy laws to clarify the scope of an order when the need arises. Commerce has a long history of issuing clarifications in its proceedings, and there is no question that such clarifications assist in the administration of the AD and CVD laws. However, a scope clarification is not equivalent to a scope ruling or scope determination, and Commerce never intended for the regulation to equivocate the two through the codification of the original § 351.225(q) or the proposed revision in the *Proposed Rule.* The commenters have pointed to concerns with both the original and modified language, and we understand those concerns. Thus, we have revised the provision in response to those concerns.

First, in the introductory language to § 351.225(q), Commerce explains that a scope clarification may be issued in any segment of a proceeding that provides an interpretation of specific language in the scope of an order and addresses other scope-related issues, but makes clear that a scope clarification may not analyze or determine whether a product is covered by the scope of an order in the first instance, outside of the situations explicitly listed in the regulation. The purpose of a scope ruling, unlike a scope clarification, is to determine if a specific physical product, in the first instance, is covered or not covered by an AD or CVD order.

Next, rather than provide ''examples'' that were non-exhaustive, as was set forth in the *Proposed Rule,* the new § 351.225(q)(1) provides four specific situations in which a scope clarification may be applied. First, it may be used to determine if a product is covered or excluded by the scope of an order if Commerce has previously issued at least two scope determinations or rulings covering the same products with the same physical characteristics. This is the example which is set forth in the existing regulation. Such a situation arises, for example, when one exporter exports a product with certain physical characteristics, and Commerce issues a scope ruling on that product. Then, another exporter exports a product with the same physical characteristics, and Commerce issues a scope ruling on that product as well. Then a third exporter exports a product, again, with the same physical characteristics, and Commerce determines that rather than repeat the same analysis through multiple scope rulings, a scope clarification is the appropriate means of communicating its determination in general going forward for that particular product with specific physical characteristics.

In response to those commenters who requested that Commerce explain the difference between this language and the analysis set forth in § 351.225(k)(1)(i)(C), in Commerce's analysis under § 351.225(k), Commerce is considering whether a product is covered, or not covered, by an AD or CVD order in the first instance, and is looking to Commerce's earlier scope rulings and determinations covering physically same or similar products under the order at issue, as well as orders with same or similar scope language, for guidance. In the example above, Commerce would likely consider the sources listed in § 351.225(k)(1)(i)(C) as part of its analysis of the products exported by the first and second scope ruling applicants to determine if both products are covered, or not covered, by the scope of an AD or CVD order. It is only once Commerce continues to receive repeated requests for scope rulings on the same physical product that Commerce might determine, instead, to issue a general scope clarification covering products with the same physical characteristics.

The second situation set forth in the regulation pertains to section 771(20)(B) of the Act, for merchandise imported by, or for the use of, the Department of Defense, in which coverage by the scope of an AD or CVD order is not at issue. Under that provision, the issue is not if the product is covered by an order, but if the merchandise is able to avoid the payment of duties pursuant to the limited governmental importation exception set forth in the statutory provision. The purpose of a scope ruling is to determine if a product is covered by the scope of an order, not if subject merchandise should be excluded from coverage pursuant to a statutory exception to the trade remedy laws. In that situation, a scope clarification is an appropriate means of addressing the issue.

The third situation relates to language or descriptors in the scope of an order that has been subsequently updated, revised, or replaced under certain circumstances. The regulation explains that those circumstances involve 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, changes to HTSUS clarifications, as administered by the ITC, and changes to

[48] *Id.*

[49] *See* § 351.225(q).

[50] *See Proposed Rule,* 88 FR 29856.

industrial standards set forth in a scope, as determined by the industry source for those standards identified in the scope. Such changes have the potential to lead to confusion and, therefore, in those circumstances a scope clarification might be beneficial. For example, sometimes, products covered by a particular HTSUS classification set forth in an AD or CVD order following an investigation may not be subsequently covered by that same HTSUS classification when it is revised in the future. In that case, Commerce might issue a scope clarification in an ongoing segment of a proceeding, explaining that the HTSUS classifications are provided for illustrative reasons, but are not binding on the merchandise covered by a scope. Accordingly, if the product was covered at the time the AD or CVD order was issued, Commerce could explain through a scope clarification that the subsequent change in that classification would not change the coverage status of merchandise under the AD or CVD order.

Finally, the fourth situation pertains to the need for clarification of an analysis conducted by Commerce in a previous scope determination or scope ruling. The regulation provides an example where Commerce previously determined in a country-of-origin determination, pursuant to § 351.225(j)(2), that the country-of-origin was established at a certain stage of production where the agency determined that the essential component of the product was produced or where the essential characteristics of the product were imported. If Commerce observes that a company in a segment of the proceeding has divided that stage of production between two or more countries, Commerce may need to clarify its previous country-of-origin analysis to explain in which part of the stage of production was the essential component produced or the essential characteristics imparted. Such an analysis might not require a new scope ruling but could instead be addressed through a scope clarification.

In response to those commenters suggesting that scope clarifications should never be conducted in segments of proceedings, and should always be published in the **Federal Register**, or at least be published in the quarterly notice of scope rulings under § 351.225(o), we disagree that publication in the **Federal Register** is usually necessary. Historically, Commerce has addressed scope clarifications in individual segments because the nature of a scope clarification is such that it is targeted only to a limited issue before the agency, like many other calculation and methodological issues which Commerce normally faces in its investigations and administrative reviews on a case-by-case basis. However, we recognize that there may be situations in which a scope clarification may be less specific to the case at hand and may have outsized effects on those subject to an AD or CVD order in general. In that situation, Commerce believes the agency would benefit from the broader participation of the ''trading community,'' as noted by one of the commenters. Accordingly, removing the ''examples'' language from the proposed regulation, Commerce has modified § 351.225(q)(2) to provide that scope clarifications may take the form of an interpretive footnote to the scope when the scope is published or issued in its instructions to CBP, in a memorandum issued in an ongoing segment of a proceeding, or, at the discretion of the Secretary, in a **Federal Register** document. The regulation provides that when the scope clarification is conducted as a standalone segment, Commerce will publish a preliminary notice of scope clarification in the **Federal Register**, provide parties with at least 30 days to file comments with the Secretary, and then address comments received in a final notice of scope clarification published in the **Federal Register**. To be clear, Commerce does not believe that the publication of a scope clarification in the **Federal Register** will be necessary for most scope clarifications, but Commerce does agree that it should be an option available for Commerce in certain circumstances.

G. Commerce has made minor edits to §§ 351.225(m)(2), 351.226(m)(2), and 351.227(m)(2) to clarify certain terms in those provisions.

In reviewing the proposed revisions to the scope, circumvention, and covered merchandise regulations, Commerce became aware that language proposed for §§ 351.225(m)(2), 351.226(m)(2), and 351.227(m)(2) stated that the Secretary would include on the record of the CVD proceeding a copy of the ''final determination'' and a ''preliminary determination.'' [51] We have concluded that such language is not sufficiently clear. Therefore, in the final regulations, we are revising that sentence in § 351.225(m)(2) to state that once the Secretary issues a final scope ruling on the record of the AD proceeding, the Secretary will include a copy of the final scope ruling memoranda, a copy of the preliminary scope ruling memoranda if one had been issued, and ''all relevant instructions to U.S. Customs and Border Protection.'' The language for § 351.227(m)(2) will align with the circumvention language, but will instead apply to a covered merchandise proceeding. We determine that this change will provide added clarity on the information which will be placed on the record of the CVD proceeding following a scope, circumvention or covered merchandise determination issued on the record of the companion AD proceeding.

H. Commerce made no changes in responses to other scope and circumvention issues raised in the comments on the Proposed Rule.

One commenter criticized Commerce's existing regulations that require that scope, circumvention, and covered merchandise proceedings in companion orders should be conducted on the record of the AD proceeding. That commenter also suggested that Commerce should place preliminary scope, circumvention, and covered merchandise rulings/determinations on the record at the same time that those preliminary determinations are placed on the AD record. Furthermore, that commenter expressed frustration that although parties with an APO in previous AD segments could move information from one AD segment to another under the revised § 351.306(b)(3), those who were not covered by an APO in those segments could not.

Another commenter expressed concerns with the language of the current standard APO, stating that it does not reflect the cross-proceeding sharing provisions of § 351.306(b)(3) and (4). They offered suggestions for language to revise the standard APO once these regulations become final.

Commerce's Response:

Commerce will continue to conduct scope, circumvention, and covered merchandise segments covering companion orders on the record of the AD segment. We will not place information on the CVD record following the notification to interested parties that all subsequent filings should be filed on the AD segment of the proceeding, as explained in §§ 351.225(m)(2), 351.226(m)(2), and 351.227(m)(2), until final scope rulings and circumvention and covered merchandise determinations are issued. With respect to the APO, Commerce intends to modify its standard language to incorporate the changes to the regulation, but those changes will not be reflected in the regulation and the APO will not be revised until the effective date of the final rule.

4. Commerce has made certain revisions to the proposed amendments

[51] *See Proposed* Rule, 88 FR 29872, 29873.

to Notices of Subsequent Authority—§ 351.301(c)(6).

As Commerce explained in the *Proposed Rule,* sometimes while an administrative segment is ongoing, a Federal court may issue a holding, or Commerce may issue an administrative decision, in another case which an interested party believes is directly applicable to an issue currently before the agency.[52] When that occurs, the interested party may file on the record a Notice of Subsequent Authority. The uniqueness of a Notice of Subsequent Authority is that the subsequent authority may occur at any time, including after the time for new factual information under § 351.301(c) has passed, after briefs and rebuttal briefs have been filed consistent with § 351.309(c) and (d), and possibly right up until Commerce issues a final determination or final results in a segment of an AD or CVD proceeding.

Currently, Commerce has no regulation guiding the filing of, or receipt and use of, a Notice of Subsequent Authority, nor is there any regulation allowing other interested parties to comment on such a Notice. Further, there is no regulation which addresses the filing of a Notice of Subsequent Authority in light of the administrative procedures and deadlines which Commerce faces in the last few weeks of a segment (*e.g.,* meeting internally to get official clearances for the agency's decisions and positions, drafting and finalizing positions, completing calculations when necessary, and preparing documents for publication in the **Federal Register** and for release to the parties under the APO). Accordingly, under statutory deadlines, it might simply be untenable for Commerce to consider a Notice of Subsequent Authority in the days immediately preceding a final determination or final results. Commerce, therefore, determined in the *Proposed Rule* that it would be beneficial to issue a regulation which addressed the procedures and deadlines for the filing of a Notice of Subsequent Authority and a response to such a notice.[53] It therefore proposed a new regulatory provision, § 351.301(c)(6), which stated that Commerce would ''only be required to consider and address'' a Notice of Subsequent Authority if it was filed 30 days or more before a final determination or results deadline and a response to that Notice if it was filed 25 days or more before that final determination or results deadline.[54] Furthermore, the proposed regulation set forth the content requirements of such a Notice and responsive comments in § 351.301(c)(6)(iii).

Some commenters generally accepted Commerce's proposal, while four commenters expressed concerns. Two commented that Commerce already had sufficient discretion to consider and address Notice of Subsequent Authority whenever and however it wished, and voiced concerns that parties would abuse what they consider ''subsequent authority'' under this provision. Another expressed concerns that not only did Commerce have such discretion, but if Commerce was unable to consider arguments before its final determination or results, then the party would have the opportunity to appeal the decision and Commerce could address the alleged authority in a remand redetermination. That party also stated that Commerce's restriction of filing dates of 30 days and 25 days might be unlawful, because when a precedential court or agency decision is issued, Commerce is required by law to consider it and follow it, regardless of whether the decision is issued one day or one month before a final determination or decision. That commenter emphasized that constraining parties to file by 30 days and 25 days would not relieve Commerce of its legal obligation to follow binding precedent. The three commenters therefore suggested that Commerce should not implement the proposed Notice of Subsequent Authority provisions, or at least not implement the timing restrictions, in the proposal.

The fourth commenter expressed concerns that the 30-day and 25-day deadlines would lead to unnecessary litigation when subsequent authorities, of which Commerce was aware, arose and Commerce nonetheless issued final determinations or results inconsistent with binding authorities. That commenter suggested that the regulation should allow Commerce to consider extensions in certain circumstances, or at least move the deadlines closer to the final determination or results deadlines by 15 days.

Commerce's Response:

After consideration of the comments, we agree that the timing language as proposed in § 351.301(c)(6)(ii) was too restrictive given Commerce's legal obligation to consider subsequent authorities when possible. Accordingly, we have removed the language of § 351.301(c)(6)(ii) which stated that Commerce would ''only be required to consider and address'' Notices of Subsequent Authority and rebuttal comments submitted within the 30-day and 25-day deadlines. Instead, the revised language states only that Commerce ''will consider and address'' Notices of Subsequent Authority and rebuttal comments filed within those deadlines.

On the other hand, we also believe that interested parties should file Notices of Subsequent Authority only when the authorities are immediate and ''subsequent'' to agency actions. Commerce has timing requirements in each of its segments for parties to make the agency aware of relevant court and agency decisions as the segment progresses. If a party is aware of the existence of an alleged binding authority but does not alert Commerce of that alleged authority until 30 days before the deadline for issuing the final determination or results, we believe that such an action would be inconsistent with our normal deadlines and an abuse of this provision. Accordingly, we have added a second timing requirement to the regulation that Notice of Subsequent Authority may only be filed within 30 days after the alleged subsequent authority was issued.

In addition, a new sentence was added to the regulation which states that given statutory deadlines, ''the Secretary may be unable to consider and address the arguments and applicability of alleged subsequent authorities adequately in a final determination or final results if a Notice of Subsequent Authority or rebuttal submission is submitted later in the segment of the proceeding.'' Finally, we edited references to final results ''of administrative review'' to make it just final results in general because a Notice of Subsequent Authority may be filed in other administrative segments, such as circumvention inquiry proceedings under section 781 of the Act and § 351.226 or a scope ruling proceeding under § 351.225.

We appreciate the concerns expressed by the commenters that if a court holding, for example, is binding on Commerce and arises immediately before the issuance of a final determination or results, Commerce may be lawfully bound by that holding despite the fact that Commerce may also be administratively unable to consider and address that holding before the agency decision is issued by a statutory deadline. As one of the commenters stated, in that case, the only option may be for parties to litigate the issue and have Commerce address the subsequent authority in a remand redetermination.

[52] *Id.,* 88 FR 29857.

[53] *Id.*

[54] *Id.,* 88 FR 29873.

Still, though, it is possible in some cases that Commerce may be able to consider and address subsequent authorities and arguments in less than 30 or 25 days before the deadline for a final determination or final results, but Commerce's ability or inability to consider and address subsequent authority in a truncated period of time would be highly case-specific and cannot be guaranteed by the regulation.

Section 351.301(c)(6)(ii) primarily is intended to inform the public that if Notices of Subsequent Authority are filed 30 days or more before the deadline of a final determination or results, and a response is filed 25 days or more before the deadline for a final determination or results, Commerce will be able to consider and address the alleged authority and arguments for and against its application to the segment of the proceeding. Accordingly, if the alleged authority was issued before those deadlines, interested parties must file their Notice of Subsequent Authority by the 30-day deadline. If interested parties wait to submit notice of the alleged authority after those deadlines, or if the alleged authority was issued after those deadlines, then Commerce's ability to consider and address the alleged authority will be entirely dependent on the agency's administrative resources and existing time constraints before the agency issues its final determination or results.

5. *Commerce has made certain revisions to the CVD AFA hierarchies in—§ 351.308(j).*

In 2015, in the Trade Preferences Extension Act (TPEA), Congress added section 776(d) to the Act, which addresses Commerce's application of AFA under sections 776(a) and 776(b). The provision discusses Commerce's ability to select the highest CVD rate or highest dumping margin in certain circumstances, provides that there are no obligations to make certain estimates or address certain claims, and gives guidance for Commerce in otherwise selecting a CVD rate or dumping margin from the facts otherwise available. [55] With respect to CVD proceedings, in particular, section 776(d) of the Act states that Commerce may ''(i) use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or (ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use.'' [56] That language implements, in general, Commerce's longstanding use of CVD AFA hierarchies, and Commerce stated in the *Proposed Rule* that it was codifying those hierarchies, in full, by adding a new paragraph to § 351.308. [57]

As a preliminary matter, although Commerce proposed that the CVD AFA hierarchies be codified as § 351.308(g) in the *Proposed Rule,* we have subsequently concluded that other provisions found in section 776(d) of the Act, and parts of Commerce's AFA practice in general, should be codified in § 351.308 and should logically precede the CVD AFA hierarchies in the regulation. Accordingly, we have moved the CVD AFA hierarchies to § 351.308(j) in this final rule, and have reserved § 351.308(g), (h), and (i) for future rulemaking. [58]

In the CVD hierarchy regulation, Commerce provides for one hierarchy for investigations in § 351.308(j)(1) and a second hierarchy for administrative reviews in § 351.308(j)(2). In addition, the regulation provides guidance on the application of the CVD hierarchy in both types of segments in § 351.308(j)(3), providing that Commerce will treat rates less than 0.5 percent as a *de minimis* rate, will normally determine a program to be a similar or comparable program based on Commerce's treatment of the program's benefit, and will normally select the highest program rate available in accordance with the hierarchical sequence, unless Commerce determines that the highest rate is otherwise inappropriate. In addition, in accordance with section 776(c)(1) of the Act, which requires certain facts available derived from secondary information to be corroborated, § 351.308(j)(3)(iv) states that when Commerce determines a CVD AFA rate from secondary information using the hierarchy, it will determine those facts available to be corroborated.

Commerce received several comments on the AFA CVD hierarchies. Generally, the comments were supportive, though most of those commenters expressing support for the provision opposed Commerce's proposed use of an ''above-zero'' threshold in the first step of the AFA hierarchy governing investigations, and instead suggested that the regulation should include an ''above-*de minimis*'' threshold. While these commenters recognized that the intention of the proposed rule was to codify existing Commerce practice, they also commented that the ''above-*de minimis*'' threshold in no way conflicted with the statutory language and, in fact, would better reflect the purpose and goals of the AFA CVD hierarchy. Those commenters focused primarily on concerns that parties could obtain a more favorable result by failing to cooperate than if they had cooperated fully by gaming the ''above-zero'' threshold, undermining Commerce's statutory directive to discourage non-compliance. Further, some commenters also expressed concerns that even though section 776(d)(3) of the Act was added by Congress in the TPEA and explicitly states that in selecting an AFA rate Commerce is not required to estimate what a CVD rate would have been if the respondent had cooperated, or demonstrate that an AFA rate reflects a respondent's ''alleged commercial reality,'' the ''above-zero'' threshold implicitly considers both.

In addition, multiple commenters suggested revisions to the proposed regulation as it relates to instances when Commerce may determine that a rate selected from a hierarchy is inappropriate. Section 351.308(j)(3)(iii) states that ''{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.'' One commenter noted that deviation from the hierarchy may be necessary to ensure the statutory purpose of AFA is achieved and stated that the placement of § 351.308(j)(3)(iii) at the end of the regulatory provision made this purpose seem like an afterthought. This commenter suggested moving a portion of this paragraph to the introductory section of paragraph (j), and subsequently deleting § 351.308(j)(3)(iii).

Other commenters requested that Commerce elaborate on specific instances in which Commerce may deviate from an AFA hierarchy or otherwise deem a rate selected via a hierarchy to be inappropriate. These suggestions included, *inter alia,* requests that: Commerce clarify that the use of the word ''normally'' permits deviation from the hierarchy when it fails to effectuate the purpose of the AFA statute; an explicit statement that Commerce will not apply the hierarchy to generate a *de minimis* CVD rate for uncooperative respondents; and modifications to paragraph (j)(3)(iii) of § 351.308 to specifically note that Commerce may deviate from a hierarchy if the rate ''fails to ensure that the party

[55] *See* TPEA of 2015, Public Law 114–27, 129 Stat. 362, 384 (2015), sec. 502, codified at 19 U.S.C. 1677e(b)(1).

[56] *See* sections 776(d)(1)(A)(i) and (ii) of the Act.

[57] *See Proposed Rule,* 88 FR 29858.

[58] To prevent confusion, to the extent parties made arguments about proposed § 351.308(g) in their comments, we have referred to those comments below as referencing § 351.308(j).

does not obtain a more favorable result by failing to cooperate than if it had cooperated fully, or is not sufficiently adverse so as to deter future noncompliance.''

In addition, one commenter requested that Commerce clarify that it will not apply lower AFA rates in response to the same types of uncooperative responses regarding the same program from one segment of a proceeding to another, while another commenter suggested that Commerce must calculate ''a reasonably accurate estimate of the respondent's actual rate'' and, therefore, should edit paragraphs (j)(1)(iii) and (j)(2)(ii) and (iii) of § 351.308 to read that Commerce will ''apply the highest calculated above-*de minimis* rate for the most similar or comparable program.''

Finally, another commenter expressed broad disagreement with the proposed regulation, claiming that the application of an adverse inference in CVD rate calculations is not permitted by the WTO and inconsistent with the ''spirit'' of the CIT's understanding of the use of AFA in general. This commenter referenced certain Panel and Appellate Body decisions in support of its statement that the 1994 WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) does not allow the imposition of ''punitive'' measures and that the purpose of Article 12.7 of the SCM Agreement is not to ''punish non-cooperating parties.'' Further, that same commenter stated that Commerce's use of AFA ''contradicts the legal principles'' expressed by the CIT, referencing challenges to AD proceedings and CVD proceedings which did not involve Commerce's application of the CVD AFA hierarchies.

Commerce's Response:

After consideration of the comments, we have determined to make one change to the proposed regulation covering the AFA hierarchies. We are replacing ''above-zero'' with ''above-*de minimis*'' in § 351.308(j)(1)(i). While Commerce seeks to balance the dual goals of relevancy and inducement in its application of AFA, it must do so while properly effectuating the statutory goal of compliance and ensuring that parties do not obtain a more favorable result by failing to cooperate than if they had cooperated fully. We believe replacing the ''above-zero'' requirement with an ''above-*de minimis*'' threshold in paragraph (g)(1)(i) of § 351.308 better accomplishes this objective, for the reasons stated by the commenters. For example, as the commenters pointed out, there could be situations in which parties obtain a more favorable result by failing to cooperate than if they had cooperated fully through an abuse of the ''above-zero'' threshold. Such an outcome would be unacceptable. We do not believe the same situation would arise with the use of an ''above-*de minimis*'' threshold. Accordingly, we have adopted the suggested revised standard in this final rule.

On the other hand, we disagree with the one commenter's proposal to move the ''normally select'' and ''unless the Secretary determines that such a rate is otherwise inappropriate'' language in § 351.308(j)(3)(iii) to elsewhere in the regulation. Section 351.308(j)(3) contains several generally-applicable rules and principles for when Commerce is utilizing the AFA hierarchies, and we believe a general principle that Commerce will select the highest program rate available in accordance with the hierarchical sequence, unless otherwise deemed inappropriate, is properly placed in this section, whereas moving this statement to the introductory section would not provide additional clarity. Moreover, we disagree that the placement of paragraph (j)(3)(iii) in § 351.308 does not indicate that this provision is more or less important than any other in the regulation.

Regarding the requests that we elaborate on specific instances in which Commerce may deviate from an AFA hierarchy or otherwise deem a rate selected via a hierarchy to be inappropriate in the regulation, we have not elected to make such explicit declarations in this final rule, as we believe that codifying such scenarios would unnecessarily inhibit Commerce's flexibility to address situations on a case-by-case basis. The introductory language of paragraph (j) of § 351.308 states that ''the Secretary will *normally* select the highest program rate available using a hierarchical analysis as follows . . .'' and further provides in paragraph (j)(3)(iii) that ''{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*'' (emphasis added). We believe this language provides Commerce with sufficient flexibility to codify its long-standing practice, but still allows Commerce to apply an alternative AFA remedy in exceptional situations. It is Commerce's long-standing practice that it will normally utilize the applicable hierarchy (either for investigations or administrative reviews) when selecting a program rate as AFA. However, we recognize that there may be certain instances where Commerce must deviate from this default approach when the facts of a given case or of a particular type of subsidy program across several cases necessitate such deviation. For example, in certain CVD investigations, we have determined that rather than apply an AFA CVD hierarchy to certain non-responsive companies for particular income tax programs, the facts on the record warranted an adverse finding that those non-cooperative companies paid no income tax during the relevant period.[59] Pursuant to such a finding, we therefore determined to apply the corporate income tax rate as the highest possible benefit that could be applied for such programs.[60]

Accordingly, given the wide variety of potential fact patterns and unforeseen circumstances that Commerce may encounter in the future, we do not believe specifically outlining and limiting the circumstances Commerce may, or may not, deviate from its default methodology of selecting the highest program rate in the regulation would be beneficial to Commerce's application of AFA in CVD investigations and administrative reviews in future cases.

Likewise, we will not place language in the regulations that states that Commerce will or will not apply different AFA rates in response to the same program for the same parties from one segment of a proceeding to the next. Commerce applies two distinct hierarchical methodologies for investigations and administrative reviews, and therefore, naturally, the AFA rate which results from those two different hierarchies might differ, even when applied to the same parties in a different segment on the same proceeding. Commerce's use of different hierarchies for investigations and administrative reviews, which reflect inherent differences in the circumstances around investigations versus administrative reviews, has been upheld by the CIT on multiple

[59] *See, e.g., Countervailing Duty Investigation of Certain Hardwood Plywood Products from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part,* 82 FR 53473 (November 16, 2017), and accompanying Issues and Decision Memorandum (IDM) at 8 (citing *Aluminum Extrusions from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 76 FR 18521 (April 4, 2011), and accompanying IDM at the section, ''Application of Adverse Inferences: Non-Cooperative Companies) (explaining that Commerce applied an adverse inference that each of the non-responsive companies paid no income tax during the period of investigation and ''{the} standard corporate income tax rate in China is 25 percent . . . . We, therefore, find the highest possible benefit for all income tax exemption and reduction programs combined is 25 percent (*i.e.,* the income tax programs combined provide a countervailable benefit of 25 percent).'').

[60] *Id.*

occasions,[61] accepting that ''the administrative review AFA hierarchy achieves the dual goals of relevancy and inducing cooperation.'' [62] Maintaining consistency in applying our CVD AFA hierarchy provides predictability and transparency to parties involved in administrative proceedings, and we see no reason to change that practice in these regulations.

The TPEA added section 776(d)(3)(A) to the Act which states that Commerce ''is not required'' for ''any purpose'' to ''estimate what the countervailable subsidy rate'' would have been if the party ''had cooperated.'' [63] Nonetheless, one commenter suggested that Commerce should amend its hierarchies to do just that when applying AFA in CVD proceedings. We have not adopted that suggestion in this final rule. The proposed and final rule reflect Commerce's practice, which has been upheld as in accordance with law by the CIT.[64] Under that practice, through the hierarchy, Commerce selects the highest above-*de minimis* rate for similar or comparable programs, but not necessarily identical or ''most'' similar programs. Under its practice, as now codified by this final rule, Commerce determines a program to be a similar or comparable program based on the Secretary's treatment of the benefit, as stated in § 351.308(j)(3)(ii).

Finally, we disagree with the commenter who expressed concerns that Commerce's CVD AFA hierarchy is inconsistent with the United States' WTO obligations and the general AFA views of the CIT. Commerce's practice and these regulations are fully in compliance with the United States' WTO obligations. Furthermore, Commerce's use of CVD AFA hierarchies has been sustained by the CIT on numerous occasions, as noted earlier in this section. Thus, we find the commenter's suggestion that Commerce may not utilize such AFA rates in its CVD calculations (if circumstances warrant) to be unavailing and we have made no further revisions to § 351.308 other than as described above.

6. Commerce has made minor changes to its regulations addressing government inaction which distorts certain costs through weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, and environmental protections.

In the *Proposed Rule,* Commerce explained that because ''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,'' it was proposing modifications to its regulations to consider such inaction when determining if certain potential surrogate values, benchmark prices, or input costs of production are potentially distorted or otherwise not in accordance with market principles.[65] Commerce explained that this is because such firms are not paying a ''cost of compliance'' to meet regulatory standards for which firms operating in other jurisdictions are responsible.[66] Commerce also discussed how 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 and largely ignore the indirect societal costs of their production decisions.[67]

Notably, although Commerce received several comments on the proposed revisions to §§ 351.408(d), 351.416(g)(10) and (11), and 351.511(a)(2), it received no comments that challenged the concept that weak, ineffective, or nonexistent real, personal and intellectual property protections, human rights protections, labor protections, and environmental protections can result in lower direct costs of production that do not reflect indirect societal costs. Commerce explained in the *Proposed Rule* that for each of these situations, there are scenarios that can result in distorted costs of production (*e.g.,* a lack of environmental laws or the existence of slave, forced, or child labor).[68] Accordingly, Commerce explained that, consistent with its statutory and inherent authority to select appropriate surrogate values in determining a normal value for a non-market economy analysis, select appropriate benchmarks prices in its less than adequate remuneration analysis, and determine if a particular market situations exists that distort costs of production, Commerce was codifying its ability to consider such arguments if interested parties raised such claims and provided sufficient evidence to support allegations.[69]

A. Commerce does not agree with the overarching, generalized concerns expressed by certain commenters.

Certain commenters expressed overarching concerns about Commerce's proposals, claiming that Commerce did not have the appropriate expertise or statutory authority to address the lack of various ''social'' protections in its analysis. One commenter suggested that Commerce was ''attempting to set itself up as judge, jury and executioner on matters of property rights, human rights, labor rights'' and ''environmental protections,'' and that by analyzing the protections provided by various countries, Commerce was ''unilaterally'' ''asserting authority to stand in judgment of the enforcement of various rights by other sovereign nations,'' despite the fact that allegedly Commerce possesses no particular expertise in how property rights (including intellectual property), human rights, labor rights, or environmental protections should best be ''defined, implemented and enforced.'' That commenter claimed that nothing in the trade laws appoints Commerce to act as the ''global rights police'' and expressed concerns that Commerce's proposal would ''punish respondents for operating in countries that do not meet a U.S. administration's policy preferences.''

Another commenter claimed that Commerce was trying to ''insert social

[61] *See, e.g., Clearon Corp.* v. *United States,* 359 F. Supp. 3d. 1344, 1360–61 (CIT 2019) (sustaining Commerce's application of the second step of the review hierarchy, noting the hierarchy method is judicially approved); *Essar Steel Ltd.* v. *United States,* 908 F. Supp. 2d 1306, 1310–11 (CIT 2013) (sustaining Commerce's application of the second step of the review hierarchy and use of an adverse rate calculated for Essar for a similar program in a previous administrative review of the CVD order at issue), *aff'd* 753 F. 3d 1368 (Fed. Cir. 2014); and *SolarWorld Ams. Inc.* v. *United States,* 229 F. Supp. 3d 1362, 1366 (CIT 2017) (*SolarWorld*) (sustaining Commerce's application of the second step of the review hierarchy despite a lower rate than using the investigation hierarchy).

[62] *See SolarWorld,* 229 F. Supp. 3d at 1370 (stating ''{t}he court assesses the methodology for reasonableness and for sufficient explanation of the reasoning underlying the approach . . .. Although it could be argued that a case-by-case hierarchy system also would be reasonable, that possibility does not make Commerce's hierarchy structure unreasonable.'').

[63] *See* section 776(d)(3)(A) of the Act.

[64] *See Changzhou Trina Solar Energy Co.* v. *United States,* 352 F. Supp. 3d 1316, 1329 (''Under Commerce's established {hierarchy} methodology and consistent with the plain text of the statute, Commerce selects a *similar* program, not necessarily the *most similar* program.''); *see also Bio-Lab Inc.* v. *United States,* 487 F. Supp. 3d 1291, 1308 (CIT 2020) (''Selecting a program that is similar is enough to satisfy the statute.'')

[65] *See Proposed Rule,* 88 FR 29859–61; *see also* OECD, *OECD Regulatory Policy Outlook 2018: Glossary,* available at *https://www.oecd-ilibrary.org/sites/9789264303072-51-en/index.html?itemId=/content/component/9789264303072-51-en, accessed February 2, 2021.*

[66] *Id.,* 88 FR 29858–61.

[67] *Id.,* 88 FR 29859 (citing International Monetary Fund (Thomas Helbling), ''Externalities: Prices Do Not Capture All Costs,'' *Finance & Development* (date unspecified); 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)).

[68] *Id.,* 88 FR 29859.

[69] *Id.*

considerations into AD calculations'' through ''social dumping,'' which historically the United States did not advocate addressing in the AD law. That commenter expressed concerns that by including social dumping in its analysis, Commerce was inviting other countries to do the same, and to punish United States' exporters because of the United States's own alleged ''under enforcement of labor rights.''

Other commenters challenged Commerce's overall analysis as too broad because it does not define what ''weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, or environmental protections'' means in every case and does not explain if objective international standards, U.S. standards, or other standards are intended to be used in every case to determine if such protections are deficient or not deficient.

Conversely, other commenters stated that not only was Commerce acting within its statutory and inherent authority, but that Commerce's proposal is too narrow, and Commerce should consider even more scenarios involving property (including intellectual property), human rights, labor, and environmental protections (and the resulting low or nonexistent compliance costs). Specifically, those commenters suggested that because a country could take immediate steps following an allegation of a lack of effective protections in an effort to forestall Commerce's actions and ''greenwash a failure to adopt and effectively enforce such protections,'' Commerce should add a requirement to its overarching language that Commerce would consider not only weak, ineffective, or nonexistent protections, but also ''arbitrary'' protections with no lawful history or context. In other words, those commenters advocated that interested parties should be able to argue that an alleged protection in a given case was, in fact, set up solely to avoid Commerce reconsidering prices or costs in its various analyses, and that such ''arbitrary'' protections should not be treated as actual or real protections by the agency.

Commerce's Response:

Commerce has the statutory and inherent authority to consider the impact of weak, ineffective, or nonexistent protections on its analysis of surrogate values, benchmark prices, and costs of production in its PMS analysis. As explained in the *Proposed Rule,* it is well established that Commerce has the authority to consider if potential benchmark prices and potential surrogate values are distorted, and are, therefore, inappropriate to use in its analysis.[70] Not only have courts affirmed such an authority, but Commerce's consideration of potential labor surrogate values in light of evidence of the existence of forced labor in potential surrogate countries was also prominent in three cases before the CIT, again, cited in the *Proposed Rule.*[71]

Commerce emphasizes that in each of the modified regulatory provisions, the focus is on whether weak, ineffective, or nonexistent protections distort prices or costs. This is the same distortion analysis Commerce applies for all less than adequate remuneration benchmarks and surrogate values if interested parties claim that those prices or values are distorted. In that regard, the PMS examples at issue are consistent with the other examples of a PMS set forth in § 351.416(g). Commerce will not use distorted potential benchmark prices or distorted potential surrogate values, and its refusal to use distorted values in its methodologies and calculations is not a novel concept. Further, Congress explicitly directed Commerce in section 773(e) of the Act to consider ''another calculation methodology'' if it determines that a PMS 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.'' Again, it is standard practice for Commerce to consider arguments based on real-world factors that can affect the cost of production, and to reject the use of prices or costs which Commerce has determined to be distorted or potentially distorted.

What would, in fact, be inappropriate would be for Commerce to knowingly ignore real-world factors that distort or potentially distort costs placed on the record. One of the commenters expressed concerns that Commerce is trying to incorporate ''social dumping''[72] into its AD analysis through these regulations. However, Commerce's intent through these regulations is not to consider foreign government policies into its calculations to effectuate change in those policies, but instead to focus on one overarching analysis relevant to its calculations: whether the record reflects that certain prices or costs at issue were, more likely than not, distorted by identified weak, ineffective, or nonexistent protections. Commerce has a great deal of experience in analyzing if prices or costs are distorted, and it is in accordance with that expertise that Commerce is issuing these regulations.

Accordingly, there is no validity to the concerns that Commerce is trying to be a ''judge, jury and executioner'' on the property rights (including intellectual property), human rights, labor rights, and environmental protections administered and enforced by other countries, nor that it is trying to act as ''global rights police'' through these regulatory changes, nor that it is trying to push certain United States ''policy preferences.'' As Commerce recognized in the *Proposed Rule,* every country retains discretion to pursue its own priorities, including the implementation and enforcement of certain laws, policies and standards for the public welfare.[73] If Commerce determines that a company were able to produce its merchandise for prices cheaper than foreign competitors because it followed no workplace safety laws and used forced or child labor, it would be both logical and reasonable for Commerce to reject potential surrogate values derived from sales of that merchandise in a non-market economy AD proceeding. On the other hand, it would be illogical and unreasonable to ignore arguments and record information that shows that those surrogate values are distorted for fear of generalized claims that Commerce is trying to impose itself as a global judge or policeman over other countries'

[70] *Id.,* 88 FR 29860.

[71] *Id.,* at nn. 36 and 39 (citing, *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 *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)); *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).*

[72] ''Social dumping'' is defined as ''the practice of allowing employers to lower wages and reduce employees' benefits in order to attract and retain employment and investment.'' *See Collins Dictionary,* ''Social Dumping,'' retrieved November 8, 2023, *https://www.collinsdictionary.com/us/dictionary/english/social-dumping.*

[73] *See Proposed Rule,* 88 FR 29858.

social-, environmental-, and property-welfare priorities. Such claims are inconsistent with what the agency explained in the *Proposed Rule* and are inconsistent with the regulatory modifications being proposed.

Governments may implement and enforce their property (including intellectual property), human rights, labor, and environmental laws and protections as they believe appropriate, just as Commerce may continue to apply its AD and CVD laws in a manner that rejects the use of distorted prices and costs when it determines such a rejection is supported by record information. Further, just as governments might determine to take certain actions and provide certain subsidies to certain industries, even though other authorities might reasonably determine to countervail those subsidies, the same holds true when governments determine to not take certain actions that require compliance costs of producers within their borders. When governments decide not to enact environmental restrictions on a factory's pollution to protect the soil, water, air, or wildlife, or not to enforce existing laws under which that factory would normally be required to undertake costs to implement those protections, it is both logical and reasonable that other countries may consider the impact such decisions have on the costs of production for that factory in their AD calculations. This is not, despite the criticisms of some of the commenters, a judgment on the social welfare policies, priorities, and laws of different countries. Instead, it is a recognition of economic reality—the lack of enforcement of certain protections granted in other countries, or the nonexistence of those protections under law entirely, can have a notable impact on a company's or industry's costs of production.

In sum, the proposed amendments to the AD and CVD regulations in this regard are intended to allow for interested parties to raise issues and supply information on the record about foreign government inaction on implementing or enforcing certain articulated protections and for Commerce to consider that inaction in its analysis and calculations. Accordingly, Commerce rejects claims that it is restricted by law from considering arguments and facts on the record that certain prices or costs are distorted as a result of weak, ineffective, or nonexistent protections in other countries.

In response to the concerns that Commerce is not an expert in labor law, environmental law, human rights law, intellectual property law, or property law in general, the agency is not holding itself out as an expert in these areas. However, Commerce is the U.S. Government agency with an expertise in analyzing costs of production in an AD analysis and has a long-established practice of selecting surrogate values in non-market economy cases and benchmark prices in less than adequate remuneration CVD cases. One commenter expressed concerns that Commerce was ''not equipped'' to consider the impact of weak, ineffective, or nonexistent protections on costs and prices, but Commerce has decades of experience of analyzing cost and price distortions. Accordingly, the agency disagrees with that assessment of Commerce's knowledge, experience, and abilities. The test Commerce applies in each of these cases is one of price or cost distortion—not one of compliance with international laws, agreements, or standards. Commerce needs to consider only whether evidence on the record suggests that prices or costs are lower than they would otherwise be as a result of weak, ineffective, or nonexistent protections. If the answer to that question is ''yes,'' a cost might not be appropriate to use as a surrogate value, a price might not be appropriate to use as a benchmark for a less than adequate remuneration case, and the reported cost of an input might not be appropriate to use in Commerce's cost of production calculations.

Furthermore, we disagree with the claim that Commerce must define what ''weak'' or ''ineffective'' property (including intellectual property), human rights, labor, and environmental standards are, in every case, in these regulations. In fact, such decisions are fact-specific and made on a case-by-case basis. In addition, Commerce does not agree that it should consider or codify certain international standards or sources for its analysis in each case for the same reason. Indeed, trying to incorporate certain international standards, specifically, into the regulations for this purpose could inhibit rather than support an outcome appropriate with the facts and circumstances in a specific case. For example, if the evidence on the record reflected that laws in a given country meet certain international standards, but the record also reflects that certain government authorities have never required a factory or industry to abide by those laws, thereby allowing certain factories or industries to avoid compliance costs and produce and sell their merchandise for lower prices, then a regulation setting forth international benchmarks would not only be of little value, but also prevent the agency from reviewing both the law and the facts as they apply to a business or industry in that foreign country. This is not to say in certain cases, with certain allegations, Commerce might not benefit from considering an international standard, or other laws in the foreign country itself, or even laws and standards in other countries, as part of its determination whether certain protections are weak or ineffective. Just as Commerce considers all of the information placed before it in other cases involving surrogate values and determinations of benchmarks in less than adequate remuneration cases, Commerce would conduct the same type of analysis in determining if protections are weak or ineffective, including in analyzing a PMS allegation under § 351.416(g)(10).

Finally, we also disagree that Commerce should extend its analysis to evaluate whether property (including intellectual property), human rights, labor, and environmental protections are ''arbitrary.'' Regardless of the intention of a protection, if a producer was required to pay a patent-owner for the rights to use certain technology, for example, and that protection was enforced by the government, then Commerce would not find that government inaction existed, nor that any distortions resulted from such inaction. Even if the protections were only temporary during the production period subject to examination, as explained above, it is not Commerce's intention to judge why protections exist, but only to determine if those protections were weak or ineffective during that period of investigation or review and if the costs of production were distorted because of those weak or ineffective protections. Accordingly, we have not incorporated the suggestion to include ''arbitrary'' as a factor for these proposed regulatory revisions.

B. Commerce will analyze weak or ineffective protections by entities entrusted or directed by the government to provide such protections.

In addition to more general allegations and concerns involving Commerce's proposals to amend its regulations to address the cost and price distortions potentially arising from weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, and environmental protections, Commerce received many individual questions and concerns. For example, two commenters requested that Commerce acknowledge that if an entity was entrusted or directed by the government, but is not

a public body or government entity itself, with the responsibility of providing some or all of the listed protections, then Commerce would still conduct the same analysis it would apply if the government itself was responsible for providing those protections, including within the context of a PMS analysis under § 351.416(g)(10).

Commerce's Response:

Commerce agrees with the premise that, no matter if the entity that is supposed to provide a protection is a government-controlled entity or is a private entity entrusted or directed by the government to provide a protection, the agency's analysis will be the same in determining if the protections at issue are weak or ineffective. As the examples in § 351.416(g) are only examples, Commerce determined that it was not necessary to add further language about entrustment and direction into that regulation; however, we agree that the crux of our analysis is not the authority failing to grant an effective protection, but rather the fact that the protection itself is ineffective and the result is distorted prices or costs.

C. The factual information deadlines of § 351.301(c)(3) apply to some of these regulatory revisions.

One commenter requested that Commerce clarify that the deadlines covering submissions of factual information to value factors of production under § 351.408(c) and measure the adequacy of remuneration under § 351.511(a)(2) found in § 351.301(c)(3) apply equally to proposed §§ 351.408(d) and 351.511(a)(2)(v).

Commerce's Response:

Commerce confirms that factual information deadlines covering submissions of factual information to value factors of production under § 351.408(c) and measure the adequacy of remuneration under § 351.511(a)(2) found in § 351.301(c)(3) apply equally to §§ 351.408(d) and 351.511(a)(2)(v). To be clear, § 351.408(d) does not stand alone, but rather exists in addition to the surrogate value methodology described in § 351.408(c), which is the reason paragraph (d) starts with the statement, ''Notwithstanding the factors considered under paragraph (c) of this section . . . .'' Accordingly, the deadlines applicable to § 351.408(c) apply equally to § 351.408(d).

D. Commerce may reject prices which are distorted but not aberrational.

One commenter suggested that, with respect to §§ 351.408 and 351.511, Commerce should clarify that prices or costs do not need to be ''aberrational'' to be disregarded under the proposed government inaction provisions.

Commerce's Response:

Commerce confirms that prices and costs may be distorted, but need not be aberrational, for the agency to reject the use of a surrogate value or benchmark for a less than adequate remuneration analysis. In general, aberrational sales or costs are normally outliers—values which are so high or so low, that they may not even appear to be market-driven. Commerce would not normally consider aberrational sales or costs in a surrogate value or less than adequate remuneration analysis. However, for purposes of selecting a surrogate value or determining the appropriate benchmark to measure the adequacy of remuneration, prices or costs can be distorted by multiple factors (*e.g.,* weak, ineffective, or nonexistent protections) without being considered aberrational. If the record contains potential surrogate values or benchmark prices which Commerce determines are not distorted and are from an economically comparable country that produces comparable merchandise, then in choosing a surrogate, it will normally prefer the non-distorted prices or costs over the distorted prices or costs. That analysis need not require a finding that prices or costs are aberrational in any way.

E. The revised regulations are consistent with the United States's WTO obligations.

Some commenters expressed concerns that Commerce's consideration of the impact of foreign government inaction on costs or prices incorporates concepts not embodied in the relevant WTO agreements and allows Commerce to manipulate its trade remedy laws in an effort to force property (including intellectual property), human rights, labor, and environmental standards on other WTO members. They commented that the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (AD Agreement) does not permit such considerations, pointing to a dispute Panel decision in *European Union-Antidumping Measures on Biodiesel from Argentina,* in which the dispute Panel concluded that a dumping analysis is not intended to cover certain distortions arising out of government actions or circumstances.[74] They also suggested that other international and WTO agreements cover such matters satisfactorily.

Commerce's Response:

Commerce's AD statute and regulations are in full compliance with the United States' WTO obligations. Commerce is permitted under U.S. law and the AD Agreement to consider factors that may objectively distort costs of production. There is no obligation for WTO members enshrined in any of the WTO Agreements to ignore price or cost distortions caused by another government's decision to ignore or permit a company to pollute, use slave labor, or discriminate in violation of a country's own laws, or in absence of laws altogether, and therefore, benefit from cheaper production costs. As we indicated above, Commerce is codifying its consideration of the appropriate surrogate values, benchmark prices, or input cost in an PMS analysis. These considerations are not intended to impose any standards on any country.

Indeed, in the context of a surrogate value (which involves using values from other countries for a non-market economy analysis) and less than adequate remuneration analysis (which involves using prices from other countries to determine an appropriate benchmark value), the rejection of certain surrogates or benchmarks will have no bearing on the countries from which those prices or costs originate in any way. Thus, it is hard to see how such an analysis could ''punish'' the source countries, as stated by some in their comments. Further, for both a surrogate value and PMS analysis, Commerce's analysis under §§ 351.408 and 351.416 will normally be limited only to ''significant'' inputs, reflecting that Commerce's analysis will be a targeted analysis focused only on certain alleged ''weak, ineffective, or nonexistent'' protections and their impact on certain costs of production, and no more.

Finally, we disagree that other WTO Agreements address Commerce's concerns in this regard in any way. These modifications to the trade remedy regulations address distortions in costs or prices caused by weak, ineffective, or nonexistent protections, and other WTO Agreements do not address such cost or price distortions.

F. Commerce need not reward more stringent protections by foreign governments.

Two commenters requested that when Commerce conducts its surrogate value analysis, if it finds that a potential surrogate value has stronger environmental or other such protections than other potential surrogate values, Commerce should ''make an allowance'' for that—essentially improving chances for use of that surrogate value over others. They make the same suggestion

[74] *See Report of the Panel,* European Union—Anti-Dumping Measures on Biodiesel from Argentina, WT/DS473/R, (May 23, 2016) (*European Union-Antidumping Measures on Biodiesel from Argentina*), at para. 7.240.

for potential benchmark prices. Likewise, they suggested an offset to an input cost in a PMS analysis to reflect strong social welfare protections. They comment that doing so would be consistent with the United States' support of renewable energy and climate change reduction programs in other capacities.

Commerce's Response:

Commerce declines to elevate the use of certain potential surrogate values or benchmark prices over others based on, for example, their effective protection of the environment, in this rule. One of Commerce's ultimate goals in this exercise is to select surrogate values which are comparable to the factors of production reported by the non-market economy. If a value is distorted, that may remove it from consideration. However, Commerce is under no obligation to provide offsetting extra credit based on excellent environmental, labor, human rights, or property rights (including intellectual property) protections. The same is equally true in selecting benchmark prices and determining if the costs of an input as reported are reasonable. Indeed, if anything Commerce believes that such an adjustment to those values could create distortions rather than avoid them.

G. External concerns do not impact these regulations.

Some parties commented that United States businesses are actively working to raise standards and protections in other countries, and they suggested that these regulations should be withdrawn because other countries might become frustrated and stymie those efforts. Other parties stated that various environmental programs in other countries meet the same goals as Commerce supposedly intends in these regulations, and thus Commerce should not counteract those programs when given the opportunity, consistent with the proposed regulations.

Commerce's Response:

As noted above, Commerce's concerns in issuing these regulations are to use surrogate values and benchmark prices not distorted by weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, or environmental protections. Likewise, it is also Commerce's intention to not use input prices distorted by a PMS. The efforts by outside parties and governments to strengthen such protections in other countries are not at issue in these regulations, and therefore, do not affect the content of these regulations.

H. Commerce will not codify additional procedures suggested by certain commenters.

Certain commenters requested that in determining the existence of foreign government inaction in §§ 351.408, 351.511, and 351.416(g)(10) and (11), Commerce should directly address the burden of proof in the regulation, describe how much the foreign government will be required to participate, address how Commerce will consider information on the record, and indicate if it intends to verify claims of government inaction.

Commerce's Response:

When selecting a surrogate value or benchmark price, an interested party alleging price or cost distortions has an obligation to place information on the record to substantiate its claims. Likewise, the same holds true if a party argues the existence of a PMS or if government inaction is at issue. We see no need to add further detail on the need for parties to provide Commerce with arguments and information on the record.

With respect to how Commerce will consider such information, again, it will weigh all of the information before it and make a determination as to the appropriate surrogate value or benchmark price or determine if a PMS exists.

Finally, under the statute, verification is only required in investigations. However, Commerce may determine that verification is warranted in other segments of a proceeding. Accordingly, Commerce has determined not to codify a verification requirement in the regulation, recognizing that in some situations, the government inaction and its effect on prices or costs is evident, and little more is needed on the record, while in others, the agency may need to gather more information, and perhaps even conduct a verification, to fully understand the objective facts of the alleged situation.

I. Commerce will not include additional, alternative language suggested by commenters in the regulation.

Two commenters requested that Commerce should ''clarify'' in §§ 351.408 and 351.511 that interested parties are only required to show that government inaction relating to a significant input, or a labor input, existed and that there were ''depressed or suppressed prices'' for that input—not that parties must actually prove that the government inaction caused the depressed or suppressed prices. They suggested that Commerce should specify in the regulations that interested parties need only provide information available to them, and that rather than demonstrating that an ''impact'' on prices exists, as set forth in the proposed § 351.511(a)(2)(v), Commerce should use language about prices being ''suppressed or depressed.'' They also commented that Commerce should revise its language to only require that an interested party submit the information which is ''best available'' to them in making an allegation of distortions—not ''sufficient information'' as is currently set forth also in § 351.511(a)(2)(v). Likewise, another commenter suggested that Commerce should be flexible with interested parties and allow them to submit reports and other third-party information that may not be contemporaneous, but still supports their claims.

Commerce's Response:

Commerce will not modify the language in either § 351.408 or § 351.511 as requested. First, we do not agree that ''best available information'' is the correct standard for an allegation under these regulations. If an interested party believes that government inaction exists, and may have an impact on prices or costs, but does not provide sufficient information to support such an allegation on the record, Commerce will not pursue the issue further. An allegation of cost or price distortions caused by weak, ineffective, or nonexistent protections must be accompanied by sufficient information for Commerce to determine that the allegation is reasonable. A mere allegation with little supporting information will not suffice, even if that is the only information available to the interested party making the allegation.

With respect to the types and quality of documents Commerce might accept for these allegations, we have also decided not to codify such requirements at this time because, again, these are decisions made on a case-by-case basis. Additionally, Commerce must maintain its own flexibility in determining if the evidence of alleged government inaction and distorted benchmark prices and surrogate values is acceptable and sufficient to warrant further Commerce action. Instead, for both § 351.408(d)(1)(i) and (ii), we have added the words ''the Secretary determines'' to clarify that it is Commerce, and not the alleging parties, who will determine if the evidence is sufficient on the record to support the alleged claim. Further, for § 351.511(a)(2)(v) we have rearranged some of the text to make it clearer that this provision pertains specifically to the Secretary's authority to exclude

certain proposed benchmark prices from its analysis.

With respect to the need to use the phrase ''suppressed or depressed'' prices or costs rather than the term ''impact'' in § 351.511 or ''appropriate'' in § 351.408, though we agree that Commerce is primarily concerned about prices or costs being lowered by distortions caused by government inaction, and therefore, in most if not all cases under these provisions, Commerce will be focused on ''suppressed or depressed prices,'' we cannot ignore the fact that artificially higher prices can be just as distortive as suppressed or depressed prices. In accordance with its regulations, Commerce rejects potential surrogate values and benchmark prices when they are distorted and not just when they are suppressed or depressed. Accordingly, it would be illogical for Commerce to use a surrogate value or benchmark price which it determines is over-inflated for a reason(s) based on record evidence and to revise the regulatory language to permit the usage of distorted high prices. Accordingly, we are not making the suggested revisions.

J. Commerce will not further refine the term ''limited number'' or remove the restriction to ''significant inputs'' in § 351.408(d).

Proposed § 351.408(d) limited the surrogate values that Commerce will consider disregarding based on an allegation of foreign government inaction to only ''significant inputs or labor'' and when the proposed surrogate value is ''derived from one country or an average of values from a limited number of countries.'' [75] In the *Proposed Rule,* Commerce explained that such limitations are appropriate because it anticipated that such an analysis could be resource intensive.[76] Commerce explained that it anticipated that the phrase ''limited number'' would ''normally involve averaged values that are sourced from no more than three countries.'' [77]

One commenter suggested that Commerce should more broadly define the term ''limited number'' to not preclude a scenario where there may be averaged values from dozens of countries, but where a significant percentage of the value is derived from a limited number of countries. Other commenters requested that Commerce should not limit its analysis in a PMS allegation to ''significant inputs'' only, and their suggestions equally apply to the same restriction placed in § 351.408(d).

Commerce's Response:

We have determined not to remove the restriction of applying this provision only to ''significant inputs or labor,'' nor will we remove the restriction in the PMS regulation. In both provisions, an analysis of the circumstance at issue (*i.e.,* government inaction resulting in weak, ineffective, or nonexistent protections) would require an analysis of the facts and the law. Furthermore, it would require in both provisions an analysis of the costs at issue and determination as to whether they are distorted or likely distorted. We do not anticipate that it would be reasonable for Commerce to conduct such an analysis for all potential surrogate values in a given case. Accordingly, we are not removing the restrictions set forth in the proposed regulation.

With respect to the definition of ''a limited number,'' we have not codified that term because we think that it should be left to Commerce on a case-by-case basis to determine how many countries may be at issue in an allegation, the nature of the alleged government inactions, and if an average of values will include countries with both government inaction allegations and no government inaction allegations. It is still Commerce's understanding that even three countries might be more than a ''limited number'' if the allegations of government inaction pertain to all three. Accordingly, we have made no change in this regard for purposes of the final rule.

K. Commerce will not issue a regulation in the final rule that countervails government inaction with respect to property (including intellectual property), human rights, labor, and environmental protections.

Two commenters suggested that Commerce should take the proposed government inaction regulations and adapt them into the CVD law. They commented that weak and ineffective government protections should be countervailed as a subsidy which ultimately injures United States industries.

Commerce's Response:

The purpose of these regulations is not to treat weak, ineffective, or nonexistent government protections as a countervailable subsidy, but instead to consider that the lack of protections has real-world impacts on costs of production and prices, and reject the use of distorted surrogate values, benchmark prices, or input costs if Commerce determines that government inaction resulted in such distortions. We, therefore, are not adopting this suggestion in the final rule.

L. Commerce has added text to § 351.416(d)(3)(v) to clarify that if Commerce looks to other countries to determine if certain protections are weak, ineffective or nonexistent, Commerce will normally consider countries that are economically comparable to analyze the cost effects of government inaction.

Certain commenters expressed concerns with proposed § 351.416(d)(2)(v), a provision which stated that Commerce may look to information in other countries to determine if property (including intellectual property), human rights, labor, or environmental protections in the subject country are weak, ineffective, or nonexistent. In doing so, the proposed provision stated that Commerce may consider if those protections exist in those other countries and are effectively enforced there.

One commenter suggested that the provision should be withdrawn because it was unclear and not transparent as required by the WTO Agreements. That commenter requested that Commerce should remove words such as ''weak'' and ''ineffective,'' as they are too general and provide Commerce with too much discretion. Further, the same commenter suggested that because determinations of distortion are made on a case-by-case basis, Commerce should not rely on its past analysis in other cases under this provision to give it any guidance, as every government action and inaction is unique and should be considered so in every case.

Another commenter expressed concerns that nothing in United States law permits Commerce to look to entirely different countries and determine whether actual market prices would have been different if the country under examination had, hypothetically, followed the policies and practices of those different countries.

Commerce's Response:

Upon consideration of the general concerns about Commerce's consideration of weak, ineffective, and nonexistent protections, as well as the claims specific to this provision, Commerce has determined that further clarification is necessary in the regulation. The proposed § 351.416(d)(2)(v) is now § 351.416(d)(3)(v) and Commerce has revised the regulation to include language which states: ''For purposes of this paragraph (d)(3)(v), the Secretary will normally look to cost effects on same or similar merchandise produced in economically comparable countries

[75] *See Proposed Rule,* 88 FR 29874.

[76] *Id.,* 88 FR 29861.

[77] *Id.,* at n.41.

in analyzing the impact of such protections on the cost of production.'' Commerce anticipated that an analysis under this provision would cover same or similar merchandise, and would normally be limited to economically comparable countries, but never stated that in the *Proposed Rule.* Accordingly, we received concerns from various parties that Commerce would look to the United States or similar countries to determine ''acceptable'' property (including intellectual property), human rights, labor, or environmental protections, even when the country at issue is a developing country and in no way economically comparable to the United States. Such an interpretation of that provision was never the agency's intention.

For other alleged PMS allegations, Commerce does not intend to look to the experience of other governments. However, Commerce continues to find that if a country has wide-spread pollution, child labor, slavery, or abuses of intellectual property or other property laws, it would be illogical to compare labor values, for example, within the same country to decide if a particular surrogate is distorted or useable. Nonetheless, it would be equally illogical to look at values of products in other countries that are not the same or similar to the input or subject merchandise at issue. Furthermore, the experiences of foreign governments may differ greatly, but if economies are comparable, it is reasonable to believe that a comparison of property, human rights, labor, and environmental protections on the cost of production would be more appropriate than if the two economies were vastly different. Commerce disagrees with the commenter who stated that Commerce does not have the authority to use such an analysis to consider if weak, ineffective, or nonexistent protections distorted costs, but we do agree that in conducting such an analysis, Commerce should be aware of both the similarities and the differences of the subject country and the country being considered for comparison purposes.

Accordingly, Commerce has retained the language covering this provision in the *Proposed Rule,* but Commerce has added the aforementioned sentence to provide greater clarity on how the analysis under this provision would be conducted.

M. Commerce has added language to § 351.408(d)(1)(i) and (ii) to clarify that it is Commerce who determines if a value is derived from a country that provides subsidies, that was subject to an AD order, or is from a source with weak, ineffective, or nonexistent protections.

In the proposed language for § 351.408(d)(1)(i) and (ii), the provisions stated that Commerce could reject the use of a potential surrogate value if: (1) it was derived from a country that provides broadly available export subsidies; (2) it was shown to be subsidized in that country; (3) it was subject to an AD order; or (4) it was derived from a facility, party, industry, intra-country region or a country with certain weak, ineffective, or nonexistent protections. Upon consideration of the language used in those proposed provisions, Commerce concluded that the text at issue presumed that parties would understand that it's Commerce who determines that one of those factors applies. To provide clarification on this point in the final regulations, Commerce has modified both paragraphs to note that Commerce alone decides that the proposed surrogate value is derived from such sources.

7. Commerce has substantially revised proposed § 351.416, its PMS regulation, in response to several comments.

On November 18, 2022, Commerce issued an advanced notice of proposed rulemaking (*PMS ANPR*) in which it explained that the 2015 TPEA amended section 773(e) of the Act to provide that 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.'' [78] Commerce recognized that the Act did not define a PMS and did not identify the information which Commerce should consider in determining if a market situation exists or is particular. Commerce stated that it hoped to provide some clarity on this issue in future regulations, which was why it was issuing the advanced notice of proposed rulemaking.

In the *PMS ANPR,* Commerce referenced the limited legislative history on the provision, in which it highlighted that a member of the U.S. House of Representatives argued that the legislation would ''empower'' Commerce to be able to disregard prices or costs of inputs that foreign producers purchased if Commerce concluded that those input values were ''subsidized'' or ''otherwise outside the ordinary course of trade.'' [79] Commerce also cited statements made on the U.S. Senate floor by a U.S. Senator stating that the legislation would help stop U.S. workers and manufacturers from ''being cheated'' by foreign industries that were ''not playing fair'' and ''illegally subsidizing'' the production of certain products.'' [80] Commerce accordingly invited public comments on various factors it might consider in preparing a regulation that would address ''the information which Commerce should consider, or need not consider, in determining a PMS that distorts costs of production.'' [81] Commerce received 19 comments in response from the public on this issue, from which it took many ideas incorporated in the draft regulations, and others it addressed or rejected in the preamble of the *Proposed Rule.*[82]

Commerce received a significant amount of commentary on its proposed § 351.416 in the *Proposed Rule,* covering both sales and cost-based PMS decisions. Commerce considered each comment and has modified its proposed regulation in response to those comments. Further, where Commerce disagreed with arguments made by the commenters, it has addressed those comments below.

A. Commerce has the authority to issue its proposed PMS regulation.

Several commenters supported Commerce's authority to issue a regulation that addresses both sales-based and cost-based PMS analyses and thanked the agency for its attempts to provide clarity on the issue, stating their belief that the proposed regulations would allow for more effective implementation and enforcement of the cost-based PMS provision in the Act. One commenter cited additional legislative history for the concept that the amended trade laws were intended to give Commerce ''flexibility in calculating a duty that is not based on distorted pricing or costs'' in any situation ''when a PMS exists.'' [83] One commenter expressed concerns that Commerce's proposed regulations unnecessarily limit its authority to make cost-based PMS determinations in listing sources of information which it may or may not consider in a given case.

Certain commenters expressed concerns, however, that Commerce may not have the authority under the WTO AD Agreement, specifically under Article 2.2.1.1 of the AD Agreement, to

[78] *See PMS ANPR,* 87 FR 69234 (citing section 773(e) of the Act).

[79] *Id.,* 87 FR 69235 (citing the Congressional Record—House, H4666, H4690 (June 25, 2015)).

[80] *Id.* (citing the Congressional Record—Senate, S2899, S2900 (May 14, 2015)).

[81] *Id.*

[82] *See Proposed Rule,* 88 FR 29861–67, 29875–77.

[83] *See* S. Rep. No. 114–45 (2015) (Senate Finance Committee Report), at 37.

address distorted costs through a PMS. Article 2.2.1.1 of the AD Agreement states that ''costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.'' [84] In a dispute brought before the Appellate Body, the European Union determined that the cost of soybeans in the production of biodiesel from Argentina was unreasonable because the domestic prices of soybeans, the main raw material used by biodiesel producers in Argentina, were found to be artificially lower than international prices due to distortions created by the Argentine export tax system.[85] It therefore disregarded those costs in its AD calculations. The Appellate Body concluded that this finding, alone, was ''not, in itself, a sufficient basis under Article 2.2.1.1'' to disregard those costs ''when constructing the normal value of biodiesel.'' [86] The Appellate Body stated that an investigating authority was ''free to examine the reliability and accuracy of costs recorded in the records'' of a producer to determine if all costs were captured, were over-or-under-stated, or were not at arm's length, thereby calling into question the reliability of the reported costs.[87] However, if the company's books and records reflected those costs accurately, ''within acceptable limits,'' even if the costs themselves were distorted by various factors, the Appellate Body concluded that Article 2.2.1.1 did not permit investigating authorities to reject the use of those costs as ''unreasonable.'' [88] A subsequent Panel adopted the Appellate Body's interpretation of Article 2.2.1.1 of the AD Agreement and found that the European Union's rejection of regulated natural gas input costs from Russia (which the European Union concluded were far below market prices paid in the unregulated Russian natural gas markets) in determining the costs to construct the normal value of welded tubes and pipes from Russia was not in accordance with Article 2.2.1.1, because the Appellate Body had concluded that the ''reasonably reflect the costs'' language pertains to the reasonableness of a producer's records, and not the reasonableness of the producer's costs themselves.[89] The commenters pointed to these cases and to Appellate Body and Panel conclusions in arguing that Commerce's statute and proposed regulations were inconsistent with the Appellate Body's interpretation of the AD Agreement. On that basis, they suggested that Commerce should not issue a final PMS regulation codifying and clarifying its cost-based PMS practice.

Commerce's Response:

As a preliminary matter, Commerce is issuing its PMS regulations in accordance with its statutory authority as the administrator and enforcer of certain trade remedies codified in the Act. That includes section 773(e) of the Act, which directs Commerce to use another calculation methodology if it determines ''that 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.'' To the extent that the commenters believe that Commerce's proposed regulations are inconsistent with the text of the AD Agreement, the Act itself is consistent with U.S. obligations under the AD Agreement. As the proposed regulations are in full compliance with the Act, we do not believe this line of argument calls into question our ability to issue regulations on the matter.

With respect to the United States' WTO obligations, Commerce disagrees that the United States is prohibited by the AD Agreement from considering and addressing costs of production distorted by only certain government actions or inactions, but not others, in its AD calculations. Commerce is permitted under U.S. law to consider factors which may distort costs of production if record evidence indicates the existence of such distortions. Likewise, Commerce is not prohibited by the WTO Agreements to consider certain actions or inactions taken by governments or other organizations that distort prices or costs in the authorities' calculations through a PMS analysis. Neither the Act nor the AD Agreement limit departures from the use of recorded costs in determining normal value to circumstances where there is an inaccuracy or unreasonable methodology or value used in determining the costs of production recorded in the books and records of the subject producer. Rather, as the TPEA makes clear, departures are warranted when the costs themselves, however recorded, do not accurately reflect the cost of production in the ordinary course of trade. The AD Agreement is intended to help provide transparency and accuracy to AD calculations, not to circumscribe the price and cost distortions which WTO members should ignore or reject.

Finally, with respect to the concerns that Commerce has limited its statutory authority through the proposed regulations, we do not believe that the regulations curtail our authority. Instead, they notify the public of the information that is normally relevant and significant to our PMS determinations.

B. The Act permits Commerce to address a cost-based PMS without also being required to address a sales-based PMS.

Three commenters took issue with Commerce's interpretation of the Act in the *Proposed Rule,* as reflected in § 351.416, that addresses sales-based particular market situations separately from cost-based particular market situations. Citing various CIT decisions, they commented that it is not enough under the Act for Commerce to find 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,'' and that for Commerce to ''use another calculation methodology'' under section 773(e) of the Act, Commerce is required to reach further legal and factual conclusions that the perceived distortion ''prevents a proper comparison'' to the U.S. price, under sections 771(15)(C) and 773(a)(1)(B)(ii)(III) of the Act. They suggested that Commerce's interpretation is ''inconsistent'' with the governing statute and that the only distortion which Commerce can address is a distortion at such a level that the distortion prevents a proper price comparison with home market or third-country sales.

Key to their concern are the examples of ''sales and transactions'' listed in section 771(15) of the Act which defines ''ordinary course of trade.'' Under the definition section of the Act, ''ordinary course of trade'' means ''the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind.'' [90] That language is consistent with Commerce's interpretation of the

[84] *See* Article 2.2.1.1 of the AD Agreement.

[85] *See European Union—Anti-Dumping Measures on Biodiesel from Argentina,* WT/DS473/AB/R (October 6, 2016), at para. 6.54.

[86] *Id.* at para. 6.55.

[87] *Id.* at para. 6.41.

[88] *Id.*

[89] *See European Union—Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint),* WT/DS494/R (July 24, 2020), at paras. 7.229–7.253.

[90] *See* section 771(15) of the Act.

Act, and the commenters do not suggest otherwise. However, after the definition, it states that the administering authority ''shall consider the following sales and transactions, among others, to be outside the ordinary course of trade,'' and lists disregarded sales, disregarded transactions, and ''{s}ituations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export prices.'' [91] The commenters pointed out that in a Federal Circuit decision, *Hyundai Steel Co.,* [92] the court affirmed a CIT holding that tied a sales-based PMS with a cost-based PMS decision. The Federal Circuit in *Hyundai Steel Co.* further held that the ''TPEA amendment to section 1677(15) linked the constructed value subsection with 'situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or the constructed export price.' '' [93] The commenters therefore suggested that for Commerce to find and adjust for a cost-based PMS, it must determine that the cost distortions create a price-based PMS that prevents a proper comparison between the normal value and the export price or constructed export prices.

In addition, one of the commenters expressed concerns that because Article 2.2 of the AD Agreement only speaks to a PMS which addresses a situation in which ''sales do not permit a proper comparison,'' the proposed regulations appear to violate the United States' WTO obligations.

Commerce's Response:

Commerce disagrees with the position taken by the three commenters that Congress intended for Commerce to address a cost-based PMS that distorts costs of production only if it also decided that the PMS would also prevent a proper comparison of normal value with the export price or constructed export price. Commerce does not believe that the Act creates such an obligation and has never applied its cost-based PMS analysis in that manner in any of its proceedings.

First and foremost, the second sentence of section 771(15) of the Act, which lists examples of sales or transactions that are not in the ''ordinary course of trade'' is not exhaustive. By its terms, the statute states that Commerce ''shall consider the following sales and transactions, *among others,* to be outside the ordinary course of trade'' (emphasis added), and then lists three examples, including a sales-based PMS.[94] Accordingly, a determination by Commerce that certain costs of production are not reflective of the ordinary course of trade (*i.e.,* not ''normal in the trade under consideration with respect to merchandise of the same class or kind'') could also result, in the words of the Federal Circuit, ''in situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or the constructed export price.'' [95] For this reason we have included paragraph (h) in § 351.416, which states that a cost-based PMS may contribute to a PMS that prevents or does not permit a proper comparison of home market or third-country sales prices with export prices or constructed export prices. However, because a cost-based PMS could contribute to a sales-based PMS, which the Federal Circuit acknowledged was possible due to the TPEA amendments to section 771(15) of the Act,[96] that possibility does not logically dictate that Commerce cannot otherwise address costs distorted by a PMS. Nor does the link between sections 773(e) and 771(15)(C) of the Act imply that Commerce's ability to ''use another calculation methodology'' under section 773(e) of the Act when it discovers distorted costs of production is severely curtailed only to situations in which Commerce conducts a second analysis and makes a second determination that the prevention of a proper comparison exists. The statute simply does not require such an extensive and multi-tiered analysis in every case in which Commerce determines the existence of a cost-based PMS.

In addition, the commenters' interpretation conflicts with Congress' intention in adding the cost-based PMS provision in the statute. As explained above, Congress expressed that it intended to give Commerce ''flexibility in calculating a duty that is not based on distorted pricing or costs'' in any situation ''when a PMS exists,'' [97] and Members of Congress expressed the hope that the additions to the Act would give Commerce the ability to address distorted costs incurred by foreign producers who were ''not playing fair.'' [98] The commenters' interpretation of the Act would allow Commerce to address cost distortions only in a very limited subset of cases, contrary to that intent.[99] Furthermore, if Commerce could only make an adjustment after finding a sales-based PMS in every case, it would limit Commerce's flexibility to define what conditions lead to a PMS. That is counter to Congress' intent, as shown through the legislative history of the TPEA, where Members of Congress expressed a desire to give Commerce greater flexibility, instead of limiting its flexibility, in calculating a duty not based on distorted pricing or costs. Commerce disagrees that such an interpretation of the Act is reasonable, as it would lead to a result inconsistent with the very purpose of the addition of the provision.[100] Accordingly, we are not revising the regulations to reflect such an interpretation of the Act.

Finally, we agree that Article 2.2 of the AD Agreement pertains to the ability of administering authorities to address sales-based particular market situations, just as we agree that Article 2.2.1.1 of

[91] *See* section 771(15)(C) of the Act.

[92] *See Hyundai Steel Co.* v. *United States,* 19 F.4th 1346, 1353–54 (Fed. Cir. 2021) (*Hyundai Steel Co.*).

[93] *Id.*

[94] *See* section 771(15) of the Act.

[95] *See Hyundai Steel Co.,* 19 F.4th at 1353–54.

[96] *Id.,* 19 F.4th at 1354.

[97] *See* Senate Finance Committee Report at 37.

[98] *See* Congressional Record-Senate, S2899, S2900 (May 14, 2015)).

[99] Congress has recognized that Commerce may adjust its AD calculations for cost distortions in a few sections of the Act, including Commerce's ability to consider the existence of a cost-distorting PMS in its calculations. For example, section 773(f)(1)(A) of the Act states that in calculating costs of production, costs ''shall normally'' be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting and producing country and ''reasonably reflect the costs associated with the production and sale of the merchandise.'' Commerce's long-standing interpretation of that provision, as affirmed by the Federal Circuit in *Thai Plastic Bags,* has been to adjust a company's reported costs of production if Commerce determines that record evidence does not show that the reported costs ''reasonably reflect'' the actual cost of production. *See Thai Plastic Bags Indus. Co.* v. *United States,* 746 F. 3d 1358, 1363–69 (Fed. Cir. 2014).

In *Thai Plastic Bags,* the Federal Circuit affirmed Commerce's determination that the respondent's reported labor and overhead costs did not ''reasonably reflect'' the company's production costs and held that Commerce's reallocation of the reported costs ''to diminish'' the cost ''distortions'' reflected in the company's books and records was supported by substantial evidence on the record and in accordance with law.

[100] *See Church of the Holy Trinity* v. *United States,* 143 U.S. 457, 459 (1892); and *Public Citizen* v. *U.S. Dep't of Justice,* 491 U.S. 440, 454 (1989) (discouraging an interpretation of a statute which would lead to unreasonable, odd, and absurd results that are inconsistent with the intent of Congress). To the extent that commenters cite language from certain CIT decisions suggesting possible alternative interpretations of the Act, those interpretations were made within the restrictions of limited arguments and specific facts in the cases before the Court. These regulations are the first instance in which Commerce has provided an extensive analysis of the history of the relevant statutory provisions and the Federal Circuit's PMS holdings.

the AD Agreement states that costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records reasonably reflect the costs associated with the production and sale of the product under consideration. Just because one provision of the AD Agreement recognizes that an administering authority may address a PMS which does not permit a proper comparison of prices, does not mean that other types of particular market situations which result in cost distortions cannot also be addressed by administering authorities consistent with members' WTO obligations.

C. Certain language in the proposed § 351.416 required revision for consistency and clarification.

In different claims about various provisions in the proposed regulation, several commenters expressed concerns about word choices and inconsistent language and terms being applied in proposed § 351.416. We have considered those concerns and agree each of the different sections contained certain terminology and phrases that should be revised and clarified. Accordingly, for each section we will describe the significant revisions made from the *Proposed Rule* below.

i. Section 351.416(a)—the introduction of the regulation and definition of PMS.

Revisions:

In revised paragraph (a), Commerce has clarified that we are defining both types of particular market situations. For a sales-based PMS, we have clarified that a PMS can be a PMS that prevents or does not permit a proper comparison of sales prices, as set forth in sections 773(a)(1)(B)(ii)(III) and 773(a)(1)(C)(iii) of the Act. A cost-based PMS is defined as a PMS that contributes to the distortion of the cost of materials and fabrication or other processing of any kind, such that the cost of production of the merchandise subject to an investigation, suspension agreement, or AD order does not accurately reflect the cost of production in the ordinary course of trade, as set forth in section 773(e) of the Act.

In addition, numerous commenters requested that Commerce remove the term ''distinct'' from paragraph (a), (c), (d), and (e), and we agree with that request. The commenters suggested that nothing in the Act requires a market situation to be ''distinct'' from other circumstances or sets of circumstances in other countries, for example, and they fear that courts will misinterpret such language as requiring an additional obligation or analysis. They point out that, just as Commerce explained in the *Proposed Rule* that a market situation need not be ''unique'' or ''excessively narrow in its application'' [101] to be particular, there is also no statutory requirement that a market situation must be ''distinct.'' We understand and share those commenters' concerns and have therefore removed the term ''distinct'' from the final rule.

ii. The evidentiary standard and requirements for filing a PMS allegation § 351.416(b).

Revisions:

In revised paragraph (b) of § 351.416, Commerce has clarified that if a PMS allegation has been made previously in the same proceeding, or in a previous or ongoing different proceeding, the interested party must identify the facts and arguments distinguishable from those provided in the other segment or proceeding. To prevent any confusion, because we have removed the word ''distinct'' in paragraphs (a), (c), and (d) of the regulation, as described above, we have revised the term distinct as used in proposed paragraph (b) to the word ''distinguishable.''

iii. Covering sales-based PMS determinations, including examples of a sales-based PMS and the possible use of constructed value if Commerce determines a sales-based PMS exists.

Revisions:

In revised paragraph (c), Commerce has explained that its analysis is specific to the period of investigation or review and that it will consider both circumstances and sets of circumstances in the home market to determine if a PMS prevents or does not permit a proper comparison of home market prices with export or constructed export prices.

iv. Covering cost-based market situation determinations, including the analysis applied by Commerce, a description of information it normally finds beneficial in making such a determination, and a description of information it finds to be of little value in most cases—§ 351.416(d).

Revisions:

In revised paragraph (d) of § 351.416, Commerce has clarified that a cost-based PMS analysis is specific to a period of investigation or review and that its analysis is conducted in three parts. First, Commerce determines if a circumstance or set of circumstances existed during the period of investigation or review that may have impacted the costs of producing subject merchandise, or costs or prices of inputs into the production of subject merchandise. Second, Commerce considers if the cost of production was distorted and, therefore, did not accurately reflect the costs of production of subject merchandise in the ordinary course of trade during that period of time. Third, Commerce determines if it is more likely than not that the circumstance or set of circumstances at issue contributed to the distortion of the costs of production of subject merchandise. If all three of these factors exist, Commerce will determine the existence of a cost-based PMS.

Furthermore, in a new paragraph (d)(2) of § 351.416, Commerce moved the references to the ''likelihood'' standard from each of the proposed examples in paragraph (g) in the *Proposed Rule* and placed that process of analysis in one section applicable to all cost-based PMS allegations. The final regulation explains that in determining if a circumstance or set of circumstances contributed to the distortion of the costs of subject merchandise, Commerce will weigh the information on the record and determine whether it is more likely than not that the circumstances or set of circumstances at issue contributed to observed cost distortions of subject merchandise during the period of investigation or review. This is consistent with Commerce's standard analysis of many facts and factors in its AD procedures. It is of particular importance to an analysis such as this one in which certain actions or inactions may impact costs of production, but proving a direct cause and effect relationship may be extremely difficult, if not impossible. Accordingly, a weighing of the record information and a determination that a PMS more likely than not contributed to a distortion of costs is the logical standard of analysis and satisfies the intent of Congress in implementing the cost-based PMS provision in the Act.

An additional modification made to paragraph (d) of § 351.416, and described above, is language included in paragraph (d)(3)(v) which states that if Commerce considers an allegation that property (including intellectual property), human rights, labor, or environmental protections in the subject country are weak, ineffective, or nonexistent, then Commerce may determine that it is appropriate to look to the enforcement of such protections in other countries to determine if a cost-based PMS existed during the period of investigation or review. The additional language states that, for purposes of that provision, the Secretary will normally look to cost effects on same or similar merchandise produced in economically comparable countries in analyzing the impact of such protections on the cost

[101] *See Proposed Rule,* 88 FR 29864.

of production. This consideration was always the intention of the agency, but a few commenters expressed concerns that Commerce would consider other countries with very different economies in its analysis. Accordingly, the agency has determined that this additional language should be added to the regulation to clarify that normally Commerce will look to countries with comparable economies in determining the effects of such enforced protections.

In addition, in response to requests from several commenters pertaining to proposed paragraph (d)(2)(ii), we have removed the term ''considerably'' from paragraph (d)(3)(ii) of § 351.416 because, as those commenters suggested, if Commerce will consider reports and documentation that indicate lower prices for significant inputs would likely result from certain governmental actions or inactions, there is no requirement in the Act that those lower prices be ''considerably lower,'' only that those prices not reflect costs or prices in the ordinary course of trade (*i.e.,* that they are distorted).

Next, in paragraph (d)(4) of § 351.416, Commerce has revised the introductory language of proposed paragraph (d)(3) stating that ''it will not be required'' to consider certain information, to an explanation that given the nature of the listed information, even if that information is all correct, that the provision of such information on the record will not preclude Commerce from making a finding of a cost-based PMS. We agree with those who commented that Commerce does not have the authority to ignore record evidence, and the proposed language raised concerns as to Commerce's intentions. However, the purpose of this provision was, and continues to be, to provide guidance that there are sources of information and related arguments which parties have filed and raised with Commerce in the past which, in its experience, generally do not assist Commerce's analysis. For example, in the AD investigation of biodiesel from Argentina, Commerce found a PMS existed, despite acknowledging that the source of the PMS (a government export tax) had been in place for numerous years. Commerce found that it was not ''precluded'' from finding a PMS ''where the distortion at issue has occurred over several years'' and that ''the fact that Argentina's soybean export tax regime has been in place since 2002 does not render its effects on Argentina's domestic soybean prices within the ordinary course of trade.'' [102] That conclusion is now reflected in paragraph (d)(4)(iv). The submission of such information and related arguments in most cases does nothing but distract Commerce and other interested parties from focusing on the information on the record which does assist the analysis. Accordingly, we have included this ''does not preclude'' provision to hopefully benefit all parties in providing guidance as to the information Commerce actually needs.

Lastly, paragraph (d)(4)(iv) of § 351.416 removes general references from proposed paragraph (d)(3)(iv) to historical policies adopted by a government or nongovernmental entities. It now more directly states the existence of the same or similar governmental or nongovernmental actions in the subject country that preceded the period of investigation or review will be of little to no relevance to Commerce's analysis (as discussed in the preceding paragraph). The removed language explaining that the pre-existence of government or industry actions does not make circumstances or sets of circumstances ''market based'' or nullify distortions of costs during a period of investigation or review remains true. However, because that language seemed to create some confusion for the public, it was removed to simplify the example of information that will not preclude the finding of a PMS.

v. Addressing the factors which make a market situation ''particular''—§ 351.416(e).

Revisions:

Paragraph (e) of § 351.416, which addresses factors to consider in determining if a market situation is particular, was revised in this final rule to use language consistent with other provisions in the regulation and was updated to apply equally to both sales-based and cost-based particular market situations. We agree with some of the commenters who expressed concerns that it was illogical to have a provision that defined what particularity meant for one type of PMS but not the other. The final regulation explains that a market situation is particular if it impacts prices or costs for only certain parties or products in the subject country. Further, additional language was added to paragraph (e)(1)(i) that explains clearly that Commerce's analysis does not concern the number of parties or products, but rather whether the market situation impacts only certain parties and products, as opposed to the general population of parties or products in the subject country.

vi. Addressing Commerce's ability to adjust, or not adjust, its calculation for a cost-based PMS—§ 351.416(f)

Revisions:

Paragraph (f) of § 351.416 was significantly revised to provide greater clarity and explanation of Commerce's authority, once it finds that a cost-based PMS exists, to address that PMS in its calculations. Notably, the Act simply states in section 773(e) that Commerce ''may use another calculation methodology under this subtitle or any other calculation methodology.'' Accordingly, the revised paragraph (f) of § 351.416, which now clarifies that it only applies to particular market situations under paragraphs (d) and (e), is divided into three separate provisions. The first states generally that if Commerce determines that a PMS exists in the subject country which has contributed to a distortion in the cost of materials and fabrication or other processing, such that those costs do not accurately reflect the cost of production of subject merchandise in the ordinary course of trade, Commerce may adjust for those distortions in its cost of production calculations.

The second provision explains that if Commerce cannot precisely quantify the distortions in the cost of production caused by the PMS after consideration of the information on the record, it may use any reasonable methodology to adjust its calculations to address those distortions based on that record information. This provision was expanded from the *Proposed Rule* to address concerns raised by commenters that Commerce would ignore available and relevant record information and make adjustments to its calculations using information outside of the record unrelated to that information, which was never Commerce's intention.

The third provision was added to reflect that even if Commerce determines that a PMS exists, it may also determine that an adjustment to its cost of production calculations is inappropriate based on record information. There was language in most of the proposed examples in § 351.416(g) of the *Proposed Rule* which stated that Commerce would only find a PMS existed if it could adjust for distortions in its calculations of the cost of production. However, that was not an accurate reflection of Commerce's analysis or practice, as pointed out by some commenters. In fact, Commerce may determine that a cost-based PMS exists, but not make an adjustment because it determines that an

[102] *See Biodiesel from Argentina: Final Determination of Sales at Less Than Fair Value and final Affirmative Determination of Critical Circumstances, in Part,* 83 FR 8837 (March 1, 2018) (*Biodiesel from Argentina*), and accompanying IDM at Comment 3.

adjustment is not appropriate, necessary, or warranted. Accordingly, we removed that language from the examples of paragraph (g) and imported the concept to paragraph (f), with additional explanation to provide clarity. Specifically, the final rule provides guidance on factors which Commerce may consider in determining if an adjustment is appropriate: (1) whether the cost distortion is already sufficiently addressed in its calculations in accordance with another statutory provision, such as the transactions disregarded and major input rules of sections 773(f)(2) and (3) of the Act; (2) whether a reasonable method for quantifying an adjustment to the calculations is absent from the record (*e.g.,* no interested party has proposed a methodology to address the cost-based PMS which would work in Commerce's calculations); and (3) whether information on the record suggests that the application of an adjustment to Commerce's calculations would otherwise be unreasonable. We believe that describing such factors in the regulations will better inform interested parties on the type of information Commerce requires to make not only a cost-based PMS determination, but also a separate determination as to whether an adjustment can, or should, be made to its cost of production calculations.

vii. Providing examples of cost-based particular market situations—§ 351.416(g).

Revisions:

As explained above, Commerce moved references to the ''likelihood,'' weighing-of-evidence analysis, and its ability to adjust cost calculations from the § 351.416(g) examples provided in the *Proposed Rule* to other provisions of the regulation.

Otherwise, most revisions to the text of the various examples were implemented to bring the language of those provisions into conformity with language used in other parts of § 351.416. For instance, each example now mentions that a determination of a cost-based PMS is based on record information and is specific to the period of investigation or review being examined by the agency. These changes were implemented in this provision, as they were in other provisions, in response to comments and concerns we received on this issue from multiple commenters and to provide greater clarity as to Commerce's cost-based PMS analysis.

One of the listed examples, paragraph (g)(9), was the source of concern for several commenters, who stated that they believed that the language of the provision was too broad and could open the door to other governments making costs adjustments to the AD calculations of U.S. exporters based on U.S. domestic policies only tangentially related to business decisions, costs, or prices. They cited U.S. industrial policies, supply chain measures, greenhouse gas emission reduction programs, and trade restrictions pertaining to Russia's invasion of Ukraine as examples that reflect government actions that may ''otherwise influence'' the production of merchandise not only in the United States, using a term Commerce included in the proposed paragraph (g)(9) example. Upon consideration of those comments, we agree that the proposed paragraph (g)(9) example was too broadly written, and we have restricted it to only three mandated government requirements—the use of a certain percentage of domestic-manufactured inputs, the sharing or use of certain intellectual property or production processes, or the formation of certain business relationships with other entities to produce subject merchandise or a significant input into the production of subject merchandise. We believe this new language reflects the specific examples of potential cost-distorting circumstances which Commerce sought to address in the regulation.

Furthermore, in the proposed examples where Commerce had referenced ''state-owned enterprises,'' we have removed that term, as the focus of Commerce's examples is more general than just that situation, focused not on the type of government entity, but on whether a government, government-controlled entity, or other public entity has taken actions, or not taken certain actions, that result in distorted costs of production. One party requested that Commerce define the term ''state-owned enterprise,'' but because that term is now removed from this regulation, there is no reason to define that term at this time. We have, however, added greater context to the entire provision and provided further description of the actions intended to be addressed by paragraph (g)(12). Accordingly, the provision now explains that a cost-based PMS may exist when ''nongovernmental entities take actions'' which the Secretary concludes can lead to cost distortions. It states that such actions ''include, but are not limited to, the formation of business relationships between one or more producers of subject merchandise and suppliers of significant inputs to the production of subject merchandise, including mutually-beneficial strategic alliances or noncompetitive arrangements, as well as sales by third-country exporters of significant inputs into the subject country'' for dumped prices. We believe that this revised description of the example set forth in paragraph (g)(12) better illustrates the type of nongovernmental actions that can become a PMS which distorts a producer's costs of production.

viii. Explaining that a cost-based PMS may contribute to a sales-based PMS—§ 351.416(h).

Revisions:

The only revisions Commerce made to § 351.416(h) were the same revisions it made to other provisions: (1) bringing the language into conformity with the Act's terminology; (2) explaining that Commerce's determinations are based on record information; and (3) emphasizing that its cost-based and price-based PMS determinations are specific to the period of investigation or review at issue. Commerce received many comments on this provision expressing very different perceptions and claims on Commerce's authority in this regard. As explained above, some commenters suggested that Commerce could only make adjustments for cost-based PMS determinations that it determined based on record evidence contributed to a sales-based PMS. However, other commenters claimed that that regardless of record evidence, Commerce should always presume that a cost-based PMS causes a sales-based PMS. In addition, Commerce received a third group of comments that suggested that Commerce has no authority to ever determine that a cost-based PMS can contribute to a sales-based PMS.

For the reasons explained above, Commerce has concluded that the Act does not require that Commerce must first determine a sales-based PMS exists before it can make adjustments to its calculations for a cost-based PMS. It also does not restrict Commerce from considering that a cost-based PMS may contribute to a sales-based PMS, and in fact, as pointed out by the Federal Circuit in *Hyundai Steel Co.,* the ''TPEA amendment to section 1677(15) linked the constructed value subsection with 'situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or the constructed export price.' '' [103] Accordingly, it is reasonable to conclude that Congress intended to grant Commerce the ability to consider cost-based particular market situations in determining if a sales-based PMS exists. However, despite that ability and

[103] *See Hyundai Steel Co.,* 19 F.4th 1346, 1353–54.

authority to consider such information, we continue to see no reason to presume that the existence of a cost-based PMS always results in a sales-based PMS, nor that a cost-based PMS cannot exist unless it also creates a sales-based PMS. That does not reflect Commerce's experience in administering and determining the existence of cost-based and sales-based particular market situations. For these reasons, we have made no further revisions to proposed § 351.416(h).

D. Additional comments and requests specific to particular paragraphs of proposed § 351.416 but not directly incorporated into the final rule.

As explained above, Commerce received 53 comments from different governments, organizations, importers, producers, and exporters on many different provisions in the proposed regulations, and in several of those comments, commenters proposed changes or requested that Commerce clarify further certain points in the preamble to the final rule. Commerce provided its rationale for those changes which we incorporated into the revised § 351.416 above. For the remainder of suggested edits which we did not incorporate, and in response to requests that we clarify further certain points in the preamble, we address those comments below.

i. Comments on the evidentiary standard of § 351.416(b).

Several commenters commented on the evidentiary standard set forth in proposed § 351.416(b), which stated that interested parties must include with their PMS allegation ''relevant information reasonably available to that interested party supporting the claim.'' [104] Various commenters supported, opposed, or sought further modification of the allegation evidentiary standard. Those in support of the standard explained that it reasonably reflects that petitioners sometimes have only limited access to information about a PMS and, therefore, a ''reasonably available'' standard is a realistic standard to expect of parties making an allegation. The purpose of a PMS examination, in the context of an investigation or review, is ultimately to gather more information about the alleged circumstance or set of circumstances allegedly distorting prices or costs, and to determine if in fact a PMS actually exists in the first place. An increased and unrealistic standard would make it more difficult for Commerce to initiate a PMS examination, and possibly prevent Commerce from addressing cost distortions as intended by Congress in placing the cost-based PMS in the Act.

However, two commenters objected to the standard, claiming that Commerce's proposed language lowers the evidentiary threshold to allege the existence of a PMS from its current practice. Section 351.404, which covers the selection of the market to be used as the basis for normal value, provides at § 351.404(c)(2)(i) that Commerce may ''decline to calculate normal value in a particular market under paragraph (c)(1) of this section'' if the Secretary determines that ''a particular market situation exists that does not permit a proper comparison with the export price or constructed export price.'' [105] In the preamble to the AD regulations implementing that sales-based PMS provision, Commerce explained that the ''party alleging the existence'' of a PMS ''has the burden of demonstrating that there is a reasonable basis for believing'' that a PMS exists.[106] The commenters suggested that a ''reasonable basis for believing'' is a higher standard than ''relevant information reasonably available to that interested party supporting the claim,'' and because § 351.416(b) applies equally to both sales-based and cost-based PMS allegations, Commerce's proposed regulation lowers the PMS allegation standard from its past practice.

Those commenters expressed concerns that because Commerce does not provide further guidance on the term ''reasonably available,'' petitioners could abuse the vague terminology, alleging whatever they wanted on a case-by-case basis. They also expressed concerns that Commerce could likewise abuse the terminology by arbitrarily determining what is ''reasonable'' in each case as it determines appropriate. They expressed concerns that Commerce's current ''reasonable basis'' standard is inconsistent with the statutory presumption that Commerce uses a producer's reported costs of production in its calculations, absent actual probative evidence that cost distortions may exist in those books and records. They commented that by allegedly lowering the evidentiary threshold using vague terminology, Commerce is placing unnecessary burdens on respondents to prove in each case that no PMS exists and requiring Commerce to expend unnecessary resources on addressing incomplete allegations.

A third group of commenters requested that Commerce revise the described evidentiary standard in § 351.416(b) to always permit parties making a cost-based PMS allegation to solely rely on cost-based PMS determinations in a previous segment of the same proceeding under a rebuttable presumption of the ongoing existence of a cost-based PMS. In the *Proposed Rule,* Commerce explained that it would not adopt a rebuttable presumption to apply to future proceedings once it had determined the existence of a cost-based PMS in one segment of a proceeding, as requested by several commenters in response to the *PMS ANPR,* because unlike a non-market economy designation (which commenters had used as an example), which applies to an entire economy, a cost-based PMS is based on a circumstance or set of circumstances that may or may not be ''particular to certain products or individuals in the subsequent years.'' [107] Some commenters continued to urge Commerce to reconsider this decision, commenting that frequently Commerce has found cost-based particular market situations to exist in subsequent segments of a proceeding. They also pointed out that it is not uncommon, even in the context of proceedings that do not involve the non-market economy entity, for Commerce to rely on previous distortion findings in subsequent proceedings unless parties rebut those earlier determinations with new evidence, such as earlier agency findings that certain world market prices are distorted, for example in the selection of benchmarking prices for a less than adequate remuneration analysis, pursuant to § 351.511(a)(2)(iii). They suggested that, likewise, it would be reasonable to allow those alleging a PMS which has already been determined to distort costs in a previous segment of the proceeding, to rely solely on that previous determination in their PMS allegation submissions under § 351.416(b). Additionally, they suggested that such a presumption would be lawful and fair because respondents could still respond with rebuttal factual information in the investigation or review. Further, they commented that such a presumption would decrease administrative burdens by not requiring Commerce to do an extensive PMS cost-based analysis in every adjacent 12-month period.

Finally, another commenter essentially advocated for the opposite of those requesting a rebuttable presumption that a cost-based PMS exists in subsequent segments of a

[104] *See Proposed Rule,* 88 FR 29875.

[105] *See* § 351.404(c)(2)(i).

[106] *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27295, 27357 (May 19, 1997) (*1997 Preamble*).

[107] *See Proposed Rule,* 88 FR 29865.

proceeding. That commenter requested that Commerce clarify that cost-distortion findings are case-specific and suggested that Commerce should never rely on its previous findings of cost-distortions in previous segments of a proceeding, as facts such as prices and costs are constantly changing and there is no guarantee that a cost-based PMS found to exist in a particular period of investigation or review will continue to exist in another. Such decisions, the commenter stated, are to be made by Commerce based solely on the facts of the case before it.

Commerce's Response:

We have not revised the evidentiary standard as set forth in the *Proposed Rule* in § 351.416(b) in the final rule as requested by the commenters. First, we disagree with the commenters who expressed concerns that Commerce has somehow lowered its evidentiary standard from ''a reasonable basis for believing'' to something less stringent. While those commenters focused on the term ''reasonably available,'' we believe the more important term in the clause at issue is ''supporting the claim.'' If a PMS allegation is made with no evidence ''supporting the claim,'' Commerce will not initiate on that PMS allegation. It is Commerce's current practice to consider if the information accompanying a PMS allegation is sufficient to support the claim of a PMS. If Commerce determines that the information provided does not adequately support the claim, but that the alleging party has the ability to retrieve certain additional evidence to further support the allegation, Commerce may request that the party submit the additional information before the agency determines to initiate, or not initiate, a PMS examination. We believe that standard is fully consistent with the ''reasonable basis for believing'' standard expressed in the preamble to § 351.404(c)(2).[108]

Furthermore, Commerce frequently uses a ''reasonably available'' standard in its AD and CVD proceedings; thus, the usage of such a standard is fully consistent with Commerce's normal practice. For example, in investigations, Congress provides in the Act that a petition must contain information ''reasonably available to the petitioner'' supporting its allegations.[109] Furthermore, in Commerce's regulations for investigations, scope inquiries and circumvention inquiries, petitioners, applicants and requesters are all required to provide ''reasonably available'' information in their submissions.[110] Thus, we disagree that the standard set forth in § 351.416(b) is unreasonable and have maintained that standard in the final rule.

In addition, we are not implementing a rebuttable presumption in our regulations for subsequent segments in the same proceeding at this time. We agree with the commenter that pointed out that facts do frequently change in a proceeding from year to year, such as prices and costs for certain inputs, costs for subject merchandise, the application of government programs, and nongovernmental actions that may distort costs, and that Commerce must make both sales-based and cost-based PMS determinations on a segment-to-segment basis. On the other hand, we also agree with the commenters that noted that Commerce has found cost-based particular market situations to exist in sequential segments of the same proceeding, and that in a given case, Commerce might conclude that previous cost-based PMS determinations could form part of the ''relevant information reasonably available to that interested party supporting the claim'' standard for purposes of initiating a cost-based PMS examination. However, given the evolving circumstances in sequential cases across AD orders, we have concluded that such a determination is best left to be determined by Commerce on a case-by-case basis and have determined not to codify such a rebuttable presumption in § 351.416(b).

ii. Comments on the second sentence of § 351.416(b) and Commerce's authority to self-initiate a PMS examination.

One commenter suggested that Commerce should delete the requirement in the second sentence of § 351.416(b) that if a similar PMS was alleged in a previous segment of the same proceeding, the alleging party must identify in the submission the facts and arguments which can be distinguished from those provided in the previous segment. The commenter stated that this provision does not provide certainty regarding what will be required of alleging parties and could increase Commerce's administrative burden. Furthermore, the commenter interpreted this requirement to unreasonably force an alleging party to identify the bases on which an opposing party could build an argument against finding a PMS, based on the distinguishing features from the previous segment, which the commenter suggested is a departure from other allegations administered by Commerce.

Three other commenters requested that Commerce reaffirm its authority to find a PMS in the context of an investigation or administrative review, *sua sponte,* without an allegation by other parties, when information on the record supports initiation, as affirmed by the CIT for a sales-based PMS determination.[111]

Commerce's Response:

We have not removed the requirement that parties submitting an allegation similar to one made in a previous or ongoing segment of a proceeding must identify the facts and arguments in the submission which are distinguishable from those provided in the other segment, and in fact, we have modified it to cover similar allegations in other proceedings as well. As we stated in the *Proposed Rule,* 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 submitted to Commerce.[112] To the extent that the commenter believes it weakens its allegation to point out distinguishing features from its previous allegations, if an allegation cannot stand up to the evidentiary requirements set forth in the regulation, then that fact suggests the allegation itself is weak.

With respect to Commerce's ability to examine, and possibly determine, the existence of a PMS without an allegation, we agree with the commenters and the CIT that there are no statutory restrictions on Commerce's ability to conduct such an examination *sua sponte* in the context of its administrative proceedings. We do not believe that such an unrestricted authority must be codified in the regulation, however.

iii. Comments on the examples of a sales-based PMS in § 351.416(c)(1).

Commerce received multiple comments on the examples of a sales-based PMS set forth in § 351.416(c)(1)(i) through (iv).

a. Comments on past practice and the examples in § 351.416(c)(1).

[108] *See 1997 Preamble,* 62 FR 27357.

[109] *See* sections 702(b)(1) and 732(b)(1) of the Act.

[110] *See* §§ 351.202(b), 351.225(c), and 351.226(c).

[111] In referencing the CIT, the commenters cite *Atar, S.r.l.* v. *United States,* 33 CIT 658, 670 (June 5, 2009) (finding that ''{t}he general shortcoming in plaintiff's argument is that neither the statute nor the regulations prohibit Commerce from determining, even absent an allegation, that a third-country market is affected by a particular market situation. Moreover, the Preamble language, in stating that Commerce ''typically'' proceeds only upon a timely allegation, does not state or imply that Commerce intended to confine its own discretion such that it could not act *sua sponte*'' (citing the *2017 Preamble,* 62 FR 27357)) and (''{n}or do the statute or regulations require Commerce to provide a ''substitute'' for such an allegation.'').

[112] *See Proposed Rule,* 88 FR 29862.

Several commenters requested that Commerce clarify that those examples are intended to codify past agency practice and do not reflect a change in practice.

Commerce's Response:

The examples are intended to illustrate a circumstance or set of circumstances that may prevent or not permit a proper comparison of prices in the home market or a third-country market and the export price or constructed export price. As with the examples of a cost PMS listed under paragraph (g), the examples under paragraph (c)(1) are not entirely a codification of past practice, but, to some extent, indicate the type of circumstance or circumstances Commerce anticipates might result in the existence of a PMS. For example, Commerce has found a PMS as the result of direct government control over the pricing of home market sales.[113] Moreover, ''government control over pricing to an extent that home market prices cannot be considered competitively set'' is a specific example of a possible PMS identified by the Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA).[114]

The other examples of a sales-based PMS listed in paragraph (c)(1), while not taken from past practice, are not inconsistent with past practice and do not reflect a change to what Commerce considers to be a sales-based PMS. Rather, each example illustrates a circumstance in which comparison market sales might not provide a proper comparison to the export price or constructed export price.

b. Comments on the term ''may'' in § 351.416(c)(1).

One commenter expressed its appreciation for Commerce setting forth examples, stating that it will assist Commerce and interested parties in quickly identifying sales-based particular market situations in future cases with similar facts, while another commenter suggested that Commerce should state that the examples set forth in § 351.416(c)(1)(i) through (iv) ''will'' prevent or not permit a proper comparison of prices, not ''may'' prevent a proper comparison of prices, as was set forth in the *Proposed Rule.*

Commerce's Response:

In response to the first of the comments, we agree that by providing examples of past sales-based particular market situations, we hope to provide clarification as to the types of circumstances or sets of circumstances that could prevent or not permit a proper comparison of prices, but we disagree that such circumstances ''will'' prevent or not permit a proper comparison of prices in every case. Every PMS determination is based upon the information on the record of the segment of the proceeding before Commerce. Accordingly, we have not modified the language from ''may'' to ''will,'' as suggested.

c. Comments on the ''normalcy'' of certain government actions described in § 351.416(c)(1).

In addition, several commenters expressed concerns about the specific examples set forth in the regulation, commenting that export taxes, export limitations, anticompetitive regulations that confer unique status on favored producers or create barriers to new entrants to an industry, and direct government control over pricing of subject merchandise can all be part of the normal ''conditions and practices'' applied by governments, producers, and exporters in the ordinary course of trade under section 771(15) of the Act. They expressed concerns that addressing ''anticompetitive regulations'' in this manner is inconsistent with the intent of the AD law and that ''direct government control over pricing'' may not necessarily lead to distortions in prices.

They also suggested that these examples are already adequately addressed through Commerce's non-market economy methodology, and that Commerce would be acting inconsistently with the Act in addressing such examples using a sales-based PMS analysis.

Other commenters suggested that to the extent each of these examples involve government policies or broad economic phenomena, the use of such examples in the regulation is inconsistent with the ''original intent'' of the AD Agreement.

Commerce's Response:

There is no support for the allegations that the examples listed as possible sales-based particular market situations in § 351.416(c)(1)(i) through (iv) are inconsistent with Commerce's obligations under the Act or the United States' obligations under the AD Agreement. Further, Commerce only applies a PMS analysis to market economy countries and, therefore, there is no merit to the suggestion that the examples raised would be addressed through Commerce's non-market economy methodology. Additionally, as noted above, the examples are illustrative and not exhaustive, and in every case, Commerce still must determine if the facts on the record of a given investigation or review before it support a finding of a sales-based PMS. The examples provided could be particular market situations if the alleged circumstances are shown to distort prices on the record of an investigation or review, and are intended to provide the public with guidance, but a PMS determination is one anchored in record evidence, and Commerce will not determine the existence of a PMS without a thorough analysis. Further, to the extent comparability between comparison market prices and export or constructed export prices can be addressed through another section of the Act (*e.g.,* price adjustments to normal value under section 773(a)(6) of the Act), Commerce may determine an adjustment for the sales-based PMS is not appropriate. Accordingly, we have made no changes to the examples set forth in the *Proposed Rule.*

iv. Comments on the use of constructed value in § 351.416(c)(3).

Section 351.416(c)(3) states that if Commerce determines the existence of a sales-based PMS, it 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 of Commerce's regulations. Certain commenters indicated their support for this provision, stating that it is fully consistent with section 773(a)(4) of the Act, while others requested that Commerce clarify that sales prices will only be disregarded when a sales-based PMS is shown by record evidence to prevent proper comparisons of prices, as required by both the Act and the AD Agreement.

In addition, some commenters requested that Commerce ''make clear'' that it will seek to use home or third-country sales as the basis of normal value to the extent possible, including using third-country sales where a home market may be disqualified due to a PMS.

Commerce's Response:

Commerce agrees that § 351.416(c)(3), as proposed, is consistent with section 773(a)(4) of the Act and agrees that sales will only be disregarded when the record evidence reflects that a PMS prevented or did not permit a proper comparison of sales prices in the home market or third-country market with export prices or constructed export prices during the period of investigation or review. However, the conclusion that the PMS prevents or does not permit a proper comparison of comparison

[113] *See Biodiesel from Argentina* IDM at Comment 2.

[114] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103–316, Vol. 1 (1994), at 822.

market prices with export prices or constructed export prices will be reached when the existence of a PMS is demonstrated. The question is whether particular market circumstances prevent comparison market prices from serving as the basis of ''normal value'' for purposes of comparison with export or constructed export sales, not the extent to which the PMS may affect comparison market prices or whether the PMS affects both comparison market and export market prices evenly. Thus, there is no need for additional analysis to determine that comparison market sales cannot provide the basis for a proper comparison once they are determined to be outside the ordinary course of trade via an affirmative PMS finding.

In response to the request that Commerce codify a preference for the use of third-country sales over constructed value for determining normal value when home market sales are deemed outside the ordinary course of trade and unusable, we note that the *Proposed Rule* did not address Commerce's decision-making analysis in determining normal value when Commerce concludes that no home market sales were made in the ordinary course of trade during the investigation or review period. We continue to determine that no such analysis is necessary in the final rule.

v. Comments on § 351.416(d)(1) as it applies to a cost-based market situation.

As explained above, Commerce revised § 351.416(d) in response to many comments received on the provision. There were some comments, however, with which we disagreed and did not incorporate changes into the regulation. For example, two commenters expressed concerns with § 351.416(d) in its entirety and called for its removal, arguing that it reverses the statutory burden of proof and requires exporters to demonstrate that a cost-based PMS does not exist rather than requiring those alleging the PMS to prove that it exists based on record evidence. Another commenter suggested that Commerce should remove all references to ''accurately reflect the cost of production'' throughout § 351.416(d), including the header and § 351.416(d)(1)(ii), and replace it with ''reasonably reflects the cost of production,'' because the commenter expressed concerns that the term ''accurately reflect'' suggests a standard of precision which is unrealistic and inconsistent with Commerce's emphasis in the draft regulation that it need not quantify with precision the distortions caused by a cost-based PMS.

In addition, two commenters suggested that section 733(e)(1) of the Act requires that each cost or price distortion finding be respondent-specific and unique to the costs paid for inputs compared to what Commerce deems to be the amount that would have been paid in the ordinary course of trade (*i.e.,* absent the PMS). They suggested that in investigations or reviews in which Commerce determines the existence of a cost-based PMS, the regulation should indicate that Commerce will determine on a transaction-by-transaction analysis whether reported costs exceeded, or were exceeded by, the undistorted cost of an input. For those transactions in which the reported costs exceed distorted costs, those commenters suggested that Commerce should not apply a PMS adjustment that covers those transactions.

Commerce's Response:

We disagree with the commenters who expressed concerns that the regulation ''reverses'' the burden of proof. After a party makes their allegation of a sales-based or cost-based PMS, Commerce still must determine on the record if the evidence supports such a claim. Commerce may issue questionnaires, will consider comments from all of the interested parties, and weigh the evidence on the record to determine if a PMS exists. The regulation provides additional guidance on examples and factors Commerce normally will consider or find less helpful, but in no way does it reverse any burden of proof.

Furthermore, we also have elected not to remove the term ''accurately reflect'' from the regulation. The language of section 773(e) of the Act specifically refers to a finding 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 costs are distorted, they do not accurately reflect the cost of production in the ordinary course of trade—no more and no less. Commerce does not interpret the use of that phrase to mandate an overly burdensome level of proof for interested parties and does not interpret the phrase to mean that cost distortions must be precisely quantified. Indeed, as explained in the *Proposed Rule,* the Federal Circuit has already explicitly held that Commerce is not required to precisely quantify a distortion in costs by the PMS to find the existence of a PMS.[115] The regulation is codifying Commerce's PMS practice to assist in the administration and enforcement of the Act. We do agree, however, that if the burden of proof is interpreted to be too restrictive, Congress' intention that Commerce effectively address cost-based particular market situations in AD investigations and reviews would be greatly undermined.

Finally, there is no language in the Act that requires Commerce to determine on a transaction-by-transaction, or a company-by-company, basis if reported costs exceeded undistorted costs during the period of investigation or review. Accordingly, we have not incorporated into the regulation the suggestion that a transaction-by-transaction analysis of distorted costs is required in analyzing a cost-based PMS and implementing an adjustment under paragraph (f).

vi. Comments on Commerce's proposed analysis that after weighing all the information on the record, Commerce will determine if it is more likely than not that a market situation contributed to a distortion in the cost of production.

As explained above, Commerce has determined to remove references to the analysis which it will conduct in weighing evidence of an alleged market situation and determining if that circumstance or set of circumstances contributed to the distortion in the cost of production of subject merchandise during the period of investigation or review in § 351.416(g) and various other parts of the regulation. Instead, it will address that analysis solely in § 351.416 in the new paragraph (d)(2). The new provision states that Commerce will determine if a market situation existed during the relevant period by determining whether it is more likely than not that the circumstance or set of circumstances contributed to the distortions of cost of production based on record information.

In the *Proposed Rule,* Commerce explained that it had received comments in response to the *PMS ANPR* arguing that Commerce must prove through a direct ''cause and effect'' standard that a market situation caused cost distortions, while other comments suggested that Commerce should just presume that all potential particular market situations contribute to cost distortions.[116] Commerce explained that a direct ''cause and effect'' test would not be realistic or appropriate because sometimes the information to directly tie price and cost changes to external factors might not be publicly available, or the nature of the market situation

[115] *See Proposed Rule,* 88 FR 29863 (citing *NEXTEEL Co., Ltd.* v. *United States,* 28 F.4th 1226, 1234 (Fed. Cir. 2022) (*NEXTEEL*)).

[116] *Id.,* 88 FR 29866.

(*e.g.,* the existence of slave labor or domestic content requirements) might be such that although the impact might be demonstrated by the weight of the evidence on the record, a direct and traceable ''cause and effect'' standard simply would be unattainable and could not be administered.[117] However, Commerce also determined it could not presume all potential cost based market situations had an impact on costs or prices. As Commerce explained, a PMS determination is a ''fact-intensive'' analysis and a circumstance or set of circumstances might distort costs in one case but not in another. Accordingly, Commerce determined that ''on a case-by-case basis'' it would consider ''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 contributed to the distortions of prices or costs in the subject country.[118] We continue to believe that is the only reasonable analysis available to the agency in light of the realities of market situations that might contribute to distorted costs, as shown through the examples in § 351.416(g), and have therefore codified that standard in the regulations.

Despite Commerce's explanation in the *Proposed Rule,* certain commenters suggested that the term ''such that'' in the statutory language requires that when Commerce weighs the evidence on the record, it cannot make a determination on the basis of the likelihood of a market situation contributing to the distortion of costs and may only make a determination on the basis of a direct ''cause and effect'' or ''pass-through'' analysis. In other words, they suggest that by using the term ''such that,'' Congress expected that Commerce would only make an adjustment to its calculations if there was evidence that a circumstance or set of circumstances could be directly traced to a distortion of costs of production.

To the extent that such an interpretation of the statute means that Commerce might not be able to address certain market situations that were likely to be contributing to the distortion of costs of production, because they were not directly tied to specific cost distortions, some commenters suggested that this outcome was reasonable. They suggested that a cost-based PMS determination, and an adjustment pursuant to that determination, was intended by Congress to be an exception to the use of an entity's actual, recorded costs of production and, therefore, was also intended by Congress to be a rarely-used trade remedy. They expressed concerns that Commerce's use of a ''likelihood'' standard is inconsistent with that intention, as is the inclusion of many of the examples of a potential cost-based PMS in proposed § 351.416(g), which they suggest do not rise to the standard of a rare or exceptional circumstance or set of circumstances that are the direct cause of distortions in the cost of production. Still, another commenter expressed concerns that Commerce's use of a ''likelihood'' analysis in weighing the evidence on the record not only goes beyond the intentions of Congress in the statute, but also is such a broad abuse of its authority that it is in violation of the nondelegation doctrine of Article 1, Section 1 of the U.S. Constitution. That commenter noted that the CIT in *Jilin Forest Industry* [119] recently held that agencies cannot willfully expand their powers through continuous self-empowerment. The commenter argues that through its use of a likelihood standard in the proposed regulations, Commerce engaged in self-empowerment in the *Proposed Rule* in violation of the nondelegation doctrine.

In advocating for the ''cause-and-effect'' or ''pass-through'' standard, some commenters pointed to a statement in *NEXTEEL,*[120] where the Federal Circuit faulted Commerce for not providing sufficient evidence on the record about a countervailable subsidy, and for not showing that 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.' '' [121] In the Federal Circuit's analysis, it pointed out that Commerce had neither made a ''finding that any subsidies were passed through to the prices of {hot-rolled coil}'' or ''that they affected Korean {oil country tubular goods (OCTG)} producers any more than OCTG producers elsewhere.'' [122] On the basis of that language, the commenters suggested that Commerce is required to use a ''pass-through'' analysis in every cost-based PMS analysis.

Furthermore, two more commenters expressed concerns that the likelihood standard is too speculative, and that the use of such a standard in weighing record evidence would result in PMS determinations unsupported by record evidence.

Other commenters expressed their support for Commerce's use of a likelihood standard, arguing that Commerce's proposal is administrable and consistent with Congress's intent to effectively address particular market situations that contribute to the distortion of costs of production. They also expressed their support for Commerce's interpretation of the Federal Circuit's holding in *NEXTEEL* articulated in the *Proposed Rule,* stating that the Federal Circuit did not mandate a ''cause-and-effect'' or ''pass-through'' requirement for subsidies or other market situations.

Commerce's Response:

Congress amended the Act in 2015 to allow Commerce to consider cost-based particular market situations in its proceedings to effectively address what Congress perceived to be unfair use of distorted costs by foreign entities in producing subject merchandise. We disagree that the statute shows that Congress intended for Commerce to consider cost-based PMS allegations only rarely, just as we would disagree that the statute shows that Congress intended for Commerce to consider such allegations in every AD investigation or review. As reflected in § 351.416(b), Commerce will consider a PMS allegation if an interested party submits a timely allegation as to the existence of a PMS along with information that supports the claim. In addition, if record information before Commerce in an AD investigation or review suggests the existence of a cost-based PMS, Commerce will conduct a cost-based PMS analysis in that segment of the proceeding on that basis. Such a consideration is not tied to any concept of rareness or frequency. Accordingly, we find no merit in the suggestion that Commerce should not use a likelihood standard because Congress intended for a cost-based PMS analysis and adjustment to be rarely applied.

To be clear, under § 351.416(d)(2), in determining whether a cost-based PMS exists that has contributed to distortions in costs of production, Commerce will weigh the record evidence and make a determination on that basis. Commerce will not make a determination that a cost-based PMS ''may or may not'' exist. Rather, Commerce will make a determination that a cost-based PMS 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

[117] *Id.*

[118] *Id.*

[119] *See Jilin Forst Industry Jinqiao Flooring Group Co. Ltd.* v. *United States,* Slip Op. 23–14 (CIT February 9, 2023) (*Jilin Forest Industry*), at 33–34 and 36.

[120] *See NEXTEEL,* 28 F.4th at 1235.

[121] *See Proposed Rule,* 88 FR 29866 (citing *NEXTEEL,* 28 F.4th at 1235).

[122] *Id.*

course of trade,'' [123] consistent with the language of section 773(e) of the Act or it will find that there is insufficient evidence on the record to make such a finding.

The term ''such that'' is ''used to express purpose or result.'' [124] Incorporating that definition into the statutory language, Commerce will determine if there is sufficient record information to find that, as a result of the cost-based PMS, there were distortions to the costs of production. The PMS does not have to be the only circumstance or set of circumstances contributing to a distortion in costs, but merely one of the circumstances making such a contribution. The key is that Commerce will determine if it is likely, that the circumstance or set of circumstances at issue contributed to distortions in the cost of production, and if it did, Commerce will also determine whether or not it is appropriate to adjust its AD calculations for that PMS. Such an analysis and determination are fully consistent with the agency's obligations and authority under the Act. It is a weighing exercise delegated by Congress to Commerce as the administrator of the AD law and, therefore, we reject the argument that applying a rational and reasonable ''likelihood'' test in this capacity is a violation of the nondelegation doctrine of the U.S. Constitution.

Despite the claims of several of the commenters, the Act does not address the methodology or analysis Commerce must conduct in reaching such a conclusion. Indeed, the Act is generally silent on the analysis or methodology to be employed by Commerce in making all of its evidence-based determinations in the Act. As the administrator of the AD law, it is Commerce's authority and responsibility to determine the appropriate methodology or analysis to use in reaching such a determination. We have determined to codify in the regulation Commerce's ''likelihood'' analysis because we appreciate that some commenters have suggested that we should just presume causality, while others have suggested that causality must be traced through from beginning to end and shown in granular detail. For the reasons set forth in the *Proposed Rule,* we reject both of those options and conclude that the use of a ''more likely than not'' standard is appropriate.[125]

Furthermore, for the reasons explained in the *Proposed Rule,* we disagree that the Federal Circuit mandated that Commerce apply a ''pass-through'' analysis when addressing a cost-distorting subsidy, or any other type of cost-based PMS for that matter, in *NEXTEEL.*[126] The Federal Circuit was not faced with this issue, and the cited language was provided to give examples of information which Commerce could have provided, but did not, in proving that the existence of a subsidy distorted costs in that case.[127] We do not interpret the Federal Circuit's language in *NEXTEEL* to direct Commerce to incorporate a particular methodology or analysis across the board in determining if a PMS has contributed to the distortion of costs of production.

Indeed, given the many types of cost-based particular market situations which might distort costs of production, we strongly believe that a mandated ''pass-through'' requirement would have overwhelmingly negative consequences and undermine the purpose of the provision in the Act in the first place. It would require that in many, if not most, of the cases in which a cost-based PMS may exist, Commerce would be prohibited from addressing that PMS because the nature of the PMS is such that it is impossible or excessively difficult to directly tie the market situation ''cause'' to the cost distortion ''effect.'' To put it into perspective, it would be, at minimum, extremely burdensome and costly for U.S. industries seeking trade remedy relief or the U.S. Government, to use economic studies and other data to measure with specificity the direct financial impacts of slavery on specific labor wages, of intellectual property theft on the specific financial benefits which should have been appreciated by the owner of a patent or trademark, of export restraints on particular domestic prices, or of domestic-content and technology transfer requirements on particular costs of manufacturing. In fact, there is a possibility that none of these examples of potential cost-based particular market situations listed in § 351.416(g) which would, given certain circumstances, normally have distortive effects on costs of production, could be directly traceable through a ''pass-through'' analysis. We do not find such an interpretation to be reasonable or consistent with Congress' intentions and have therefore rejected the calls by certain commenters to revise the regulation to reflect a direct ''cause-and-effect'' or ''pass-through'' standard of weighing the evidence on the record in reaching a final PMS determination.

vii. Comments on the lists of information which Commerce determines to be, as a rule, relevant to cost-based PMS analysis.

Commerce received multiple comments on the list of information which it proposed to be relevant, in general, to a cost-based market situation analysis. One commenter expressed concerns that the information listed in proposed § 351.416(d)(2)(i) through (v) might not always be available to the parties, and expressed a particular concern about proposed paragraphs (d)(2)(i) through (iii) because governments or independent entities or organizations might not always produce such information. The commenter expressed a concern that if such data are unavailable, Commerce might automatically determine that there is insufficient record information to support the existence of a cost-based market situation.

Another commenter suggested that Commerce consider removing analyses of the price effects of government action and inaction in proposed paragraphs (d)(2)(ii) and (iii) because each report or documentation might define or interpret data differently and have different understandings of terms such as ''fair market value'' or ''significant input,'' which could lead to confusion on the record. That commenter expressed concerns that Commerce was relinquishing some flexibility and discretion in including such reports and documentation on the list of relevant sources.

A few commenters expressed concerns with the nature and quality of foreign government and independent analytical and academic organizations studies and reports. Some requested that Commerce clarify that hypothetical results from such reports, such as the reference to report conclusions in proposed paragraph (d)(2)(ii) that ''lower prices for a significant input in the subject country would likely result from government or nongovernmental actions or inactions taken in the subject country or other countries,'' could not be the sole basis for a cost-based market situation determination. Conversely, others expressed concerns that Commerce might create a hierarchy among such reports and studies, prioritizing certain studies over others on a claim that some are more ''speculative'' than others due to a lack of source data. They suggested that Commerce should make clear that just because one study may be based on less information than another does not mean that Commerce should automatically give it less weight. Instead, they suggested that Commerce should

[123] *See* section 773(e) of the Act.

[124] *See Collins Dictionary,* ''such that,'' retrieved November 8, 2023, *https://www.collinsdictionary.com/dictionary/english/such-that.*

[125] *See Proposed Rule,* 88 FR 29866.

[126] *Id.*

[127] *See NEXTEEL,* 28 F.4th at 1235.

consider all information on the record and take into consideration the reality that objective studies may not be available for every product and industry.

Commerce also received comments from commenters who suggested for every portion of the *Proposed Rule* in which Commerce relies on the term ''significant input,'' it should remove the term ''significant,'' because the use of that term would be overly restrictive. That term appeared in proposed § 351.416(d)(2)(i) through (iii) and (v) and (d)(3)(ii) and in multiple examples listed in proposed § 351.416(g). The commenters suggested that Commerce should remove the restrictive term ''significant'' because section 773(e) of the Act does not limit Commerce's authority in that manner, and in fact the Act uses the term ''of any kind.'' They disagreed with Commerce's explanation in the *Proposed Rule* that use of the term is necessary to prevent an administrative burden, instead suggesting that no party would file a PMS allegation for inputs which do not have a meaningful impact on the cost of production after adjusting for distorted costs. One commenter also expressed concerns that all ''significant'' inputs might not be distorted, but that a combination of other less ''significant'' inputs might be distorted and that the collected ''insignificant'' input distorted costs would have an impact on the overall cost of production.

In addition, one commenter expressed concerns with Commerce's comparison of prices paid for significant inputs used to produce subject merchandise under the alleged market situation to prices paid for the same input without the market situation, in the home market or elsewhere, in proposed paragraph (d)(2)(i), alleging that section 773 of the Act ''does not allow for a comparison'' of input prices in one country where a market situation allegedly exists and input prices in other countries where no such situation exists.

Furthermore, another commenter expressed concerns with Commerce's consideration of previous agency determinations or results that did or did not support the existence of an alleged PMS with regard to the same or similar merchandise in previous segments or proceedings. That commenter requested that Commerce explain that each record is separate and distinct and that it cannot presume an outcome or conclusion based on previous determinations or results. An additional commenter requested that Commerce emphasize that cost-based PMS determinations are based on the facts on the record and not presumptions based on information external to the record.

With respect to proposed paragraph (d)(2)(v), which pertained to the consideration of the use of property (including intellectual property), human rights, labor, and environmental protections in other countries and is addressed to a greater extent above, one commenter suggested that Commerce should remove the terms ''weak'' and ''ineffective'' entirely because neither term is defined and the terms create too much discretion for Commerce to make a cost-based PMS determination on an arbitrary basis. That commenter expressed concerns that such a broad use of discretion is inconsistent with the United States' WTO obligations. Likewise, other commenters expressed concerns with the same provision, arguing that because the provision does not explain how Commerce is going to consider various factors in doing price comparisons between governments with distinguishable economies and programs, Commerce should provide further guidance and standards in the final rule or preamble. Those commenters also complained that no burden of proof is set forth in this provision and that Commerce should provide further guidance and standards on that burden in the final rule or preamble. Lastly, those same commenters expressed concerns that Commerce had not listed any environmental, labor, human rights, or property (including intellectual property) standards in the regulation or preamble, and absent such standards, Commerce might ''unfairly penalize'' countries on a case-by-case basis for providing protections in a way which is different, but not less effective, how the United States provides protections.

In addition, another commenter expressed concerns with the existence of proposed paragraph (d)(2)(v) altogether, stating that Commerce's consideration of the actions or inactions of other governments in determining whether or not costs are distorted during a certain period of time is inconsistent with section 771(15) of the Act and the SAA [128] because both of those legal sources require that the ''ordinary course of trade'' analysis focus on the conditions and practices generally made in the same market as merchandise being examined. That commenter suggested that the law does not permit Commerce to analyze conditions and practices in other countries as set forth in proposed paragraph (d)(2)(v) because the prices and protections which Commerce would analyze using such information would not be costs incurred in the home market ''in the ordinary course of trade'' during the period of investigation or review.

Finally, another commenter expressed concerns that proposed paragraph (d)(2)(v) could be inconsistent with the United States' WTO obligations because it may result in the United States demanding that certain WTO members, for whom a PMS has been alleged, maintain certain standards for environment, labor, human rights, and property (including intellectual property) protections, while making no such demand of other countries if no PMS has been alleged with respect to their industries.

Commerce's Response:

As explained above, in response to certain comments, Commerce made certain changes to the list of information which it will generally find beneficial in most cases in determining the existence of a market situation which distorts costs of production, and that list now appears in § 351.416(d)(3). However, Commerce has not revised that list in response to the comments listed here, but instead addresses the comments raised.

First, although the information sources listed in § 351.416(d)(3)(ii) and (iii) will generally be helpful if complete and timely, we agree with the commenter who suggested that sometimes, some or all of these sources may not exist, may be incomplete, or may not be current. We also agree that sometimes, even if the various reports and documentation are timely and complete, there may be inconsistency between the terminology used and presumptions upon which the data and results provided rely. All of these concerns are standard concerns whenever an agency relies on outside studies and reports, and Commerce has a long history of familiarity with such potential concerns. None of these predictable data concerns, however, dissuade us from recognizing that despite those possible considerations, reports, and documents such as those listed in § 351.416(d)(3)(ii) and (iii) generally benefit our cost-based PMS analysis.

Furthermore, we disagree that considerations of price and cost effects remove Commerce's flexibility and discretion in administering this area of law. By listing these sources, we believe the public and Commerce both benefit

[128] *See* SAA at 834 (noting that the SAA states that Commerce ''may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market'').

from knowing the types of information which Commerce considers generally beneficial to a cost-based PMS analysis and in no way does it remove Commerce's ability to consider alternative information or even reject the listed sources if they suffer from inadequacies or other problems which Commerce determines undermine the conclusions of the listed sources on the record. To be clear, in response to one commenter's concerns, Commerce will not automatically reject a cost-based PMS allegation if the data listed in § 351.416(d)(3) is not on the record, including the reports and documentation listed in paragraph (d)(3)(ii) or (iii), or even if the information is on the record but proves to be unusable, or is unavailable, if other information is on the record. Ultimately, Commerce's determination of a cost-based market situation will be one based on all of the information on the record before it, and not just the historically helpful sources listed in § 351.416(d)(3).

In response to the comments raised on the results of certain ''external'' reports which some commenters called ''hypothetical'' or ''based on presumptions,'' Commerce will make its determinations based on the record as a whole. If a report includes solid data which supports its conclusions, for example, and is not contradicted by other information on the record, Commerce may determine based on record evidence that a cost-based PMS exists, consistent with that report. Claiming that a report's conclusions on price effects are ''hypothetical'' or ''presumptive'' ignores that fact that the reports Commerce frequently has received from such sources have been based on a great deal of data and analysis. For this reason, we continue to include such sources in the list of documentation which Commerce generally finds to be helpful to its cost-based PMS analysis. In addition, we agree with the commenters who suggested that sometimes one study may be based on less data than another. However, this fact alone does not mean that the study with more data is necessarily more accurate or beneficial. Commerce has no intention of creating a ''hierarchy'' of reports based on data sources, but instead will consider all information on the record before it and determine the relevance of such studies and reports individually on a case-by-case basis.

Likewise, Commerce will continue to consider previous determinations of the existence of a cost-based PMS by Commerce in § 351.416(d)(3)(iv) to be generally helpful. We do not disagree that each record stands alone, but there is no question that if Commerce has previously considered a circumstance or set of circumstances in a subject country covering the same or similar merchandise, that those analysis and facts are relevant to Commerce's analysis.

Commerce makes a PMS determination specific to a period of investigation or review, but if the merchandise, parties, and circumstances are the same or similar, all of that information can be extremely relevant to Commerce's analysis and ultimate conclusion.

With respect to the arguments that Commerce cannot lawfully compare prices and costs outside the subject country and the alleged market situation with prices and costs within the subject country under proposed § 351.416(d)(3)(i) and (v), we disagree that section 773 of the Act, or any statutory provision, hampers Commerce's analysis in that manner. If a market situation distorts costs in a subject country, sometimes there might be other prices of the same or similar merchandise within the same country which can be compared for purposes of determining if the circumstance or set of circumstances distorts costs of production. One of the commenters cites language in the SAA for its argument in this regard, which states that ''Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market.'' [129] We do not disagree that when Commerce is able to compare costs to other non-distorted costs in the same market, that is ''generally'' an informative comparison and very likely the most informative comparison available to Commerce.

However, in certain circumstances, the record may not reflect that factual scenario. It may be that the entire market for an input or subject merchandise within the subject country has been distorted, or at least that certain merchandise is not being purchased or sold in accordance with market principles anywhere in the subject country, because of the nature and size of the alleged market situation. When that is the case, it is completely reasonable and logical that Commerce may consider prices and costs outside of the subject country of a significant input into subject merchandise to determine if a cost-based PMS exists. We know of no statutory, regulatory, or judicial prohibition on Commerce considering such data in determining if certain costs reasonably reflect the costs of production in the ordinary course of trade. Indeed, Commerce has made this type of comparison in both determining the existence of a cost-based PMS and in determining the appropriate adjustment to remedy the PMS.[130] As we have stressed, Commerce's determination is based on the entire record, and information about both internal and external costs and prices may assist Commerce in determining whether the costs reported accurately reflect the cost of materials and fabrication or other processing of any kind in the ordinary course of trade, as required by section 773(e) of the Act.

We understand that some commenters believe that the phrase ''normal in the trade under consideration'' and the term ''ordinary'' in the statutory definition of ''ordinary course of trade'' in section 771(15) of the Act suggests that even if costs of production were distorted, if those costs were used by an examined producer or exporter in its normal business practices, Congress intended for Commerce to determine that those costs were ''ordinary'' and use those costs in its calculations. We find that such an interpretation is inconsistent with the language of section 773(e) of the Act requiring Commerce to consider whether costs, as reported, ''accurately reflect the cost of production in the ordinary course of trade,'' because under that interpretation all reported costs would be ''accurate.'' That interpretation is also inconsistent with the intentions of Congress for Commerce to address foreign production costs benefiting from lower, distorted costs of production. Accordingly, we find that such an interpretation of the definition of ''ordinary course of trade'' would undermine the very purpose of the cost-based PMS provision in the Act. Commerce will therefore continue to address distorted costs in its cost-based PMS analysis.

Furthermore, we are not removing the terms ''weak'' or ''ineffective'' in the regulation in describing certain protections, nor will we try to set up standards or define those terms, as no regulation could predict every and all possible scenario under this provision. It is clearly a case-by-case analysis. A government may have intellectual property protections in its laws but provides nothing but a proverbial ''slap on the wrist'' for violations of the law, in no way dissuading irresponsible

[129] *Id.*

[130] *See, e.g., Biodiesel from Argentina* IDM at Comment 3.

companies or individuals from violating those protections. Under any definition, such a law and protections would be considered ''weak.'' Likewise, another government may have hypothetically strong protections in its laws for protecting the waterways around a factory or for protecting workforce health and safety, but if the evidence on the record shows that the government does not enforce those laws or that they are largely ignored by businesses and government officials alike, there is no question that such laws and protections could be described as ''ineffective.''

As we have described above, weak and ineffective property (including intellectual property), human rights, labor, and environmental protections may contribute to distorted prices and costs of production, but might not contribute to any cost distortions, and a conclusion by Commerce on such matters must be based on the record evidence before it. As we have previously explained, in making such a determination, Commerce will weigh all of the evidence on the record in its analysis and determine if it is more likely than not that the alleged market situation contributed to distorted costs of production.

We do not agree that Commerce's analysis, as set forth in the regulation, ''unfairly penalizes'' countries for providing protections in a manner differently from the United States. Commerce's determination is not a ''penalty'' on a foreign government or a subjective statement on the priorities and values of another sovereign nation. It is an objective determination based on record evidence as to whether the lack of certain compliance costs ordinarily associated with certain enumerated protections contributed to a distortion in costs for certain producers or exporters in the subject country. As we explain above, we disagree with the generalized claims by certain commenters that the AD Agreement requires the United States to use prices and costs which it determines, based on record evidence, are distorted due to weak, ineffective, or nonexistent protections in its calculations.

On the other hand, we fully agree with the commenters who expressed concerns that different countries enforce certain protections through different methods, and even if those methods may differ from the United States, they may still prove to be strong and effective. Accordingly, we believe that it would not be logical to set forth restrictive standards in the regulation to determine what protections, or methods of protection, are strong or weak, or effective or ineffective. Instead, a determination of the strength and effectiveness of a protection in the subject country is an analysis best left for interested parties to argue and for Commerce to analyze, consider, and determine on a case-by-case basis.

Furthermore, we do not agree that paragraph (d)(3)(v) is inconsistent with the United States' WTO obligations. The United States is not demanding certain property (including intellectual property), human rights, labor, and environmental protections be applied in certain countries, but not in others. Instead, the United States is merely determining if weak, ineffective, or nonexistent protections in the subject country had an impact on the cost of production. That analysis is neutral among all countries and provides no preference for one over the other. Accordingly, it does not create a conflict with the United States' WTO most favored nation obligations.

Finally, we have declined to remove the term ''significant'' from ''significant input'' whenever that term arises in the regulations. If, as some of the commenters stated, no party will make allegations on ''insignificant'' inputs because insignificant inputs will not have a meaningful impact on the cost of production, after adjusting for distorted costs, then the use of the term should be of no consequence to parties making PMS allegations because the regulatory language will reflect actual practice. However, if a combination of ''insignificant inputs'' can, collectively and hypothetically, have a meaningful impact on the cost of production, Commerce would anticipate that interested parties would be inclined to make PMS allegations on those alleged distorted costs as well, either individually or in the aggregate. We have determined that the administrative and resource burden on the agency to review and consider PMS allegations for several ''insignificant'' inputs in potentially numerous cases would, be unreasonable and inhibit, or even prevent, the timely completion of the proceeding in which such allegations are made. Accordingly, we have retained the use of the term ''significant input'' throughout the PMS regulations.

viii. The definition of ''ordinary course of trade'' does not prohibit Commerce from determining that past government or nongovernmental actions do not preclude a finding of distorted costs of production under § 351.416(d)(4)(iv) or otherwise undermines the PMS examples set forth in § 351.416(g).

Commerce included language in the *Proposed Rule* that stated that the agency would ''not be required to consider'' certain information, and as noted above, we received several comments that expressed concerns that Commerce did not have the authority to prohibit consideration of information on the record. We agree and have revised the introductory language that was in proposed paragraph (d)(3) to instead explain that the examples set forth ''will not preclude the finding of a market situation'' in the introductory language of § 351.416(d)(4). Commerce will not prohibit parties from submitting such information on the record, and Commerce will consider their claims based on that information, but even if all they state is true, we have determined it is important to stress that Commerce normally will not consider such arguments beneficial or persuasive to its analysis.

One of those examples, as proposed, spoke to ''the existence of historical policies and previous actions taken or not taken by the government or industry in the subject country,'' and we received comments that essentially expressed concerns that such a provision was too broad. As explained above, we have narrowed and simplified the language in that provision to reflect what we were trying to address at its core: ''The existence of the same or similar governmental or nongovernment actions in the subject country that preceded the period of investigation or review'' will not preclude the finding of a market situation. As we explained in the *Proposed Rule,* in Commerce's experience some parties have argued 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.'' [131] Commerce explained that it disagreed with that interpretation and explained that cost distortions cannot become non-distortive merely because of historical usage. As Commerce stated in the *Proposed Rule,* ''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.'' [132] Commerce also explained 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 every year they are in effect,'' and the mere fact that those actions previously existed will not

[131] *See Proposed Rule,* 88 FR 29863.

[132] *Id.*

prevent Commerce from finding the existence of a cost-based PMS.[133]

Despite Commerce's explanation in the *Proposed Rule,* some commenters suggested that because the term ''ordinary course of trade'' is defined in section 771(15) of the Act as ''the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind,'' such language indicates that not only can Commerce not refuse to consider historical information, it is, in fact, required to analyze historic conditions over a ''reasonable'' period of time prior to the exportation of the subject merchandise. In that regard, we agree that Commerce is required to consider ''conditions and practices'' which are ''normal in the trade'' for the subject merchandise during a period of time in considering if costs are incurred in the ordinary course of trade. It is for that reason we have modified the language in the regulation from that proposed in the *Proposed Rule.*

However, we disagree with the premise that because government actions, such as subsidies, nongovernmental actions, or government and nongovernmental inactions, have been applied over time, that fact alone ''normalizes'' those actions and inactions, and requires Commerce to consider those actions or inactions to be in the ''ordinary course of trade,'' even if those actions or inactions have distortive effects on prices and costs. The commenters suggesting such an interpretation of the Act expressed concerns with Commerce's determination that past actions or inactions do not prevent a finding of a cost-based market situation in proposed § 351.416(d)(3)(iv). They also commented that all of the examples set forth in § 351.416(g) of potential cost-based particular market situations cannot be addressed in Commerce's calculations if those government or nongovernmental actions existed in a time period preceding an investigation or administrative review, with some commenters claiming that most of the listed examples are just common economic policies and global phenomena which are in the ordinary course trade and are not particular to individual respondents.

As we explained above, we find that such an interpretation of section 771(15) of the Act is inconsistent with the below-cost PMS provision in section 773(e) of the Act, requiring Commerce to consider whether costs, as reported, ''accurately reflect the cost of production in the ordinary course of trade.'' [134] Under such an interpretation of ''ordinary course of trade,'' if all subsidies and government or nongovernmental actions or inactions were considered ''normal,'' no matter if they impacted costs or not, then all reported costs would be considered ''accurate.'' Such an interpretation is illogical—the statute does not turn a blind eye to government or nongovernmental actions that distort costs of production under a blanket claim of historic normalization.

Furthermore, such an interpretation is also inconsistent with the intentions of Congress for Commerce to address foreign companies benefiting from lower, distorted costs of production through the below-cost PMS provision. As Commerce explained in the *PMS ANPR,* members of the U.S. House of Representatives and U.S. Senate expressed concerns about inputs being ''subsidized'' or ''otherwise outside the ordinary course of trade,'' [135] and that U.S. industries were ''being cheated'' by foreign industries that were ''illegally subsidizing'' certain products,'' [136] in introducing the legislation into law. Such language does not suggest that Congress intended to allow government or nongovernmental actions or inactions that distort costs of production to be considered ''normal'' or ''ordinary'' just because they were in place before the period of investigation or review.

Accordingly, we have revised and simplified the regulation as explained above in § 351.416(d)(4)(iv) to more accurately explain that the mere existence of the same or similar government or nongovernmental actions in the subject country that preceded the period of investigation or review will not preclude a finding of a market situation. In addition, we have continued to provide all twelve of the examples set forth in § 351.416(g) in the *Proposed Rule,* with some modifications, as described above.

ix. Providing a list of sources which Commerce determines will be of little to no benefit in most cases to a cost-based PMS determination in § 351.416(d)(4) will not have a ''chilling effect'' on other arguments.

Certain commenters approved of Commerce's listing of the types of information that it generally does not find beneficial to a cost-based PMS analysis. Such commenters considered the list to be helpful and consistent with the Act and Federal Circuit precedent, citing *NEXTEEL.* Those commenters suggested that by providing a list of sources which generally do not benefit Commerce's analysis, interested parties will be better aware of what arguments to make or not make in persuading the agency that a cost-based PMS exists or does not exist, thereby saving every participant's time and resources. In contrast, some commenters also suggested that such a list was not necessary and might unduly restrict Commerce's ability and flexibility to consider all of the record evidence on a case-by-case basis.

Still other commenters expressed a concern that listing documents which Commerce ''would not consider,'' creates a ''chilling effect'' and prevents parties from making good arguments based on record evidence which might be uniquely appropriate to the case before the agency. Those commenters expressed concerns that because of such restrictions, parties might be predisposed to not even submit information on the record which could otherwise be helpful to a cost-based PMS analysis in a specific, given case. Still other commenters expressed concerns that by including such a list, Commerce might even be violating the due process rights of those who should be able to provide any argument they wish to argue their positions before the agency.

Commerce's Response:

In changing the introductory language of proposed § 351.416(d)(3), which used the language ''will not consider,'' into the ''will not preclude a finding'' language in § 351.416(d)(4), as described above, Commerce has addressed any due process claims or arguments that such a list might unduly restrict Commerce's ability and flexibility to consider certain arguments and facts on the record. Parties are not prevented from submitting information and arguments on the record and Commerce will consider such arguments and facts, but we continue to believe that the public benefits from understanding that the agency generally finds little benefit to its analysis in most cases when the listed information and arguments are submitted, for the reasons explained in the *Proposed Rule.*

As for the concerns expressed for a ''chilling effect,'' in some ways, that is the purpose of the regulatory provision to the extent that it allows parties to better understand the value of making certain arguments over others. No party should waste its time and resources making an argument based on certain information which Commerce has

[133] *Id.*

[134] *See* section 773(e) of the Act.

[135] *See PMS ANPR,* 87 FR 69235 (citing the Congressional Record—House, H4666, H4690 (June 25, 2015)).

[136] *Id.* (citing the Congressional Record—Senate, S2899, S2900 (May 14, 2015)).

determined previously to be largely irrelevant to its cost-based PMS analysis. One commenter suggested that Commerce should continue to just address such views on a case-by-case basis and provide no list of examples of arguments and facts that it frequently finds to be irrelevant, but we have determined that the public benefits more from the inclusion of those examples in the regulation and understanding that such arguments are generally of little help to Commerce in deciding if a cost-based market situation exists. Thus, Commerce does not believe that the described examples of arguments and facts listed under § 351.416(d)(4) will have a ''chilling effect'' on valid cost-based PMS allegations.

Section 351.416(d)(4)(i) provides that the lack of precision in the quantifiable data relating to the distortion of prices or costs in the subject country will not preclude the finding of a cost-based PMS. Commerce provided a lengthy explanation for this provision in the *Proposed Rule.*[137] Certain commenters suggested that Commerce should remove the provision from the list because they expressed concerns that it might prevent parties from providing more accurate or precise data in response to, or in making, a PMS allegation. Others expressed concerns that it suggested that Commerce will not consider quantifiable data at all in its analysis. Still, others expressed concerns that the provision suggested that Commerce would conclude that it was acceptable to rely on erroneous data in certain circumstances in making a cost-based PMS adjustment where precise quantifiable data were unavailable. Lastly, one commenter requested that Commerce explain that the applicability of a data source is different from the precision of data and, therefore, even if Commerce determines to retain the regulatory provision, it should explain to the public that parties can still argue that one data source is more applicable and appropriate than another data source, and that decisions about the precision of quantifiable data would only come after Commerce determined the appropriate data sources to apply.

Section 351.416(d)(4)(ii) addresses costs of production which would allegedly exist absent a cost-based PMS, providing that without objective data, Commerce would not find such ''hypothetical'' or speculated costs to be of assistance to its analysis. One commenter expressed concerns that the provision might preclude Commerce from finding a PMS based on an input which, due to the PMS, makes up a relatively small percentage of the cost of production. For example, a single production input might, absent a PMS, represent a large percentage of a manufacturer's cost of production. However, because of a PMS, it may be significantly undervalued and instead represent a small percentage of the manufacturer's reported cost of production. The commenter reasoned that if Commerce refuses to consider a ''hypothetical'' cost analysis of what an input's value would be absent the PMS, then it might fail to actually address the cost distortions in the first place. The commenter therefore disagreed that arguments about hypothetical costs are of no value and posited that Commerce should not base its analysis only on ''significant'' inputs but rather on cost distortions in inputs generally.

With respect to both of these provisions, one commenter expressed agreement with the statement that Commerce made in the preamble to the *Proposed Rule,* that in reviewing the record to determine if there is a cost-based PMS, Commerce's ''analysis is usually qualitative, rather than quantitative, in nature,'' in that Commerce is not required to find a precise quantitative distortion to determine a PMS exists.[138] In the *Proposed Rule,* Commerce explained that ''whether Commerce's analysis is solely qualitative or both qualitative and quantitative,'' Commerce would ''consider all relevant information submitted on the record by interested parties.'' [139] Accordingly, the commenter emphasized that even if precise quantifiable data are unavailable, qualitative allegations and information can be useful if those allegations and information are supported by objective record evidence. The commenter stated that Commerce should note the importance of qualitative allegations and information in the final rule.

Commerce's Response:

We agree with the commenter that stated that qualitative allegations and information, be it claims that forced labor in the country has a suppressing effect on overall labor values, for example, or that a government's technology transfer requirements possibly distort the market price for particular products, can be extremely useful to Commerce's cost-based PMS analysis, as long as those allegations and information are supported by objective evidence on the record. That is true under paragraph (d)(4)(ii) for both allegations of a PMS and information provided in response to those allegations.

With respect to § 351.416(d)(4)(i), we will not remove the provision, but rather will state that we agree with the commenters who wanted Commerce to emphasize that this provision is not meant to prevent or dissuade parties from submitting more accurate or precise data on the record. Like qualitative allegations and information supported by objective evidence on the record, more comprehensive, accurate and precise data are always appreciated and considered by Commerce in its analysis when such information is placed on the record. Commerce's cost-based PMS determinations are based on record evidence, and we disagree with the commenter who expressed concerns that the regulation suggests the agency would not consider quantifiable data or the commenter who expressed concerns that Commerce was suggesting that it would be acceptable to rely on erroneous data. Such claims are unfounded. The purpose of § 351.416(d)(4)(i) is to address those situations in which some quantifiable data are on the record that support finding the existence of a cost-based PMS, but commenters suggested that because the data are not adequately precise, those data are meritless or should be ignored. We continue to find that such claims are of no benefit to Commerce's cost-based PMS analysis and have therefore included that example on the list.

In response to the request that Commerce clarify that the appropriateness of data sources is a different issue from whether the quantifiable data are adequately precise as articulated in the regulation, we agree with the commenter. There may be situations in which there are multiple data sources before the agency and Commerce will determine which data source is the appropriate data source to use in its calculations based on the perceived benefits of each, including the precision and detail of quantifiable data specific to the costs of production of subject merchandise. In that case, if one data source has more precise quantifiable data specific to the costs of production of the subject merchandise than other data sources, that could be a factor, among others, which leads Commerce to select that data source as the one it uses for purposes of its analysis.

The scenario set forth in § 351.416(d)(4)(i) addresses the situation, which Commerce has experienced multiple times, in which

[137] *See Proposed Rule,* 88 FR 29863.

[138] *Id.,* 88 FR 29862.

[139] *Id.*

Commerce has determined to rely on certain data and interested parties attempt to undermine the usefulness of the information by claiming that the quantifiable data in that data base are insufficiently precise to support a cost-based PMS allegation. It is that argument which Commerce finds to be of no assistance to its analysis and to which § 351.416(d)(4)(i) applies.

In response to the comments stating that Commerce's PMS analysis might be undermined by the undervaluation of an input, thereby making it appear to be insignificant on its face, absent an argument of a hypothetical cost without the existence of a PMS under § 351.416(d)(4)(ii), we disagree. The provision states explicitly that allegations of speculated prices or costs of significant inputs unsupported by objective data may prove to be of little value to Commerce's PMS analysis. In the scenario raised by the commenters, if a party alleged that a PMS undervalued a particular input, and provided an objective analysis with data which reflect that the input would be significant absent the existence of the alleged PMS, such an allegation and data would be helpful to Commerce's analysis. However, if the allegation was devoid of any objective analysis and data, then, as the provision states, speculated prices and costs would be of little assistance to the agency's analysis. The issue in such a situation would not be, as suggested by the commenters, whether the input was significant or not significant—that matter could be determined through the PMS analysis. The issue under § 351.416(d)(4)(ii) would be whether the alleging party merely speculated about the prices or costs of the input, or whether the PMS allegation was supported by objective data on the record.

x. The factors listed by Commerce to determine if a market situation is particular in § 351.416(e) are in accordance with law.

Section 351.416(e) addresses factors Commerce will consider in determining if a market situation is particular. As explained above, Commerce has simplified the provision from that proposed and revised certain language to bring it into conformity with other text in the regulation, as requested by some commenters. Commerce has also modified the language so that it applies equally to sales-based and cost-based particular market situations. Certain commenters questioned Commerce's decision to provide a separate particularity consideration from a market situation determination, arguing that such a separate consideration is unnecessary under the Act. However, we believe that both the CIT and Federal Circuit have disagreed with this assessment in various holdings and that Commerce is required in PMS determinations to separately analyze if a market situation is particular to certain parties or products in the subject country. Accordingly, we have retained paragraph (e) to provide factors Commerce will consider as part of its particularity analysis.

Some commenters also commented that Commerce should focus not on whether a market situation ''impacts'' prices or costs for only certain parties in paragraph (e)(1), but instead focus on whether a market situation ''suppressed'' or ''lowered'' prices or costs for certain parties. Although we do agree that in cost-based PMS analyses and determinations, Commerce's primary concern will be whether a market situation had a downward effect on costs of production to the disadvantage of the domestic industry, we also recognize that sometimes market situations may, counter to market principles, causing prices and costs to both rise and fall. For purposes of determining whether a market situation is particular, we do not see the distinction between distortions which cause costs to decline or distortions which cause costs to rise. The important part of the particularity analysis is whether the market situation impacted prices or costs for only certain parties or products in the subject country. Accordingly, we have determined to maintain the use of the term ''impact'' in the regulation in determining if a market situation is particular.

Comments on this provision otherwise essentially fell into one of two interpretations of the word ''particular.'' One group of commenters expressed concerns that Commerce misunderstood in the proposed regulation what the term particular means and misunderstood various statements made by the courts. They suggested that a market situation cannot be particular if it exists in one form or another outside of the subject country, for it must be unique only to the subject country. They also suggested that it cannot be particular if it applies to industries beyond those of producers of subject merchandise or inputs into subject merchandise. They commented that a market situation is only particular if it is limited, by its terms, to producers of subject merchandise, and that any interpretation broader than that is lawfully impermissible.

These commenters expressed concerns that Commerce's proposed regulation indicated that a cost-based market situation could contribute to distortions of costs for a large number of parties or products, including parties and products with no relationship to subject merchandise. They expressed concerns that such an analysis goes beyond the intentions of Congress, and that the Act was amended only to address particular programs which distort costs solely for subject merchandise in the subject country, and no more.

Furthermore, one commenter suggested that because a Panel concluded that the term ''particular'' in a price-based PMS case meant ''distinct, individual, single and specific,'' [140] Commerce's proposed regulations are WTO inconsistent because they allowed for Commerce to adjust its calculations for market situations that applied to industries far beyond such a limitation.

However, other commenters suggested that the term ''particular'' in the Act is undefined and need not be limited to a particular country, economy, or industry, and that even the Federal Circuit in *NEXTEEL* recognized that a global phenomenon like the presence of low-priced Chinese steel could contribute to a cost-based PMS in multiple countries as long as there is ''sufficient particularity'' to the market in question.[141] Some commenters advocated adoption of the proposed provision without a change. Other commenters advocated for Commerce to maintain the factors set forth in the *Proposed Rule* for particularity, but also requested that Commerce elaborate further on the circumstance or set of circumstances that could impact prices or costs for certain parties or products and the amount of impact which Commerce would consider sufficient to make the market situation ''sufficiently particular'' for purposes of a PMS determination.

Commerce's Response:

We disagree with the commenters who suggested that Commerce is required by the Act or the courts to limit its analysis only to government actions in the subject country that are targeted solely to producers of subject merchandise or inputs into subject merchandise. The term at issue is ''particular market situation,'' and the focus is on the distortion of costs of production for a cost-based PMS and whether a comparison of sales is proper for a sales-based PMS. Some situations may impact particular parties, other situations may impact particular products, and others may be so

[140] *See* Panel Report, Australia—Anti-dumping Measures on A4 Copy Paper, WTO Doc. WT/DS529/R (adopted 27 January 2020).

[141] *See NEXTEEL,* 28 F.4th at 1237.

expansive as to impact a large number of parties and products among the general population of the subject country. For a situation to be considered particular, the key question is whether it has impacted only certain parties or products or whether it is sufficiently broad as to impact the general population of parties and products in the subject country. We do not believe the analysis should be any further complicated than that question.

Any other understanding of the term ''particular market situation'' in the context of a cost-based PMS would require Commerce to ignore situations that distort costs in the subject country because a situation could impact other manufacturers in the subject country as well as manufacturers of the merchandise subject to an investigation or order (*e.g.,* all steel manufacturers could be impacted and not just manufacturers of steel wheels). Such limitations on Commerce's ability to determine if costs are distorted would be arbitrary and inconsistent with the purposes of the cost-based PMS provision, and we find no support of such a limitation in the Act. Section 351.416(e)(1) clarifies that Commerce's analysis is relatively simple and straightforward, as reflected by the 12 examples set forth in § 351.416(g)—if a market situation distorts costs of production for only certain parties or products in the subject country, it is particular.

With respect to the request from some commenters that Commerce provide further analysis in its regulations or preamble as to the amount of impact which Commerce would consider sufficient to make a market situation ''sufficiently particular,'' we have determined that such an analysis is a decision best left to be addressed on a case-by-case basis. There are many different types of market situations, as shown by the examples set forth in § 351.415(g), and the delineation between ''certain parties and products'' and ''the general population of parties and products in the subject country'' would be one best left to the facts on the case before Commerce. Accordingly, we will not include any further direction, at this time, in the regulation.

xi. Commerce's authority to determine the appropriate adjustment to apply, as set forth in § 351.416(f), is lawful.

As explained above, Commerce revised § 351.416(f) as presented in the *Proposed Rule* in several ways. The provision now clarifies that when the Secretary is unable to precisely quantify the distortions to the cost of production of subject merchandise to which the PMS contributed, the methodology used by Commerce to determine an appropriate adjustment will be based on record information. We have also added a provision which states that Commerce may determine that an adjustment is not appropriate even if it does find the existence of a PMS if certain circumstances exist, with examples of such circumstances listed. These changes were all made to the paragraph in response to comments we received on the *Proposed Rule.*

There were additional comments on the provision from the public, and suggestions which, after consideration, we determined not to incorporate into the regulation. All commenters agreed that if the information on the record provided a means of precisely quantifying the distortion to costs, then an adjustment based on that quantification was required. However, at that point there was disagreement. Some commenters stated that if the distortion to costs cannot be quantified precisely, then Commerce does not have the authority to make an adjustment. Other commenters suggested that Commerce must still find a means to quantify the distortion in some way based on record evidence if it cannot quantify the distortions precisely. A third set of commenters supported Commerce's proposed regulation and suggested that Commerce should be free to use whatever information on the record it believes appropriate to make an adjustment, consistent with the language of section 773(e) of the Act, which states that Commerce may use ''any other calculation methodology'' once a cost-based PMS is determined to exist.[142] That third set of commenters suggested that whatever methodology Commerce determined to use in a given case should be fact- and case-specific, and tied to the nature of the product at issue and the availability of information.

For the other two sets of commenters, they pointed out that section 773(b) of the Act requires an analysis as to whether sales of subject merchandise are outside the course of trade due to distorted costs. They commented that Commerce failed in the *Proposed Rule* to address the holdings by the CIT and Federal Circuit which held that the statute does not permit Commerce to apply its below-cost test to transactions it finds distorted by a PMS, and they requested that either Commerce remove paragraph (f) entirely or address the legislative restrictions and court decisions in the provision or the preamble to these regulations.

They also suggested that, despite the Federal Circuit's holding in *NEXTEEL* that Commerce need not quantify the cost distortions precisely in adjusting for a cost-based PMS, Commerce cannot adjust its calculations without some determination as to the amount of distortions caused by a cost-based PMS and allowance for parties to make arguments in each case to that effect. Otherwise, they suggested that any adjustment to Commerce's calculations could not be based on a ''reasonable methodology.''

In addition, some commenters expressed concerns that in using the term ''reasonable methodology,'' the regulations did not define what methodologies are ''reasonable.'' Likewise, other commenters requested that Commerce define what ''calculations'' are intended when the regulation states that Commerce may adjust its calculations in paragraph (f), again citing CIT and Federal Circuit holdings that stand for the proposition that the statute does not contain a provision which allows Commerce to apply a PMS adjustment for purposes of its below-cost test.

Another commenter suggested that Commerce should include the term ''significant'' before the word ''distortions'' because Congress only intended for significant cost distortions to be addressed by Commerce in its calculations.

In addition, other commenters suggested that the regulation should prohibit the application of AFA under sections 776(a) and (b) of the Act in determining an adjustment for a cost-based PMS and prohibit the consideration of previous Commerce determinations based on AFA.

Finally, those same commenters also suggested that Commerce should prohibit the application of an adjustment for a cost-based PMS based on a subsidy when Commerce has already countervailed a subsidy at issue in the companion CVD proceeding to prevent the application of a double remedy.

Commerce's Response:

The purpose of these regulations is to address Commerce's analysis for determining the existence of a PMS. Paragraph (f) addresses the fact that Commerce has the authority to adjust its calculations once it determines the existence of a cost-based PMS. As several commenters pointed out, we are restricted by the Act and the courts' interpretation of the Act from making certain adjustments to our calculations.

[142] These commenters suggested that such an analysis is consistent with the Federal Circuit's opinion in *NEXTEEL,* which stated nothing in the statute requires Commerce to precisely quantify the distortion caused by a PMS in order to make an affirmative PMS finding. *See NEXTEEL,* 28 F.4th at 1234.

We are also aware, as some other commenters have noted, that recently legislation has been proposed to Congress to remove those restrictions. Accordingly, we have decided not to codify with any specificity the adjustments Commerce may or may not make in its calculations in paragraph (f), and instead have drafted the regulation using general terminology which may apply if the status of the adjustments Commerce can make to its calculations remains the same or changes. We will therefore not define the terms ''reasonable methodology'' or ''calculations'' in the regulation, but we do recognize that at the time these regulations are issued, Commerce is unable to adjust for a cost-based PMS determination when performing the sales-below-cost test, pursuant to section 773(b)(1) of the Act.

Likewise, we will not add the term ''significant'' before the term ''distortion in the cost of materials and fabrication or other processing,'' or any other use of the term ''distortion'' in paragraph (f) because the Act does not require such a restriction and we believe that such a restriction would unreasonably limit Commerce's authority to determine to adjust, or not adjust, its calculations as it finds appropriate, on a case-by-case basis. There may be one proceeding in which Commerce finds that a PMS contributed to one distortion in costs, while in another proceeding it finds that the PMS contributed to several different cost distortions. The addition of the word ''significant'' to the term would require Commerce to determine if a single or combination of distortions met a standard of significance before it could make an adjustment to its calculations in every case. We will not include such an additional requirement in the regulation. Notably, we have already limited our cost-based PMS analysis to ''significant'' inputs into the production of subject merchandise or the subject merchandise itself; therefore, we see no reason to further limit our analysis in paragraph (f) in the manner suggested by the commenter.

In response to the request from certain commenters that the regulation should impose an across-the-board prohibition on the use of AFA under sections 776(a) and (b) of the Act in determining an adjustment for a cost-based PMS or prohibit the consideration of previous Commerce determinations based on AFA in making an adjustment, we do not believe such regulatory prohibitions would be appropriate. The appropriateness of the use of AFA is determined on a case-by-case basis. For example, it is possible that in a given investigation or review, Commerce might determine that a single respondent benefited from a cost-based PMS. If Commerce requested information from the respondent pertaining to the PMS allegation in the conduct of the proceeding, and the respondent failed to act to the best of its ability in providing the necessary information, then the application of AFA under sections 776(a) and (b) in selecting from possible adjustments to its calculations would be warranted. An across-the-board prohibition on the use of AFA or previous agency determinations based on AFA would unreasonably prevent such an application in that case. Accordingly, we have not incorporated the suggested prohibitions into paragraph (j) of § 351.416.

With respect to commenters who suggested that Commerce should prohibit the application of an adjustment for a cost-based PMS based on the existence of a subsidy in an AD proceeding when Commerce has already countervailed that subsidy in a companion CVD proceeding to prevent the application of a double remedy in the regulation, we disagree that such a regulatory restriction is necessary or warranted. The AD and CVD laws are separate regimes that provide separate remedies for certain unfair trade practices and in proceedings in which Commerce has been faced with such an argument, Commerce found that neither the Act nor the record evidence supported an ''adjustment of the AD remedy to account for a putative overlap with the CVD remedy.'' [143] In other words, Commerce concluded that the existence of the CVD remedy was not grounds to reconsider or adjust the PMS remedy in a companion dumping investigation. Additionally, when that determination was appealed to the Federal Circuit, the court upheld Commerce's determination that the record did not support a finding that a double remedy resulted when the same government action countervailed in a CVD proceeding was also the basis of a cost-based PMS finding and adjustment in the companion AD proceeding.[144] Accordingly, no addition of such an all-encompassing prohibition to paragraph (f) is warranted.

Lastly, in response to the suggestion that Commerce cannot make an adjustment to its calculations without some quantification of the distortion of costs, we note that the purpose of Commerce's adjustment is to address the observed cost distortions. Accordingly, in general, Commerce's selected methodology will attempt to estimate the amount of distortions in the cost of production of the subject merchandise pursuant to that exercise. As noted above, we have modified the language of the regulation to reflect that when Commerce uses a reasonable methodology to determine an appropriate adjustment to its calculations, that methodology will be based on record information. We have not defined what adjustments Commerce may make to address those cost distortions. Whatever methodology Commerce employs to determine the appropriate adjustment (*e.g.,* Commerce might determine at time it is appropriate to replace a distorted value on the record with a market-determined value, while other times Commerce might determine it appropriate to adjust the reported costs with an amount to offset the cost distortions) will be case-specific and depend on the facts on the record and what information is provided to Commerce for purposes of making an adjustment. Thus, we have determined it would not be appropriate to set forth standards for quantifying the cost distortions and determining an appropriate adjustment to its calculations in all cost-based PMS determinations in the final regulation.

xii. The examples set forth in § 351.416(g) help clarify the types of actions and inactions Commerce may determine to be a PMS.

Several commenters expressed strong support for Commerce's decision to include examples of government or nongovernment actions that may be found to be a cost-based PMS in paragraph (g) of the regulation. They stated that such examples will help inform both Commerce employees and parties outside of Commerce as to the circumstances or set of circumstances which sometimes distort costs of production of subject merchandise and inputs into subject merchandise.

One commenter requested that Commerce emphasize that the list is not comprehensive, and that there are many more circumstances beyond the 12 examples that might be determined to be a cost-based PMS.

Other commenters provided multiple examples in which the circumstances listed in paragraphs (g)(1) through (12) might not distort costs and, therefore, would not always be determined to be

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[143] *See Final Results of Redetermination Pursuant to Court Remand, Vicentin S.A.I.C. et al.* v. *United States,* Consol. Court No. 18–00111, Slip Op. 20–91 (CIT July 1, 2020), dated November 12, 2020, at 5–6, available at *https://access.trade.gov/resources/remands/20-91.pdf.*

[144] *See Vicentin S.A.I.C. et al.* vs. *United States,* 42 F.4th 1372, 1381 (Fed. Cir. 2022) (*Vicentin S.A.I.C.*) (''{the PMS adjustment} resulted in an adequate remedy for dumping, which is not duplicative of the countervailing duty remedy.'').

cost-based particular market situations. One commenter suggested in one example that producers might respond to government export restrictions by cutting production or input producers might simply pocket rebates and, in both cases, the result would be no changes in prices or costs of production.

Some of those commenters expressed concerns that including the 12 examples might confuse the public into thinking these circumstances will always be, *de facto,* a cost-based PMS and they suggested that Commerce should remove the examples altogether. Other commenters did not suggest the removal of the examples, but instead, requested that Commerce emphasize that these are just examples and that two similar fact patterns can have very different impacts on the cost of production, depending on facts specific to the record before the agency in a specific proceeding.

For paragraph (g)(1), some commenters opposed the focus on ''global'' overcapacity—stating that mere ''overcapacity'' should be sufficient for that example, global or otherwise. Others suggested that any situation which is ''global'' in effect would not be particular and, therefore, could not be a PMS. Still, others did not question that Commerce has the authority to address global overcapacity in its regulations, but rather suggested that such an analysis could lead to legal disputes and trade tensions with other global partners. Those commenters requested that Commerce remove that example from the proposed regulation for diplomatic purposes.

For paragraph (g)(2), certain commenters suggested that government ownership does not always lead to distorted costs, while another commenter agreed with Commerce that direct and indirect actions pertaining to inputs, particularly actions or inactions by the government, can have significant impacts on the overall distortion of costs of production.

For paragraphs (g)(4) and (5), two commenters suggested that government intervention and export restrictions do not always cause distortions, and they requested that Commerce emphasize in those examples that Commerce must also find that costs of production were distorted before finding the existence of a PMS.

For paragraph (g)(8), one commenter expressed its support for that example, highlighting that financial assistance takes different forms (*e.g.,* tax incentives, such as rebates and exemptions). Another commenter suggested that, despite the legislative history of the below-cost PMS provision in the Act, Commerce should not address government subsidies through the dumping law in a PMS determination, but instead should address such concerns solely in a CVD proceeding. Still other commenters suggested that government assistance is irrelevant in calculating costs of production, but notwithstanding if there is already a CVD companion order countervailing the subsidy at issue, Commerce may not find a cost-based PMS if it results in the application of a remedy twice for the same action, which is impermissible under U.S. WTO obligations and U.S. law.

With respect to paragraph (g)(9), one commenter voiced its strong endorsement for a finding that government actions which otherwise influence the production of subject merchandise or significant inputs can distort costs of production, such as technology transfer requirements and, therefore, be an example of a below-cost PMS. Another commenter, however, expressed concerns with the economics behind such an example, because if Commerce is only concerned about suppressed prices, then domestic content requirements and technology transfer requirements might actually artificially raise prices and costs rather than diminish them. That commenter suggested that because Commerce's assumption that the government actions listed in this example only distorts costs downward is flawed, paragraph (g)(9) should be removed as an example.

With respect to paragraphs (g)(10) and (11), certain commenters expressed their support for Commerce's acknowledgement that weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, and environmental protections could impact costs of production and could warrant an adjustment to Commerce's AD calculations. Others, however, critiqued the regulations for providing no guidance on how Commerce intends to address such allegations, what sources it intends to use in determining if protections are weak or ineffective, and how a respondent with no control over such government policies could respond to questionnaires on the issue. As noted above, still others expressed concerns that these provisions were in violation of United States' international obligations and unfairly ''punished'' governments for administering their laws in a different manner than the United States.

For paragraph (g)(12), one party requested that Commerce define the term ''strategic alliance,'' while another suggested that adjusting cost calculations based on prices derived from private company arrangements was illogical because sometimes such arrangements increase rather than decrease the costs of production and, if the companies are affiliated, the Act already addresses distorted prices and costs through the transactions disregarded and major input rules in sections 773(f)(2) and (3) of the Act.

Lastly, one commenter asked Commerce to consider that strategic alliances do not require joint ownership, familial grouping, or formal agreements to exist to distort costs. Therefore, this commenter reasoned, Commerce should acknowledge that it will not disregard relationships in which these circumstances may not be formally recognized or named.

Commerce's Response:

Commerce agrees with every commenter that emphasized that the examples in § 351.416(g) are just illustrative and that the list is not comprehensive (*i.e.,* exhaustive). As multiple commenters argue, governmental and nongovernmental actions and inactions frequently do not contribute to the distortion of costs of production; thus, depending on the facts in an individual case, the described example simply may not be a cost-based PMS. That is made clear by the actual text of each example, but because many commenters expressed concerns about that fact, we are emphasizing in the preamble that these are just examples, dependent on the facts of each case. Nonetheless, Commerce also believes that listing examples provides a better illustration of cost-based particular market situations than just a definition or test. It certainly provides more guidance than not having examples at all, as suggested by one commenter. Accordingly, we have retained each example in the final regulation.

With respect to comments on the individual examples which are not focused on case-specific distortions, Commerce responds as follows.

• Commerce has retained the use of the term ''global'' before ''overcapacity'' in paragraph (g)(1) because that is the intended example and one which Commerce has observed and addressed in past proceedings.[145] Commerce disagrees that it does not have the authority to address distortions caused by global overcapacity in the subject country, and Commerce does not believe the potential effects of addressing global overcapacity on other

[145] *See Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Amended Final Results of Antidumping Duty Administrative Review; 2020–2021,* 88 FR 2606 (January 1, 2023), and accompanying IDM at Comment 1.

trading partners is relevant for purposes of the trade remedy laws.

• In response to the comments on paragraph (g)(8), Commerce agrees that government financial assistance can take many forms, but disagrees that it cannot address subsidies through a cost-based PMS for the reasons explained above and in the *Proposed Rule.*[146] We emphasize that financial assistance does not always mean that a subsidy is countervailable, but it may still have an impact on costs of production and, therefore, warrant a cost-based PMS determination. Further, as explained above, even if Commerce has countervailed a subsidy in a companion CVD investigation or review, that does not mean that the application of a cost-based PMS adjustment results in a double remedy. In fact, agency experience has shown that it does not.[147]

• With respect to the comments on paragraph (g)(9), Commerce does not disagree that government actions which otherwise influence the production of subject merchandise may sometimes distort prices and costs downward, while other times, they may actually distort prices and costs upward. In either case, such actions have a distortive impact on costs of production. The existence of costs of production which are not in the ordinary course of trade is a different issue from whether Commerce should make an adjustment to its calculations in response to those distortions under § 351.416(f). Commerce has retained this example in paragraph (g), however, as addressed above, Commerce has modified the example to address only three articulated circumstances which may impact prices and costs.

• In response to the comments on paragraphs (g)(10) and (11), for the reasons provided above, Commerce has determined that it has the authority to address weak, ineffective, and nonexistent protections that distort costs of production, and Commerce does not believe that it would be appropriate at this time to set forth standards and tests to address hypothetical scenarios in the regulation. Such analyses and determinations will be fact-specific and addressed by Commerce on a case-by-case basis. Furthermore, as Commerce is only analyzing factors which distort costs of production, such an analysis is in no way a violation of the United States' WTO obligations.

• Finally, with respect to paragraph (g)(12), Commerce has revised the language to explain that the provision applies to nongovernmental entities that, for example, form business relationships between producers of subject merchandise and suppliers of significant inputs to the production of subject merchandise, including mutually-beneficial strategic alliances or noncompetitive arrangements, that result in distortive prices and costs. This language adequately describes the business relationships at issue in this example, and an additional definition of strategic alliances is not necessary in the regulation, as requested by one commenter. Furthermore, as the transactions disregarded rule and major input rule of sections 773(f)(2) and (3) of the Act apply only in circumstances involving affiliated entities, Commerce disagrees with the commenter that expressed concerns that those provisions undermine the viability of this example. As set forth in § 351.416(f)(3)(i), Commerce may determine not to apply an adjustment if it determines that either of these provisions has sufficiently addressed the cost distortions caused by a PMS, but the fact that a PMS has contributed to the distortion of costs of production is a different issue than whether or not Commerce should make an adjustment to its calculations. Likewise, some nongovernmental entity actions may distort costs of production upward while others might suppress prices and costs downward, but in either case the fact that a PMS exists that distorted costs of production during the period of investigation or review is not at issue. Again, whether Commerce determines to adjust its calculations under § 351.416(f)(3) is a different issue from whether or not a cost-based PMS exists in the first place.

xiii. Cost-based particular market situations may contribute to a sales-based PMS, as set forth in § 351.416(h).

Several commenters expressed support for the inclusion of § 351.416(h). Certain commenters suggested, however, that Commerce should modify the language of § 351.416(h) from ''may consider'' to ''will consider'' to require Commerce to always consider if a cost-based PMS contributes to a sales-based PMS. Those commenters suggested that because Commerce did not explain under what scenarios it would consider such a relationship to exist in the proposed regulation, it either must make such a consideration mandatory in every case it finds the existence of a cost-based PMS or set forth further guidance as to how it will determine a possible linkage between the two market situations. Another commenter likewise suggested that Commerce should revise its regulation to make clear that it will thoroughly review record information in every case in which it finds the existence of a cost-based PMS to determine if improper comparisons between home market or third-country market prices and export prices or constructed export prices exist, in part, because of the cost distortions caused by the cost-based PMS. In addition, still other commenters requested that Commerce issue further guidance on the standards it would use to conduct an analysis under this provision, including the burden on the party alleging a connection between a cost-based PMS and a sales-based PMS.

In addition, certain other commenters expressed concerns that paragraph (h) is inconsistent with the Act. They pointed out that as recently as 2020, Commerce agreed, stating its position that ''there is no statutory basis for Commerce to find a price-based PMS using the same data as Commerce used to find a cost-based PMS,'' [148] and suggested that the proposed regulatory provision stands for the ''exact'' opposite interpretation. Other commenters suggested further that a cost-based PMS that impacts a physical input consumed identically for the production of domestic and export sales cannot generate a divergence that would frustrate a price-to-price comparison. In support of this conclusion, they cited the aforementioned Federal Circuit decision, *Hyundai Steel Co.,* in which the court held that a PMS ''that affects costs of production would presumably affect prices for domestic sales and export sales, so there would be no reason to adjust only for home market prices.'' [149] Both sets of commenters therefore suggested that Commerce remove this provision from the regulation.

Commerce's Response:

Commerce made no revisions to § 351.416(h) in response to these comments. First, Commerce disagrees with the commenters that portrayed this as the ''exact'' same scenario which Commerce was addressing in *Cold-Rolled Steel from Korea.* Section

[146] *See Proposed Rule,* 88 FR 29864–65.

[147] *See Vicentin S.A.I.C.,* 42 F.4th at 1377; *see also Urea Ammonium Nitrate Solutions from the Republic of Trinidad and Tobago: Final Affirmative Determination of Sales at Less than Fair Value,* 87 FR 37824 (June 24, 2022), and accompanying IDM at Comment 1.

[148] *See Certain Cold-Rolled and Steel Flat Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 2017–2018,* 85 FR 41995 (July 13, 2020) (*Cold-Rolled Steel from Korea*), and accompanying IDM at Comment 1.

[149] *See Hyundai, Steel Co.,* 19 F.4th at 1355, n. 11 (citing *Husteel Co.* v. *United States,* 426 F. Supp. 3d 1376, 1388 (CIT 2020)).

351.416(h) states that after Commerce determines the existence of a cost-based PMS, it may determine, based on record information, whether that PMS also contributed to a sales-based PMS. It does not say that it will be the only factor contributing to a sales-based PMS, or that Commerce will make its sales-based PMS determination using only the ''same data'' as it used to determine the existence of a cost-based PMS. Furthermore, Commerce does not disagree with the Federal Circuit in its logic that in many cases, if a market situation distorts costs in the home market, it may, under certain facts, equally distort prices for export sales and constructed export sales. For these reasons, Commerce has not issued a provision that states that a cost-based PMS always results in a sales-based PMS.

Instead, § 351.416(h) suggests that a cost-based PMS may, under certain facts, contribute to a circumstance or set of circumstances that prevents or prohibits a proper comparison of home market or third market sales to export or constructed export sales. Commerce knows of no statutory restriction that prevents Commerce from considering distorted costs of production as a factor, amongst others, that may inhibit comparisons between sales in different markets. However, Commerce also believes that such a determination would be case-specific and may be highly dependent on other factors also contributing to a sales-based PMS. Accordingly, Commerce does not believe it would be appropriate to incorporate standards or guidance to hypothetical scenarios in the regulation.

Likewise, we will not revise the ''may consider'' language in the regulation to ''will consider,'' as requested by certain commenters. Because, as Commerce has explained, the link between a cost-based PMS and sales-based PMS would be highly dependent on the facts of a case, Commerce believes that it would be a misuse of agency resources to conduct such an analysis every time Commerce determines the existence of a cost-based PMS. Instead, the provision allows for Commerce to conduct such an analysis when an interested party makes a sales-based PMS allegation, or if Commerce determines based on the facts before it in an investigation or administrative review that such an analysis is warranted. We have determined that making the analysis possible, but not mandatory, is the appropriate standard to apply in the regulation.

Finally, with respect to the standard which a party alleging a cost-based PMS has contributed to a sales-based PMS must meet, Commerce believes it is the same standard as set forth in § 351.416(b). The alleging party must submit a timely allegation supported by relevant information reasonably available to it in support of the allegation. We see no reason why the standard should be different for an allegation of a sales-based PMS with a cost-based PMS contribution, from that of an allegation of a sales-based PMS without a cost-based PMS contribution.

xiv. Other comments pertaining to § 351.416.

a. Commerce will not align the deadlines for filing sales-based and cost-based PMS allegations.

Several commenters suggested that Commerce should align the deadline for alleging a sales-based PMS with the deadline for alleging a cost-based PMS, claiming that it would be easier to allege that a cost-based PMS has contributed to a sales-based PMS if both deadlines are set 20 days after a respondent submits its complete response to the original questionnaire. One commenter requested that Commerce consider moving that deadline to 50 days after a respondent has submitted its questionnaire response, to allow parties time to analyze respondents' questionnaire responses fully and determine if a PMS exists.

Commerce's Response:

Commerce did not modify its deadlines in the *Proposed Rule* and will not modify its regulations to do so in the final regulation. Commerce currently has the flexibility to set such deadlines without the restriction of a regulation and there are resource-related and administrative reasons for which Commerce has been reluctant to modify these deadlines in the past. Accordingly, because we wish to retain the flexibility to set such deadlines as necessary, there will be no alignment of sales-based PMS and cost-based PMS allegation deadlines in the final regulation.

b. Commerce will not eliminate its application of a non-market economy analysis under section 773(c) of the Act, nor will it apply its PMS analysis only to non-market economies.

One commenter proposed that Commerce eliminate its application of a non-market economy analysis and instead apply a cost-based PMS analysis on a case-by-case basis to government actions it determines are distorting costs of production for all countries. That commenter suggested that such an application of the cost-based PMS provision would ensure fairer treatment for all types of economies in comparison to its non-market economy methodology.

Another commenter suggested that, rather than apply its cost-based PMS analysis to all market economies, Commerce should only apply the cost-based PMS analysis to those countries which it determines are non-market economies.

Commerce's Response:

Commerce finds no rationale to cease its application of the non-market economy analysis set forth in section 773(c) of the Act, and no reason that it should instead apply its cost-based PMS analysis only to non-market economies. Accordingly, we will not incorporate either of these suggestions into the regulation.

c. This regulation will increase transparency and accuracy in both of Commerce's PMS analyses.

One commenter expressed concerns that Commerce's PMS regulations might prove an obstacle to transparency and due process, as well as reduce the accuracy of its AD decisions.

Commerce's Response:

We disagree that by setting forth in § 351.416 Commerce's analysis for determining if a sales-based PMS and cost-based PMS exists, the regulation is creating an obstacle to transparency and due process. In fact, it is the opposite. Commerce has issued extensive proposed regulations and considered and addressed numerous comments on those regulations to clarify and provide transparency as to its market situation determinations. As a result of this regulation, Commerce's policies and considerations in determining the existence of a PMS are now expressed in greater detail and available for wider public consideration and understanding than at any time in the agency's history.

Furthermore, we disagree that this regulation in any way reduces the accuracy of our AD determinations and decisions. Instead, by addressing, in detail, market situations that prevent or prohibit a proper comparison of home market and third market sales with export and constructed export sales and governmental and nongovernmental actions and inactions that contribute to the distortion of costs of production, § 351.416 increases, rather than decreases, Commerce's ability to accurately calculate AD margins in its investigations and administrative reviews.

8. Commerce has made no changes to the proposed amendment to the CVD benefit regulation—§ 351.503.

In the *Proposed Rule,* Commerce indicated that it was revising § 351.503 to divide existing paragraph (c) into two parts. The first part reflects the existing language, 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.[150] The second part states 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 (*i.e.,* the government assistance) and will not be required to also consider the cost to comply with those regulations, requirements or obligations.[151] These modifications to the benefit regulation were intended to codify Commerce's existing practices and policies.

Commerce received comments on these proposed changes to its benefit regulation, and based on some of the comments, it was evident that not every submitter was aware of Commerce's long-standing practices in this area of CVD law. On this basis alone we therefore believe that these additions to the regulation will provide greater transparency to the public.

In sum, Commerce received comments from nine parties on the proposed amendments in § 351.503(c). Of those, six of the commenters supported the amended language within § 351.503(c). Of the remaining three commenters, two stated that Commerce failed to provide sufficient clarity on defining the terms ''cost in complying'' and ''government-imposed regulation, or obligation.''

The new § 351.503(c)(2) states that 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.''

In addition, one of the commenters stated that, contrary to what the proposed regulation seems to suggest, Commerce cannot determine that a countervailable subsidy exists or the amount, if any, of a benefit conferred by focusing exclusively on what the government has provided. This commenter suggested that the Act and the regulations require Commerce to determine the type of financial contribution at issue, and the benefit corresponding to that type of financial contribution, by recognizing what, if anything, the foreign manufacturer provided in return. For example, this commenter explained that when a government transfers funds to a foreign producer, Commerce cannot presume, looking exclusively at the funds transferred, that a grant has been provided. Instead, the commenter explained that Commerce must determine whether the funds constitute a loan, an equity infusion, a purchase of goods, or a purchase of services. The differences in these types of financial contributions depend on what, if anything, the foreign producer provides in return. For example, a direct transfer of funds would be a loan and not a grant if the foreign producer were to provide payments of principal or interest in return to the foreign government. Accordingly, this commenter expressed concerns with the language of § 351.503(c)(2), which it commented appears to suggest that Commerce will only consider the government's actions, and not the actions of the subsidy recipient, in determining a benefit.

Another party expressed concerns that § 351.503(c)(2) is inconsistent with section 771(6) of the Act, which the commenter stated requires Commerce to subtract from the gross countervailable subsidy received ''any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy.''

That same commenter also stated that the new § 351.503(c)(2) is also inconsistent with section 771(5)(E)(iv) of the Act. Section 771(5)(E)(iv) of the Act states that when the government provides a good or service, Commerce will determine whether a benefit is provided by examining whether the price paid by the recipient for the government good or service was for ''adequate remuneration.'' The Act provides that the adequacy of remuneration will be based on ''prevailing market conditions'' that include ''price, quality, availability, marketability, transportation, and other conditions of purchase or sale.'' Therefore, this commenter suggested that section 771(5)(E)(iv) of the Act requires that Commerce account for the full costs associated with respondent's eligibility and receipt of a countervailable subsidy, while the changes to the regulation appeared to reject full consideration of all those associated costs.

Another commenter expressed concerns that § 351.503(c)(2) was overly broad and in conflict with the plain language of the statute and provided an example to support its comment. This commenter hypothesized a situation in which a foreign producer purchased land from the government for the development of its manufacturing facility and the land purchase agreement required the producer, as a condition of the land sale, to upgrade a public road for a neighboring community as a public service that otherwise would be undertaken by the government. This commenter suggested that under that proposed situation, Commerce's regulation would ignore important information as part of its analysis.

Lastly, one commenter stated that specifically in the context of environmental subsidies, Commerce's proposed across the board refusal to consider compliance costs conflicts with the Biden Administration's support for the renewable energy and climate change reduction programs. The commenter raised its concern that Commerce's proposed regulation is especially problematic with regards to compliance costs associated with environmental standards. For instance, a government may regulate the carbon emission standards of a foreign producer. That foreign producer may face significant costs in meeting the government's emission standards that may otherwise outweigh any benefit that the government would offer the foreign producer in return for meeting these standards. Nevertheless, under the proposed regulation, Commerce would disregard foreign producers' resources expended even where the overall program conferred no measurable benefit for the foreign producer. This commenter requested that Commerce must not adopt a regulation that would confer a benefit when no such benefit exists. It commented that this is not the appropriate time for Commerce to amend its existing regulations to clarify that compliance costs with a government program (*e.g.,* an incentive program relating renewable energy) cannot be considered as an offset and instead essentially treat these compliance costs as a grant.

Commerce's Response:

In response to the commenters who stated that Commerce has not provided an adequate explanation of the terms ''cost in complying with the government-imposed regulation, requirement, or obligation,'' we note that in the *Proposed Rule,* Commerce explained that much of the agency's interpretation of the Act and examples were originally set forth in the *CVD Preamble.*[152]

However, given the comments from these two commenters, Commerce has concluded that it would be prudent to repeat the discussion and explanation of compliance costs and a government-imposed mandate. Commerce believes

[150] *See Proposed Rule,* 88 FR 29867.

[151] *See id.*

[152] *See Proposed Rule,* 88 FR 29867 (citing *Countervailing Duties: Final Rule,* 63 FR 65348, 65361 (November 25, 1998) (*CVD Preamble*)).

that this explanation will not only provide a sufficient understanding of these concepts to interested parties but also provides a fuller explanation as to why Commerce has adopted this practice for at least the last 25 years.

To begin, a determination of whether a benefit is conferred is completely separate and distinct from an examination of the ''effect'' of a subsidy. In other words, a determination of whether a firm's costs have been reduced or revenues have been enhanced bears no relation to the effect of those cost reductions or revenue enhancements on the firm's subsequent performance (*e.g.,* its prices or output). In analyzing whether a benefit exists, Commerce is concerned with what goes into a company, such as enhanced revenues and reduced-cost inputs. Commerce is not concerned as much with what the company actually does with the subsidy. The agency's emphasis on reduced-cost inputs and enhanced revenues is derived from elements contained in the examples of benefits in section 771(5)(E) of the Act and in Article 14 of the SCM Agreement. In contrast, the effect of government actions on a firm's subsequent performance, such as its prices or output, cannot be derived from any elements common to the examples in section 771(5)(E) of the Act or Article 14 of the SCM Agreement.

For example, as a hypothetical, imagine a situation in which the government establishes new environmental restrictions that require a firm to purchase new equipment to adapt its facilities, and that the government also provides the firm with subsidies to purchase that new equipment. Now, however, assume that the government's subsidies do not fully offset the total increase in the firm's costs (*i.e.,* the net effect of the new environmental requirements and the subsidies leaves the firm with costs that are higher than they previously were). In this situation, the Act treats the imposition of new environmental requirements and the subsidization of compliance with those requirements as two separate actions. A subsidy that reduces a firm's cost of compliance remains a subsidy that is subject to the Act's remaining tests for countervailability even though the overall effect of the two government actions, taken together, may leave the firm with higher costs.

As another example, assume a government promulgated safety regulations requiring auto makers to install seatbelts in back seats, and then gave the auto makers a subsidy to install the seatbelts, but the subsidies did not fully offset the total increase of the auto maker's costs. Similar to the environmental restriction subsidies described above, we would draw the same conclusion from this situation. In the two examples, the government action that constitutes the benefit is the subsidy to install the equipment, because this action represents an input cost reduction. The government action represented by the requirement to install the equipment will not be construed as an offset to the subsidy provided to reduce the costs of installing the equipment.

Thus, if there is a financial contribution and a firm pays less for an input than it otherwise would pay in the absence of that financial contribution (or receives revenues beyond the amount it otherwise would earn), that is the end of the inquiry insofar as the benefit element is concerned. Commerce need not consider how a firm's behavior is altered when it receives a financial contribution that lowers its input costs or increases its revenues.

Section 771(5)(C) of the Act explains that the ''benefit'' and the ''effect'' of a subsidy are two separate concepts. While there must be a benefit for a subsidy to exist, section 771(5)(C) of the Act expressly provides that Commerce ''is not required to consider the effect of the subsidy in determining whether a subsidy exists.'' This message is reinforced by the SAA,[153] which states that ''the new definition of subsidy does not require that Commerce consider or analyze the effect (including whether there is any effect at all) of a government action on the price or output of the class or kind of merchandise under investigation or review.''

Paragraph (c) of § 351.503 in the current regulation further reinforces this principle by stating affirmatively that, in determining whether a benefit is conferred, Commerce is not required to consider the effect of the government action on the firm's performance, including its prices or output, or how the firm's behavior otherwise is altered.

With respect to the statement made by one of the commenters that Commerce is required to consider what a foreign manufacturer ''provided in return'' in order to determine the type of financial contribution provided, Commerce clarifies that the payment for a government good or service or the payment of interest or principal on a loan is not the same thing as a ''cost of compliance,'' as set forth under § 351.503(c).

The methodologies for calculating the benefit for a financial contribution provided in the form of a loan or the provision of a good or service are set forth within both the Act and the current CVD regulations. To use one of the examples above, assume a government promulgated safety regulations requiring automakers to install seatbelts in back seats and then gave the auto makers a subsidy to install the seatbelts. The government subsidy to the automaker was in the form of a loan. While we would not consider and offset the cost of the automaker for the cost and installation of the seatbelts in the calculation of the loan benefit, we would still calculate the loan benefit as required by the methodology set forth in the Act and in our regulations by taking the difference between what the automaker paid on the government loan and the amount of interest the automaker would have paid on a comparable loan that it could actually obtain on the market. The decision by the government to provide a subsidy to assist a firm with complying with an existing government-imposed regulation, requirement or obligation is a separate and discernible action from the action in which the government imposed the regulation, requirement, or obligation. Therefore, each of these actions is treated separately under the Act.

However, on a more basic level, when a government imposes a regulation, requirement or obligation on a party, a government has no further obligation to provide assistance to a party to comply with that regulation, requirement, or obligation. For example, governments normally impose an obligation on parties to pay taxes. However, if the government, through an action or government obligation, then exempts, in whole or part, the taxes that a particular party is obligated or required to pay, then that exemption is a financial contribution, and if that program is found to be specific and provide a benefit, the tax exemption could be determined to be a countervailable subsidy. In other words, just as the tax obligation is separate from the countervailable exemption, so too would a government requirement that automobiles carry seatbelts be separate from a government subsidy to pay for some of the compliance costs to install seatbelts in the first place.

In response to the comment that § 351.503(c)(2) is inconsistent with section 771(6) of the Act, which the commenter stated requires Commerce to subtract from the gross countervailable subsidy received ''any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy,''

[153] *See* SAA at 926.

Commerce must first note that this reading of section 771(6) of the Act is incorrect. Section 771(6) of the Act explicitly states that ''the administering authority *may* subtract from the gross countervailable subsidy'' (emphasis added). The statutory use of the word ''may'' instead of the word ''shall'' or ''will'' does not establish a requirement but provides the administering authority with a level of discretion with respect to the criteria set forth within section 771(6) of the Act.

In addition, the commenter also misunderstands the use of the term ''application fee, deposit, or similar payment paid.'' The costs for complying with an imposed obligation or requirement are not like an application fee, deposit, or similar payment to receive the benefit of a countervailable subsidy. For example, if the government requires that an industrial mill remove harmful materials from industrial gases before being released into the environment and the mill purchases a scrubber to comply with that requirement, then the mill did not make an ''application fee, deposit, or similar payment'' within the meaning of section 771(6) of the Act. The industrial mill simply paid for a piece of capital equipment. That payment was not a cost of receiving a subsidy, it was the simple exchange of money for a good.

Indeed, the commenter's interpretation of section 771(6) of the Act is inconsistent with how subsidies and the costs of compliance operate. Under an interpretation of the Act proposed by the commenter, assume that the government imposes a 30 percent income tax on all firms but provides high-tech firms with a 50 percent reduction in their income taxes. Under the commenter's interpretation of section 771(6) of the Act, Commerce would be required to deduct the amount of income taxes the firms paid from the amount of the 50 percent income tax subsidy reduction the high-tech firms received because the income taxes they were required to pay constitute an ''application fee, deposit, or similar payment paid'' to qualify or receive the benefit from the income tax subsidy. Accordingly, the commenter misunderstood section 771(6) of the Act and, consequently, the language of the new § 351.503(c)(2) of our regulations.

As noted above, this commenter also expressed concerns that the new § 351.503(c)(2) of our regulations is inconsistent with section 771(5)(E)(iv) of the Act. Section 771(5)(E)(iv) of the Act states that when the government provides a good or service, Commerce will determine whether a benefit is provided by examining whether the price paid by the recipient for the government good or service was for ''adequate remuneration.'' The adequacy of remuneration will be based on ''prevailing market conditions'' that include ''price, quality, availability, marketability, transportation, and other conditions of purchase or sale.'' Therefore, the commenter suggested that section 771(5)(E)(iv) of the Act requires that Commerce account for the full ''costs'' associated with a respondent's eligibility and receipt of a countervailable subsidy. In putting forth such an interpretation, the commenter provided no further support other than a general allegation. Further, in alleging that Commerce must account for ''costs'' under that statutory provision, the commenter did not note that term ''costs'' does not actually appear in section 771(5)(E)(iv) of the Act.

In response, it is worth pointing out that § 351.503(c)(2) refers to ''subsidies'' and ''assistance'' provided to comply with a government-imposed regulation, requirement, or mandate. Thus, it is clear from the language of § 351.503(c)(2) that tax incentives, loans, and grants would fall with the purview of this new regulation. Under section 771(5)(E) of the Act, the concept of ''adequate remuneration'' and ''prevailing market conditions'' do not apply to subsidies provided in the form of tax incentives, grants, or loans. However, if the subsidy or assistance at issue within § 351.503(c)(2) did take the form of a provision of a good or service, then the benefit calculation of the provision of the good or service would certainly be determined based upon the criteria set forth under section 771(5)(E)(iv) of the Act.

In addition, as noted above, one commenter expressed concerns that Commerce's modification to § 351.503(c) is overly broad and in conflict with the plain language of the Act based on a hypothetical situation. Specifically, that commenter suggested that if a foreign producer purchased land from the government for the development of its manufacturing facility and the land purchase agreement required the producer, as a condition of the land sale, to upgrade a public road for a neighboring community as a public service that otherwise would be undertaken by the government, then under the contract, the producer would be required to build the road and the government would be required to reimburse the producer for 80 percent of the road construction cost. Under that hypothetical, the producer would absorb 20 percent of the cost, but the commenter stated that under Commerce's proposed regulatory changes, the road building obligation under the land purchase agreement could be misconstrued as a ''government-imposed mandate,'' the foreign producer's road building cost as a ''compliance cost,'' and the government's reimbursement under the contract as ''compliance assistance.'' The commenter expressed concerns that Commerce would therefore, under the revised regulation, misinterpret the contract, misinterpret the condition of sale, and incorrectly ignore the respondent's contribution and costs. According to the commenter, Commerce would consider only the value of the government's reimbursement as a grant when, according to the contract, the foreign producer was paying a purchase premium for the land by incurring costs in the amount of 20 percent of the construction of a road.

Commerce disagrees with the presumed outcome of the commenter's hypothetical. Whether a government act or program conveys a countervailable subsidy is solely determined under the criteria that is set forth under the Act and the CVD regulations, and not under contract law. If a government signs a contract to provide a company with $200 million to build a manufacturing facility, the fact that there is a contract to provide the recipient with a $200 million grant does not allow the government grant to fall outside the scope of the CVD law.

In addition, these types of hypotheticals demonstrate why such examples may not always be helpful in applying a practice or preparing a regulation. Any decision as to the countervailability of a government action or program, and the calculation of any benefit conferred by that government action, can only be based on a complete set of facts with respect to the provision of government assistance. One can make few general observations with respect to this example because it lacks several critical facts and details. Assuming the provision of land was specific (from the example the commenter concedes that there is a financial contribution), the analysis of whether there is a benefit would be made under section 771(5)(E)(iv) of the Act and § 351.511. However, based on the lack of specifics within the example, it would be useless to opine as to how this example would be treated under § 351.503(c).

Even with respect to the analysis of whether the provision of land was provided for adequate remuneration as defined by the statute and CVD regulations, there are many questions which remain outstanding under such a hypothetical as to how the producer's

absorption of 20 percent of the road construction should be treated. For example, for the provision of land to other firms, Commerce would need to know if the government required that those firms pay the full cost to the company to construct the roads at issue. Commerce would also need to know the details as to the criteria listed in the land purchase contracts between the private parties, and, when the land was sold to the producer, and if the government included land that had the sole road that connected the neighboring community to other communities in the area. Furthermore, Commerce would want to know, as part of its analysis, if after construction the producer had sole use of that road. Therefore, we disagree that the outcome of this hypothetical scenario can be determined under the limited set of facts put forth by the commenter. Furthermore, we disagree with the commenter's assumption that Commerce would ''misconstrue'' or ''misunderstand'' anything from such a contract on the administrative record because of the language being added to § 351.503(c).

In response to the commenter's policy comments on environmental subsidies and the current administration's support for renewable energy and climate change reduction programs, any decision of whether a government action or program provides a countervailable benefit can only be made with respect to the criteria that are set forth within the Act and the CVD regulations. Nowhere in § 351.503(c) is Commerce proposing to treat compliance costs as a grant, and we have fully described above how compliance costs are treated with respect to our analysis of the benefit conferred by the provision of a countervailable subsidy. Lastly, we agree with the commenter that Commerce's regulations should not confer a benefit when no such benefit exists, and Commerce sees nothing in the modifications to § 351.503(c) which would do such a thing.

9. Commerce has made certain changes to the proposed amendment to the CVD loan regulation—§ 351.505.

For the regulation pertaining to loans, Commerce has determined to move current § 351.505(d) to a new § 351.505(e) and add a new provision in paragraph (d) titled ''Treatment of outstanding loans as grants after three years of no payments of interest or principal.'' While it is rare to encounter this issue, Commerce has concluded that it is important to codify a practice and methodology to address situations where the government has not collected any loan payments for a long period of time to promote both clarity and consistency in our administration of the CVD law.

The revisions to § 351.505(d) address 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 payments on an outstanding loan after a three-year period, the foreign government made a decision to simply not collect loan payments at all. Commerce has therefore created this provision to address the scenario if no loan payments have been made to the government or a government-owned bank on a loan for three years. Under that situation, Commerce will normally treat the outstanding loan as a grant. To ensure consistency with section 771(5)(E)(ii) of the Act, we also are stating that we would not treat this type of loan as a grant if the respondent can demonstrate that this nonpayment of interest and principal is consistent with the terms of a comparable commercial loan that it could obtain on the market.

We received comments from 11 interested parties with respect to the amendment incorporated into § 351.505(d), with six of the parties supporting this new regulation on the treatment of loans. However, one of the parties supporting this new regulation stated that Commerce should clarify: (1) that the benefit should include both outstanding principal and any unpaid accrued interest; (2) that for loans with a balloon payment of principal due at the end of term, the nonpayment of interest should be sufficient grounds to treat the loan as a grant; and (3) for uncreditworthy firms, accrued interest should be calculated using an uncreditworthy benchmark.

In addition, Commerce received the following comments on the proposed change to § 351.505(d):

- One commenter suggested that Commerce should defer to the actual terms of the loan contract and that the three-year triggering period does not account for different payment terms that may be present in the loan contract;
- A second commenter stated that it was not clear whether the exception regarding whether the nonpayment is consistent with the terms of a comparable commercial loan applies to loans made under ''balloon'' payment terms (*i.e.,* loans that do not require payments for an extended period and then require larger interest and principal payments once the grace period has expired);
- A third commenter stated that a loan is a different financial contribution from a grant, as a loan requires an obligation of repayment while a grant does not require such an obligation, and a loan is usually provided by a bank, whereas grants are usually provided by a government;
- A fourth commenter expressed concerns that Commerce's proposed change shifts the burden to a respondent to show that it could obtain a comparable loan, and that such a shift in a burden of provision was inappropriate; and
- A fifth commenter suggested that that § 351.505(d) is not needed because the existing regulations already allow Commerce to decide when a loan may be treated as a grant.[154]

In addition, some of the commenters stated that the three-year period set forth by § 351.505(d) is arbitrary, particularly because in the United States, the statutes of limitation set by individual states on debt collection range from three to 15 years for written contracts, with six years being the most common threshold.

Commerce's Response:

In the *Proposed Rule,* we proposed a three-year period as the triggering time period for treating a loan as a grant.[155] After consideration of the concerns raised by the commenters, we continue to believe that a three-year period is the appropriate amount of time for which nonpayment on the outstanding loan can lead to Commerce treating the loan as a grant. Respondents may demonstrate, however, that the loan should not be treated as a grant by showing that they could obtain a comparable loan with these terms of nonpayment.

As noted above, one of the parties stated that Commerce should clarify that the benefit should include both outstanding principal and any unpaid accrued interest. We agree that it is the normal practice of Commerce to include both the amount of principal and any accrued, unpaid interest that would have been paid when a government forgives or assumes a firm's debt when that debt obligation was provided in the

[154] *See* § 351.505(d)(2) (allowing Commerce to treat the loan as a grant if the event upon which repayment depends is not a viable contingency); *see also* § 351.508 (allowing Commerce to treat the total of principal and interest as benefits in the case of an assumption or forgiveness of a debt).

[155] *See Proposed Rule,* 88 FR 29867.

form of a loan.[156] However, with respect to the situation addressed under § 351.505(d), there has not been a formal case of debt assumption or forgiveness. In such a situation, the government, for whatever reason, has simply stopped collecting payments on the outstanding loan. In a prior period of review in which that loan was outstanding, we may have already treated the nonpayment on the loan as an interest-free loan, and thus, calculated a benefit based on the amount of interest paid on the loan (*i.e.,* zero) and the amount of interest that would have been paid on a loan from a commercial bank. Therefore, in those instances, Commerce determines that it would be inappropriate to treat accrued, unpaid interest as a grant because we had already calculated a countervailable benefit to account for that unpaid interest. Because whether to include any accrued, unpaid interest in the benefit calculation will be dependent on case-specific facts, we have not included that suggested provision within § 351.505(d). Instead, the decision of whether to include any accrued, unpaid interest in the benefit calculation will be made on a case-by-case basis. If there is a determination that the firm was uncreditworthy at the time the relevant government-provided loan was made, we agree with that commenter that any accrued interest that is to be treated within our benefit determination will be calculated using an uncreditworthy benchmark as set forth within § 351.505.

That same commenter also suggested that for loans with a balloon payment of principal due at the end of term, Commerce should indicate in the regulation that the nonpayment of interest should be sufficient grounds to treat the loan as a grant.

With respect to this comment and other comments made with respect to ''balloon'' loans, such loans would fall within the definition of ''comparable commercial loans'' under both section 771(5)(E)(ii) of the Act and § 351.505 of the CVD regulations. Therefore, Commerce has concluded that the three-year trigger period, in addition to taking into account the exception provided for receipt of a comparable commercial loan, should also consider the terms of the loan contract. Thus, we have modified the final version of § 351.505(d). Specifically, the additional language will state that the Secretary will normally treat a loan as a grant if ''no payments on the loan have been made'' (versus the proposed language—''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 ''or the payments on the loan are consistent with the terms of the loan contract.''

In response to the concerns raised by other commenters, Commerce agrees that loans require a repayment obligation and grants do not carry that repayment obligation. However, once a governmental provision of funds no longer has an obligation of repayment, or once the government waives or no longer collects repayment of those funds, then those funds (*i.e.,* loans) effectively become a grant, and Commerce has an established practice of treating those funds as a grant. Moreover, whether a loan is normally provided by a bank or grants are normally provided by a government is irrelevant as to whether a loan or a grant provided by a government constitutes a financial contribution and a benefit under the Act.

With respect to the issue of burden shifting, we disagree that this regulatory change shifts a burden onto a respondent to show that it could obtain a comparable loan. Only the respondent has the information to demonstrate that the nonpayment on the outstanding loan is consistent with the terms of a comparable commercial loan it could obtain on the market, or that the nonpayment on the loan is consistent with the terms of the loan contract. Notably, the language regarding a comparable commercial loan that a recipient could obtain on the market is taken directly from section 771(5)(E)(ii) of the Act.

Commerce does not dispute the claim that statutes of limitation set by individual states on debt collection range from three to 15 years. However, we do not believe that such a fact is relevant to this change in the regulation. Section 351.505(d) does not address a situation where there is an ongoing legal dispute between the government and an individual firm regarding a debt that is being contested or where the government is seeking to collect a debt from the loan recipient. Instead, the regulation addresses a situation where the government, for whatever reason, is no longer requesting payment from a recipient of a government loan. If a loan recipient can demonstrate that the outstanding debt is under a legal dispute with the government or that the government is actively seeking loan payment from the recipient, then this regulatory provision will not apply, and Commerce will not treat that disputed loan debt as a grant under this provision.

Regarding the three-year ''triggering-period,'' as Commerce explained in the *Proposed Rule,* Commerce first sought to determine whether there was a clear standard used within the banking sector with respect to the treatment of ''bad debt'' or the treatment of outstanding loans in which payment has not been made based on the terms of the loan contract.[157] Such standards normally provide discretion to the individual bank to determine when it has no reasonable expectations of recovering the contractual cash flows on a financial asset. Unfortunately, Commerce determined that these practices did not provide sufficient administrative and public clarity and guidance for purposes of the CVD regulations.[158]

Based upon these conclusions, Commerce decided to adopt a three-year period, which we believe is appropriate after considering all of the comments we received on this provision. We believe that a three-year period is a reasonably long period of time because it will only apply to a very limited number of loans. To be clear, Commerce rarely encounters investigated loans in which the loan terms do not require the payment of interest for an entire three-year period. In addition, we rarely have investigations on government loan programs in which it is alleged that the government does not require at least payment of interest or principal within a three-year period, or that the regulations under which the investigated loan program operates does not require any loan payment within a three-year period. Furthermore, although some commenters characterized a three-year period as ''arbitrary,'' notably none of the commenters provided a useful alternative period.

Nevertheless, it is important to emphasize that under § 351.505(d), the three-year period provides an exception and not the rule. If the loan recipient can demonstrate that nonpayment is consistent with the terms of a comparable commercial loan it could obtain on the market, then the three-year triggering period will not apply. Furthermore, as we explain above, we have modified the proposed regulation to also allow a loan recipient to demonstrate that the payments on the loan are consistent with the terms of the loan contract. Accordingly, the three-year triggering period under this regulation will only apply if a loan recipient cannot show either of these situations to be true.

[156] *See* § 351.505(a).

[157] *See Proposed Rule,* 88 FR 29867.

[158] *Id.*

In response to the comments that Commerce already has the ability to treat a loan as a grant under existing §§ 351.505(d) introductory text and (d)(2) and 351.508, we note that while we do have current regulations that allow Commerce to decide when a loan may be treated as a grant, the new regulation at § 351.505(d) applies to loans that would not fall under the current regulations at §§ 351.505(d)(2) and 351.508. Accordingly, we disagree that Commerce already has the ability to treat loans such as this as grants and believe that this additional modification to the regulation is necessary.

Lastly, we note that Commerce is moving current § 351.505(d) to a new § 351.505(e) which addresses the treatment of a contingent liability interest-free loan. Under this current provision, Commerce will treat a contingent liability interest-free loan as a grant, if at any point in time, Commerce determines that the event upon which repayment depends is not a viable contingency. However, this regulation does not address the situation where the recipient firm either has taken the required action or achieved the contingent goal and the government has not required repayment of the contingent loan. While Commerce considers a future amendment to this section of the loan regulation to account for non-repayment when the recipient has met the contingent action or goal and the government has not taken repayment, for now Commerce may address this issue under the new § 351.505(d).

10. Commerce has made certain changes to the proposed amendment to the CVD equity regulation at § 351.507.

Commerce is making two significant changes in this final rule to its equity regulation. First, it is modifying current § 351.507(c) by moving the existing language to a new § 351.507(d) and adding a new provision in paragraph (c), titled ''Outside investor standard.'' This outside investor standard codifies Commerce's 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.

Second, Commerce is adding language to the description of the allocation of the benefit in the new § 351.507(d). 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, which usually has been the case with respect to an equity infusion into a state-owned steel company. However, in a few cases, such as *DRAMs from Korea,*[159] Commerce has determined that the AUL of the assets results in an unreasonable period of time in which to provide relief to the domestic industry from unfair and distortive foreign government subsidies, counter to the purpose of the CVD law. To prevent such an unfair and distortive allocation, the modified language of § 351.507(d) will provide that 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.

In the *Proposed Rule,* Commerce proposed new regulatory language and provided an extensive background on Commerce's 40-year history in implementing and enforcing the outside investor standard.[160] One commenter noted that the first sentence of the new proposed § 351.507(c) referred to a ''new private investor,'' but then in the second sentence referred to both an ''outside private investor'' and a non-outside ''private investor.'' That commenter suggested that Commerce clarify that the first sentence was intended to refer to a ''new outside private investor.'' Commerce agrees that such a suggestion would be appropriate and provide clarity to the regulation, and it has modified the regulation in accordance with that suggestion in the final rule.

Otherwise, Commerce has determined to make no further changes to its proposed § 351.507(c) and (d). Commerce's provision of the history and reasoning behind both changes is set forth extensively in the *Proposed Rule,* and Commerce will not reiterate that entire history or reasoning in this preamble to the final rule.

In response to our request for comments on our *Proposed Rule,* we received 15 comments from interested parties to the changes in our equity regulation with nine of these parties supporting the revisions. The six parties that objected to the proposed revisions to the equity regulation objected to both of the proposed changes to the regulation. We are addressing the challenges to the two changes separately below.

A. Commerce's codification of its outside investor standard is lawful and reasonable.

With respect to the outside investor standard, some commenters expressed concerns that Commerce failed to consider the viewpoint of an ''inside'' investor, and they alleged that such a failure could not be reconciled with section 771(5)(E) of the Act, which states that ''a benefit shall normally be treated as conferred where there is a benefit to the recipient if the investment decision is inconsistent with the usual investment practice of private investors, including the provision of risk capital, in the country in which the equity infusion is made.'' Section 351.507(a)(1) has the same language. Thus, those commenters commented that both the Act and the regulations do not make a provision for ''outside private investors,'' and that the only statutory language pertains to ''private investors.'' Those commenters stated that if a government with an existing investment in a company makes an equity investment on terms that comport with the terms that ''inside'' private investors with similar investments would have accepted, then the investment decision is consistent with the usual investment practice of private investors and there is no countervailable benefit under the statute. These commenters also stated that there are essentially no differences in the motivation and analysis in the investment decisions between internal private investors (*i.e.,* owner-investors) and outside private investors.

One of the commenters stated that a rational investment decision based on commercial principles does not exclude the reason for continuing to invest to protect income of previous investments, citing the 1986 CVD investigation determination in *Groundfish from Canada.*[161] Likewise, that commenter also noted that in a 1989 CVD investigation, *Steel Wheels from Brazil,*[162] Commerce stated that a ''a rational investor does not let the value of past investments affect present or future decisions,'' which demonstrates the consistency of business logic between inside and outside investors.[163]

Another commenter noted that in the 1993 CVD investigation determination in *Certain Steel Products from*

[159] *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.

[160] *See Proposed Rule,* 88 FR 29867–69.

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

[162] *See Final Affirmative Countervailing Duty Determination; Steel Wheels from Brazil,* 54 FR 15523, 15529–30 (April 18, 1989) (*Steel Wheels from Brazil*), and accompanying IDM at Comment 10.

[163] *Id.*

Austria,[164] Commerce explained that a distinction between inside investors and outside investors is unreasonable stating that ''{Commerce} has expressed the view that the perspectives of inside and outside investors cannot legitimately be distinguished.'' [165] As such, that commenter pointed out that Commerce stated that an inside investor can therefore act with the same rational motivations as an outside investor and ''not let the returns of past investments affect present or future decisions.'' [166] This commenter stated that even though the question in *Certain Steel Products from Austria* was whether Commerce should adopt a different standard for inside investors, Commerce's reasoning is also applicable to the inverse—an outside investor standard is also unreasonable because there is no legitimate reason to distinguish between the two.

Lastly, one commenter generally objected to Commerce's use of an outside investor standard, arguing that it is not reasonable because Commerce can neither categorically determine that no debt-to-equity conversion can meet the reasonable investor test, nor categorically determine that no inside investor is able to make an investment that will generate a reasonable rate of return within a reasonable period of time.

Commerce's Response:

At its core, the criticisms of Commerce's outside investor standard are criticisms of its overall equity analysis which has been in place since at least 1986. As noted, Commerce explained the history of this practice and the reasoning behind its policy and practices in the *Proposed Rule.*

As a preliminary point, Commerce fundamentally disagrees that section 771(5)(E) of the Act, which states that ''a benefit shall normally be treated as conferred where there is a benefit to the recipient if the investment decision is inconsistent with the usual investment practice of private investors, including the provision of risk capital, in the country in which the equity infusion is made,'' [167] is in any conflict with the outside investor standard.

Before the enactment of the URAA on December 8, 1994, which implemented the changes to the Act as a result of the Uruguay Round and the creation of the WTO, and the SCM Agreement, specifically, section 771(5) of the Act defined one type of subsidy as the provision of capital on ''terms inconsistent with commercial considerations.'' [168] The URAA amended the Act and stated that a benefit is conferred in the case of an equity infusion ''if the investment decision is inconsistent with the usual investment practice of private investors.'' However, while the language changed from ''terms inconsistent with commercial considerations'' to ''inconsistent with the usual investment practice of private investors,'' this did not denote a change in the benefit analysis with respect to whether a firm is equity-worthy.

The SAA reveals that under the revised benefit section under the URAA at section 771(5)(E) of the Act, the only replacement with respect to our established methodology in determining whether a benefit exists was with respect to the provision of goods and services and in determining whether there is a benefit conferred by a government loan guarantee.[169] In addition, § 351.507(a)(4) of our current CVD regulations states that the Secretary will consider a firm to have been equity-worthy if the Secretary determines that, from the perspective of a reasonable private investor examining the firm at the time the government-provided equity infusion was made, the firm showed an ability to generate a reasonable rate of return within a reasonable period of time. In determining whether a benefit is conferred within the meaning of section 771(5)(E) of the Act, we note that the Act does not define ''the usual investment practice of private investors.'' However, the CVD equity regulation states that a reasonable private investor will make its investment decisions based on whether the investment will ''generate a reasonable rate of return within a reasonable period of time.'' [170] This standard is set forth in § 351.507(a)(4) and is taken from the *1989 Proposed Rules.*[171] Thus, the standard used in the examination of whether there is a benefit conferred by the government provision of equity was identical under both section 771(5)(E) of the Act and section 771(5) of the pre-URAA version of the Act. That standard was also addressed by the CIT in the Court decisions, *BSC I* [172] and *BSC II.*[173]

At the time of the CIT decisions in *BSC I* and *BSC II,* section 771(5) of the Act defined one type of subsidy as the provision of capital on ''terms inconsistent with commercial considerations.'' [174] In *BSC II,* the CIT relied upon the definition of ''commercial considerations'' that was established a year earlier in *BSC I.* In *BSC I,* with respect to the provision of equity capital, the CIT construed the ''commercial considerations'' test to mean that an investment is consistent with commercial considerations if a reasonable investor could expect a reasonable rate of return on its investment within a reasonable period of time. Moreover, pertaining to the question of whether government funds are provided to a company under conditions inconsistent with commercial considerations, in 1979, the Subcommittee on Trade of the House Committee on Ways and Means observed that in its interpretation of the Act ''with regard to the provision of capital, 'commercial considerations' shall mean consideration of whether at the time the capital is provided, the recipient is required, and can be expected within a reasonable period of time, to derive from its operations a reasonable rate of return on its invested capital.'' [175]

Thus, it is clear from the language in the Act, the CVD regulations, and the legislative history that ''the usual investment practice of private investors'' is that a reasonable private investor will make its investment decisions based on whether the investment will ''generate a reasonable rate of return within a reasonable period of time.'' Otherwise, what ''private investors'' Commerce considers reasonable for purposes of its equity analysis was left by Congress for Commerce to discern through its practice and regulations over time. As Commerce explained in the *Proposed Rule,* over a 40-year span of time, Commerce concluded that the standard of the private investor should be based on an outside private investor and is now codifying that practice.

In response to the claims that there is ''no'' difference in the motivations and

[164] *See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria,* 58 FR 37217, 37249 (July 9, 1993) (*Certain Steel Products from Austria*), at the General Issues Appendix.

[165] *Id.*

[166] *Id.*

[167] *See* section 771(5)(E) of the Act.

[168] *See* Trade Agreements Act of 1979, Public Law 96–39, 80 Stat. 144 (July 26, 1979) (Trade Agreements Act of 1979).

[169] *See* SAA at 927.

[170] *See* § 351.507(a)(4).

[171] *See Countervailing Duties Notice of Proposed Rulemaking and Request for Public Comments,* 54 FR 23366, 23381 (May 31, 1989) (*1989 Proposed Rules*).

[172] *See British Steel Corp.* v. *United States,* 605 F. Supp. 286 (CIT 1985) (*BSC I*).

[173] *See British Steel Corp.* v. *United States,* 632 F. Supp. 59 (CIT 1986) (*BSC II*).

[174] *See* Title I of the Trade Agreements Act of 1979 (adding section 771(5) of the Act, which defined the term ''subsidy'').

[175] *See* Summary of Recommendations in Legislation Implementing the Multilateral Trade Negotiations, 96th Cong., 1st Sess. 4 (Comm. Print 21 (1979)).

investment analysis between owner-investors and outside private investors, Commerce must highlight that through 40 years of practice, many interested parties have disagreed with that assessment. For example, in the aforementioned *Steel Wheels from Brazil,* when Commerce evaluated government equity infusions from the point of view of a private outside investor, a respondent argued that its motive as an owner-investor was to maximize average returns on its past and future investments into the steel company, not to marginal returns on investments as an outside investor would.[176] Likewise, in *Stainless Steel Plate from the United Kingdom,*[177] the respondent claimed that by focusing exclusively on considerations that would motivate the investment decisions of an outside investor, Commerce incorrectly found British Steel Corporation (BSC) to be unequity-worthy during the review period. The respondent argued that unlike an outside investor, as an owner it had to consider taking steps to minimize BSC's losses and to encourage the company's return to profitability. Furthermore, in the *Certain Steel Products from Austria* investigation, respondents argued that an inside investor's decision may reflect a desire to reduce or forestall an expected loss rather than to increase returns on investment. They argued that an inside investor may make an additional investment to help save the firm from insolvency.[178]

In addition to the respondents stating that there are differences in the motivations and investment analysis between owner-investors and outside private investors, the CIT has explicitly recognized these differences in motivations. The CIT in *BSC II* acknowledged that while it may make sense for an owner to want to continue to run a loss-making operation so long as variable costs are recovered, this standard is inapposite to investment decisions by investors acting according to economically rational considerations to look for a return on investment with a reasonable time.[179] Likewise, in *Hynix Semiconductor, Inc.,*[180] the CIT expressly affirmed Commerce's approach that ''the existence and status of previous investments in a company are extraneous considerations when weighing new investment in the same company.'' [181] The CIT called this approach the ''expected utility model,'' which was another name for the outside investor standard, and relied on *BSC II* in ruling against the respondent plaintiff's argument that Commerce should take the perspective of an existing investor considering a new investment to bolster prior investments.[182]

All of these arguments and decisions reflect what Commerce explained in the *Proposed Rule:* the motivations of an owner-investor can, and frequently do, differ from that of an outside private investor, and Commerce's practice, and now regulations, consider the actions of a reasonable outside private investor in its equity analysis. Forty years of precedent and practice demonstrate that inside investors sometimes may base investment decisions on criteria other than whether the investment will ''generate a reasonable rate of return within a reasonable period of time,'' while outside private investors will generally not be inclined to base investment determinations on those other criteria.

In response to the statements by the one commenter with regard to *Groundfish from Canada* and *Steel Wheels from Brazil,* there is no validity to the commenter's points because Commerce believes that the commenter misunderstood the Commerce determinations made in those cases. In both cited cases, Commerce explicitly rejected the decisions of the insider investor to make additional equity investments into financially troubled companies because Commerce recognized that the motivations of inside investors may be different from those of outside private investors.[183]

With respect to the commenter that quoted certain language from *Certain Steel Products from Austria* to support its claim against the outside investor standard, we also believe that commenter may be confused as to the details of that investigation. In the *Certain Steel Products from Austria* investigation, respondents stated that an inside investor may make an additional investment to help save the firm from insolvency. Therefore, the respondents were essentially arguing that with respect to an equity analysis for investments made by owners, Commerce should adopt a different analysis specifically for inside investors that may have different motivations than those of an outside investor. Commerce rejected this argument, declining to create two investor standards and apply two investor equity tests. In any case, that is not the issue with respect to this regulation. Here, the issue is Commerce codifying its single practice of applying an outside investor standard in an equity analysis.

Finally, in response to the commenter who suggested that Commerce cannot categorically determine either that no debt-to-equity conversion can meet the reasonable investor test, nor that no inside investor is able to make an investment that will generate a reasonable rate of return within a reasonable period of time, we believe that commenter misunderstood Commerce's practice. As we explained in the *Proposed Rule,* Commerce has been using the outside investor standard since at least 1986. In all that time, Commerce has never claimed that a debt-to-equity conversion cannot meet the equity-worthy standard of generating a reasonable rate or return within a reasonable period of time. In addition, Commerce has never made a comprehensive finding that an inside investor is unable to make an investment that would generate a reasonable rate of return within a reasonable period of time. This amendment to § 351.507 incorporates into the equity regulation our long-standing practice with respect to the use of an outside investor standard, but it in no way suggests changes to the agency's existing practice as suggested by that commenter. All of Commerce's determinations made with respect to the provision of equity are made on a case-by-case basis with an analysis of all the facts on the record in a manner consistent with the Act and the CVD regulations. There is no comprehensive exception or policy whereby all debt-to-equity conversions or investments made by an insider investor fail the standard of the equity-worthy test of being able to generate a reasonable rate of return within a reasonable period.

The codification of our outside investor standard continues our longstanding practice of examining whether a provision of equity, be it direct through new funds or through a debt-to-equity conversion, confers a countervailable benefit by examining whether the provision of equity will generate a reasonable rate of return within a reasonable period of time. This means that when there is a private inside investor or a private debtor converting existing debt in a firm into equity, our equity analysis will be based

[176] *See Steel Wheels from Brazil,* 54 FR 15529 and IDM at Comment 10.

[177] *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*).

[178] *See Certain Steel Products from Austria,* 58 FR 37249.

[179] *See BSC II,* 632 F. Supp at 64–65.

[180] *See Hynix Semiconductor, Inc.* v. *United States,* 425 F. Supp. 2d 1287 (CIT 2006) (*Hynix Semiconductor, Inc.*).

[181] *Id.,* 425 F. Supp. 2d at 1313.

[182] *Id.*

[183] *See Groundfish from Canada; see also Steel Wheels from Brazil.*

on the standard of an outside private investor (*i.e.,* whether that new investment will generate a reasonable rate of return within a reasonable period of time). If we determine that a private insider investor or private party converting debt-into-equity provides a new equity investment that is consistent with the outside investor standard, then we will normally consider that private investor prices are available within the meaning of § 351.507(a)(2) and will use those prices in determining whether the government provision of equity confers a benefit. In situations where the government is the sole owner and investor into a firm, we will also use the outside private investor standard to determine whether the government provision of equity into the firm will generate a reasonable rate of return within a reasonable period of time. Other criteria used by the government such as trying to rescue an insolvent firm or recover its previous investments will not be consistent with ''the usual investment practice of private investors.''

B. Commerce's modification to the allocation of an equity benefit is reasonable.

The commenters who disagreed with Commerce's changes to its equity regulation also challenged the amendment to the regulation regarding the allocation of an equity benefit over a minimum period of 12 years or the AUL established for the investigation or administrative review, whichever is longer. These commenters raised these same comments with respect to this identical amendment to the allocation period for debt forgiveness under § 351.508(c).

Those commenters stated that Commerce has allocated the benefit from non-recuring subsidies over the AUL of the relevant industry for decades and should not modify that allocation methodology for any reason. Acknowledging that Commerce provided the *DRAMs from Korea* investigation as an example of an unreasonable allocation period based on the AUL of the product (wherein the AUL was five years), the commenters stated that because the allocation period was based on real-world experience of that industry and a typical research and development (R&D) cycle and life span for equipment, Commerce was incorrect in concluding that the allocation period was in any way unreasonable.

Furthermore, those commenters characterized the 12-year allocation period for equity as arbitrary. They commented that any allocation applied by Commerce should relate to the subject merchandise at issue, instead of an arbitrary minimum of 12 years. As Commerce explained in the *Proposed Rule,*[184] 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.[185] Looking to the Modified Accelerated Cost Recovery Asset Life Table,[186] Commerce determined that those four industries fall under five asset classes, which, when averaged, results in a 12-year AUL of assets for the class. Put another way, the allocation period for non-recurring subsidies for the vast majority of Commerce's CVD measures since 1995 was 12 years. Accordingly, Commerce proposed a 12-year minimum allocation period to provide relief to the domestic industry from the harm caused by certain foreign government countervailable equity subsidies.

The commenters explained, however, that not all industries fall within those four industries, and for several industries, such as the industry at issue in *DRAMs from Korea,* the AUL of the product is less than 12 years. In making this claim, the commenters stated that Commerce's admitted reason for setting such an allocation minimum was to allow it to continue to countervail non-recurring subsidies for industries whose assets turn over relatively quickly. Therefore, they challenged a 12-year allocation period for those industries with shorter amortization rates, arguing that it would ''artificially extend'' the AUL to 12 years and, accordingly, distort the benefit calculation.

They also commented that Commerce's allocation minimum would unreasonably include a calculation of benefit associated with costs of capital, where Commerce builds into its allocation methodology a discount rate associated with the responding parties' costs of borrowing. In addition, the commenters expressed concerns that the application of the proposed revision would lead to an extended allocation period for non-recurring subsidy programs that would increase the retroactive period for each subsidy program. They suggested that by extending the allocation period, subsidy projects that no longer benefit the company during the investigation period could be captured erroneously in the CVD calculation. As a consequence, they commented that the calculated subsidy rate could end up in excess of the actual subsidy received by the company.

In the alternative, they suggested that if Commerce continues to insist on a 12-year allocation period for equity (and debt forgiveness), then it should establish that period as a rebuttable presumption and not a hard rule and permit parties an opportunity to demonstrate that the under-12, company-specific AUL is reasonable.

Commerce's Response:

All countervailable benefits must be determined based on the specific facts on the record and must be determined in accordance with the Act and Commerce's CVD regulations. No one is arguing otherwise. However, consistent with the Act and CVD regulations, the calculation of benefits conferred by countervailable subsidies are not subject to different rules based upon the merchandise being investigated. The benefit from a $10 million grant is $10 million, regardless of the recipient, the merchandise being produced by the grant recipient, or the AUL of the merchandise being produced. To be clear, at issue in this regulation is not the calculation of a subsidy benefit, despite some of the points made by the commenters, but instead the allocation of that benefit over a certain period of time.

With respect to the allegation that the allocation period of a subsidy benefit must be specific to the subject merchandise, the commenters cite no provision in the Act to support such a claim. In fact, for many types of subsidies, the benefit is allocated to the year of receipt which takes no measure of the type of merchandise that is subject to the investigation or administrative review. In truth, the Act is silent as to the allocation period for a subsidy; thus, Commerce's proposed changes to both § 351.507(d) and § 351.508(c) to include a 12-year minimal allocation period in the case of equity and debt forgiveness is fully consistent with Commerce's statutory authority to apply the CVD law in a reasonable and administrable manner.

Even our current allocation regulation at § 351.524(b) explicitly acknowledges that, for many subsidies, Commerce does not always allocate the benefit from non-recurring subsidies over the AUL of subject merchandise. Under § 351.524(b), Commerce will allocate or expense the benefit from a non-recurring subsidy only to the year of receipt if the subsidy benefit is less than 0.5 percent of relevant sales. Therefore, two companies in the same investigation, and thus producing the

[184] *See Proposed Rule,* 88 FR 29868–69.

[185] *Id.*

[186] *See* Internal Revenue Service Publication 946 (2021), Table B–2, the Modified Accelerated Cost Recovery Asset Life Table.

same subject merchandise, could have the identical subsidy benefit allocated over different periods.

With respect to the arguments that an allocation period of five years was reasonable in *DRAMs from Korea* and based upon a typical R&D cycle and life span for equipment, Commerce must first clarify that neither the allocation period nor the AUL tables used in our cases are based upon R&D cycles for the industry producing subject merchandise. Accordingly, that particular fact is irrelevant to the arguments challenging this regulatory change. The current regulations base the allocation period on the AUL of the assets.

In *DRAMs from Korea,* the government led a massive bailout of a financially-troubled firm by converting debt into equity and by forgiving debt to allow that firm to remain financially viable so it would not cease operations.[187] The forgiveness of debt and equity provisions were not specific to subject merchandise nor to the equipment that manufactured the subject merchandise.[188] Instead, the government-led bailout was a complete restructuring of the firm's capital formation to ensure the continuation of the firm's operations.[189] The forgiveness of debt and equity provisions undertaken at the direction of the government ensured the survival of Hynix and the company continued to operate for more than 20 years after the provision of these subsidies, a period much longer than five years. Thus, it is clear that the economic benefit, or the ''commercial impact'' of these subsidies, to use the argument of various commenters, is much longer than five years.

As the CIT stated in *BSC I,* fundamentally, the value of a subsidy must be measured in accordance with its benefit to the recipient, which is not necessarily limited to the period of time assets are actually used.[190] Similarly, in other cases like *Certain Steel Products from Austria,* respondents also stated that the governments' decisions to provide new equity funds was not related to the production of subject merchandise but to help save firms from insolvency.[191]

With respect to the general issue of allocation periods, it is important to note the history of this issue. There are no statutory, economic, or financial rules that mandate the choice of an allocation period, and theoretically one could argue that a subsidy benefits a firm forever, thereby rendering arbitrary any period short of the actual lifespan of the firm or facilities.

As noted above, the Act is silent with respect to the allocation of benefits, and what little legislative history there is on the subject deals with the shape of the benefit stream rather than its length. At most, the legislative history exhorts Commerce to use a ''reasonable'' method of allocation.[192] Commerce first explained its general policies on the allocation of subsidies focusing on the provision of grants provided for the purchase of capital equipment in the *1982 Subsidies Appendix.*[193] Commerce stated in that document that the legislative history of the Act required that where a grant was bestowed specifically to purchase capital equipment that the benefit flowing from the grant should be allocated in relation to the useful life of that equipment. Moreover, a subsidy for capital equipment should also be ''front-loaded'' in these circumstances. That is, it should be allocated more heavily to the earlier years of the equipment's useful life, reflecting its greater commercial impact and benefit in those years.[194]

The Senate Report to the legislative history of the Trade Agreements Act of 1979 explained that there was ''a special problem in determining the gross subsidy with respect to a product in the case of nonrecurring subsidy grants or loans, such as those which aid an enterprise in acquiring capital equipment or a plant. Reasonable methods of allocating the value of such subsidies over the production or exportation of the products benefiting from the subsidy must be used.'' [195] The House Report to the same Act also noted the ''special problem with regard to subsidies which provide an enterprise with capital equipment or a plant. In such cases, the net amount of the subsidy should be amortized over a reasonable period, following the beginning of full-scale commercial operation of the equipment or plant, and assessed in relation to the products produced with such equipment or plant during such period.'' [196] Thus, both the Senate and House Reports on the issue of the allocation of nonrecurring subsidies noted that the allocation should be over a ''reasonable time period.'' The House Report went slightly further with respect to grants that were provided for the purchase of capital equipment stating that the subsidy could be amortized based on the commercial operation of the capital equipment.[197]

For the 1982 steel investigations that were the subject of the *1982 Subsidies Appendix,* the allocation period of 15 years was based on Internal Revenue Service (IRS) data for integrated mills in the United States. Commerce used this IRS data because it sought a uniform period for allocation and one that reflected the estimated average life of steel assets worldwide.[198] Commerce stated that it could not calculate the average life of capital assets on a company-by-company basis since different accounting principles, extraordinary write-offs, and corporate reorganizations yielded extremely inconsistent results.[199] In determining whether a grant was to be allocated or expensed, Commerce determined to allocate grants that were large (*i.e.,* at least $50 million) and specifically provided for the purchase of capital equipment. Where the grant was small (*e.g.,* grants generally less than one percent of the company's gross revenues) and provided for items that are generally expensed in the year purchased such as wages or purchases of material, Commerce expensed the subsidy in the year the grant was received.[200]

Commerce next addressed the allocation period in the *1984 Subsidies Appendix.*[201] Commerce again stated that on the question of the allocation of subsidies, the legislative history revealed nothing more concrete than a directive that {Commerce} use ''reasonable methods.'' [202] Commerce stated that funds provided under government direction or directly by the government provide a subsidy to the extent that the recipient pays less for the funds than it would on the market. In

[187] *See DRAMS from Korea* IDM at Comment 7.

[188] *Id.* at 12.

[189] *Id.*

[190] *See BSC I,* 605 F. Supp. at 295–96.

[191] *See Certain Steel Products from Austria,* 58 FR 37249.

[192] *See* Senate Report on Trade Agreements Act of 1979, No. 249, 96th Cong., 1st Sess. (July 17, 1979), at 85–86.

[193] *See Final Affirmative Countervailing Duty Determinations; Certain Steel Products from Belgium,* 47 FR 39304, 39317 (September 7, 1982), at Appendix 2—Methodology (containing the *1982 Subsidies Appendix*).

[194] *Id.,* 47 FR 39316.

[195] *See* S. Rep. No. 249, 96th Cong., 1st Sess. at 85.

[196] *See* House Report on Trade Agreements Act of 1979, No. 96–317, 96th Cong., 1st Session. (July 3, 1979), at 74–75.

[197] *Id.*

[198] *See 1982 Subsidies Appendix,* 47 FR 39317.

[199] *Id.*

[200] *Id.*

[201] *See Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 49 FR 18006, 18016 (April 26, 1984), at the Subsidies Appendix (*1984 Subsidies Appendix*).

[202] *Id.*

the case of a loan, this is the difference between the cash flows (*i.e.,* the company's receipts and payments) on the loan under examination and the cash flows for a comparable commercial loan taken out by the same company.[203] For equity, it is the difference between what the government paid for a share of the company and what the market would have paid for the share.[204] For grants, the saving to the recipient is the face value of the grant—that is, the difference between what the company paid for the funds (*i.e.,* zero), and what it would have to pay on the market to receive the funds (*i.e.,* the face value of the grant).[205]

Differences in cash flows can arise in a single moment, as with grants (*i.e.,* complete receipt of the funds at once), or over several years, as with long-term loans (*i.e.,* through periodic repayment).[206] The point at which the difference in cash flows occurs does not always coincide with the economic benefit of the subsidy, and therefore, does not necessarily provide an appropriate schedule for assessing CVDs. The economic benefit is diffused around the time that the cash flow differential occurs. For example, it would be inappropriate to allocate a $1 billion grant received on March 17, 1984, entirely to March 17, 1984. The grant continues to benefit the company after that date, and thus, Commerce would not counteract the economic benefit of the grant by assessing CVDs to products exported on only that single day. Therefore, to counteract the benefit of such actions, Commerce had to determine an appropriate period over which to allocate benefits and decide how much of the benefit to allocate to each year.

Commerce first attempted to codify different allocation periods for subsidies in the *1989 Proposed CVD Rules*.[207] Commerce stated in the preamble to the *1989 Proposed CVD Rules* that it would consider the use of a set 10-year allocation period for all non-recurring benefits before issuing its final rules; however, it never issued those final rules. In the decades since the *1989 Proposed CVD Rules,* Congress has not addressed the allocation period for subsidies in the Act, deferring the issue to Commerce's expertise. Accordingly, through its practice, Commerce has developed allocation rules to ensure that a reasonable method of allocation will provide adequate relief to the domestic parties with respect to offsetting the injurious effect of unfair foreign government subsidies and to ensure consistency and predictability in the allocation period. Towards that end, Commerce has implemented through the formal rule-making process allocation rules that differentiate between different forms of financial contributions and for different types of subsidy benefits. We have different allocation rules for non-recurring subsidies and recurring subsidies.[208] We even have allocation rules that differentiate whether a non-recurring subsidy will be allocated over an AUL or only allocated (*i.e.,* expensed) in the year of receipt.[209] Moreover, recurring subsidies are allocated (*i.e.,* expensed) in the year of receipt regardless of the merchandise that is under investigation.[210]

Different types of subsidy programs also have different allocation periods wholly unrelated to the recipients' production operations. There are specialized allocation rules for loans.[211] There are different allocation periods for income tax programs [212] and different allocation periods for the provision of goods and services.[213] None of the allocation periods for these common subsidy programs are related to the production of subject merchandise or related to the AUL of the recipients' capital assets.

For grant programs, there are different allocation periods based on the purpose of the grants. For example, grants provided for R&D, export promotion, or training are allocated to the year of receipt,[214] while grants for capital equipment are allocated over time based on the AUL, except in instances where the grant benefit for capital equipment is less than 0.5 percent of the recipient's relevant sales.[215] Thus, if each of the respondents in an investigation receive a $30 million grant to purchase equipment used to manufacture subject merchandise, the grant received by one respondent could be allocated to the year of receipt due to the size of its sales revenue while, for the other respondent, that identical grant is allocated over time.

For example, if a respondent received a $30 million tax credit based on a firm's purchase of equipment used to manufacture subject merchandise, it would be allocated (fully expensed) in the year that it uses the tax credit to reduce its income tax liability. On the other hand, another respondent, instead of receiving a $30 million tax credit, might have instead received a $30 million grant to purchase equipment used to manufacture subject merchandise. Under that hypothetical, instead of the benefit being fully allocated to one year, the benefit would instead be allocated over time. Similarly, Commerce could calculate a $30 million countervailable benefit from the provision of capital equipment for less than adequate remuneration to a firm and under the allocation rules established by the CVD regulations, the benefit would be allocated (*i.e.,* expensed) in the year in which the firm paid for the capital equipment.

In sum, Commerce has adopted and codified different allocation rules for different types of subsidies over the past 40 years, consistent with the Act and the legislative history of this issue. Throughout that period, for purposes of the CVD law, Commerce has concluded that the purpose of an allocation period is to provide adequate relief to domestic parties with respect to offsetting the injurious effect of unfair foreign government subsidies. Further, Commerce has also determined that an allocation period for a subsidy should ensure consistency and predictability across CVD proceedings.[216] This understanding of the purposes of an allocation period has consistently been Commerce's starting point in determining an appropriate allocation period for a subsidy.

Accordingly, we believe that the allocation periods set forth within §§ 351.507(d) and 351.508(c)(1) to account for the unique nature of equity and debt forgiveness subsidies are not only consistent with those purposes, but also consistent with Commerce's statutory and regulatory obligations.

In addition to the challenge to the 12-year minimal allocation period in general, one commenter expressed concerns that by extending the AUL to 12 years for industries with shorter amortization rates, Commerce's allocation methodology would introduce a distortive calculation of benefit associated with costs of capital. This commenter stated that this would occur where Commerce builds into its allocation methodology a discount rate associated with the responding parties' costs of borrowing. As a preliminary matter, Commerce agrees that it calculates the discount rate based on a respondent's cost of borrowing.

[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *See 1989 Proposed Rules,* 54 FR 23376–77.
[208] *Id.*
[209] *Id.,* 54 FR 23383–84.
[210] *Id.*
[211] *Id.,* 54 FR 23376–77.
[212] *Id.,* 54 FR 23374–75.
[213] *Id.,* 54 FR 23375–76.
[214] *Id.,* 54 FR 23384.
[215] *Id.,* 54 FR 23385.
[216] *Id.,* 54 FR 23376–77.

However, that calculated discount rate is unrelated to the allocation period and would not change based on the allocation period. Thus, we disagree that it would create any distortions as stated by the commenter. Under § 351.524(d)(3), the discount rate is based upon a company's costs of long-term, fixed rate loans for the year in which the government agreed to provide the subsidy. For example, if the government agreed to provide a subsidy to a respondent in 2020, Commerce would calculate the discount rate based on the respondent's costs of borrowing in 2020. That calculation would not change if the allocation period was three, eight, or 12 years. In fact, two companies with the identical AUL can have different costs of borrowing, and thus can have different calculated discount rates. Therefore, we disagree that the modified regulation would introduce any distortions into calculations of benefit associated with costs of capital.

Lastly, in response to the commenter that requested that Commerce should, at minimum, make the 12-year minimum allocation period a rebuttable presumption, we do not agree that such an option would be a reasonable change to the regulation. Adopting this suggestion would undermine our reasons, described above, for providing a predictable minimum 12-year allocation period for equity and debt forgiveness subsidies. Moreover, the proposal is also inconsistent with the treatment of the allocation periods for other types of subsidy programs within our regulations such as loans, loan guarantees, income tax programs, the provision of goods and services, and recurring grants, in which the allocation period of the subsidy benefit is not established as a rebuttal presumption.

11. Commerce has made no further changes to the proposed amendment to the CVD debt forgiveness regulation, § 351.508.

For the debt forgiveness regulation, we are modifying § 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 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 debt forgiveness benefit, as the provision of debt forgiveness is normally part of a government-led restructuring package for a state-owned steel company. However, there are cases, as discussed in the *Proposed Rule* and in the equity section 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 are 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 explained both in the *Proposed Rule* and further above in the equity section why we selected the allocation period of 12 years.[217]

We received comments from 11 parties with respect to this amendment to our debt forgiveness regulation, with six of the parties supporting the revisions to this regulation. The parties that expressed opposition to this revision expressed the same concerns with respect to the identical revision to the equity regulation. Accordingly, for further analysis on these comments, and the reasoning behind our decision to continue to amend the 12-year minimum allocation period in § 351.508(c), see the equity section above.

12. Commerce has made no further changes to the proposed amendments to the CVD regulations covering direct taxes, § 351.509.

For purposes of the CVD regulation addressing direct taxes, we are adding a new paragraph (d) to § 351.509, which states that benefits from income tax-related subsidies are not tied to particular products or markets. In the *CVD Preamble,* Commerce stated that it considers certain subsidies such as payments for plant closures, equity infusions, debt forgiveness, and debt-to-equity conversions as not tied to certain products or markets because they benefit all production.[218] 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.'' [219] 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 attribute the subsidy over sales of all products by the company.[220] 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.[221]

Therefore, based on the language in the *CVD Preamble* and our experience since the issuance of the current CVD regulations, we have added a provision to the CVD regulations that states, ''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).'' In accordance with this provision, if subsidies in fact benefit the overall operations of a firm, even if they are allegedly tied to a particular product or market, we will attribute the subsidy to all sales of all the firm's products.

We received comments from five parties that supported this amended provision and another commenter who generally concurred with the amendment but stated that Commerce should retain discretion with respect to the allocation of the benefit if they grant the direct tax program based on a specific market or product. In addition, two commenters stated that Commerce should not implement this proposal. One of these commenters stated that it is Commerce's long-standing practice to evaluate the purpose of the subsidy in determining whether the subsidy is tied, and that Commerce does not trace how the subsidy is used. In addition, according to that commenter, Commerce has not offered a reason for its proposed departure from its long-established attribution rules. The other commenter stated that the proposed change under § 351.509(d) provides Commerce with greater discretion in deciding when a tax is tied to a particular market or product and it is not clear how Commerce will exercise that discretion, nor does the preamble indicate why Commerce needs such discretion. That commenter also expressed concerns that this amendment would contradict section 701(a)(1) of the Act, which states that Commerce must establish that the government or a public entity is providing, directly or indirectly, a countervailable subsidy with respect to

[217] *See Proposed Rule,* 88 FR 29868–69.

[218] *See CVD Preamble,* 63 FR 65400.

[219] *Id.*

[220] *Id.*

[221] *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.

the manufacture, production, or export of merchandise under investigation.

Commerce's Response:

As a preliminary matter, we agree with the commenter that stated that Commerce has a long-standing practice when analyzing whether a subsidy benefit is tied to a particular product or particular market. It was in the *1982 Subsidies Appendix* that Commerce published the criteria for determining whether a subsidy is tied, and that standard is the one that is still used and reflected in the *CVD Preamble.* Under this standard, a subsidy benefit is ''tied'' when the intended use is known to the subsidy giver and so acknowledged prior to or concurrent with the bestowal of the subsidy. This is the standard that Commerce will continue to use with respect to whether a subsidy benefit is tied to a particular product or market.

However, in the *CVD Preamble,* Commerce explicitly 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 emphasized that it was ''extremely sensitive to potential circumvention of the countervailing duty law.'' [222] 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 attribute the subsidy over sales of all products by the company. Direct tax programs reduce or eliminate income taxes paid by a firm, which by their very nature benefit the overall operations of the recipient firm.

We disagree with respect to the comment that this amendment contradicts section 701(a)(1) of the Act. Section 701(a)(1) of the Act does not establish an attribution methodology to be used for any type of countervailable program, much less for a program that provides for a full or partial exemption, reduction, credit, or remission of an income tax. This section of the Act requires Commerce to investigate and quantify countervailable subsidies provided directly or indirectly to the manufacture, production, or exportation of subject merchandise, which we are doing under the new language at § 351.509(d). Section 351.509(d) is fully consistent with the requirements in section 701(a)(1) of the Act and no commenter provided further reasoning to suggest otherwise.

We also disagree with the commenter that stated that Commerce has not offered a reason for its proposed departure from its long-established attribution rules. In the *Proposed Rule,* Commerce sought public comment and explicitly stated why we were making this amendment with respect to the attribution of direct taxes, citing language in the *CVD Preamble* that explained that the attribution rules under § 351.525 may not precisely fit the facts of a particular case.[223] Moreover, Commerce explained in the *Proposed Rule* that the *CVD Preamble* explicitly concluded that if subsidies allegedly tied to a particular product are in fact provided to the overall operations of a company, Commerce will attribute the subsidy over sales of all products by the company, and that direct tax benefits addressed under § 351.509 meet the ''tying'' exception criterion established in the *CVD Preamble.*[224] 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 production and sales. Thus, these types of direct tax programs benefit the overall domestic production of the firm. No commenter provided any type of support or reasoning that would contradict our conclusion that a program that provides for a full or partial exemption, reduction, credit, or remission of an income tax reduces the overall tax liability of a firm which is generated from all the firm's production and sales.

Commerce also disagrees with the commenter who stated, with no cited support, that this amendment amounts to tracing how a subsidy is used. In the *CVD Preamble,* Commerce stated the concept of fungibility related to the issue of whether Commerce could, or should, trace the use of specific funds to determine whether such funds were used for their stated purpose.[225] Neither the fungibility of money nor the tracing of the use of a subsidy is relevant to this amendment to our regulations. Under the provisions of § 351.509(d), Commerce is in no way suggesting that it will trace the use of a subsidy through a company's books and records to determine whether subsidy funds were used appropriately (*i.e.,* for their intended use). Indeed, there is no proposal that Commerce will go through a firm's books and records to ascertain which sales, costs, funds, and expenses contributed to the firms total taxable income in order to calculate or attribute the benefit conferred from a program that provides for a full or partial exemption, reduction, credit, or remission of an income tax. Instead, the revised language merely explains that if a program provides for a full or partial exemption, reduction, credit, or remission of an income tax, Commerce normally will consider any benefit to be not tied with respect to a particular market or product.

We also did not implement the suggestion that Commerce should retain discretion with respect to the allocation of the benefit if the granting of the direct tax program was based on a specific market or product. Acceptance of this suggestion would directly contradict the reasons for implementing § 351.509(d). 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 production and sales. Thus, these types of direct tax programs benefit the overall production of a firm. This fundamental element of a program that provides for a full or partial exemption, reduction, credit, or remission of an income tax does not change whether the granting of the income tax exemption, reduction, remission, or credit is based on a specific market or product.

Lastly, one commenter suggested that the change to § 351.509(d) provides Commerce with greater discretion in deciding when a tax is tied to a particular market or product, and it commented that it was not clear how Commerce would exercise such discretion. We believe that this party has misread or misinterpreted the language within § 351.509(d). The language within § 351.509(d) does not provide Commerce with greater discretion to decide when a direct tax is tied to a particular market or product. In fact, one could argue that it limits Commerce's discretion in some ways. Specifically, § 351.509(d) states that Commerce normally will not find a program that provides for a full or partial exemption, reduction, credit, or remission of an income tax to be tied to a particular market or product. Nonetheless, as explained in the *Proposed Rule* and *CVD Preamble,* Commerce currently has the discretion to determine if subsidies allegedly tied to a particular product are in fact provided to the overall operations of a company, and if it makes such a determination, the agency may determine to attribute the subsidy to sales of all products by the company. The revision to § 351.509(d) neither increases nor takes away that discretion from the agency.

13. Commerce has made no further modifications to its proposed changes to the CVD regulation covering export insurance—§ 351.520(a)(1).

[222] *See CVD Preamble,* 63 FR 65400.

[223] *See Proposed Rule,* 88 FR 29869.

[224] *Id.*

[225] *See CVD Preamble,* 63 FR 65403.

With respect to export insurance, Commerce is modifying § 351.520(a)(1) to include a 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 Commerce determines that those rates were inadequate to cover such costs and losses during that period of time, then it may determine that a benefit exists.

As Commerce explained in the *CVD Preamble,*[226] this standard of benefit for export insurance is based on paragraph (j) of the Illustrative List.[227] 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.[228] 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.[229] Therefore, we are amending § 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. All the comments received with respect to § 351.520(a) supported this change.

14. Commerce has made no further amendments to its regulation covering the calculation for ad valorem subsidy rates and attribution of subsidies to a product, § 351.525.

Commerce is making 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 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 this 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 will 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 limited provision of Commerce's discretion.

One point which was not made in the *Proposed Rule,* which we emphasize in this final rule with respect to this regulation, involves export subsidies. An export subsidy is defined under section 771(5A)(B) of the Act as a subsidy that is, in law or fact, contingent upon export performance, alone or as one of two or more conditions. If Commerce determines that a subsidy is an export subsidy because it is contingent upon export performance as one of two or more conditions, the fact that other conditions are not contingent upon export performances is not itself sufficient to depart from the standard attribution and allocation methodology that an export is solely attributed and allocated to products that are exported by the firm.

Commerce received several comments on this regulation that supported this change to § 351.525(b)(2) and (3). However, there were some submissions in which commenters expressed opposition to this amendment. Most of these commenters explained that the amendment should not be adopted because it would create ''excessive unpredictability'' and ''standardless uncertainty'' through agency discretion into the calculation of a subsidy rate. Those commenters expressed concerns that by introducing the word ''normally'' into the attribution rules for export subsidies and domestic subsidies, which are clear and well-established, without any boundary to that discretionary language, Commerce was creating uncertainty where none needs to exist.

In addition, one commenter expressed concerns that the addition of the term ''normally'' to this regulation would contradict section 701(a)(1) of the Act, which states that Commerce must establish that the government or a public entity is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of merchandise under investigation.

Commerce's Response:

We disagree that the insertion of the word ''normally'' into paragraphs (b)(2) and (3) of § 351.525 will create unpredictability and uncertainty in the attribution of export and domestic subsidies. While Commerce does not disagree that the term ''normally'' provides a small degree of flexibility or discretion, such flexibility or discretion is narrow. ''Normally'' means usually or regularly[230]—in other words, the standard practice. If Commerce were to attribute export subsidies not to products exported by a firm, or to attribute domestic subsidies not to products sold by a firm, Commerce would have to provide a reason on the record for not following its normal practice. Commerce does not see how this would make the agency's practice ''unpredictable'' or ''standardless.'' Indeed, the term ''normally'' indicates the very existence of a standard.

In fact, the use of the term ''normally'' and its equivalent, ''in general,'' have appeared in most of Commerce's CVD regulations for at least 25 years, and even § 351.525(b) itself starts with the words ''in general.'' Throughout that time period, Commerce has

[226] *Id.,* 63 FR 65385.

[227] *See* Illustrative List of Export Subsidies, annexed to the 1994 WTO 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'').

[228] *See CVD Preamble,* 63 FR 65385.

[229] *See, e.g., Washers from Korea,* 77 FR 75975; and *Bottom Mount Combination Refrigerators-Freezers from the Republic of Korea: Final Affirmative Countervailing Duty Determination,* 77 FR 17410 (March 26, 2012), and accompanying IDM at Comment 2.

[230] *See Collins Dictionary,* ''Normally,'' retrieved November 9, 2023, *https://www.collinsdictionary.com/us/dictionary/english/normally.*

administered its CVD regulations and has never had problems with ''excessive unpredictability'' and ''standardless uncertainty,'' as suggested by some of the commenters. Accordingly, we disagree that adding the term ''normally'' to § 351.525(b)(2) and (3) will create any of the confusion suggested by certain commenters.

Lastly, in response to the commenter that expressed concerns that this change would contradict section 701(a)(1) of the Act, we disagree. Section 701(a)(1) of the Act does not set forth an attribution methodology to be used with respect to either a domestic subsidy or an export subsidy. This section of the Act requires that Commerce investigate and quantify countervailable subsidies provided directly or indirectly to the manufacture, production, or exportation of subject merchandise. The addition of the term ''normally'' to § 351.525(b)(2) and (3) in no way undermines or contradicts that analysis. Therefore, this modification to the regulation does not in any way contradict section 701(a)(1) of the Act.

15. Commerce has determined to withdraw its transnational subsidy regulation, § 351.527.

After considering the comments received on our proposal to withdraw this section, Commerce has determined to repeal the current transnational subsidies regulation. In repealing this regulation, we clarify that when appropriate, Commerce will investigate and countervail transnational subsidies (*i.e.,* subsidies provided by a government or public entity in one country that benefit producers or exporters in another country).

Section 701 of the Act does not impose geographic limitations on countervailing unfair foreign subsidies. As was explained in the *CVD Preamble,* § 351.527 was derived from now-repealed section 303(a)(1) of the Act.[231] When § 351.527 was promulgated, Commerce's administrative experience at that time was that normally governments were subsidizing manufacturing and production activities in their own countries rather than subsidizing manufacturing and production abroad. Consistent with the experience at that time, upon promulgating § 351.527, in 1998, Commerce repeated this perspective and, accordingly, stated, ''{i}n our view, neither the successorship of section 701 for Subsidies Code members nor the repeal of section 303 by the {Uruguay Round Agreements Act (URAA)}, eliminated the transnational subsidies rule, and there is no other indication that Congress intended to eliminate this rule.'' [232]

Since that time, the assumptions underlying Commerce's interpretation of section 701 of the Act have changed. In the intervening two decades, Commerce has observed increasing instances in which a government subsidizes foreign production. As a result, we now believe that our past regulatory interpretation of section 701 of the Act was overly restrictive and not required by statute. Commerce's self-imposed restriction on its 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 injurious to producers of the domestic like product, is inconsistent with the very purpose of the CVD law. Section 701 of the Act does not require such a restrictive interpretation.

We received numerous comments expressing strong support for eliminating the current transnational subsidies regulation. These commenters argue that Commerce has the statutory authority to investigate and countervail transnational subsidies. Whereas the now-repealed section 303(a)(1) of the Act previously focused on the administering authority's analysis of subsidization on ''article{s} or merchandise manufactured or produced in {the} country {of bestowal},'' this limiting language was repealed by section 261(a) of the URAA, as well as the entirety of section 303 of the Act.[233] In place of the now-repealed section 303 of the Act, section 701 of the Act introduced a new subsidy definition, in which there is no limitation on Commerce's authority to investigate the ''subject country'' or otherwise circumscribe the ''country'' from which the subsidy emanates.[234]

Numerous commenters provided specific examples of the increasing prevalence in which a government provided a subsidy that benefits foreign production. Several commenters cited the People's Republic of China's (China) ''Belt and Roade Initiative'' (BRI) as a primary example. One such commentator explained that subsidies associated with China's BRI program have propped up third country export platforms for a variety of industries. Another commentator explained that programs like China's BRI have driven a rapid expansion of Chinese industrial capacity in third countries with significant government support, which both displaces sustainable, market-based investment and perpetuates global distortion. Significantly, industrial capacity projects under the BRI often proceed with support from investment funds that have the trappings of international lending or development institutions but that are ultimately vehicles for Chinese industrial policy initiatives. In certain industries, including the steel industry, BRI-linked subsidies have transplanted excess capacity into third countries, resulting in a proliferation of non-market production that has avoided AD/CVD orders on unfairly traded imports directly from China.

Commerce's Response:

We agree with these comments. Section 701 of the Act does not impose geographic limitations on countervailing unfair foreign subsidies. Section 351.527 was promulgated over 25 years ago in a global trade environment much different than the current trade environment. Specifically, the subsidization landscape of 25 years ago related primarily to transnational transactions involving foreign aid.[235] In contrast, in today's subsidization landscape, governments provide cross-border equity infusions, fundings, loans, *etc.,* and they are no longer limited to foreign aid. Rather, they are provided to

[231] *See CVD Preamble,* 63 FR 65405. Section 303 (19 U.S.C. 1303) was repealed in 1994, effective January 1, 1995, pursuant to the URAA.

[232] *See Proposed Rule,* 88 FR 29870 (citing *1997 Proposed CVD Rules,* 62 FR 8847, referencing the subsidy attribution regulation covering multinational firms).

[233] *See* SAA at 923. The SAA accompanying the URAA explains the change, in relevant part, as follows: ''under existing law, section 303 applies in the case of a country which is not a 'country under the Agreement' and contains its own definition of subsidy. In light of the new subsidy definition contained in the Subsidies Agreement, it is unnecessary and confusing to retain section 303.''

[234] *See Aerolineas Argentinas* v. *United States,* 77 F.3d 1564, 1575 (Fed. Cir. 1996). The Federal Circuit has pronounced a clear rule: ''When a statute has been repealed, the regulations based on that statute automatically lose their vitality. Regulations do not maintain an independent life, defeating the statutory change.''

[235] *See, e.g., Final Affirmative Countervailing Duty Determination; Fuel Ethanol from Brazil,* 51 FR 3361 (January 27, 1986), and accompanying IDM (determining funds that were provided by the World Bank with the Government of Brazil (GOB) required to match the World Bank's fund commitment. While Commerce countervailed the portion attributed to GOB funds, it found that the portion of funds provided by the World Bank not countervailable); *Final Affirmative Countervailing Duty Determinations; Certain Steel Products from the Republic of Korea,* 47 FR 57535 (December 27, 1982), and accompanying IDM (determining funding for helping war reparations are the result of unique circumstances and reflect political and economic considerations that are outside of the realm of activities which are contemplated by the CVD law. Thus, Commerce could not envision an instance in which benefits flowing from payments of war reparations confer subsidies within the meaning of the Act).

promote the grantor country as well as the recipient's country manufacturing capacities for a particular industry.[236] We also have observed direct investments in a third country from state-owned enterprises, with backings from state-owned policy banks, promoting the specific grantor country's industry policies.[237]

Some commenters argue that, regardless of whether Commerce removes § 351.527, the statute prohibits Commerce from countervailing transnational subsidies. One commenter points out that the statute only gives Commerce the authority to impose a countervailing duty on merchandise from a single country. Therefore, they argue that the statute clearly establishes that Commerce's investigations, and subsequent imposition of countervailing duties as a result of its investigations, are limited to a single country (*i.e.,* ''a'' country).

We are unpersuaded by this argument. As some commenters acknowledged, the text of section 701 of the Act does not prohibit Commerce from finding that a transnational subsidy is countervailable and further, section 701 of the Act allows Commerce to countervail a subsidy from multiple countries if those countries are part of an international consortia.

Another commenter relied on repealed section 303(a)(1) of the Act and the 1993 General Issues Appendix,[238] which provided guidance on pre-URAA determinations, arguing that Congress intended section 701(a) of the Act to have to the same meaning and application as the language in repealed section 303(a)(1) of the Act. We find this comment also to be unpersuasive. As explained above, the language in section 303 of the Act was repealed in its entirety, and the language that existed in section 303(a)(1) was revised and is different from that found in the language codified, pursuant to the URAA, in section 701(a) of the Act.

Some commenters noted practical constraints with respect to transnational subsidy allegations, particularly the risk of imposing unreasonable evidentiary obligations on the government of the exporting countries and, exporting enterprises, as well as the government or other entities of third countries. We acknowledge these concerns, but believe that it is premature to speculate as to Commerce's future evidentiary standards for allegations or findings on various potential transnational subsidies. The existence of a transnational subsidy would be a case-specific one, and Commerce will not speculate on what evidence is needed to allege or prove the existence of a countervailable transnational subsidy without analyzing in the first instance the record evidence presented in a particular proceeding.

As the administering authority for countervailing duty proceedings, it is Commerce's charge to enforce U.S. CVD law, such that U.S. industries are receiving the fullest extent of the remedy provided by the statute. As the dynamics of global trade continue to evolve and foreign governments implement novel approaches to subsidization, the removal of § 351.527 strengthens Commerce's ability to accomplish its statutory mission to assess and remedy unfair foreign trade practices that harm U.S. workers, farmers, and companies.

16. Commerce has made no further modifications to its new CVD regulation covering fees, fines, and penalties—§ 351.529.

Commerce explained in the *Proposed Rule* that when a government fails to enforce its regulations, requirements, or obligations by not collecting a fee, a fine, or a penalty, such inaction can be considered a countervailable subsidy.[239] In that case, the government has forgone revenue it was otherwise due, therefore, benefiting the party not paying the fee, fine, or penalty, pursuant to section 771(5)(D)(ii) of the Act. There are various 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 that were never paid. 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, recognized that no payment had been made, or indicated to the company that it was permitting a payment to be deferred. Section 351.529 of the *Proposed Rule* codified that practice.

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.

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), then 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).

Commerce received several comments on this proposed regulation. We have determined to make no modification to the proposed regulation in response to those comments for the reasons provided below.

Several commenters approved of Commerce's codification of its practice in this regard. One commenter expressed its support for the fact that Commerce may find the existence of a countervailable subsidy even if the government has not taken efforts to seek payment or grant deferral, or otherwise acknowledged nonpayment of the fee, fine, or penalty. Under their view, an unpaid obligation is an unpaid obligation, regardless of the actions taken by the government. That commenter suggested that Commerce might also include in the regulation that it could rely on evidence from third parties, such as reports by international or non-governmental organizations to establish the existence of an unpaid fee, fine, or penalty.

Other commenters supporting the regulation expressed concerns that the

[236] *See, e.g., Economic Statecraft in China's New Overseas Special Economic Zones,* International Food Policy Research Institute (March 2012), found at *https://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/126834/filename/127045.pdf.*

[237] *Id.*

[238] *See Certain Steel Products from Austria,* 58 FR 37217, at Comment 2 of the General Issues Appendix.

[239] *See Proposed Rule,* 88 FR 29858.

regulation, as drafted, could be interpreted too narrowly to only apply when the nonpayment of a fee, fine, or penalty is unique to a particular party, and not when a law or other government measure generally imposes an exception to the payment of a fee, fine, or penalty for certain industries, enterprises, or other groups. The commenters expressed concerns that respondents or foreign governments could argue that payment of a fee, fine, or penalty would not be ''otherwise due'' or ''otherwise required'' under that scenario. They therefore requested that Commerce clarify in the final rule that it will consider a financial contribution to have been conferred under this provision even when non-payment of fees, fines, or penalties by certain entities is provided for by law.

Additional commenters supporting the provision expressed concerns that the regulation was too narrow in addressing government inaction, and that it should also apply to the other examples Commerce described in the preamble to the *Proposed Rule*—specifically, weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, and environmental protections. Those commenters suggested that Commerce should determine that the government inaction in those situations is a financial contribution that provides a benefit specific to those industries and enterprises benefiting from lower costs and, therefore, Commerce should countervail that government inaction in practice and in its regulations.

Other commenters focused on the ''otherwise due'' language. One sought further clarification as to when the benefit of an unpaid fee, fine, or penalty is ''otherwise due.'' Another commenter, focusing both on the ''otherwise due'' language, as well as on the regulatory language stating that there need not be evidence of affirmative government demands for payment, commented that the word ''due'' means ''immediately enforceable,'' and therefore, in the absence of an automatic or formal final assessment of the fee, fine, or penalty, claimed that Commerce lacks the statutory authority to treat the non-collection of such obligations as a countervailable subsidy. In other words, for example, if a law is passed that exempts certain companies from paying certain fines, until those fines actually come due and the government demands payment, the commenter stated that the revenue cannot be due or ''forgone.'' Therefore, the commenter suggested that Commerce should provide for this alleged revenue forgone limitation in the regulation.

Another commenter stated that the proposed regulation presents a vague definition of government inaction and unreasonably expands the scope of subsidies permitted by law, while other commenters expressed concerns that Commerce's practice and the regulation undermines the sovereign authority of foreign regulatory and enforcement agencies to determine the extent to which they will pursue, settle, or dismiss these types of claims. They expressed concerns that this regulation fails to account for legitimate disputes between the foreign government regulatory or enforcement authority and the foreign producer, including, for example settlements of litigation in which the government determines that a lesser amount, or nonpayment, of a fee, fine, or penalty is acceptable, as part of a bigger settlement package.

Commerce's Response:

In response to the request that Commerce include in the regulation that the agency could rely on evidence from third parties, such as reports by international or non-governmental organizations, to establish the existence of unpaid fees, fines, or penalties, Commerce has determined that no such additional language is needed. It is Commerce's practice in determining if there is a financial contribution, including a financial contribution in the form of revenue forgone, to consider all of the information on the record before it. That would include international and non-governmental organization reports, but it could also include other sources of information. Therefore, consistent with long-standing established practice, in making any findings or determinations under this regulation, Commerce will analyze and consider all of the facts and information on the record of the proceeding. Accordingly, Commerce has determined not to include the language suggested by that commenter in the regulation.

With respect to the suggestion that Commerce should clarify that § 351.529 applies when the law itself excludes certain industries, enterprises, or other groups from paying certain fees, fines, or penalties, Commerce does not disagree that it could apply, but we do not believe that the regulation should be revised. Without question, a *de jure* exemption in the law from the requirement to pay a fee, fine, penalty, direct tax, indirect tax, or import charge, or an exemption from the requirements of various laws, regulations, or programs, can confer a countervailable subsidy within the meaning of the Act. However, Commerce can address such subsidies in its application of the CVD law with or without § 351.529. The issue is whether language specific to exclusions from payment by statute or regulation should be added to this regulatory provision unique to fees, fines, and penalties. We have decided that the inclusion of such language would be inappropriate because similar language does not exist in the regulatory provisions for direct taxes, indirect taxes, import charges, and other relevant revenue forgone examples.

Section 771(5)(D)(ii) of the Act states that there is a financial contribution conferred by forgoing or not collecting revenue that is otherwise due, (*e.g.,* granting tax credits or deductions from taxable income), and the SAA states that although section 771(5)(D) of the Act provides a list of four broad categories of government practices that constitute a ''financial contribution,'' the examples of particular types of government practices under each of these categories are not intended to be exhaustive.[240] Therefore, the range of government acts or practices that constitute revenue forgone is broad. We are concerned that if we applied the suggested language in this particular regulatory provision, but not to others where it would also naturally apply, a court might incorrectly hold that we intended for such a requirement to only apply to some, and not all, of the regulations addressing revenue forgone by a government through nonpayment or non-collection of certain obligations. That is not Commerce's intention because *de jure* exemptions from payment of financial obligations are countervailable across the board for all types of revenue forgone by the government. Thus, we are not including the suggested language in § 351.529.

In response to the commenters who suggested that Commerce should include the ability of the agency to countervail weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, and environmental protections in this regulation, we disagree that such a request is consistent with our intentions in issuing § 351.529. Section 351.529 is intended to codify our long-standing practice of treating unpaid and deferred fees, fines, and penalties as a countervailable subsidy. It was never intended to address all subsidies conferred by government inaction.

However, this regulation was also never intended to preclude Commerce from addressing either the inactions or measures of a government under the other forms of financial contributions

[240] *See* SAA at 927.

defined within the statute. Section 701(a) of the Act requires Commerce to impose a CVD equal to the countervailable subsidies conferred either directly or indirectly upon the manufacture, production, or exportation of subject merchandise. Therefore, any government act, measure, or practice that provides a financial contribution and a benefit within the meaning of sections 771(5)(D) and 771(5)(E) of the Act and is specific within the meaning of section 771(5A) of the Act is countervailable. In addition, our regulations explicitly acknowledge that there may be cases where a government program is not covered by a specific rule and provide for a general rule as to the benefit measurement for those types of programs.[241] Accordingly, although Commerce finds that it would be inappropriate to include other areas of government inaction in a regulation drafted to address, specifically, the nonpayment of fees, fines, and penalties, Commerce also finds that the refusal to include such language in the regulation in no way supports or detracts from the commenters' points with respect to the countervailability of other forms of government inaction.

With regard to the arguments about the term ''otherwise due,'' the financial contribution, and the related benefit, under the language of this regulation is the amount of the payment that was required of a party but was not made or was made only in part. Given the potential range of fees, fines, and penalties that could fall within this regulation and the various foreign government regulations, policies, and practices that may cover any of these fees, fines, and penalties, Commerce does not believe that it can provide further guidance in the regulation as to the timing of benefits. The timing of the benefit will differ depending on the facts on the record (*e.g.,* the terms of a fine, the various forms the fine might take, and types of payment that a party may use to pay for all, or some, of the fine). Thus, further language in the regulation on the timing of a benefit could be counterproductive and unnecessarily limit Commerce's ability to address the timing of a benefit based on the unique facts of a record before it.

Moreover, with respect to the alleged definition of revenue ''otherwise due'' and revenue forgone, we disagree with that commenter's understanding of the CVD law in general. Section 771(5)(D) of the Act defines one type of financial contribution as forgoing or not collecting revenue that is otherwise due. Congress, in creating and enacting the CVD law, did not provide a statutory definition for the word ''due.'' Thus, the commenter's presented definition of ''due'' is not binding. Indeed, the explicit language within the Act uses the phrase ''not collecting'' without the use of any qualifier such as ''automatic'' or ''final assessment,'' as suggested by the commenter. Although not a controlling definition, even the cite to *Black's Law Dictionary* used by the commenter itself for the term ''due'' does not, in fact, include within its definition the words ''automatic'' or ''final,'' as suggested by the commenter.[242]

Furthermore, the commenter's points with respect to the limitations of a revenue forgone analysis are illogical. For example, if a government creates an income tax law which sets the corporate income rate at 25 percent and makes it applicable to all corporations except those in the car industry, it would be nonsensical to claim that a countervailable subsidy has not been provided to the car industry because no bill was demanded of the car manufacturers. In creating this income tax law, the government undertook an act or practice to exempt one industry from income taxes. Similarly, if a government created a law to address the releasing of pollutants into the water which provided for fines of companies that violate this law, but specifically exempted or simply did not include the car industry within this law, this exclusion or exemption would provide a financial contribution and benefit under the statute to the car industry if it was determined that an investigated car manufacture released pollutants into the water, and the benefit would be based on the amount of the fines it otherwise would have been assessed under the law if it were any manufacturer other than a car manufacturer.

In addition, it is counterintuitive to argue that a financial contribution within the meaning of section 771(5)(D)(ii) of the Act would not exist if a government exempts an enterprise or industry from the requirements of a law, regulation, or program that imposes fees, fines, or penalties (or taxes for that matter). Indeed, with respect to exporters, a government providing exporters with such exemptions is the very definition of an export subsidy, a type of countervailable subsidy explicitly referenced in section 771(5A)(B) of the Act. As the U.S. Supreme Court stated in *Zenith,*[243] the CVD law was intended to offset the unfair competitive advantages that foreign producers would otherwise enjoy from export subsidies provided by their governments, and the points made by the commenter on revenue forgone in this context would be contrary to those intentions. Accordingly, Commerce will not include the limitations suggested by that commenter in § 351.529.

With respect to the claim that the regulation presents a vague definition of government inaction and unreasonably expands the scope of subsidies, we disagree. The regulation is limited only to the nonpayment of fees, fines, and penalties, and the regulation explicitly addresses revenue forgone by the government it was otherwise due, thereby, providing a financial contribution that benefits the party not paying the fee, fine, or penalty.

We also disagree with that same commenter's claim that the regulation unreasonably expands the scope of subsidies which Commerce may lawfully address. Section 351.102(a)(25) of our regulations state that ''government-provided'' is a shorthand expression for an act or practice that is alleged to be a countervailable subsidy. Under section 771(5)(D) of the Act, a government act or practice may provide a financial contribution, which under section 771(5)(E) of the Act may confer a benefit to the recipient. If Commerce determines under section 771(5A) of the Act that the financial contribution providing a benefit is specific, then Commerce may countervail that subsidy.[244] Moreover, as noted above, the SAA states that section 771(5)(D) of the Act provides a list of four broad categories of government practices that constitute a ''financial contribution,'' and that the examples of particular types of government practices under each of these categories are not intended to be exhaustive.[245] The nonpayment and non-collection of fees, fines, and penalties is a clear example of revenue forgone under section 771(5)(D) of the Act, and therefore, this regulation in no way ''expands'' the scope of subsidies which Commerce may address in its CVD law.

Finally, in response to the concerns of certain commenters that § 351.529 undermines the sovereign authority of

[241] *See* § 351.503(a) and (b).

[242] *See Black's Law Dictionary, 2nd Ed.,* ''due,'' retrieved November 8, 2023, *https://thelaw dictionary.org/due.* (''Owing; payable; justly owed. That which one contracts to pay or perform to another; that which law or justice requires to be paid or done'' and ''Owed, or owing, as distinguished from payable. A debt is often said to be due from a person where he is the party owing it, or primarily bound to pay, whether the time for payment has or has not arrived'').

[243] *See Zenith Radio Corporation* v. *United States,* 437 U.S. 443, 455 (1978) (*Zenith*).

[244] *See* SAA at 925.

[245] *Id.* at 927.

foreign regulatory and enforcement agencies to determine the extent to which they will pursue, settle, or dismiss these types of claims, we disagree. Neither the Act nor the SCM Agreement ''undermine{} the sovereign authority'' of foreign governments, and this regulatory provision is consistent with both.

For example, a foreign government is free to subsidize its car industry; however, the Act and the SCM Agreement allow the United States government to offset those subsidies with countervailing duties. If a foreign government does not wish to collect a fee, fine, or penalty that should have been paid by one of its domestic car manufacturers, it is free not to do so as well. Commerce is not suggesting that the foreign government cannot prioritize the collection of certain financial obligations by certain parties over others. However, under both the Act and the SCM Agreement, just as the foreign government has the right to not collect foreign fees, fines, and penalties, the United States has the right to countervail that non-collection of foreign fees, fines, and penalties by the foreign government.

With respect to the issue about settlements and litigation, Commerce recognizes that where there is the presence of an independent judiciary system, there could be a legitimate legal dispute between two parties such as a government agency and a private company with respect to money or taxes due. That could lead to a court holding that the private party pay less or no fees, fines, and penalties. It could also lead to the payment of less or no fees, fines, or penalties pursuant to a larger litigation settlement between the government and a private company. Commerce recognizes such holdings and settlements arising out of litigation occur both in the United States, as well as other countries, and that the existence of such holdings and settlements could be facts on the record before Commerce in considering whether to countervail or not countervail the nonpayment and non-collection of certain fees, fines, or penalties.

However, it is important to emphasize that the judgment of an independent court on a legitimate legal dispute is different from a court accepting a settlement of a dispute between the government and a private party. Unlike a court holding, a settlement of a debt, fee, or fine between a government and a private party could constitute both a financial contribution and a benefit under the Act regardless of whether that settlement has been sanctioned by a court. The countervailability of such a subsidy would be based on the facts on the record.

We understand that foreign governments may decide to waive the payment of certain fees, fines, and penalties for a host of reasons, including litigation, and ultimately such a waiver is a benefit to the recipient regardless of the motivations of the foreign government. Accordingly, we disagree with the commenters that stated that Commerce cannot countervail the nonpayment of fees, fines, or penalties depending on the reason provided for such a waiver by the foreign government. Nonpayment and non-collection of fees, fines, and penalties is, by any other identifier, nonpayment and non-collection of fees, fines, and penalties, and in many cases, Commerce will be able to countervail such nonpayment and non-collection as revenue forgone by the foreign government in accordance with § 351.529.

17. Commerce is changing each reference to Customs Service in part 351 of its regulations to U.S. Customs and Border Protection and adding a definition of U.S. Customs and Border Protection—§ 351.102(b)(53).

The Customs Service, which was created on July 31, 1789, was integrated into a new agency, the U.S. Customs and Border Protection, on March 1, 2003. However, Commerce's antidumping and countervailing duty regulations continue to refer to the agency which administers the trade remedy laws in part 351 as the Customs Service, other than in the definition of ''Customs Service'' in current § 351.102(b)(14). Commerce is now amending its regulations in this final rule to remove the term Customs Service, wherever it appears, and to replace it with the correct agency name—U.S. Customs and Border Protection. Furthermore, Commerce has added a definition for the term U.S. Customs and Border Protection to its regulations.

18. Commerce is adding the definition of the term ''days'' to clarify that the term normally means calendar days when used throughout part 351—§ 351.102(b)(14).

Commerce's regulations currently do not define whether the term ''days,'' when used throughout part 351, references calendar days or business days, and Commerce is frequently asked by outside parties whether certain regulatory deadlines are based on calendar or business days. Commerce has consistently treated the term ''days'' in its regulations, with no further qualifier, to mean calendar days.[246] Accordingly, to add clarity to the regulations, Commerce is amending the regulation at § 351.102(b)(14), replacing the definition of ''Customs Service'' with the definition of the term ''days.'' The definition of ''days'' states that for purposes of deadlines and time limits for submissions, if the term ''days'' is used, without a qualifier, the term will generally mean calendar days. If Commerce intends in a particular provision to use business days instead, then the definition states that the regulation will explicitly indicate that the business day alternative applies.[247]

Summary of Changes From the Proposed to the Final Rule

Commerce has made the following changes to the regulatory text in the *Proposed Rule* that are reflected in the final regulatory text and preamble of this final rule as follows:

Commerce has revised § 351.102(b)(14) to define the term ''days'' to explain that the term generally means calendar days and not business days, and if Commerce wishes for business days to be applied, it will explicitly state as such.

Commerce revised § 351.104(a)(1) and added § 351.104(a)(3) through (7) to identify the information sources that may be cited in submissions without submitting them on the official record and the information sources that must be submitted on the official record for Commerce to consider them in the ongoing segment of a proceeding. All citations to public documents from other segments and proceedings which may be cited without submitting them on the record must include the ACCESS barcode in the citation.

Commerce determined to not revise § 351.301(c)(4) as was presented in the *Proposed Rule,* in agreement with the commenters who expressed concerns that the proposed revision would not provide interested parties with sufficient opportunity to respond to

[246] *See e.g., Sodium Nitrite from India: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures,* 87 FR 50604 (August 17, 2022) (stating, in accordance with § 351.210(b), ''Commerce will make its final determination no later than 135 days after the publication of this preliminary determination.''); and *Sodium Nitrite from India: Final Affirmative Determination of Sales at Less Than Fair Value,* 88 FR 1052 (January 6, 2023) (announcing Commerce's final determination signed on December 30, 2022, or 135 calendar days after the preliminary determination).

[247] *See, e.g.,* § 351.304(d)(1) (stating that a submitter must take certain actions ''within two business days after receiving the Secretary's explanation'').

information placed by Commerce on the record late in a segment of a proceeding.

Commerce revised §§ 351.225(f), 351.226(f), and 351.227(d) to reflect that only the filing and timing restrictions set forth in § 351.301(c) do not apply to the filing deadlines set forth in the scope, circumvention, and covered merchandise regulations. Further, in response to comments and concerns from outside parties, the proposed amendments to § 351.225(q) have been revised to limit and further clarify the situations in which a scope clarification may be applied, and the means by which it may be issued. Commerce also made minor edits to the terminology proposed in §§ 351.225(m)(2), 351.226(m)(2), and 351.227(m)(2) to clarify what preliminary and final documents from scope, circumvention, and covered merchandise segments should be placed on the CVD record once a proceeding covering companion orders is completed on the AD record.

Commerce revised certain language in the newly proposed § 351.301(c)(6), clarifying that Commerce can only guarantee that it will address Notices of Subsequent Authority filed within 30 days of the issuance of the alleged authority and 30 days before a final determination or final results deadline (and 25 days before a final determination or final results deadline for rebuttal comments), but removed proposed language which would have stated that Commerce would not consider and address submissions after the pre-final determination and results deadlines. Commerce agreed with commenters who explained that when Commerce is able, it must address subsequent authorities, but notes that the regulation explains that Commerce may not be able to consider and address such authorities if there is little time after the submission is filed before the issuance date of a final determination or results.

With respect to the proposed amendments to § 351.308, Commerce revised the lettering to have the CVD AFA hierarchy appear at paragraph (j), reserving paragraphs (g), (h), and (i) for future rulemaking to codify, in part, additions Congress made to section 776 of the Act in 2015. Furthermore, in response to multiple comments, Commerce removed its ''above-zero'' threshold in the first step of the CVD AFA hierarchy for investigations, and instead replaced it with a ''above-*de minimis*'' threshold to better reflect the statutory purpose of AFA to induce cooperation by interested parties.

Commerce made minor changes to its regulations addressing government inaction which distorts prices or costs through weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, and environment protections. Specifically, Commerce modified § 351.416(d)(2)(v) of the PMS regulation to clarify that if Commerce looks to the actions of governments in other countries to analyze the cost effects of government inaction, it will normally consider only the actions of governments in comparable economies. Furthermore, Commerce revised the proposed language for § 351.408(d)(1)(i) and (ii) to clarify that it is Commerce who determines as part of its surrogate value analysis if a proposed value on the record ''was derived'' from a country that provides broadly available export subsidies,'' that particular instances of subsidization occurred with respect to a proposed surrogate value, and that a proposed surrogate value was subject to an AD order, or was derived from a facility, party, industry, intra-country region or a country with weak, ineffective, or nonexistent protections.

Commerce substantially revised its proposed PMS regulation, § 351.416, in response to many outside comments on the regulation. Such revisions include the following: (1) addition and revision of terminology throughout the regulation for consistency and clarification; (2) clarification in § 351.416(a) that the regulation is defining both sales-based particular market situations and cost-based particular market situations; (3) the removal of the terms ''distinct'' and ''considerably'' from proposed § 351.416(a), (b), (c), (d), and (e), so as not to create any confusion that further standards or tests are required as part of Commerce's PMS analysis; (4) revisions to § 351.416(c) to explain that Commerce's sales-based PMS analysis is limited to certain period of investigation or review; (5) revisions to § 351.416(d) to clarify that Commerce's analysis is limited to the relevant period of investigation or review, and is divided into three parts—a finding of a circumstance or set of circumstances that impacts costs or prices, a finding that costs were distorted, and a finding that it is more likely than not that the circumstances or set of circumstances at issue contributed to the distortion of the costs of production of the subject merchandise; (6) additional changes to § 351.416(d) to clarify Commerce's analysis of a cost-based PMS allegation, including a listing of information in § 351.416(d)(4) that will not preclude it from finding the existence of a PMS; (7) modifications to § 351.416(e) to explain that a market situation's particularity is not determined by the number of impacted parties, but only if it applies to certain parties and products, and that the provision applies equally to both sales-based and cost-based PMS determinations; (8) extensive changes to § 351.416(f)—explaining that if Commerce determines the existence of a cost-based PMS, it can adjust its calculations of the cost of production, and if it cannot precisely quantify the distortions in the cost of production caused by the PMS, then it can use any reasonable methodology to adjust its calculations based on record information. Furthermore, the regulation provides that even if Commerce determines the existence of a cost-based PMS, it may determine to make no adjustment if it believes an adjustment is not warranted, and the regulation provides guidance on factors which Commerce may consider in determining if an adjustment is appropriate; (9) revisions to certain language used in its proposed examples of cost-based particular market situations in § 351.416(g), a refinement of the circumstances described in § 351.406(g)(9), and provision of more extensive descriptions of nongovernmental actions in § 351.416(g)(12) that could become a PMS which distorts a producer's costs of production; and (10) certain minor revisions to § 351.416(h) to bring that provision into conformity with the language of other provisions of the PMS regulation.

Commerce modified the proposed amendment to § 351.505(d), the loan regulation, to state that Commerce will normally treat a loan as a grant if no ''payments on the loan'' 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 or ''the payments on the loan are consistent with the terms of the loan contract.'' Commerce made the modifications to allow for parties to show that the payments on the loan were consistent with the terms of a contract, and not to treat accrued, unpaid interest in every case as a grant, as proposed in the *Proposed Rule,* in response to comments filed on the record addressing ''balloon'' loans and the case-specific nature of the inclusion, or exclusion, of accrued, unpaid interest in Commerce's benefit calculations.

Commerce also made a small change to its proposed amendments to § 351.507(c), its equity regulation, adding the word ''outside'' to the term ''private investor,'' to clarify that the sentence was meant only to apply to

outside private investors, and not private investors within a company.

Lastly, the Customs Service was integrated into a new agency, the U.S. Customs and Border Protection, in 2003. Commerce amended its regulations in this final rule to remove the term ''the Customs Service,'' wherever it appears, and to replace it with the correct agency name—U.S. Customs and Border Protection. In furtherance of that modification, Commerce has also added a definition of U.S. Customs and Border Protection at § 351.102(b)(53).

Classifications

Executive Order 12866

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

Executive Order 13132

This final rule does not contain policies with federalism implications as that term is defined in section 1(a) of Executive Order 13132 of August 4, 1999, 64 FR 43255 (August 10, 1999).

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Chief Counsel for Regulation has certified to the Chief Counsel for Advocacy of the Small Business Administration under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the rule would not have a significant economic impact on a substantial number of small business entities. A summary of the need for, objectives of, and legal basis for this rule is provided in the preamble and is not repeated here. Commerce did not receive comments opposing this certification in response to the *Proposed Rule.* Thus, a Final Regulatory Flexibility Analysis is not required and 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: March 8, 2024.

Ryan Majerus,

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

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

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

■ 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 part 351, remove the text ''the Customs Service'' wherever it appears and add in its place the text ''U.S. Customs and Border Protection''.

■ 3. In § 351.102, revise paragraph (b)(14) and add paragraph (b)(53) to read as follows:

§ 351.102 Definitions.

* * * * *

(b) * * *

(14) *Days.* Deadlines and time limits for submissions with the Secretary that reference a number of ''days,'' will generally mean calendar days. If certain deadlines or time limits are intended to apply to business days instead, which are Monday through Friday, except Federal holidays, then the applicable regulatory provisions implementing such deadlines or time limits will explicitly indicate the use of the business day alternative.

* * * * *

(53) *U.S. Customs and Border Protection. U.S. Customs and Border Protection* means United States Customs and Border Protection of the United States Department of Homeland Security.

■ 4. In § 351.104, revise paragraph (a)(1) and add paragraphs (a)(3) through (7) 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, documents published in the **Federal Register**, and transcripts of hearings. The official record will contain material that is public, business proprietary, privileged, and classified. 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) *Filing requirements for documents not originating with the Department*—(i) *In general.* Documents not originating with the Department must be placed on the official record for the documents to be considered by the Secretary in the Secretary's analysis and determinations. With the exception of the sources enumerated in paragraph (a)(3)(ii) of this section, mere citations to hyperlinks, website Uniform Resource Locators (URLs), or other sources of information do not constitute placement of the information from those sources on the official record. Unless the exceptions of paragraph (a)(3)(ii) apply, the filing and timing requirements of § 351.301 apply to such information.

(ii) *Exceptions for publicly available documents not originating with the Department.* The following publicly available sources of information not originating with the Department will be considered by the Secretary in the Secretary's analysis and determinations when fully cited by submitting parties without the requirement that the information sources be placed on the official record: United States statutes and regulations; published United States legislative history; United States court decisions and orders; **Federal Register** notices and determinations; Commission reports adopted by reference in the **Federal Register**; dictionary definitions; international agreements identified in § 351.101(a) and dispute settlement determinations arising out of those international agreements. The Secretary may decline to consider sources of information in its analysis or determination that are not cited in full.

(4) *Filing requirements for proprietary, privileged, and classified information.* When lawfully permitted, all proprietary, privileged, and classified information, including documents originating with the

Department containing such information from another segment of the same proceeding, must be placed on the official record in their entirety for the Secretary to consider that information in its analysis and determinations, and the filing and timing restrictions of § 351.301 apply to such information.

(5) *Notices and determinations originating with the Department and published in the* **Federal Register**. All notices and determinations originating with the Department and published in the **Federal Register** may be cited by parties in submissions for consideration by the Secretary without the requirement that the notice or determination be placed on the official record, as long as those notices and determinations are cited in full. The Secretary may decline to consider notices or determinations that are not cited in full. Section 351.301 does not apply to **Federal Register** notices and determinations.

(6) *Public versions of certain unpublished documents originating with the Department which may always be referenced by citation without placing the information on the record.* Public versions of the following documents originating with the Department derived from other segments and proceedings may be cited in submissions for consideration by the Secretary without being placed on the record, as long as those documents are cited in full. In providing a citation to a document originating with the Department, the submitter must explain in the text of the submitted document the factual and legal reasons for which the submitter is citing the document and an Enforcement and Compliance Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS) barcode number associated with the document must be included as part of the citation. If an ACCESS barcode number is not included in the citation or is incorrectly transcribed, or the document is not cited in full, the Secretary may decline to consider the cited decision document in its analysis or determination. The timing and filing restrictions of § 351.301 shall not apply to these documents:

(i) Preliminary and final issues and decision memoranda issued in investigations pursuant to §§ 351.205 and 351.210;

(ii) Preliminary and final issues and decision memoranda issued in administrative reviews, pursuant to § 351.213;

(iii) Preliminary and final issues and decision memoranda issued in new shipper reviews, pursuant to § 351.214;

(iv) Preliminary and final issues and decision memoranda in changed circumstances reviews, pursuant to § 351.216;

(v) Preliminary and final issues and decision memoranda in sunset reviews, pursuant to § 351.218;

(vi) Preliminary and final decision memoranda issued in scope inquiries pursuant to § 351.225, circumvention inquiries pursuant to § 351.226, and covered merchandise inquiries pursuant to § 351.227;

(vii) Draft and final redeterminations on remand;

(viii) Draft and final redeterminations issued pursuant to section 129 of the Uruguay Round Agreements Act;

(ix) Initiation decision documents, such as initiation checklists;

(x) New subsidy allegation memoranda;

(xi) Scope memoranda issued in an investigation; and

(xii) Post-preliminary determination or results memoranda addressing issues for the first time in the period of time between preliminary and final determinations or results.

(7) *Special rules for public versions of documents originating with the Department with no associated ACCESS barcode numbers.* Public versions of documents originating with Commerce in other segments or proceedings under paragraph (a)(6) of this section but not associated with an ACCESS barcode number, including documents issued before the implementation of ACCESS, must be submitted on the record in their entirety to be considered by the Secretary in its analysis and determinations and are subject to the timing and filing restrictions of § 351.301.

* * * * *

■ 5. In § 351.225:

■ a. Revise paragraph (c)(1);

■ b. Add paragraphs (c)(2)(x) and (c)(3);

■ c. Revise paragraph (d)(1);

■ d. Add introductory text to paragraph (f);

■ e. Revise paragraph (l)(1);

■ f. In paragraph (l)(5), remove ''the Customs Service's'' and add in its place ''the U.S. Customs and Border Protection's''; and

■ g. Revise paragraphs (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, or has been 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) *Acceptance and 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 and to initiate or not initiate a scope inquiry, or, in the alternative, paragraph (d)(1)(ii) will apply.

(i) If the Secretary determines that a scope ruling application is incomplete or otherwise unacceptable, the Secretary may reject the scope ruling application and will provide a written explanation of the reasons for the rejection. If the scope ruling application is rejected, the applicant may resubmit the full application at any time, with all identified deficiencies corrected.

(ii) If the Secretary 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 filing and timing restrictions of § 351.301(c) do not apply to this paragraph (f), and factual information submitted inconsistent with the terms of this paragraph may be rejected as unsolicited and untimely.

* * * * *

(l) * * *

(1) When the Secretary initiates a scope inquiry under paragraph (b) or (d) of this section, the Secretary will notify U.S. Customs and Border Protection of the initiation and direct U.S. Customs and Border Protection 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), and a rescinded administrative review pursuant to § 351.213(d), as well as any other entries already suspended by U.S. Customs and Border Protection 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 the scope ruling memoranda, a copy of the preliminary scope ruling memoranda, if one had been issued, and all relevant instructions to U.S. Customs and Border Protection.

* * * * *

(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 but does not address or determine whether a product is covered by the scope of an order in the first instance other than in the situations listed in this paragraph (q).

(1) Scope clarifications may be used in the following situations to clarify:

(i) Whether a product is covered or excluded by the scope of an order based on two or more previous scope determinations covering products which have the same or similar physical characteristics (including chemical, dimensional, and technical characteristics);

(ii) Whether a product covered by the scope of an order, and for which coverage is not at issue, 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, in the following circumstances, continue to apply to the product at issue:

(A) 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;

(B) Changes to Harmonized Tariff Schedule classifications, as administered by the Commission; and

(C) Changes to industrial standards set forth in a scope, as determined by the industry source for those standards identified in the scope; and

(iv) To clarify an analysis conducted by Commerce in a previous scope determination or scope ruling. For example, an issue may arise as to whether certain processing, observed in a segment of proceeding and conducted in a third country, falls within a stage of production previously determined by the Secretary in a country-of-origin analysis in the same proceeding, pursuant to paragraph (j)(2) of this section, to be the stage of production at which the essential component of the product is produced or where the essential characteristics of the product are imparted.

(2) Scope clarifications may take the form of an interpretive footnote to the scope when the scope is published or issued in instructions to U.S. Customs and Border Protection, or in a memorandum issued in an ongoing segment of a proceeding. At the discretion of the Secretary, a scope clarification may also take the form of preliminary and final notices of scope clarification published in the **Federal Register**. If the Secretary decides to publish preliminary and final notifications of scope clarification, it must provide interested parties at least 30 days after the publication of the preliminary notification of scope clarification to file comments with the Secretary. The Secretary will address those comments in the final notification of scope clarification published in the **Federal Register**.

■ 6. In § 351.226:

■ a. Add paragraph (c)(3);

■ b. Revise paragraphs (d)(1) and (e)(1);

■ c. Add introductory text to paragraph (f);

■ d. In paragraph (l)(5), remove ''the Customs Service's'' and add in its place ''the U.S. Customs and Border Protection's''; and

■ e. 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.

(i) If the Secretary determines that the request is incomplete or otherwise unacceptable, the Secretary may reject the request, and will provide a written explanation of the reasons for the rejection. If the request is rejected, the requestor may resubmit the full request at any time, with all identified deficiencies corrected.

(ii) If the Secretary 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 additional days.

* * * * *

(f) *Circumvention inquiry procedures.* The filing and timing instructions of § 351.301(c) do not apply to this paragraph (f), and factual information submitted inconsistent with the terms of this paragraph may be rejected as unsolicited and untimely.

* * * * *

(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 copies of the final circumvention determination memoranda, the final circumvention determination **Federal Register** notice, the preliminary circumvention determination memoranda, the preliminary circumvention determination **Federal Register** notice, and all relevant instructions to U.S. Customs and Border Protection.

* * * * *

■ 7. In § 351.227:

■ a. Add introductory text to paragraph (d);

■ b. In paragraph (d)(5)(i), remove ''The Customs Service'' and add in its place ''The U.S. Customs and Border Protection'';

■ c. Revise paragraphs (l)(1);

■ d. In paragraph (l)(5), remove ''the Customs Service's'' and add in its place ''the U.S. Customs and Border Protection's''; and

■ e. Revise paragraph (m)(2).

The addition and revisions read as follows:

§ 351.227 Covered merchandise referrals.

* * * * *

(d) *Covered merchandise inquiry procedures.* The filing and timing restrictions of § 351.301(c) do not apply to this paragraph (d), and factual information submitted inconsistent with the terms of this paragraph (d) may be rejected as unsolicited and untimely.

* * * * *

(l) * * *

(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 U.S. Customs and Border Protection of the initiation and direct U.S. Customs and Border Protection 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), and a rescinded administrative review pursuant to § 351.213(d), as well as any other entries already suspended by U.S. Customs and Border Protection 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 the final covered merchandise determination memoranda, the final covered merchandise determination **Federal Register** notice, the preliminary covered merchandise determination memoranda and preliminary covered merchandise determination **Federal Register** notice, if a preliminary determination was issued, and all relevant instructions to U.S. Customs and Border Protection.

* * * * *

■ 8. In § 351.301, add paragraph (c)(6) to read as follows:

§ 351.301 Time limits for submissions of factual information.

* * * * *

(c) * * *

(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 consider and address a Notice of Subsequent Authority in its final determinations or final results which is submitted no later than 30 days after the alleged subsequent authority was issued and no later than 30 days before the deadline for issuing the final determination or results. Rebuttal submissions must be filed no later than 25 days before the deadline for issuing the final determinations or results. Given statutory deadlines for administrative proceedings, the Secretary may be unable to consider and address the arguments and applicability of alleged subsequent authorities adequately in a final determination or final results if a Notice of Subsequent Authority or rebuttal submission is submitted later in the segment of the proceeding.

(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.

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

§ 351.306 Use of business proprietary information.

* * * * *

(b) *By an authorized applicant.* (1) An authorized applicant may retain business proprietary information for the time authorized by the terms of the administrative protective order (APO).

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

(3) 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.

(4) 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.

(5) 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.

* * * * *

■ 10. In § 351.308, add reserved paragraphs (g) through (i) and paragraph (j) to read as follows:

§ 351.308 Determinations on the basis of facts available.

* * * * *

(g)–(i) [Reserved]

(j) *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-*de minimis* rate for the identical program;

(ii) If no rate exists which the Secretary is able to apply under paragraph (j)(1)(i), 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 (j)(1)(ii), 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 (j)(1)(iii), 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 (j)(2)(i), 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 (j)(2)(ii), 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 (j)(2)(iii), 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.

§ 351.402 [Amended]

■ 11. In § 351.402, remove ''the Customs Service's'' and add in its place ''the U.S. Customs and Border Protection's'' in paragraph (f)(2)(ii).

■ 12. 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 the Secretary determines that the 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 the Secretary determines based on record evidence that the 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.

■ 13. Add § 351.416 to read as follows:

§ 351.416 Determination of a particular market situation.

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

(1) Prevents or does not permit a proper comparison of sales prices in the home market or third country market with export prices and constructed export prices; or

(2) Contributes to the distortion of the cost of materials and fabrication or other processing of any kind, such that the cost of production of merchandise subject to an investigation, suspension agreement, or antidumping order does not accurately reflect the cost of production in the ordinary course of trade.

(b) *Submission requirements when alleging the existence of a particular market situation.* When an interested party submits 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 or ongoing segment of the same or another proceeding, the interested party must identify the facts and arguments in the submission which are distinguishable from those provided in the other segment or proceeding.

(c) *A determination that a particular market situation prevented or did not permit a proper comparison of prices existed during the period of investigation or review.* The Secretary may determine that a particular market situation, identified in paragraph (a)(1) of this section, existed during the period of investigation or review if a circumstance or set of circumstances prevented or did not permit a proper comparison between sales prices in the home market or third country market of the foreign like product and export prices or constructed export prices of subject merchandise for purposes of an antidumping analysis.

(1) *Examples of particular market situations in the home market that may prevent or do not permit a proper*

comparison with U.S. price. Examples of a circumstance or set of circumstances in the home market that may prevent or not permit a proper comparison of prices, 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 market that may prevent or not permit a proper comparison of prices.* In situations where third country prices may be needed to calculate normal value in a dumping calculation, 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 use of constructed value may be warranted if a proper comparison of prices is prevented or not permitted.* If the Secretary determines that a particular market situation prevented or did not permit a proper comparison of sales prices in the home market or third country market with export prices or constructed export prices during the period of investigation or review, 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 existed during the period of investigation or review 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 market situation, identified in paragraph (a)(2) of this section, existed during the period of investigation or review if the Secretary determines the following, based on information on the record:

(i) A circumstance or set of circumstances existed that may have impacted the costs of producing subject merchandise, or costs or prices of inputs into the production of subject merchandise;

(ii) The cost of materials and fabrication or other processing of any kind, including the prices of inputs used to produce subject merchandise, were not in accordance with market principles or distorted, and therefore did not accurately reflect the cost of production of subject merchandise in the ordinary course of trade; and

(iii) The circumstance or set of circumstances at issue contributed to the distortion of the cost of production of subject merchandise.

(2) *The Secretary will determine if it is more likely than not that a circumstance or set of circumstances contributed to distorted costs or prices.* In accordance with paragraph (d)(1)(iii), the Secretary will weigh the information on the record and determine whether it is more likely than not that the circumstance or set of circumstances contributed to the distortion in the cost of production of subject merchandise during the period of investigation or review, and therefore, that a market situation existed during that period.

(3) *Information the Secretary may consider in determining the existence of a market situation.* In determining whether a market situation existed in the subject country such that the cost of materials and fabrication or other processing did not accurately reflect the cost of production of subject merchandise in the ordinary course of trade during the period of investigation or review, the Secretary will 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 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 that 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 information 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 the cost of production of subject merchandise or prices or costs of a significant input into the production of subject merchandise in the subject country. For purposes of this paragraph (d)(3)(v), the Secretary will normally look to cost effects on same or similar merchandise produced in economically comparable countries in analyzing the impact of such protections on the cost of production.

(4) *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 do not accurately reflect the cost of production in the ordinary course of trade, the following will not preclude the finding of a market situation:

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

(ii) The speculated cost of production of the subject merchandise, or the speculated prices or costs of a significant input into the production of the 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, government-controlled entities, 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)(3)(v) of this section; and

(iv) The existence of the same or similar government or nongovernment actions in the subject country that

preceded the period of investigation or review.

(e) *Factors to consider in determining if a market situation is particular*—(1) *In general.* If the Secretary determines that a market situation exists under paragraph (c) or (d), the Secretary must also determine if the market situation is particular. A market situation is particular if it impacts prices or costs for only certain parties or products in the subject country. In reaching this determination, the following applies:

(i) A particular market situation may exist even if a large number of certain parties or products are impacted by the circumstance or set of circumstances. The Secretary's analysis does not concern the specific number of products or parties, but whether the market situation impacts only certain parties or products, or the general population of parties or products, in the subject country;

(ii) The same or similar market situations can exist in multiple countries or markets and still be considered particular for purposes of this paragraph (e)(1) if the Secretary determines that a market situation exists which distorts sales prices or cost of production for certain parties or products 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, and a market situation may apply only to certain producers, importers, exporters, purchasers, users, industries, or enterprises, individually or in any combination.

(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 will 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) *The Secretary may adjust its calculations to address distortions to which a particular market situation under paragraphs (d) and (e) of this section has contributed*—(1) *In general.* If the Secretary determines a particular market situation exists in the subject country which has contributed to a distortion in the cost of materials and fabrication or other processing, such that those costs do not accurately reflect the cost of production of subject merchandise in the ordinary course of trade, in accordance with sections 771(15) and 773(e) of the Act, the Secretary may address such distortions to the cost of production in its calculations.

(2) *Imprecise quantification of the distortions.* If, after consideration of the information on the record, the Secretary is unable to precisely quantify the distortions to the cost of production of subject merchandise in the ordinary course of trade to which the particular market situation has contributed, the Secretary may use any reasonable methodology based on record information to adjust its calculations to address those distortions.

(3) *The Secretary may determine not to adjust its calculations.* If the Secretary determines that a particular market situation exists in the subject country which has contributed to the distortions to the cost of production, but that an adjustment to its calculations of the cost of production of subject merchandise is not appropriate based on record information, the Secretary may determine not to adjust its calculations. In determining whether an adjustment is appropriate, the Secretary may consider the following:

(i) Whether the cost distortion is already sufficiently addressed in its calculations in accordance with another statutory provision, such as the transaction disregarded and major input rules of sections 773(f)(2) and (3) of the Act;

(ii) Whether a reasonable method for quantifying an adjustment to the calculations is absent from the record; and

(iii) Whether information on the record suggests that the application of an adjustment to the Secretary's calculations would otherwise be unreasonable.

(g) *Examples of particular market situations which contribute to distortions in the cost of materials and fabrication or other processing of any kind, such that those costs do not accurately reflect the cost of production in the ordinary course of trade.* Examples of particular market situations which may 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 and the Secretary concludes, based on record information, that regardless of the impact of such overcapacity of the significant input on other countries, such overcapacity contributed to distortions of the price or cost of that input in the subject country during the period of investigation or review;

(2) A government, government-controlled entity, 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 and the Secretary concludes, based on record information, that such ownership or control of the producer or supplier contributed to price or cost distortions of that input in the subject country during the period of investigation or review;

(3) A government, government-controlled entity, or other public entity in the subject country intervenes in the market for a significant input into the production of subject merchandise and the Secretary concludes, based on record information, such that the intervention contributed to price or cost distortions of that input in the subject country during the period of investigation or review;

(4) A government in the subject country limits exports of a significant input into the production of subject merchandise and the Secretary concludes, based on record information, that such export limitations contributed to price or cost distortions of that input in the subject country during the period of investigation or review;

(5) A government in the subject country imposes export taxes on a significant input into the production of subject merchandise and the Secretary concludes, based on record information, that such taxes contributed to price or cost distortions of that input in the subject country during the period of investigation or review;

(6) A government in the subject country exempts an importer, producer, or exporter of 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 during the period of investigation or review;

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

merchandise during the period of investigation or review;

(8) A government, government-controlled entity, or other public entity in the subject country provides financial assistance or other support to the producer or exporter of subject merchandise, or to a producer or supplier of a significant input into the production of subject merchandise and the Secretary concludes, based on record information, that such assistance or support contributed to cost distortions of subject merchandise or distortions in the price or cost of a significant input into the production of subject merchandise in the subject country during the period of investigation or review;

(9) A government, government-controlled entity, or other public entity in the subject country mandates, through law or in practice, the use of a certain percentage of domestic-manufactured inputs, the sharing or use of certain intellectual property or production processes, or the formation of certain business relationships with other entities to produce subject merchandise or a significant input into the production of subject merchandise and the Secretary concludes, based on record information, that those requirements contributed to cost distortions of subject merchandise or distortions in the price or cost of a significant input into the production of subject merchandise in the subject country during the period of investigation or review;

(10) A government, government-controlled entity, 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 either a producer or exporter of subject merchandise, or to a producer or supplier of a significant input into the production of subject merchandise in the subject country and the Secretary concludes, based on record information, that the lack of enforcement or effectiveness of such laws and policies contributed to cost distortions of subject merchandise or distortions in the price or cost of a significant input into the production of subject merchandise during the period of investigation or review;

(11) A government, government-controlled entity, or other public entity in the subject country does not implement property (including intellectual property), human rights, labor, or environmental protection laws and policies and the Secretary concludes, based on record information, that the absence of such laws and policies contributed to cost distortions of subject merchandise, or distortions in the price or cost of a significant input into the production of subject merchandise in the subject country during the period of investigation or review; and

(12) Nongovernmental entities take actions which the Secretary concludes, based on record information, contributed to cost distortions of subject merchandise or distortions in the price or cost of a significant input into the production of subject merchandise in the subject country during the period of investigation or review. Actions that result in distortive prices and costs by nongovernmental entities covered by this example include, but are not limited to, the formation of business relationships between one or more producers of subject merchandise and suppliers of significant inputs to the production of subject merchandise, including mutually-beneficial strategic alliances or noncompetitive arrangements, as well as sales by third-country exporters of significant inputs into the subject country for prices for less than fair value.

(h) *A particular market situation which contributes to distortions in the cost of materials and fabrication or other processing of any kind, such that the costs do not accurately reflect the cost of production in the ordinary course of trade, may also 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 existed during the period of investigation or review such that the cost of materials and fabrication or other processing of any kind did not accurately reflect the cost of production of subject merchandise in the ordinary course of trade, the Secretary may consider, based on record information, whether that particular market situation also contributed to the circumstance or set of circumstances that prevented, or did 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)(C) of the Act.

■ 14. 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.

* * * * *

■ 15. 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 on the loan 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, or the payments on the loan are consistent with the terms of the loan contract.

(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.

■ 16. 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 outside 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.

■ 17. 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.

* * * * *

■ 18. 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).

■ 19. 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, the Secretary may exclude certain prices from its analysis if interested parties have demonstrated, with sufficient information, that those 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.

* * * * *

■ 20. 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.

* * * * *

■ 21. 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]

■ 22. Remove and reserve § 351.527.

■ 23. 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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