

DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 950306068-8205-05]

RIN 0625-AA45

Countervailing Duties

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce ("the Department") hereby issues final countervailing duty regulations to conform to the Uruguay Round Agreements Act, which implemented the results of the Uruguay Round multilateral trade negotiations. The Department has sought to issue regulations that: Where appropriate and feasible, translate the principles of the implementing legislation into specific and predictable rules, thereby facilitating the administration of these laws and providing greater predictability for private parties affected by these laws; simplify and streamline the Department's administration of countervailing duty proceedings in a manner consistent with the purpose of the statute and the President's regulatory principles; and codify certain administrative practices determined to be appropriate under the new statute and under the President's Regulatory Reform Initiative.

DATES: The effective date of this final rule is December 28, 1998, except that § 351.301(d) is effective on November 25, 1998. See § 351.702 for applicability dates.

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SUPPLEMENTARY INFORMATION:**Background**

The publication of this notice of final rules, which deals with countervailing duty ("CVD") methodology, completes a significant portion of the process of developing regulations under the Uruguay Round Agreements Act ("URAA"). The process began when the Department took the unusual step of requesting advance public comments in order to ensure that, at the earliest possible stage, we could consider and take into account the views of the private sector entities that are affected by the antidumping ("AD") and CVD laws. On February 26, 1997, the Department published proposed rules dealing with CVD methodology ("1997

Proposed Regulations"). The Department received over 200 written public comments regarding the 1997 Proposed Regulations. On October 17, 1997, the Department held a public hearing, and thereafter, received over 50 additional post-hearing written public comments on the 1997 Proposed Regulations.¹

In drafting these final rules, the Department has carefully reviewed and considered each of the comments it received. While we have not always adopted suggestions made by commenters, we found the comments to be very useful in helping us to work our way through the many legal and policy

¹ The prior notices published by the Department as part of its URAA rulemaking activity are: (1) Advance Notice of Proposed Rulemaking and Request for Public Comments (*Antidumping Duties; Countervailing Duties; Article 1904 of the North American Free Trade Agreement*), 60 FR 80 (January 3, 1995); (2) Advance Notice of Proposed Rulemaking; Extension of Comment Period (*Antidumping Duties; Countervailing Duties; Article 1904 of the North American Free Trade Agreement*), 60 FR 9802 (February 22, 1995); (3) Interim Regulations; Request for Comments (*Antidumping and Countervailing Duties*), 60 FR 25130 (May 11, 1995); (4) Proposed Rule; Request for Comments (*Antidumping and Countervailing Duty Proceedings; Administrative Protective Order Procedures; Procedures for Imposing Sanctions for Violation of a Protective Order*), 61 FR 4826 (February 8, 1996); (5) Notice of Proposed Rulemaking and Request for Public Comments (*Antidumping Duties; Countervailing Duties*), 61 FR 7308 (February 27, 1996); (6) Extension of Deadline to File Public Comments on Proposed Antidumping and Countervailing Duty Regulations and Announcement of Public Hearing (*Antidumping Duties; Countervailing Duties*), 61 FR 18122 (April 24, 1996); (7) Announcement of Opportunity to File Public Comments on the Public Hearing of Proposed Antidumping and Countervailing Duty Regulations (*Antidumping Duties; Countervailing Duties*), 61 FR 28821 (June 6, 1996); (8) Notice of Proposed Rulemaking and Request for Public Comment (*Countervailing Duties*), 62 FR 8818 (February 26, 1997); (9) Final Rules (*Antidumping Duties; Countervailing Duties*), 62 FR 27295 (May 19, 1997); (10) Extension of Deadline to File Public Comments on Proposed Countervailing Duty Regulations, (*Countervailing Duties*), 62 FR 19719 (April 23, 1997); (11) Extension of Deadline to File Public Comments on Proposed Countervailing Duty Regulations, (*Countervailing Duties*), 62 FR 25874 (May 12, 1997); (12) Notice of Public Hearing on Proposed Countervailing Duty Regulations and Announcement of Opportunity to File Post-Hearing Comments, (*Countervailing Duties*), 62 FR 38948 (July 21, 1997); (13) Notice of Public Hearing on Proposed Countervailing Duty Regulations and Announcement of Opportunity to File Post-Hearing Comments; Correction, (*Countervailing Duties*), 62 FR 41322 (August 1, 1997); (14) Notice of Postponement of Public Hearing on Proposed Countervailing Duty Regulations and of Opportunity to File Post-Hearing Comments, (*Countervailing Duties*), 62 FR 46451 (September 3, 1997); (15) Interim Final Rules; Request for Comments (*Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders*), 63 FR 13516 (March 20, 1998); and (16) Final Rule; Administrative Protective Order Procedures; Procedures for Imposing Sanctions for Violation of a Protective Order, (*Antidumping and Countervailing Duty Proceedings*), 63 FR 24391 (May 4, 1998).

issues addressed in the regulation. Therefore, we are extremely grateful to those who took the time and trouble to express their views regarding how the Department should administer the CVD laws in the future.

In addition, in these final rules, the Department has continued to be guided by the objectives described in the 1997 Proposed Regulations. Specifically, these objectives are: (1) Conformity with the statutory amendments made by the URAA; (2) the elaboration through regulation of certain statements contained in the Statement of Administrative Action ("SAA");² and (3) consistency with President Clinton's Regulatory Reform Initiative and his directive to identify and eliminate obsolete and burdensome regulations.

In the case of CVD methodology, the Department previously issued proposed regulations in 1989 ("1989 Proposed Regulations").³ Because the Department never issued final rules, the 1989 Proposed Regulations were not binding on the Department or private parties. Nevertheless, to some extent both the Department and private parties relied on the 1989 Proposed Regulations as a restatement of the Department's CVD methodology as it existed at the time. Thus, notwithstanding statutory amendments made by the URAA and subsequent developments in the Department's administrative practice, the 1989 Proposed Regulations still serve as a point of departure for any new regulations dealing with CVD methodology.

In an earlier rulemaking (see item 9 in note 1), we consolidated the AD and CVD regulations into a single part 351. For the most part, the regulations contained in this notice constitute subpart E of part 351.

Explanation of the Final Rules

In drafting these Final Regulations, the Department carefully considered each of the comments received. In addition, we conducted our own independent review of those provisions of the 1997 Proposed Regulations that were not the subject of public comments. The following sections contain a summary of the comments we received and the Department's responses to those comments. In addition, these sections contain an explanation of changes the Department has made to the 1997 Proposed Regulations either in response to

² See *Statement of Administrative Action* accompanying H.R. 5110, H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess. 911-955 (1994).

³ See *Notice of Proposed Rulemaking and Request for Public Comments (Countervailing Duties)*, 54 FR 23366 (May 31, 1989).

comments or on its own initiative. Finally, these sections contain a restatement of principles that remain unchanged from the 1997 Proposed Regulations and that were not the subject of any public comments.

The Department is also hereby issuing interim final rules to set forth certain procedures for establishing the non-countervailable status of alleged subsidies or subsidy programs pursuant to section 771(5B) of the Tariff Act of 1930, as amended ("the Act"). Pursuant to authority at 5 U.S.C. 553(b)(A), the Assistant Secretary for Import Administration waives the requirement to provide prior notice and an opportunity for public comment because this action is a rule of agency procedure. This interim final rule is not subject to the 30-day delay in its effective date under 5 U.S.C. 553(d) because it is not a substantive rule. The analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 note) are inapplicable to this rulemaking because it is not one for which a Notice of Proposed Rulemaking is required under 5 U.S.C. 553 or any other statute.

Section 351.102

These regulations add several definitions to § 351.102. Many of these definitions are identical (or virtually identical) to definitions contained in § 355.41 of the 1989 Proposed Regulations, and some are based on definitions contained in the Illustrative List of Export Subsidies ("Illustrative List") annexed to the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). We have made some changes to the definitions contained in the 1997 Proposed Regulations.

While we have not changed the definition of *consumed in the production process*, we are clarifying that the definition is not to be used as a way to expand significantly the rights of countries to apply border adjustments for a broad range of taxes on energy, particularly in the developed world. See SAA at 915.

The definition of *firm* is based on § 355.41(a) of the 1989 Proposed Regulations, but an additional clause has been added to clarify that the purpose of this term is to serve as a shorthand expression for the recipient of an alleged subsidy. While other terms could be used, the use of the term "firm" in this manner has become an accepted part of CVD nomenclature. For clarification, we have added "company" and "joint venture" to the entities listed in the definition in the 1997 Proposed Regulations.

Similarly, the term *government-provided* is used as a shorthand adjective to distinguish the act or practice being analyzed as a possible countervailable subsidy from the act or practice being used as a benchmark. As made clear in the regulation, the use of "government-provided" does not mean that a subsidy must be directly provided by a government. This definition is unchanged from our 1997 Proposed Regulations.

As in our 1997 Proposed Regulations, *loan* is defined to include forms of debt financing other than what one normally considers to be a "loan," such as bonds or overdrafts. Again, this definition is intended as a shorthand expression in order to avoid repetitive use of more cumbersome phrases, such as "loans or other debt instruments."

In this regard, the Department considered codifying its approach with respect to so-called "hybrid instruments," financial instruments that do not readily fall into the basic categories of grant, loan, or equity. In the 1993 steel determinations (see *Certain Steel Products from Austria (General Issues Appendix)*, 58 FR 37062, 37254 (July 9, 1993) ("GIA")), the Department developed a hierarchical approach for categorizing hybrid instruments, an approach that was sustained in *Geneva Steel v. United States*, 914 F. Supp. 563 (CIT 1996). However, notwithstanding this judicial imprimatur, the Department has relatively little experience with hybrid instruments. Therefore, although the Department has no present intention of deviating from the approach set forth in the GIA, the codification of this approach in the form of a regulation would be premature at this time.

Many commenters proposed definitions of the phrase "entrusts or directs" as it is used in section 771(5)(B)(iii) of the Act, which deals with "indirect subsidies." Indirect subsidies generally involve situations where a government provides a financial contribution through a private body. Under section 771(5)(B)(iii) of the Act, a subsidy exists when, *inter alia*, a government "makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution * * *" (emphasis added). In our 1997 Proposed Regulations, we did not address indirect subsidies in detail. Instead, we noted that the SAA directs the Department to proceed on a case-by-case basis (see SAA at 925-26), and we requested comments on the factors we should consider in making our case-by-case determinations.

One commenter suggested that an indirect subsidy need only be linked to a government action or program to satisfy the "entrusts or directs" standard. This same commenter asked the Department to include an illustrative list of situations that would meet the "entrusts or directs" standard. A second commenter believed that the standard is met when a government takes an action that causes a private party to confer a benefit. This same commenter asked the Department to clarify that the term "private body" is not limited to a single entity, but also includes a group of entities or persons. A third commenter proposed that the "entrusts or directs" standard be considered satisfied whenever a government takes an action that proximately results in a private entity providing a financial contribution. Certain commenters also asked the Department to confirm that the standard is no narrower than the prior U.S. standard for finding an indirect subsidy.

The issue of what "entrusts or directs" means was debated extensively at the Department's hearing on its 1997 Proposed Regulations. This debate prompted the submission of additional proposed definitions. Two commenters argued that an indirect subsidy occurs whenever a government action has the inevitable result of compelling a private party to provide a benefit. A second commenter proposed a "but for" test, i.e., if the government did not act, the subsidy would not exist.

As the extensive comments on this issue indicate, the phrase "entrusts or directs" could encompass a broad range of meanings. As such, we do not believe it is appropriate to develop a precise definition of the phrase for purposes of these regulations. Rather, we believe that we should follow the guidance provided in the SAA to examine indirect subsidies on a case-by-case basis. We will, however, enforce this provision vigorously.

We agree with those commenters who urged the Department to confirm that the current standard is no narrower than the prior U.S. standard for finding an indirect subsidy as described in *Certain Steel Products from Korea*, 58 FR 37338 (July 9, 1993) and *Certain Softwood Lumber Products from Canada*, 57 FR 22570 (May 28, 1992). Also, we believe that the phrase "entrusts or directs" subsumes many elements of the definitions proposed by commenters. With respect to the suggestion that we include an illustrative list of situations that would fall under the "entrusts or directs" standard, we do not believe this is necessary. The SAA at 926 lists a number of cases where the Department

has found indirect subsidies in the past, and these cases serve to provide examples of situations where we believe the statute would permit the Department to reach the same result. Similarly, regarding the request that we define the phrase "private entity" to include groups of entities or persons, the SAA is clear that groups are included (see SAA at 926). Therefore, we have not promulgated a regulation with this definition.

Although the indirect subsidies that we have countervailed in the past have normally taken the form of a foreign government requiring an intermediate party to provide a benefit to the industry producing the subject merchandise, often to the detriment of the intermediate party, indirect subsidies could also take the form of a foreign government causing an intermediate party to provide a benefit to the industry producing the subject merchandise in a way that is also in the interest of the intermediate party. We believe the phrase "entrusts or directs" could encompass government actions that provide inducements, other than upstream subsidies, to a private party to provide a benefit to another party.

One commenter argued that the Final Regulations should include a definition of consultations. Consistent with Article 13 of the SCM Agreement, section 702(b)(4)(A)(ii) of the Act requires the Department to provide the government of the exporting country named in a petition an opportunity for consultations with respect to the petition. This commenter suggested that the definition of consultations should include a statement of purpose as articulated in the SCM Agreement (*i.e.*, clarifying the allegations in the petition and arriving at a mutually agreed solution). Furthermore, the commenter argued, in the Final Regulations the Department should commit to consult with the foreign government both prior to initiating and during the course of the investigation. Finally, the commenter proposed that the definition contain a requirement that all government-to-government exchanges (oral and written) be placed on the record of the proceeding.

We do not believe that a regulation is required to define "consultations." We agree that, in accordance with Article 13 of the SCM Agreement, the purpose of consultations is to clarify the allegations presented in a petition and arrive at a mutually agreed solution. Section 351.202(h)(2)(i)(2) of *Antidumping Duties; Countervailing Duties; Final rule*, 62 FR 27295, 27384 (May 19, 1997) clearly states that the Department will invite the government of any exporting

country named in a CVD petition to hold consultations with respect to the petition. Further, consistent with Article 13.2 of the SCM Agreement, the Department affords foreign governments reasonable opportunities to consult throughout the period of investigation. In regard to communications, it is the Department's longstanding practice that all *ex parte* communications with Department decisionmakers be placed on the record of a proceeding through memoranda to the file.

Section 351.501

Section 351.501 restates very generally the subject matter of subpart E. To be more specific, the arrangement of subpart E is as follows. After dealing with the specificity of domestic subsidies in § 351.502 and the concept of "benefit" in § 351.503, §§ 351.504 through 351.513 deal with the identification and measurement of various general types of subsidy practices. Sections 351.514 through 351.520 focus on export subsidies, incorporating the appropriate standards from the Illustrative List of Export Subsidies contained in Annex I of the SCM Agreement. Sections 351.521 through 351.523 deal with import substitution subsidies (currently designated as "Reserved"), green light and green box subsidies, and upstream subsidies, respectively. Section 351.524 addresses the allocation of benefits to a particular time period. Section 351.525 sets forth rules regarding the calculation of an *ad valorem* subsidy rate and the attribution of a subsidy to the appropriate sales value of a product. Finally, §§ 351.526 and 351.527 contain rules regarding program-wide changes and transnational subsidies, respectively. The section numbering in these Final Regulations reflects minor changes from the 1997 Proposed Regulations. As discussed below, we have decided to codify a final rule on the concept of "benefit." This rule is now § 351.503. We have also moved the rules regarding the allocation of benefits, which were included in the section on grants in the 1997 Proposed Regulations to a separate section, § 351.524. Finally, we have moved § 351.520 of the 1997 Proposed Regulations to § 351.514(b) because general export promotion activities are more appropriately addressed as an exception to export subsidies.

The last sentence of § 351.501 acknowledges that subpart E does not address every possible type of subsidy practice. However, the same sentence provides that in dealing with alleged subsidies that are not expressly covered by these regulations, the Secretary will

be guided by the underlying principles of the Act and subpart E.

In this regard, the Act and the SCM Agreement serve to eliminate much of the confusion and controversy surrounding the necessary elements of a countervailable subsidy. First, under section 771(5)(B) of the Act and Article 1.1(a)(1) and (2) of the SCM Agreement, there must be a financial contribution that a government provides either directly or indirectly, or an income or price support in the sense of Article XVI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Although the precise parameters will have to be determined on a case-by-case basis, this element provides a framework for analysis that previously was not directly addressed.

Second, under section 771(5)(B) of the Act and Article 1.1(b) of the SCM Agreement, the financial contribution (or income or price support) must confer a benefit. Section 351.503 sets out the principles we will generally follow in determining whether a benefit has been conferred.

Finally, under section 771(5)(A) of the Act and Article 1.2 of the SCM Agreement, a subsidy must be specific in order to be countervailable. The "specificity test" is addressed in § 351.502, but we note here that by clarifying the purpose of the specificity test and the manner in which it is to be applied, the URAA, the SAA and the SCM Agreement should serve to reduce the controversies and volume of litigation concerning this issue.

In the preamble to our 1997 Proposed Regulations we discussed our decision not to include two topics in our proposed changes to subpart E: Indirect subsidies (with the exception of upstream subsidies) and privatization. The numerous comments regarding our decision not to promulgate regulations on these two topics are addressed below.

Indirect Subsidies

In our 1997 Proposed Regulations, we discussed only briefly the topic of indirect subsidies. We received several comments on this issue. Comments concerning the adoption of a definition of the phrase "entrusts or directs" have been addressed previously (see § 351.102). The remaining comments relating to indirect subsidies are addressed here.

One commenter asked the Department to codify a rule stating that indirect subsidies are countervailable. In this commenter's view, this would eliminate any uncertainty that could become the cause of litigation. Another commenter requested that the Department include a

broad definition of indirect subsidies in our regulations.

We have not adopted either suggestion. We believe that section 771(5)(B)(iii) of the Act clearly states that subsidies provided by governments through private parties are covered by the CVD law. Additionally, section 771(5)(C) of the Act states that the determination of whether a subsidy exists shall be made "without regard to whether the subsidy is provided *directly or indirectly* * * *" (emphasis added). Therefore, no regulation is needed on this point. Regarding the second comment, as discussed previously, the phrase "entrusts or directs" as used in section 771(5)(B)(iii) of the Act could encompass a broad range of meanings. As such, we do not believe it is appropriate to develop a precise definition of the phrase for purposes of these regulations.

One commenter singled out subsidies involving the provision of goods and services for less than adequate remuneration and asked the Department to confirm that indirect subsidies can be conferred through the provision of goods or services by private parties. This same commenter also asked the Department to state in the preamble to the Final Regulations that the new statute will not alter the Department's practice of finding export restraints to be countervailable. Other commenters objected to this position. They argued that: (1) The practices constituting financial contributions under the Act are payments of cash or cash equivalents, while government regulatory measures do not entail any financial contribution; (2) export restraints do not direct private parties to make any type of payment; they simply limit the parties' ability to export; (3) regulatory measures that distort trade are separately covered by other World Trade Organization ("WTO") Agreements (e.g., GATT 1994 Articles I-V, VII-IX, Agreement on Sanitary and Phytosanitary Measures, Agreement on Technical Barriers to Trade, and Agreement on Trade-Related Investment Measures); and (4) expanding the definition of subsidy to include regulatory measures would extend that term to absurd dimensions far beyond the limited scope intended by the SCM Agreement and the Act. These same commenters urged the Department to issue a regulation which clarifies what they see as a conflict between the clear language in the statute (regulatory measures are not financial contributions within the meaning of the Act and, hence, cannot confer subsidies) and the language in the SAA at 926 (suggesting

that regulatory measures can be countervailed as indirect subsidies).

Regarding the issue of whether indirect subsidies can arise through the provision of goods and services, we believe this is clearly answered by the Act. Section 771(5)(D)(iii) states that financial contributions include the provision of goods or services. Hence, if a private entity is entrusted or directed to provide a good or service to producers of the merchandise under investigation, a financial contribution exists. With regard to export restraints, while they may be imposed to limit parties' ability to export, they can also, in certain circumstances, lead those parties to provide the restrained good to domestic purchasers for less than adequate remuneration. This was recognized by the Department in *Certain Softwood Lumber Products from Canada*, 57 FR 22570 (May 28, 1992) ("*Lumber*") and *Leather from Argentina*, 55 FR 40212 (October 2, 1990) ("*Leather*"). Further, as indicated by the SAA (at 926), and as we confirm in these Final Regulations, if the Department were to investigate situations and facts similar to those examined in *Lumber* and *Leather* in the future, the new statute would permit the Department to reach the same result.

We agree that regulatory measures that distort trade normally may be subject to the provisions of other WTO Agreements. We do not believe, however, that this negates our ability to address them through the application of our CVD law when such measures meet the definition of a countervailable subsidy. We disagree that countervailing such measures goes beyond the ambit of the SCM Agreement and the Act. As discussed above in response to an earlier comment, the SCM Agreement clearly permits, and the Act clearly requires, that we countervail subsidies provided through private parties. Also, Article VI of GATT 1994 continues to refer to subsidies provided "directly or indirectly" by a government.

Change in Ownership

The SAA and the House and Senate Reports emphasize the importance of considering the facts of individual cases to determine whether, and to what extent, change-in-ownership transactions eliminate previously conferred countervailable subsidies. In the 1997 Proposed Regulations, we did not include a provision dealing with change in ownership. Rather, we invited comment on a broad array of factors concerning this topic and whether we should promulgate a final rule that integrates some or all of the factors identified in the preamble.

The comments we received on this issue largely fell along two lines. On the one hand, several commenters argued that the Department should promulgate a regulation stating that change-in-ownership transactions, even if conducted at arm's-length and at fair market value, have no effect on non-recurring subsidies bestowed prior to the sale of a firm, and that non-recurring subsidies, in most instances, pass through in their entirety to the sold or privatized entity. Conversely, other commenters contended that a change-in-ownership regulation should establish a rebuttable presumption that, in general, the sale or change in ownership of a firm at fair market value eliminates the benefit conferred by prior non-recurring subsidies.

According to the first group of commenters, under section 771(5)(F) of the Act, the change in ownership of a firm has no effect on the Department's ability to countervail fully subsidies bestowed prior to the change in ownership. In fact, in these commenters' view, Congress expected the Department to continue countervailing prior subsidies, unless something serves to eliminate those subsidies. The sale of a firm at fair market value does not serve to eliminate prior subsidies; thus, after such a sale, prior subsidies would continue to be countervailed until fully amortized. The only instance where partial repayment of prior subsidies can exist is where economic resources have been returned to the government, i.e., where the investor has paid more than fair market value for a productive unit. The Department should specify this in its regulations.

These same commenters argued that recent court decisions support the conclusion that subsidies continue to be countervailable after the privatization of a firm at fair market value. See, e.g., *Saarstahl AG v. United States*, 78 F.3d 1539 (Fed. Cir. 1996); *British Steel plc v. United States*, 127 F.3d 1471 (Fed. Cir. 1997). In light of these decisions, one commenter stated that it would be ironic for the Department now to conclude under the URAA that subsidies are no longer countervailable after the sale of a firm at fair market value. This commenter also claimed that such a conclusion would result in anti-subsidy practices weaker than those of the European Union ("EU"), because EU Guidelines on State Aid recognize that the sale of a company does not extinguish previously bestowed subsidies. Rather, according to this commenter, the EU requires subsidy recipients to repay illegal subsidies, including principal and interest, from the time the aid was disbursed, without

regard to whether the recipient is later sold or privatized.⁴

These commenters opposed the Department's attempt to develop a "flexible" approach toward privatization. They expressed concern that ascribing any significance to the broad array of factors listed in the 1997 Proposed Regulations may lead to all or some pre-privatization subsidies being extinguished in a fair market privatization, which would involve reevaluating the amount, and possibly the existence, of prior subsidies based on post-bestowal events and conditions. This would violate the statute's prohibition against considering the effects of subsidies and the Department's practice of not examining subsequent events to determine whether the subject merchandise continues to benefit from subsidies. See section 771(5)(C) of the Act and GIA at 37261. For example, one commenter stated that taking account of current market conditions, such as global overcapacity, in determining the extent to which pre-privatization subsidies pass through, is tantamount to considering effects. Similarly, another commenter rejected the suggestion that subsidies that reduce excess capacity are not countervailable because this too depends on an impermissible "use" analysis. Whatever the use of the subsidy, these commenters argued, the benefit from the subsidy continues unabated after privatization.

Finally, this first group of commenters asserted that the privatization or sale of a productive unit, even at fair market value, does not result in any partial or full repayment of prior subsidies. To conclude otherwise would conflict with Congress' mandate that the Department's privatization methodology be "consistent with the principles of the countervailing duty statute." S. Rep. No. 103-412, at 92 (1994). Those principles include prohibitions against (1) focusing on subsequent events, (2) analyzing alleged effects of subsidies, (3) granting offsets not included in the exclusive statutory list, and (4) valuing subsidies based on the cost-to-government standard. Some in this first group of commenters asserted that the logical reading of Congress' instruction to evaluate change-in-ownership transactions on a case-by-case basis is to

determine whether a privatization or sale involving a productive unit elicits some non-commercial activity, *i.e.*, whether under- or overpayment for the productive unit has occurred. In the case of underpayment, the Department should find that additional subsidies have been bestowed; in the case of overpayment, the Department should find that certain prior subsidies have been repaid.

In contrast to these arguments, the second group of commenters asserted that the Department should issue regulations establishing a rebuttable presumption that the arm's-length sale of a firm, including a government-owned enterprise, at a price that reflects the current market value of its assets, in most cases extinguishes any previously received subsidies. This group argued that Congress' instruction to examine change-in-ownership transactions on a case-by-case basis indicates that the URAA contemplates extinguishment of prior subsidies, at least in certain circumstances. In these commenters' view, the arm's-length sale of a company at full market value is such a circumstance, because the market price takes into account prior subsidies, and the benefit is, therefore, eliminated. However, if the price paid for the firm does not reflect full market value, the question of a continuing benefit can reasonably be raised. According to several of these commenters, any other approach would be counterproductive, because it would discourage potential buyers from bidding on subsidized government-owned enterprises about to be privatized. One commenter further stressed that restructuring of, and foreign investment in, countries such as those in Eastern Europe, may be inhibited, which is a concern for U.S. investors and the United States' wider economic and political interests.

One member of this group of commenters found support for the proposition that an arm's-length sale at fair market value must extinguish prior subsidies with the following statutory analysis. The commenter claimed that the URAA requires the Department to determine whether and to what extent government financial contributions confer a benefit on the production or sale of the investigated merchandise in each CVD proceeding. Such a determination is based on the nature of the subsidy benefit, which is the artificially reduced cost of an input used in the production of the merchandise. Thus, where the subsidy is provided for a specific use, *e.g.*, the acquisition of capital assets, the continuing subsidy benefit is the reduced cost of that asset allocated over the useful life of the

asset. Where government financial contributions are not tied to specific applications, as in the case of an equity infusion, the Department should normally view the money itself as the continuing subsidy benefit.

In light of this, the commenter contended that the Department's privatization analysis must first examine what inputs were acquired by the subsidy recipient at an artificially reduced cost. Then, the Department must determine whether the cost for those inputs was artificially reduced for the privatized company as well. According to this commenter, where the privatization transaction occurs at arm's-length and at fair market value, the privatized company would not continue to benefit from the past subsidies. Similarly, where government financial contributions are not tied to specific applications, meaning that the money itself is the continuing subsidy benefit, the Department's focus should be on the price and terms of the privatization transaction. If the privatization of the company, including all its physical and financial assets, was at fair market value, the Department would not find any benefit to have passed through, because the privatized company would not be operating with any capital for which it paid less than market value. According to this commenter, if the privatization of a firm were at full market value, the new owners of the company have paid for all of the inputs at market value. Therefore, the privatized firm no longer operates with inputs acquired at a cost that is less than what would have been paid without a government financial contribution.

This commenter stressed that there are several possible exceptions to this rule. For example, where an asset would not have been created or acquired absent the government financial contribution, and where the creation or acquisition of the asset was not economically viable, the Department may conclude that the very existence of the asset is the continuing benefit and not the reduced costs of the asset. In such an instance, the benefit could be deemed to continue, even after a full market privatization. However, this commenter asserted that this would represent an exception to the general rule.

This commenter rejected the argument that this analysis is tantamount to an "effects" test. If a subsequent event does in fact eliminate subsidization, limited Departmental resources should not prevent examination of that event. The commenter stated that, in the case of

⁴ In support of this proposition, the commenter cites *Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty*, O.J. Eur. Comm. No. C283/2 at 283/4 (September 19, 1997) ("The assessment of rescue or restructuring aid is not affected by changes in the ownership of the business aided. Thus, it will not be possible to evade control by transferring the business to another legal entity or owner.")

subsidies not tied to any particular use, the only event that the Department would need to consider is one which would eliminate the artificially reduced cost of the company's inputs as a whole. The sale of an entire company for market value is such an event, in the commenter's view. Where a subsidy is tied to a particular use, the only event that the Department would need to consider is one that would affect or eliminate the benefit arising from that specific use. Moreover, according to the commenter, in numerous contexts the Department traces the use of a subsidy. These include instances where subsidies are provided for certain uses that may be greenlighted or that may benefit a company over time, *i.e.*, non-recurring subsidies.

Most commenters also found fault with the Department's existing repayment or reallocation methodology, under which pre-sale subsidies are partially repaid to the seller as part of the purchase price. Several commenters argued that the repayment/reallocation methodology should be abandoned, because it is not defensible, economically or legally. According to these commenters, the repayment/reallocation methodology violates the offset provision of the statute (section 771(6) of the Act), because this provision does not include repayment or reallocation of subsidies in the context of a privatization at fair market value. Moreover, a fair-market-value privatization does not offset the distortion caused by government subsidies, a fact recognized by EU law, according to which subsidy repayment can occur only if the illegal aid is returned.⁵ According to these commenters, the repayment/reallocation methodology is also inconsistent with the Department's and the Court's "conceptual model of subsidies," which presumes that subsidies distort market processes and result in a misallocation of resources (*citing Carbon Steel Wire Rod from Poland*, 49 FR 19374, 19375 (May 7, 1984), and *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315-16 (Fed. Cir. 1986) ("*Georgetown Steel*"). Under this model, repayment or reallocation can only occur if an equivalent "distortion" takes place, that is, a return of the illegally provided resources from the subsidized entity.

This does not occur, the commenters emphasized, in a fair-market privatization. Further, the repayment/reallocation methodology is inconsistent with the benefit-to-recipient standard because it is based on the assumption that the government was paid more money upon privatization than it would have received absent the subsidy, a fact that is only relevant under a cost-to-government standard. These commenters stated that while the cost of the subsidy to the government may be diminished in a fair-market privatization, the value of the subsidy to the recipient is unchanged. According to these commenters, by finding that repayment/reallocation occurs in a fair-market-value transaction, the Department is encouraging subsidization. This violates the basic purpose of the CVD law, which is intended to deter subsidization. These commenters also argued that the Court of International Trade's ("CIT") decision in *British Steel plc vs. United States*, 879 F. Supp. 1254, 1277 (CIT 1995), *aff'd in part and rev'd in part*, 127 F.3d 1471 (Fed. Cir. 1997), casts doubt on the permissibility of finding repayment in the context of a privatization at fair market value. One commenter also argued that the repayment/reallocation methodology is inconsistent with the URAA and the SAA's instruction to examine carefully the facts of each case in determining the effects of privatization on prior subsidies, because it is an automatic rule that always assumes a portion of the purchase price represents repayment or reallocation of prior subsidies.

Another commenter asserted that the repayment/reallocation methodology does not capture the full extent of the benefit bestowed upon a company because it does not capture the benefit from the government's assumption of risk. According to this commenter, to encourage investment in risky industry sectors, governments can assume some of the risk, for example by providing start-up capital. If the government privatizes the company, the trade-distorting effect of the government action continues, and the production of the company continues to enjoy the benefit of the government subsidy. This commenter argued that if the Department maintains the repayment/reallocation methodology, it should also consider whether the industry could attract private capital at the time the subsidies were provided. Where an industry could not attract private capital, the Department should find that all subsidies passed through after privatization. Alternatively, if the

Department finds that privatization can extinguish or repay a subsidy, this should only be permitted when the price paid for the privatized company is equal to the net worth of the firm without the subsidy, plus the residual value of the subsidy. For example, a firm receives a \$1 million countervailable subsidy, which the Department allocates over 10 years. In year two, the residual value of the subsidy (for countervailing duty purposes) is \$900,000. In that year, the firm is privatized and its pre-subsidy assets are valued at \$18 million. If the firm is sold for \$18.9 million, the subsidy would be repaid. If it is sold for \$18 million, the subsidy would pass through in its entirety. According to this commenter, this approach recognizes that the buyer of a firm is paying for the assets as well as the residual value of the subsidy, while the current repayment/reallocation approach fails to do this.

Another modification suggested by some commenters to the repayment/reallocation methodology is to alter the calculation of "gamma," which measures the proportion of the purchase price that the Department considers to be repaid to the government in a privatization transaction, or reallocated to the previous owner in a private-to-private sale. This commenter stated that the gamma ratio should be calculated using the total remaining value of the subsidies at the time of the privatization to the company's total net worth in the same year, rather than using the average of the historical values of the subsidies to the firm's net worth starting in the years the subsidies were received. This approach would give more weight to subsidies received immediately preceding privatization.

Finally, several commenters addressed the issue of whether subsidies provided in anticipation, or in the process, of privatization should be given special consideration. On the one hand, one commenter argued that subsidies provided shortly before, and in preparation for, the sale, such as debt forgiveness, asset revaluations, tax breaks, and other measures to "clean up" balance sheets, should be considered new subsidies and not "pre-privatization" subsidies. According to this commenter, under no circumstance should these subsidies be eliminated as part of the privatization transaction. On the other hand, another commenter suggested that steps taken by a government just prior to privatization to make a company more "saleable," such as closing inefficient operations, should not by themselves be considered

⁵ Citing Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning aid which Germany has granted to Fritz Egger Spanplattenindustrie GmbH & Co. KG at Brilon, O.J. Eur. Comm. No. C369/6, 369/8-369/9 (1994), and Agreement Respecting Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry, opened for signature December 21, 1994, art. 8, ¶ 5.

subsidies that pass through to the privatized company.

Except for the comments on our current repayment/reallocation methodology and the comments on subsidies given in the process of privatization, which we address below, the commenters have presented two general positions with respect to the impact of changes in ownership on subsidies bestowed prior to the sale: (1) That the arm's-length sale of a company at fair market value has no effect on the countervailability of prior subsidies; and (2) that the fair-market sale of a firm, in general, excuses the purchaser from any CVD liability for prior subsidies. While the commenters suggest possible exceptions to these general positions that theoretically would give effect to the statutory direction to consider the facts of each case, the exceptions are narrowly defined to fit improbable circumstances. In most cases, the proposals, with their narrowly defined exceptions, would lead to either total pass-through or total extinguishment of pre-sale subsidies.

Although we see merit in some of the arguments presented, we believe that adopting either of these extreme positions would require a strained interpretation of the statute. The statute, SAA, and legislative history plainly state that the arm's-length sale of a firm does not by itself require a determination that prior subsidies have been extinguished. See section 771(5)(F), SAA at 928, and S. Rep. No. 103-412, at 92 (1994); see also the discussion in the 1997 Proposed Regulations at 8821. Moreover, we continue to disagree with the claim that in order to impose countervailing duties on a privatized or post-sale firm, the Department must affirmatively demonstrate *how* subsidies continue to benefit the subject merchandise after the fair-market sale of a company. See GIA at 37263. Our refusal to read a continuing competitive benefit test (sometimes called an "effects test") into the CVD law was upheld by the Federal Circuit in *Saarstahl v. United States*, 78 F.3d 1539 (Fed. Cir. 1996) ("*Saarstahl*") and *British Steel plc v. United States*, 879 F. Supp. 1254 (CIT 1995), *aff'd in part and rev'd in part* 127 F.3d 1471 (Fed. Cir. 1997) ("*British Steel*"). As the CIT explained in *British Steel plc v. United States*, "Commerce has consistently maintained that it does not measure the effects of subsidies once they have been determined by Commerce. In other words, whether subsequent events mitigate these effects is irrelevant. This Court, for the purposes of this proceeding, has no quarrel with that practice." 879 F. Supp.

at 1273. Further, section 771(5)(C) of the Act specifically states that the Department "* * * is not required to consider the effect of the subsidy in determining whether a subsidy exists * * *" See also *Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 61 FR 58377, 58379 (November 14, 1996) (1994 *Administrative Review UK Lead Bar*).

In this regard, it is useful to clarify what we mean in saying that we would not attempt to determine whether a subsidy had any "effect" on the recipient, or whether "subsequent events" might have mitigated or eliminated any potential effects from the subsidy. The term "effect," as used in the statute and SAA, and the term "subsequent events," as used by the Courts, refer to the question of whether a subsidy confers a competitive benefit upon the subsidy recipient or its successor. There is no requirement that the Department determine whether there is a competitive benefit, as is made clear in the SAA (at 926):

* * * 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.

In the course of the 1993 steel investigations, certain respondents argued that: (1) A subsidy cannot be countervailed unless it bestows a "competitive benefit" on merchandise exported to the United States; (2) the arm's-length sale of a subsidized company eliminates any competitive benefit from prior subsidies (because the price paid for the company includes payment for any continuing value the subsidies might have); and (3) therefore, the arm's-length sale of a subsidized company frees the new owner from any countervailing duty liability for prior subsidies to that company. We rejected this argument (see GIA at 37260-61), explaining that the statute did not require that a subsidy bestow a competitive benefit on imports to the United States as a condition of liability for countervailing duties. Just as we would not attempt to determine whether a subsidy conferred a competitive benefit on the original recipient in the first place (that is, whether the subsidy had any effect on the original recipient's subsequent performance (usually an effect upon its output or prices)), we would not attempt to determine whether any potential competitive benefit continued with respect to the new owner in light of a subsequent event such as a change in ownership. The

Federal Circuit upheld this position in *Saarstahl* and *British Steel*. As one commenter noted, the law is concerned with the benefit originally received, not with what the recipient does with it.

When we say we do not consider "subsequent events" in the calculation of a subsidy, we generally are referring to events that arguably affect the subsequent performance (normally in terms of output or prices) of the subsidy recipient or its successor. We have never implied, however, that no subsequent event could ever affect the allocation of a subsidy. The Department may consider whether government or private actions occurring after the receipt of a subsidy should result in the reallocation of a subsidy as long as there is no tracing of the uses of the subsidy or the effect of the subsidy on the output or price of subject merchandise. Clearly, a post-subsidy change in ownership is an event that occurs subsequent to the receipt of the subsidy, and we have reallocated subsidies based on changes in ownership. It is entirely appropriate and consistent with the statute to consider whether a change in ownership is an appropriate occasion to reallocate countervailing duty liability for prior subsidies to the company that is sold. Section 771(5)(F) of the Act implies that such an exercise is warranted and, as explained above, a post-subsidy change in ownership is not the type of subsequent event or effect that is envisioned in section 771(5)(C).

The language of section 771(5)(F) of the Act purposely leaves much discretion to the Department with regard to the impact of a change in ownership on the countervailability of past subsidies. Specifically, a change in ownership neither requires nor prohibits a determination that prior subsidies are no longer countervailable. Rather, the Department is left with the discretion to determine, on a case-by-case basis, the impact of a change in ownership on the countervailability of past subsidies. The SAA at 928 specifically states that "Commerce retain[s] the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies. . . ."

The repayment/reallocation methodology that we currently use achieves this objective. See 1994 *Administrative Review UK Lead Bar* at 58379-80. Depending on the amount of prior subsidies in relation to the company's net worth and the amount paid for the company, we might find that a considerable amount of prior subsidies passes through or that a

significant amount of subsidies has been repaid to the government or reallocated to the previous owner. Nonetheless, we are not codifying the current repayment/reallocation methodology. This methodology has been heavily criticized by various parties, and we recognize that it may not provide sufficient flexibility to deal with the "extremely complex and multifaceted" nature of changes in ownership. See SAA at 928. We will address comments related to the calculation of gamma in the context of specific cases.

While we have developed some expertise on the issue of changes in ownership over the past five years, and the comments submitted in response to the 1997 Proposed Regulations have provided us with additional ideas to consider, we do not think it is appropriate to promulgate a regulation on this issue at this time. As noted above, many of the ideas presented by the commenters would move us in the direction of adopting extreme positions. Another factor weighing against codification of any privatization methodology at this time is that the Courts may, in the course of their review of the current methodology, adopt an interpretation of the law that would either validate or overturn some of the options that we have considered, including those proposed by the commenters. Finally, given the rapidly changing economic conditions around the world, particularly with respect to the issue of state ownership, we believe we should continue to develop our policy in this area through the resolution of individual cases. These changing economic conditions pose additional challenges in developing a unified framework in which to analyze change-in-ownership transactions. In the 1997 Proposed Regulations, we identified many of these additional issues and new challenges that may warrant consideration in this context and raised questions about them. However, it is our view that the comments we received did not sufficiently address many of these concerns.

An additional issue that merits further discussion concerns subsidies received just prior to, or in conjunction with, the privatization of a firm. While we have not developed guidelines on how to treat this category of subsidies, we note a special concern because this class of subsidies can, in our experience, be considerable and can have a significant influence on the transaction value, particularly when a significant amount of debt is forgiven in order to make the company attractive to prospective buyers. As our thinking on changes in

ownership continues to evolve, we will give careful consideration to the issue of whether subsidies granted in conjunction with planned changes in ownership should be given special treatment.

Our decision not to include a provision on changes in ownership in these Final Regulations does not preclude us from issuing such a regulation at a later date. We will continue to examine this issue and consider whether an alternative analytical framework can be developed that addresses the variety of change-in-ownership scenarios we have encountered and that, like the present methodology, satisfies Congressional intent that we examine changes in ownership on a case-by-case basis. In the interim, we will continue to apply our current methodology for ongoing CVD cases and carefully examine the facts of each case. However, we will consider whether modifications to the methodology may be appropriate.

Section 351.502

Section 351.502 deals with the "specificity" of domestic subsidies. Unlike its predecessor, § 355.43 of the 1989 Proposed Regulations, § 351.502 does not contain a "general" specificity test. As we noted in the preamble to the 1997 Proposed Regulations, section 771(5A) of the Act and the SAA provide much more detail and clarity regarding the application of the "specificity test" than did the prior statute and its legislative history. Thus, on the subject of specificity, there are far fewer interpretative gaps for the Department to fill than there were in 1989 and, thus, less need for regulations.

We received numerous comments arguing that we should codify the policies articulated in the preamble to the 1997 Proposed Regulations, especially those dealing with sequential analysis, purposeful government action, characteristics of a "group," and integral linkage. These commenters claimed that even where the SAA is clear on a particular point, it is unclear how the Courts will view the SAA. In their opinion, detailed specificity regulations would prevent costly litigation of these issues.

We have continued to limit § 351.502 to those aspects of the specificity test that are not addressed explicitly in the statute or the SAA. Section 102(d) of the URAA provides that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of (the Agreements and the URAA) in any judicial proceeding in which a question arises concerning such interpretation or

application." 19 U.S.C. § 3512(d). Therefore, we see no need to repeat this principle. However, in reviewing the comments and the relevant provisions of the statute and the SAA, we have identified particular issues on which the SAA may usefully be clarified. In particular, we found that the statute and the SAA do not fully address sequential analysis and the characteristics of a group. Accordingly, we have included final regulations on these topics.

Sequential analysis: Paragraph (a) is a new paragraph which addresses the "sequential approach" to specificity. We received several requests that we codify the sequential approach. Under this approach, if a subsidy is *de jure* specific or meets any one of the enumerated *de facto* specificity factors, in order of their appearance in section 771(5A)(D)(iii) of the Act, further analysis is unnecessary and is not undertaken. In support of their position, these commenters emphasized the language contained both in section 771(5A)(D)(iii) of the Act and the SAA that a subsidy will be considered specific "if one or more" of the factors exists. See SAA at 931. Furthermore, these commenters contended, the SAA and the legislative history of the URAA make clear that the specificity test was intended to be generally consistent with the Department's previous practice, a practice that included this sequential approach. SAA at 929-31; S. Rep. No. 103-412, at 93-94 (1994).

In opposition to this view, other commenters maintained that the sequential approach contradicts the SAA, because the SAA states that the Department will "seek and consider information relevant" to all four of the *de facto* specificity factors. SAA at 931. Moreover, these commenters maintained, the language in the SCM Agreement requires that all of the *de facto* specificity factors be considered and that any specificity determination "shall be clearly substantiated on the basis of positive evidence." Articles 2.1(c) and 2.4 of the SCM Agreement.

The apparent disagreement over the interpretation of the SAA regarding the use of a sequential approach indicates that it is necessary to clarify our position in a regulation. Therefore, § 351.502(a) provides that the *de facto* specificity factors will be examined in sequence, in order of their appearance in section 771(5A)(D)(iii) of the Act, and that the Department may find a domestic subsidy to be specific based on the presence of a single *de facto* specificity factor. For example, the Department will first look to see if there is a limited number of users. If the number of users is limited, we will look

no further. In accordance with the SAA, the Department will continue its practice of collecting information regarding each of the four *de facto* specificity factors; however, our analysis of the issue will stop if we determine that a single factor justifies a finding of specificity. As for the SCM Agreement, none of the provisions cited precludes a finding of specificity based on the presence of a single factor. Moreover, a finding that a certain industry receives disproportionate amounts under a particular government program, for example, constitutes positive evidence of specificity even if there are numerous users of the program and there is little discretion in awarding benefits.

Discretion: In endorsing the use of a sequential approach in the preamble to the 1997 Proposed Regulations, we stated, "with the exception of the government discretion factor, the Department may find a domestic subsidy to be specific based on the presence of a single *de facto* specificity factor." (1997 Proposed Regulations at 8824.) Certain commenters objected to the exception of the discretion factor, arguing that the statute accords the exercise of government discretion equal status with the other *de facto* specificity factors. They asked the Department to clarify that the Department may find a subsidy to be specific solely based on the degree of discretion exercised in the administration of a subsidy program.

There appears to be a great deal of confusion and controversy over the role of the fourth factor, discretion, in the finding of *de facto* specificity. Based on the comments received and a review of the statute and SAA, we are elaborating on the statements we made in the preamble to the 1997 Proposed Regulations. As stated in the 1997 Proposed Regulations, we do not believe that a finding of specificity may be based solely on the fact that some measure of discretion may have been exercised in the administration of a subsidy program. This position is consistent with the SAA, which states that if a subsidy program is broadly available and widely used and there is no evidence of dominant or disproportionate use, the mere fact that government officials may have exercised discretion in administering the program is insufficient to justify a finding of specificity. SAA at 931.

Based on our experience in administering the CVD law, some measure of administrative discretion exists in the operation of almost every alleged subsidy program. At the most basic level, an administrator of a program typically must exercise

judgment or discretion in evaluating the facts and merits of an application for a subsidy to determine whether the applicant qualifies for the subsidy. If we were to find specificity based simply on the exercise of this type of discretion, the other *de facto* factors would be rendered meaningless, because virtually every subsidy program in the world could be declared specific on the basis of the discretion factor alone. This is clearly an absurd result and could not have been the intent of Congress.

Instead, section 771(5A)(D)(iii)(IV) of the Act provides that a subsidy is specific if:

The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that *an enterprise or industry is favored over others.* (Emphasis added.)

This language does not focus on discretion alone. Rather, it states that discretion is relevant only to the extent that it is exercised in a manner that favors one enterprise or industry over others. This distinction is important because it supports the statements made in the SAA and the position we are taking in these regulations. Haphazard, random, or purposeless discretion cannot by itself indicate specificity. Only discretion that shows favoritism toward some enterprises or industries over others can inform the question of specificity. In the Department's experience, favoritism generally will manifest itself as one of the first three *de facto* factors: A limited number of users, dominant users, or one or a few users receiving a disproportionate amount of the subsidy. For example, administrators of a program could exercise discretion in selecting some industries instead of others as beneficiaries. If the selected industries constituted a limited number of industries, there would be specificity. Similarly, if benefits were distributed such that there was a predominant user or such that certain users received disproportionate benefits, there would be specificity. However, if the selected industries constituted more than a limited number of industries, if there were no dominant users or disproportionate benefits to certain users, or if there were no other indication that one or a group of enterprises or industries was favored over others, the program would not be specific.

As indicated in the SAA at 931, the discretion factor is generally more valuable as an analytical tool that enhances the analysis of the other *de facto* specificity factors and criteria. The

example given in the SAA is the case of a new subsidy program for which there have been few applicants and few recipients. In accordance with section 771(5A)(D)(iii) of the Act, in evaluating the four *de facto* factors, the Department must take into account " * * * the length of time during which the subsidy program has been in operation." In the case of a new program, the first three factors—limited number of users, dominant user, or disproportionately large user—may provide little or misleading indication regarding whether the program is *de facto* specific. Therefore, the manner in which authorities have exercised their discretion in the early days of a new program (e.g., by excluding certain applicants and limiting the benefit to a particular industry) might be more useful for the Department in making a specificity determination. See SAA at 931.

Discretion can also come into play where evidence relating to the first three factors is inconclusive. As an example, where the number of users is borderline, discretion may help to inform whether there is specificity. In this situation, the factors we might consider in analyzing the relevance of discretion include the number of applicants that are turned down, the reasons they are turned down, and the reasons successful applicants are chosen.

Characteristics of a "group": New paragraph (b) clarifies the Department's position regarding whether the Department must examine the "actual make-up" of a group of beneficiaries when performing a specificity analysis. Citing *PPG Industries, Inc. v. United States*, 978 F.2d 1232, 1240–41 (Fed. Cir. 1992) ("*PPG II*"), one group of commenters argued that, to be consistent with judicial precedent, the Department must undertake such an analysis. According to these commenters, if a group of recipients does not share similar characteristics but, instead, consists of companies in a variety of industries, the Department cannot conclude that the subsidy in question is limited to a "group of industries." Moreover, they argued, nothing in the Act or the SAA requires the Department to ignore the characteristics of the group receiving the benefits from an alleged subsidy program.

Other commenters argued that the Department can identify a "group" of subsidy recipients without regard to any shared characteristics of the individual group members. According to these commenters, a proper understanding of what may constitute a specific "group of industries" flows directly from the

purpose of the specificity test as articulated in *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834 (CIT 1983) ("*Carlisle*"); namely, that subsidy recipients should be considered a specific group unless the recipient industries are numerous and distributed very broadly throughout the economy. Moreover, these commenters maintained that the Department has on several occasions found subsidy programs specific even when the "group" of recipients has not shared common characteristics. See, e.g., *Steel Wheels from Brazil*, 54 FR 15523, 15526 (April 18, 1989) and *Cold-Rolled Carbon Steel Flat-Rolled Products from Korea*, 49 FR 47284, 47287 (December 3, 1984).

As noted in the preamble to the 1997 Proposed Regulations, we disagree with the first set of comments. Section 771(5A)(D) of the Act provides that a subsidy may be found to be specific if it is limited to a "group" of enterprises or industries. There is no requirement that the members of a group share similar characteristics. The purpose of the specificity test is simply to ensure that subsidies that are distributed very widely throughout an economy are not countervailed. There is no basis for adding the further requirement that subsidies that are not widely distributed are also confined to a group of enterprises or industries that share similar characteristics. See, e.g., *Certain Refrigeration Compressors from the Republic of Singapore*, 61 FR 10315 (March 13, 1996).

Assuming, *arguendo*, that *PPG II* is relevant under the new law, this decision upheld the Department's determination that the program in question was not specific. To put *PPG II* in its proper context, it is necessary to understand the facts presented in the underlying CVD case. In that case, there were numerous enterprises that used the program under investigation. Therefore, when looked at in terms of the number of enterprises, the actual recipient enterprises did not appear to be limited. However, this conclusion says nothing about whether the number of industries that received benefits under the program was limited. To answer this question, the Department (and the Court) correctly focused on the makeup of the users. If the numerous enterprises that received benefits had comprised a limited number of industries, then the program would have been specific. However, because the users represented numerous and diverse industries, the program was found not to be specific. There is no basis in *PPG II* or in the language of section 771(5A)(D) of the Act for concluding that there is a requirement that the limited users also share similar

characteristics. Moreover, such a requirement would undermine the purpose of the specificity test as articulated in the SAA.

Several commenters have urged the Department to codify our position with respect to this issue. Because this issue is not addressed in the statute or the SAA, we have adopted this suggestion. Accordingly, § 351.502(b) provides that the Secretary is not required to determine whether there are shared characteristics among enterprises or industries that are eligible for, or actually receive, a subsidy in determining whether that subsidy is specific.

Integral linkage: Paragraph (c) is a new paragraph which sets out our revised test for considering two or more subsidy programs to be "integrally linked." Section 355.43(b)(6) of the 1989 Proposed Regulations provided that, for purposes of applying the specificity test, the Department would consider two or more subsidy programs as a single program if the Secretary determined that the programs were "integrally linked." Section 355.43(b)(6) also set forth factors to be considered in making this determination.

In the 1997 Proposed Regulations, we opted not to incorporate § 355.43(b)(6) into these regulations. We noted that claims of integral linkage were relatively rare, and that when they did arise, we did not find the factors set forth in § 355.43(b)(6) particularly helpful. We did not, however, rule out the possibility of considering two or more ostensibly separate subsidy programs as constituting a single program for specificity purposes, and we outlined circumstances that might lead us to do so.

We received a number of comments requesting that we promulgate a regulation which allows for integral linkage. Two commenters argued that, in addition to the factors discussed in the preamble, the regulation should recodify certain of the factors found in the 1989 Proposed Regulations. These commenters also suggested that programs should not be considered to be integrally linked unless they were linked "at their inception." These commenters asked the Department to clarify that it will view claims of integral linkage narrowly and that respondents will be required to establish that the programs are linked by clear and convincing evidence. Other commenters argued that the factors enumerated in both the 1989 Proposed Regulations and in the preamble to the 1997 Proposed Regulations are too restrictive and that any integral linkage test should not be applied narrowly.

We have given further consideration to our earlier decision not to codify an integral linkage test. In light of the interest in this issue, and the fact that we have had experience with a regulation on this topic, we have concluded that it would be beneficial to parties to promulgate a rule describing when two or more separate programs may be integrally linked and treated as one program for specificity purposes. We have not codified the 1989 rule because, as we stated in the preamble to our 1997 Proposed Regulations, we did not find the factors enumerated in that provision to be particularly useful. Instead, § 351.502(c) provides that integral linkage is possible in situations where the subsidy programs have the same purpose (e.g., to promote technological innovation), bestow the same type of benefit (e.g., long-term loans or tax credits), confer similar levels of benefits on similarly situated firms, and were linked at their inception.

We believe these factors are more useful for finding integral linkage than those contained in the 1989 Proposed Regulations because they require evidence of similarities in the purposes and administration of the programs which are more than coincidental. For example, where a government claims that a program is integrally linked with another program, § 351.502(c)(4), which calls for the programs to be linked at inception, requires evidence that, in establishing the most recent program, the government's clear and express purpose was to complement the other program.

As stated in the preamble to the 1997 Proposed Regulations, when an interested party believes that two or more programs should be considered in combination for purposes of the Department's specificity analysis, that party will have the burden of identifying the relevant programs and supporting its contention that the programs are integrally linked by providing information and documentation regarding the purpose, type and levels of benefit associated with the programs.

Agricultural subsidies: Paragraph (d) is based on § 355.43(b)(8) of the 1989 Proposed Regulations and is the same as § 351.502(a) of the 1997 Proposed Regulations. It provides that the Secretary will not consider a domestic subsidy to be specific solely because it is limited to the agricultural sector. Instead, as under prior practice, the Secretary will find an agricultural subsidy to be countervailable only if it is specific within the agricultural sector, e.g., a subsidy is limited to livestock, or

livestock receive disproportionately large amounts of the subsidy. See, e.g., *Lamb Meat from New Zealand*, 50 FR 37708, 37711 (September 17, 1985).

One commenter suggested that the Department should abandon the special specificity rule for agricultural subsidies, citing the fact that under section 771(5B)(F) of the Act and Article 13(a) of the WTO Agreement on Agriculture, so-called "green box" agricultural subsidies are non-countervailable. With respect to this comment, we note that the Department's application of the specificity test to agricultural subsidies was upheld in *Roses, Inc. v. United States*, 774 F. Supp. 1376 (CIT 1991) ("*Roses*"). Given the absence of any indication that Congress intended the "green box" rules to change the Department's practice or to overturn *Roses*, we are retaining the special specificity rule for agricultural subsidies.

Subsidies to small- and medium-sized businesses: Paragraph (e) is based on § 355.43(b)(7) of the 1989 Proposed Regulations, and continues to provide that the Secretary will not consider a subsidy to be specific merely because it is limited to small or small- and medium-sized firms. Instead, as under prior practice, the Secretary will find such a subsidy to be countervailable if, either on a *de jure* or a *de facto* basis, the subsidy is limited to certain small or small- and medium-sized firms. As in the case of the special specificity rule for agricultural subsidies, there is no indication that Congress intended to alter this aspect of the Department's specificity practice. We received no comments regarding this rule.

Disaster relief: Paragraph (f) provides that the Secretary will not regard disaster relief as a specific subsidy if the relief constitutes general assistance available to anyone in the affected area. Although paragraph (f) has no counterpart in the 1989 Proposed Regulations, the rule contained in paragraph (f) has been part of the Department's specificity practice since *Certain Steel Products from Italy*, 47 FR 39356, 39360 (September 7, 1982), in which the Department stated that "[d]isaster relief is not selective in the same manner as other regional programs since there is no predetermination of eligible areas and no part of the country, and no industry, is excluded from eligibility in principle." However, before declaring a subsidy to be non-specific under paragraph (f), the Department would have to be satisfied that the subsidy in question was, in fact, *bona fide* disaster relief. See *Certain Steel Products from Italy*, 58 FR 37327,

37332 (July 9, 1993). We received no comments regarding this rule.

Purpose of the specificity test: Some commenters requested that the Department restate in the regulations the policy rationale behind the specificity test. According to these commenters, the underlying purpose of the specificity test is to identify those domestic subsidies that confer a competitive advantage and thereby distort international trade. Other commenters pointed out that the new statute expressly states that the Department is not required to examine the effects of a subsidy or establish that the subsidy has any effect at all. These commenters, citing the reference to the *Carlisle* decision in the SAA, maintain that the sole purpose of the specificity test is to "winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy." SAA at 929-30.

In our view, the language from the SAA cited above makes the purpose of the specificity test abundantly clear. Given the clarity of the SAA on this point, the authoritative nature of the SAA (see 19 U.S.C. 3512(d)), and our general reluctance to issue regulations that merely repeat the statute or the SAA, we do not consider it appropriate to issue a regulation that restates the purpose of the specificity test.

Use of presumptions: Some commenters suggested that in applying the specificity test, the Department should employ certain presumptions. These commenters maintained that, when investigating a domestic subsidy program (and when considering whether to initiate an investigation of such a program), the Department should presume that the foreign government in question exercises discretion in the administration of the program, and that the program is specific. These commenters maintained that, because information regarding applications and approvals generally is not available to petitioners prior to the filing of a petition, the burden should be on respondent interested parties to provide such information and to rebut the presumption of specificity. One commenter also suggested that the Final Regulations should state that a previous finding that a subsidy was *de facto* non-specific should have no relevance when the same subsidy program is alleged in a new investigation involving different merchandise and different facts.

Other commenters argued that there is no legal basis for making presumptions regarding specificity. With respect to *de facto* specificity, the SAA states that the Department is obligated to "seek and

consider" information relevant to each of the four factors listed in section 771(5A)(D)(iii) of the Act. SAA at 931. One of these commenters also asserted that a petitioner alleging that a subsidy is specific should be required to provide a reasonable amount of information supporting the allegation.

As was true under the law prior to the URAA, we note that a petition to initiate an investigation of alleged domestic subsidies must provide reasonably available information supporting the allegation that the subsidy is specific. See section 702(b) of the Act. On the other hand, we recognize that because detailed information regarding the distribution of program benefits usually either is not published or is not widely available, information supporting specificity often is not reasonably available to a petitioner at the time a petition is filed. Therefore, in deciding whether to include alleged domestic subsidies in our investigation, we carefully consider the information the petitioner has put forward, the reasons that more information may not be available, and any arguments the petitioner makes regarding the specificity of the program. Because the types of allegations and information available will vary from case to case, it is not possible to state a general rule for accepting or rejecting specificity allegations. However, we believe that the threshold we have used in the past for including alleged subsidies in CVD investigations has been sufficient to ensure that all potentially countervailable subsidies are investigated. We intend to continue employing this initiation threshold.

In this regard, we note that when a subsidy program has been previously investigated and found to be non-specific, it would be a waste of administrative resources to re-investigate that program without a reasonable basis to believe that the facts supporting the previous finding have changed. In situations where a previous finding may be pertinent to one industry, e.g., that the paper clip industry did not receive dominant or disproportionate benefits under a particular program, petitioners seeking investigation of benefits under that program to the staple industry should allege that the program has changed or that the situation of the staple industry differs, and they should support their allegation with reasonably available information.

Where domestic subsidy programs are included in an investigation, we will not presume such programs are specific. Instead, we will seek in our questionnaire all of the information

necessary to apply the specificity test according to section 771(5A)(D) of the Act. Based on our analysis of the information provided in the questionnaire responses, verification, and other information that may be collected, we will make the necessary specificity determination. If a respondent refuses to provide the information requested by the Department to conduct its specificity analysis, we may draw adverse inferences in the application of "facts available." See section 776(b) of the Act. However, the use of an adverse inference in these situations is not the same thing as relying on a rebuttable presumption of specificity.

Purposeful government action: In our 1997 Proposed Regulations, we noted that certain commenters, citing such cases as *Saudi Iron and Steel Co. (Hadeed) v. United States*, 675 F. Supp. 1362, 1367 (CIT 1987), maintained that a finding of specificity does not require a finding of targeting or some other sort of purposeful government action that limits the number of subsidy program beneficiaries. They cited the statute and its legislative history for the proposition that the Department should deem irrelevant the fact that program usage may be limited by the "inherent characteristics" of the thing being provided by the government. SAA at 932; S. Rep. No. 103-412 at 94 (1994).

In the preamble to the 1997 Proposed Regulations, we agreed with these commenters, stating:

[e]xcept in the special circumstances described in section 771(5A), *i.e.*, where respondents request the Department to take into account the extent of economic diversification in the jurisdiction of the granting authority or the length of time during which the program has been in operation, the Department is not required to explain why the users of a subsidy may be limited in number.

Several of the same commenters objected to this statement, arguing that it could be misinterpreted to mean that evidence of purposeful action is required in some instances. These commenters requested that the Department clarify, in a regulation, that purposeful government action is *never* required.

As we stated in the 1997 Proposed Regulations, the SAA and other legislative history are clear on this point. The SAA clearly indicates that the Department does not need to find "targeting" or "purposeful government action" to conclude that a domestic subsidy is specific. See SAA at 932 ("(E)vidence of government intent to target or otherwise limit benefits would be irrelevant in *de facto* specificity

analysis"). Thus, for example, the fact that users may be limited due to the inherent characteristics of what is being offered would not be a basis for finding the subsidy non-specific. SAA at 932; S. Rep. No. 103-412 at 94 (1994). Regarding situations where the Department is asked to consider the economic diversification in the jurisdiction or the length of time during which the program has been in operation, neither purposeful government action nor targeting is required to find specificity. However, evidence indicating that the government has taken or will take actions to limit benefits to certain industries would be sufficient to find specificity.

Universe: One commenter argued that, in determining whether subsidies are specific, the Department generally should focus on the level of benefits provided to recipients, rather than the number of recipients to whom subsidies are provided. This commenter also argued that, in analyzing the level of benefits provided, the Department's point of reference should be the economy as a whole, as it was for the preferential loan programs used by the Korean steel industry in *Certain Steel Products from Korea*, 58 FR 37338 (July 9, 1993) ("*Korean Steel*"), rather than those enterprises or industries that were eligible to receive the subsidy.

For the most part, we disagree. The starting point of the Department's analysis of specificity will always be the number of users. We normally will not analyze the level of benefits provided (that is, whether the recipients were dominant or disproportionate users of the program) unless the subsidy in question was provided to numerous and diverse industries. Even in that situation, it may be impracticable or impossible to determine the relative level of benefits.

Once we have decided to analyze the level of benefits provided, our point of reference normally will be the enterprises or industries that received benefits under the program. In other words, we will attempt to determine whether one or a limited number of the recipient enterprises or industries were, in fact, dominant or disproportionate users. In certain limited circumstances, however, it may be appropriate to determine whether the benefits received by a particular enterprise or industry or group thereof were disproportionate in relation to the economy as a whole. The Department employed this approach in *Korean Steel*, because the type of subsidy under investigation—governmental use of the economy-wide banking system to direct credit to steel producers—required the broader

analysis. We consider the Korean situation to be unusual compared with the majority of cases in which we have analyzed specificity. In addition, we agree that the analysis of whether an enterprise or industry or group thereof is a dominant user of, or has received disproportionate benefits under, a subsidy program should normally focus on the level of benefits provided rather than on the number of subsidies given to different industries.

Section 351.503

Section 351.503 deals with the concept of benefit. Under section 771(5)(B) of the Act and Article 1.1(b) of the SCM Agreement, a government action must confer a benefit in order to be considered a countervailable subsidy. Hence, the notion of benefit is central to the administration of the CVD law. In the preamble to the 1997 Proposed Regulations, we included a lengthy discussion of this topic. We described a benefit as being conferred when a firm pays less for an input than it otherwise would pay or receives more revenue than it otherwise would earn. Given the crucial role that benefit plays in our analysis of whether a government action confers a countervailable subsidy, we have decided to codify a final rule regarding benefit that reflects the principles outlined in the 1997 Proposed Regulations.

Paragraph (a) states that, where a specific rule for the measurement of a benefit is contained in these regulations, we will determine the benefit as provided in that rule. Where a government program is covered by a specific rule contained in these regulations, such as a program providing grants, loans, equity, direct tax exemptions, or worker-related subsidies, we will not seek to establish, nor entertain arguments related to, whether or how that program comports with the definition of benefit contained in this section.

Paragraph (b) outlines the principles we will follow when dealing with alleged subsidies for which these regulations do not establish a specific rule. In such instances, we will normally consider a benefit to be conferred where a firm pays less for its inputs (*e.g.*, money, a good, or a service) than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn.

We have adopted this definition because it captures an underlying theme behind the definition of benefit contained in section 771(5)(E) of the Act and, in our estimation, reflects the fundamental principles that we have

articulated over the years with respect to programs and practices that we have determined confer either direct or indirect countervailable subsidies. One common element the four illustrative examples set forth in the statute share is that, in the overwhelming majority of cases, the recipient of a government financial contribution, income or price support, or indirect subsidy, enjoys a reduction in input costs or revenue enhancement that it would not otherwise have enjoyed absent the government action. As explained below, we are using the terms "input" and "cost" broadly.

While we believe that this definition will provide useful guidance, we recognize that there may be programs or practices not fitting the input cost reduction or revenue enhancement definition in some economic or accounting senses that may still give rise to a benefit in the sense that the program or practice is similar to the illustrative examples listed in section 771(5)(E) of the Act. For example, without attempting to create a hypothetical program or practice not yet encountered in our experience, we would argue that a program that is similar to a countervailable equity infusion constitutes a reduction in a firm's cost of capital, or that a program that is similar to a countervailable provision of a freight forwarding service constitutes a reduction in a firm's input costs. Since both practices constitute a reduction in the cost of an input, there would be a benefit. We recognize that some might take issue with whether equity or a freight forwarding service is in fact an input into subject merchandise, or whether equity or freight forwarding constitutes a cost of producing subject merchandise. Nonetheless, in these and other instances in which a program or practice contains elements similar to those in the illustrative examples in the statute, a benefit would still exist. As explained further below, when we talk about input costs in the context of the definition of benefit, we are not referring to cost of production in a strict accounting sense. Nor are we referring exclusively to inputs into subject merchandise. Instead, we intend the term "input" to extend broadly to any input into a firm that produces subject merchandise.

When we talk about a firm paying less for its inputs than it otherwise would pay (or receiving more revenues than it otherwise would earn), we are referring to the lower price it pays to acquire the thing provided by the government (e.g., money, a good, or a service), or the increased revenue it receives as a result

of a government action. We believe that the definition of benefit outlined here is consistent with the various standards (or "benchmarks") used to identify and measure the benefit from different subsidy programs that are contained in section 771(5)(E) of the Act and Article 14 of the SCM Agreement. For example, when the amount that a firm pays on a government-provided loan is less than what the firm "would pay on a comparable commercial loan that the (firm) could actually obtain on the market," the firm's cost of borrowing money is reduced. See section 771(5)(E)(i) of the Act. Similarly, when a firm sells its goods to the government and "such goods are purchased for more than adequate remuneration," the firm's revenues are increased beyond what it would otherwise earn. See section 771(5)(E)(iv) of the Act. In neither instance need the Department do more than apply the test enumerated by the statute in order to find that a benefit has been conferred.

Paragraph (b)(2) cautions that the definition of benefit as an input cost reduction or revenue enhancement does not limit our ability to impose countervailing duties when the facts of a particular case indicate that a financial contribution has conferred a benefit, even if that benefit does not take the form of a reduction in input costs or an enhancement of revenues. We will examine the concept of benefit in this broader sense by looking to see whether the alleged program or practice contains elements similar to the examples listed in sections 771(5)(E)(i) through (iv) of the Act. We cannot possibly foresee all the types of government actions we will encounter in administering the CVD law and, hence, cannot write a definition of benefit that would be sufficiently broad to capture all possible countervailable subsidies.

In this regard, it is important to note here our practice of not applying the CVD law to non-market economies. The CAFC upheld this practice in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). See also *GIA* at 37261. We intend to continue to follow this practice. Where the Department determines that a change in status from non-market to market is warranted, subsidies bestowed by that country after the change in status would become subject to the CVD law.

We received several comments regarding the proposed definition of benefit. Two commenters expressed the opinion that the definition is too restrictive. These parties identified examples of benefits which they believed would not be captured under the proposed definition. The first

example is where a domestic purchaser is the *only* customer for an input provided by a government entity or where non-domestic purchasers are not allowed to purchase an input. In these situations, the commenter maintains that there could be a benefit even though the price paid is not less than any other domestic price. The second example is where a transaction is structured so that the firm pays market value for the input but receives other perquisites, such as a higher-quality input or additional services or goods as part of a package.

We disagree that our definition of a benefit is not comprehensive enough to include these types of scenarios. The definition of a benefit (in the absence of a specific rule for the measurement of the benefit) does not call for comparisons only to other domestic prices. Rather, it calls for a determination of whether the input costs were reduced relative to what they would be in the absence of the financial contribution. In the first example, a benefit exists to the extent that the domestic purchaser would have paid more for the input absent the government provision or absent the restrictions placed on foreign purchasers. Likewise, in the second example, if the firm would have had to pay more in order to receive the additional perquisites without the government assistance, a benefit exists. Section 351.511, governing the provision of goods and services, contains more detailed guidance on how such subsidies would be valued.

Another commenter supported the proposed definition, but urged the Department to leave itself enough flexibility so that we could find a benefit when government action enables a firm to sell a product that would not have been created but for the government assistance. For example, if the government assists in the development of a new product, this commenter asserted that the benefit is not the reduced development cost of the new product, but the continuing existence of the product.

We believe that in situations such as that described by the commenter, the existence of a benefit is directly dependent upon the nature of the financial contribution. If a financial contribution has been provided, either directly or indirectly, in a form which is specifically identified in the statute or regulations (e.g., a loan, a grant, an equity infusion, etc.), we will identify and measure the resulting benefit in accordance with the rules contained in the statute and regulations. If the financial contribution takes a form

which has not been specifically dealt with in these regulations, we will identify and measure the benefit in accordance with the definition of benefit contained in paragraph (b). Moreover, as noted above, paragraph (b) provides sufficient flexibility to accommodate circumstances in which the facts of a particular case indicate that a financial contribution has conferred a benefit, even if the benefit does not take the form of a reduction in input costs or an enhancement of revenues.

Finally, one commenter objected to the following statement which was included in the preamble to the 1997 Proposed Regulations: "By the same token, where a firm does not pay less for an input than it otherwise would pay (or its revenues are not increased) as a result of a financial contribution, it would be very difficult to contend that a benefit exists." This commenter argued that we should not define the types of practices which do not confer benefits as this would invite the creation and exploitation of loopholes.

We agree that we need only provide a definition of what constitutes a benefit. We believe we have given ourselves the flexibility to apply the concept of benefit in such a way that we will be able to find a benefit in situations in which the regulations do *not* contain specific rules for identifying and measuring the benefit from a particular government program or practice.

We received several comments regarding the extent to which the Department should consider the overall "effect" a government program has on a firm's behavior in determining whether a benefit exists. One group of commenters requested an affirmative statement preserving the Department's discretion to consider "effects" in appropriate circumstances. Another group of commenters urged us to renounce any use of our discretion and to state that the effects of government actions are irrelevant to the existence of a countervailable subsidy.

As we explained in the preamble to the 1997 Proposed Regulations, the 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, such as its prices or output. In analyzing whether a benefit exists, we are concerned with what goes into a company, such as

enhanced revenues and reduced-cost inputs in the broad sense that we have used the term, not with what the company does with the subsidy. Our 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, assume that a government puts in place new environmental restrictions that require a firm to purchase new equipment to adapt its facilities. Assume also that the government provides the firm with subsidies to purchase that new equipment, but the subsidies do not fully offset the total increase in the firm's costs—that is, 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, section 771(5B)(D) of the Act, which deals with one form of non-countervailable subsidy, makes clear that a subsidy exists. Section 771(5B)(D) of 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 (subject, of course, to the statute'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, if a government promulgated safety regulations requiring auto makers to install seat belts in back seats, and then gave the auto makers a subsidy to install the seat belts, we would draw the same conclusion. 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 cannot 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. The

Department 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.

If there were any doubt on this score, section 771(5)(C) of the Act eliminates it by clarifying that the "benefit" and the "effect" of a subsidy are two different things. While, as stated above, there must be a benefit in order for a subsidy to exist, section 771(5)(C) of the Act expressly provides that the Department "is not required to consider the effect of the subsidy in determining whether a subsidy exists." This message is reinforced by the SAA at 926, 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 the new regulation further reinforces this principle by stating affirmatively that, in determining whether a benefit is conferred, the Department 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.

When we examine indirect subsidies, we are inquiring into whether a government is entrusting or directing a private entity to provide a reduced-cost input or enhanced revenue to a firm that produces the subject merchandise. For example, we have investigated whether below-market loans or reduced-cost goods have been provided by means of indirect subsidies. This analysis in no way implies that we are examining whether the indirect subsidy has an effect on the price or output of the subject merchandise. It merely means that we are investigating, in fulfillment of other statutory requirements, whether loans were provided on non-commercial terms or whether goods were provided for less than adequate remuneration.

In addition to those comments relating specifically to our proposed definition of a benefit, we received comments on other topics which we believe are appropriately addressed in the context of a discussion on benefits. First, one commenter objected to the absence of a regulation regarding so-called "tiered" programs. Tiered programs are those programs which provide varying levels of government assistance based upon differing eligibility criteria. Our longstanding practice regarding such programs has been to countervail only the difference between the assistance provided at a

non-specific level (within the meaning of section 771(5A) of the Act) and the assistance provided to a specific enterprise or industry (or group thereof). This practice was reflected in § 355.44(n) of the 1989 Proposed Regulations.

Our omission of a similar rule in this round of regulations was an oversight. To correct for this, we have added paragraph (d), which provides that where varying levels of financial contributions are provided, a benefit will be conferred to the extent that a specific enterprise or industry or group thereof receives a greater level of financial contribution than that provided at the non-specific level. The varying financial contribution levels must be set forth in a statute, decree, regulation, or other official act, and they must be clearly delineated and identifiable (e.g., the investment tax credit program in *Certain Fresh Atlantic Groundfish from Canada*, 51 FR 10041 (March 24, 1986)). We note, however, that this exception cannot apply where the statute specifies a commercial test for determining the benefit, such as with respect to loans and loan guarantees.

Another related topic involves the treatment of taxes on subsidies. Typically, we have referred to this issue as the "secondary tax consequences" of subsidies. Section 351.527 of the 1997 Proposed Regulations stated that we would not take account of secondary tax consequences. For example, if receipt of a grant increases the amount of income tax paid by a firm, we do not reduce the amount of the benefit from the grant to reflect the higher taxes paid. In these Final Regulations, we have retained this rule and have relocated it to § 351.503(e).

We received two comments expressing support for the 1997 Proposed Regulations. One of these commenters requested that we include in the regulation the following corollary, which flows from the same basic principle: where a subsidy is exempt from income tax, we will treat the tax exemption as a separate benefit in addition to the benefit from the original subsidy. An additional commenter requested that the regulation be expanded to clarify that we will not consider any secondary consequences or effects of the granting of the subsidy outside the exclusive list of subsidy offsets designated by the statute. To this end, this commenter advocated including the list of allowable offsets in the regulations and stating that we will not consider secondary consequences of the benefit. We have not added the requested language because the statute is clear regarding what is considered to

be an allowable offset. Nor have we broadened the regulation as requested by either commenter. We believe that the impact of the benefit under one subsidy program should not be considered in calculating the benefit under a separate program. However, in our experience, this question has only arisen with respect to the impact of tax programs on other programs. Therefore, a broader regulation is not necessary.

Section 351.504

Section 351.504 deals with the benefit attributable to the most basic type of subsidy, a grant. In the 1997 Proposed Regulations, paragraph (c) of this section (which was then numbered § 351.503) included our methodology for allocating over time the benefit from a grant, or the benefit from a subsidy that the Department treated as a grant. In these Final Regulations, we have broken out the allocation issues from the grant section and created a separate section (§ 351.524) which deals with the allocation of benefits to a particular time period. Therefore, § 351.504 now pertains only to grants.

As in our 1997 Proposed Regulations, paragraph (a) provides that in the case of a grant, a benefit exists in the amount of the grant. Paragraph (b) sets forth the rule for determining when a firm is considered to have received a subsidy provided in the form of a grant. This paragraph provides that the Secretary will normally consider the benefit as having been received on the date on which the firm received the grant. In these Final Regulations, we have added the word "normally" for reasons explained in the preamble discussion of § 351.524. Finally, paragraph (c) provides that the benefit from a grant will be allocated to a particular time period pursuant to the methodology set forth in § 351.524.

All the comments that we received regarding grants dealt with the allocation of benefits. These comments are, therefore, discussed in the preamble to § 351.524.

Section 351.505

Section 351.505 deals with loans and other forms of debt financing. Paragraph (a) deals with the identification and measurement of the benefit attributable to a loan. Paragraph (a)(1) tracks the general standard set forth in section 771(5)(E)(ii) of the Act, which directs the Department to use a "comparable commercial loan that the recipient could actually obtain on the market" as the benchmark in determining whether a government-provided loan confers a benefit.

Use of Effective Interest Rates: Paragraph (a)(1) restates the Department's current practice of normally seeking to compare effective interest rates rather than nominal rates in making this comparison. "Effective interest rates" are intended to take account of the actual cost of the loan, including the amount of any fees, commissions, compensating balances, government charges (such as stamp taxes) or penalties paid in addition to the "nominal" interest. However, where effective rates are not available, we will compare nominal rates or, as a last resort, nominal to effective rates, as under current practice. If the "loan" is a bond (see definition of "loan" in § 351.102), we normally will treat the yield on the bond as the effective interest rate.

One commenter asked that the regulations clarify that only payments legitimately made on a loan will be used when calculating the effective interest rate. The commenter urged the Department to exclude other, unrelated payments to the government which the borrower might make along with the loan payments.

We agree with this commenter that payments unrelated to the loan should not be included when we calculate the effective interest rate, but we do not believe that the regulation needs to be modified to address this concern. The preamble clearly describes the types of payments that would be included in calculating an effective interest rate. However, we will examine whether there are requirements placed on either the government loan or the benchmark loan affecting the cost of borrowing that should be factored into the calculation of the benefit amount.

Selection of Benchmark Loans and Interest Rates

Paragraphs (a)(2) and (a)(3) elaborate on the criteria for selecting the benchmark. The criteria contained in these two paragraphs are much more general (and, thus, much more flexible) than the detailed hierarchies contained in § 355.44(b) of the 1989 Proposed Regulations. The Department seldom used these hierarchies because, in practice, the information required in the 1989 Proposed Regulations was seldom available.

"Comparable commercial loan" defined: Paragraph (a)(2) sets forth the criteria the Department normally will consider in selecting a comparable commercial loan. First, paragraph (a)(2)(i) defines the term "comparable." In the preamble to the 1997 Proposed Regulations, we stated that in order to be used as a benchmark, a comparable

commercial loan should represent a financial instrument that is similar to the government-provided loan and that was taken out (or could have been taken out) at the same time. To identify a loan that is comparable to the government-provided loan, the 1997 Proposed Regulations called for primary emphasis to be placed on the structure of the loans (e.g., fixed interest rate v. variable interest rate), the maturities of the loans (e.g., short-term v. long-term), and the currencies in which the loans are denominated.

Several commenters maintained that it is not enough to look at the structure, maturity, and currency denomination to identify a benchmark loan that is comparable to the government-provided loan. These commenters argued that the Department should also consider the level of risk associated with the loans by comparing the security or collateral that the borrower is required to provide for each loan. One of the commenters observed that this approach would be consistent with the Department's practice in *Laminated Hardwood Trailer Flooring from Canada*, 62 FR 5201 (February 4, 1997). This commenter also noted that, while the risk element was discussed in the preamble of the 1997 Proposed Regulations, it did not appear in the regulation.

In opposition, another commenter argued that a commercial loan should be considered sufficiently comparable to a government loan when the structures and maturities of the two loans are identical or similar and the loans are provided in the same currency. This commenter argued that in the interest of predictability and uniformity, no further analysis, particularly with regard to the level of security of a loan, should be necessary. This commenter asserted that, where these three criteria are met, the loans would generally require the same level of security. Comparing the value of different assets securing different loans would create an unworkable test, according to the commenter, who suggested that the Department at least make it a rebuttable presumption that a commercial and a government-provided loan are comparable if the three criteria listed above match.

We have not adopted the proposals put forward by either set of commenters. As in the 1997 Proposed Regulations, § 351.505(a)(2)(i) states that we intend to place primary emphasis on three basic characteristics in determining whether particular loans are comparable to a government-provided loan: The structure, maturity, and currency denomination of the loans. This does not mean, however, that a loan in the

same currency with a similar structure and maturity will always be found comparable to the government-provided loan. Nor should our decision to place primary emphasis on these three characteristics be seen as a rebuttable presumption.

Instead, we recognize that many characteristics could factor into a decision of whether a loan should be considered comparable to the government-provided loan. Certainly, as the first set of commenters has pointed out, the levels of security or collateral on the two loans could be relevant in determining comparability. Similarly, the amounts of principal might differ so greatly that the two loans should not be compared. However, rather than identifying numerous characteristics for finding loans to be comparable, and thereby limiting our ability to find benchmarks, we have continued to place primary emphasis on what we believe to be the three most important characteristics. Regarding other characteristics that might render particular loans not comparable to the government-provided loan, such as collateral and size, we will consider arguments made by the parties based on the facts presented in their cases.

Paragraph (a)(2)(ii) provides a definition of the term "commercial." The 1997 Proposed Regulations stated that we would normally treat a loan as "commercial" if it were taken out from a commercial lending institution or if it were a bond issued by the firm in commercial markets. We also stated that a loan provided under a government program, even if the program is not specific to an enterprise or industry, would not be considered a "commercial" loan for benchmark purposes. Finally, the 1997 Proposed Regulations stated that the Department would treat a loan from a government-owned bank as a commercial loan, unless there was evidence that the loan was provided at the direction of the government or with government funds.

We received several comments on this issue, all of which urged us not to use loans from government-owned banks for benchmark purposes. One commenter asserted that a loan from a government-owned bank is the same as a loan from the government, regardless of whether the loan is provided under a government program, because the actions of a government-owned bank are presumably consistent with the policies of its owner, the government. A second commenter maintained that the distinction between "a government program" and "government control" is blurred and pointed to the Department's determination in *Certain Steel Products*

from Korea, 58 FR 37338 (July 9, 1993), where the Department found that a countervailable benefit was conferred by government-directed, preferential access to specific sources of credit offered at favorable terms. Because of the availability of "directed credit" such as that found in the Korean case, this commenter argued that the Department should not use rates from loans provided by government-owned banks as benchmark rates. A third commenter argued that the Department should not use loans from government-owned banks for benchmark purposes unless the respondent can demonstrate the commercial nature of such loans. This and other commenters objected to the burden that the 1997 Proposed Regulations allegedly placed upon a petitioner to show that a loan from a government-owned bank is provided at the direction of the government or with government funds. Noting that the 1989 Proposed Regulations directed the Department to use financing provided or directed by the government as a benchmark only under certain exceptional circumstances, several commenters urged the Department to continue to apply this narrow standard.

We have traditionally recognized that government-owned banks may operate as commercial banks in some countries. It is not appropriate to maintain that loans from government-owned banks *per se* are not commercial. Therefore, we continue to take the positions that: (1) We will not consider loans provided under government programs to be commercial loans, and (2) we will not automatically disqualify loans from government-owned commercial banks as benchmarks. However, we will not use loans from government-owned special purpose banks, such as development banks, as benchmarks because such loans are similar to loans provided under a government program or at the direction of the government. Regarding loans from government-owned commercial banks, we will treat such loans as being commercial and use them as benchmarks unless they are made on non-commercial terms or are provided at the direction of the government. We do not believe that this standard imposes an unreasonable burden on petitioners because this is the type of information they would routinely provide when alleging that government-provided loans are countervailable.

Further, regarding the definition of "commercial," where a firm receives a financing package including loans from both commercial banks and from the government, we intend to examine the package closely to determine whether

the commercial bank loans should in fact be viewed as "commercial" for benchmark purposes. In particular, we will look to whether there are any special features of the package that would lead the commercial lender to offer lower, more favorable terms than would be offered absent the government/commercial bank package.

Paragraphs (a)(2)(iii) and (iv) specify the time period from which the Department will select comparable financing. Paragraph (a)(2)(iii) addresses long-term loans and is unchanged from the 1997 Proposed Regulations. This regulation directs us to use a loan whose terms were established during or immediately before the year in which the terms of the government-provided loan were established. Paragraph (a)(2)(iv) addresses short-term loans. In the 1997 Proposed Regulations, we stated that we would use as the benchmark rate an annual average of the interest rates on comparable commercial loans taken out during the period of investigation or review. However, in cases with significantly fluctuating interest rates, the 1997 Proposed Regulations allowed us to use "the most appropriate" interest rate as the benchmark rate.

We received two comments regarding the benchmark interest rate for short-term loans. Both commenters argued against using a simple average of the interest rates on comparable commercial short-term loans obtained by the respondent. Instead, they asked the Department to weight the rates by the associated principal amount of each loan in order to prevent small, one-time loans from distorting the benchmark calculation. According to the commenters, this change would also address the Department's concern about significantly fluctuating interest rates.

We have adopted the commenters' proposal in part and have amended paragraph (a)(2)(iv) to provide that we will calculate a weighted rather than a simple average benchmark interest rate for short-term loans. However, we do not share the commenters' view that this change addresses situations where the interest rate fluctuates significantly over the year, e.g., in economies with a high inflation rate. We are, therefore, retaining the provision that allows us to use benchmarks other than annual weighted averages in these situations.

We also wish to clarify that we intend to follow our practice of calculating short-term benchmarks on a calendar year basis. In most instances, the period of investigation or review is a calendar year, so the short-term benchmark will be calculated using commercial loans that were obtained (or could have been

obtained) during the period of investigation or review. In situations where the loans under investigation span two calendar years, we will calculate two annual benchmarks corresponding to the two years.

Finally, we received one comment on the selection of benchmark interest rates to be used in administrative reviews of suspension agreements. In the preamble to the 1997 Proposed Regulations, we stated that in administering a suspended investigation, we would monitor developments in commercial benchmarks outside of the normal administrative review process and that this monitoring activity should serve to ensure that the commercial benchmarks used were timely. The commenter, however, claimed that a special regulation requiring the Department to monitor commercial benchmark rates is needed because otherwise there is no guarantee that the Department will do so. In the commenter's experience, the Department has not always undertaken this type of monitoring activity. Specifically, pointing to *Miniature Carnations and Roses and Other Fresh Cut Flowers from Colombia*, 59 FR 52514 (October 18, 1994), the commenter alleged that the Department set new benchmarks at the conclusion of each administrative review, with the result that the interest rates used for purposes of the suspension agreement always lagged behind the contemporaneous commercial rates. For short-term loans, the commenter argued, the Department should monitor commercial interest rates on at least a quarterly basis in order to keep the suspension agreement current.

We do not agree with the commenter's view that a regulation is needed on this issue. In the case of suspension agreements, we will revise the benchmarks for long- and short-term loans whenever appropriate, regardless of whether we are conducting an administrative review of the suspension agreement. To ensure that the benchmarks are kept as current as possible, we intend to review them once a year or more frequently, if information available to the Department indicates that a change is necessary.

"*Could actually obtain on the market*" defined: In accordance with section 771(5)(E)(ii) of the Act, paragraph (a)(3) addresses the requirement that the comparable loan be one that the firm "could actually obtain on the market," and reflects a change in our practice with respect to short-term loans. In the past, we have used national average interest rates to determine the benefit from government-provided short-term loans. This practice was

codified in § 355.44(b)(3) of the 1989 Proposed Regulations. However, as early as 1989, we announced that we would consider using company-specific benchmarks for short-term loans. Based upon our experience in the interim, and especially because of the ability to computerize our loan calculations, we have concluded that we have the capability to use company-specific benchmarks. Moreover, we believe that company-specific benchmarks provide a more accurate measure of the benefit, if any, to a recipient of a government-provided short-term loan. Therefore, paragraph (a)(3)(i) states a preference for using company-specific benchmarks for both short- and long-term loans. Under paragraph (a)(3)(ii), we normally would use national averages only in the event that the firm did not take out any comparable commercial loans during the relevant period. Except for a minor clarification (adding "for both short- and long-term loans" to paragraph (a)(3)(i)), these paragraphs are unchanged from the 1997 Proposed Regulations.

Two commenters warned against using the interest rates on hypothetical loan offers as benchmark rates. One of the commenters pointed to a perceived loophole in the preamble to the 1997 Proposed Regulations, which stated that "a comparable commercial loan used as a benchmark should represent a financial instrument * * * that was taken out (or could have been taken out) at the same point in time." Another commenter suggested that the acceptance of hypothetical loan offers for benchmark purposes might tempt respondents to manipulate the benchmark rate by soliciting offers of loans that they do not intend to take. Both commenters asserted that the interest rates on such hypothetical loan offers would be very low and that they would, thus, distort the benchmark rate.

We agree that respondents should not be permitted to submit hypothetical loans for use as benchmarks. The language in the preamble cited by the commenter was meant to address another situation: Where the respondent did not actually take out any commercial loans during the relevant period and where we, therefore, would use an appropriate alternative benchmark interest rate * * * such as a national average interest rate. The national average interest rate is representative of a loan that "could have been taken out."

Benchmark for uncreditworthy companies: Paragraph (a)(3)(iii), which deals with long-term loans provided to firms considered to be uncreditworthy, describes our methodology for

calculating the benchmark that we will use in identifying and measuring the benefit attributable to a government-provided, long-term loan received by an uncreditworthy firm. One important aspect of this methodology has changed from the 1997 Proposed Regulations.

Our methodology is based explicitly on the notion that, when a lender makes a loan to a company that is considered to be uncreditworthy (as opposed to a safer, creditworthy company), the lender faces a higher probability that the borrower will default on repayment of the loan. As a consequence of this higher probability of default, the lender will charge a higher interest rate. The calculation described in paragraph (a)(3)(iii) addresses the increased probability of default for an uncreditworthy company by adjusting upward the interest rate for a creditworthy company in the country in question.

As stated in the 1997 Proposed Regulations, in making this adjustment, we are not proposing to calculate the probability that a particular uncreditworthy firm will default on a particular loan. Such a calculation would require extensive data and analysis, and any conclusion would be highly speculative. Instead, similar to the method we have used since 1984, we will rely on information regarding the U.S. debt market. In the 1997 Proposed Regulations, we stated that we would use the weighted average one-year default rate for speculative grade bonds, as reported by Moody's Investor Service. This weighted average default rate would be reflected indirectly in our formula for calculating the benchmark interest rate for uncreditworthy companies, which is based on the probability that these risky loans will be repaid.

We received numerous comments on our new methodology. One commenter expressed support for the methodology, stating that it seemed to calculate accurately the full benefit of a loan subsidy. Certain other commenters supported the new methodology as long as it resulted in a "substantial spread" between the observed commercial interest rates in the country under investigation and the benchmark interest rate used for uncreditworthy companies.

One commenter did not object to the new methodology but argued that, in calculating the risk premium, the Department should use data pertaining to the country under investigation, not U.S. data, which should only be used as facts available.

Another commenter criticized the reliance upon default rates in the U.S.

"junk" bond market, arguing that U.S. data do not reflect the risk of lending to uncreditworthy companies in foreign countries, especially developing countries where the default rate is likely to be much higher. This commenter also criticized the use of a one-year default rate in the calculation of the risk premium, arguing that this significantly understates the overall default rate because default is more likely after the first year of the life of a loan. Should the Department decide to rely on U.S. market data, the commenter asked that the Department, at a minimum, examine the default rate over 10 years.

Another commenter stated that the Department's new methodology implies a serious departure from the statutory mandate to determine an interest rate that the borrower could actually obtain on the market. First, the commenter argued, a default-based premium does not take into account all the costs associated with lending to an uncreditworthy company, e.g., collection costs and lost opportunity costs and, as a result, the premium is understated. Second, the commenter asserted, the new methodology treats all uncreditworthy borrowers as if they were large corporate borrowers able to issue junk bonds of the kind reported by Moody's. According to this commenter, many companies cannot obtain long-term loans even at junk bond rates and are forced to rely on borrowing from the venture capital market at substantially higher interest rates. In reality, the commenter argued, a private lender would assess a company's creditworthiness on a case-by-case basis using the same financial indicators that the Department has relied upon in the past (see § 355.44(b)(6)(i) of the 1989 Proposed Regulations). The regulations, therefore, should reflect such private lender behavior by directing the Department to determine the risk premium on a case-by-case basis.

Finally, two commenters noted that the European Union ("EU") takes a tougher stance on government loans to uncreditworthy borrowers by treating the entire loan as a grant when the recipient company's financial position is so weak that it could not have obtained a commercial loan, and implied that the Department should follow the EU's example.

As stated in the 1997 Proposed Regulations, we are changing our methodology because we believe that the new methodology more appropriately reflects the risk involved in lending to firms with little or no access to commercial bank loans from conventional sources. By adjusting upward the interest rate that an average,

creditworthy company would pay to account for the greater likelihood of default by an uncreditworthy company, we recognize the speculative nature of loans to uncreditworthy borrowers and the premium they would have to pay the lender to assume that risk.

We have continued to rely on default information pertaining to the United States in our formula because we believe it would be difficult to locate detailed and comprehensive default information for many of the countries that we investigate. However, if such data do exist and are brought to our attention in the course of an investigation or review, and the data indicate that the default experience in the country in question differs significantly from that in the United States, we would consider using the default rate from the country under investigation. Therefore, we have amended the 1997 Proposed Regulation to say that the Secretary "normally" will calculate the benchmark for uncreditworthy companies using U.S. data.

We have not adopted the suggestion that we follow the EU's practice of treating loans to uncreditworthy firms as grants. Under our definition, uncreditworthy firms are those that cannot obtain long-term loans from conventional commercial sources. This does not mean, however, that they cannot borrow funds from other sources. Hence, we would not equate loans to these companies with grants. Instead, the purpose of our methodology is to capture the increased risk of lending to these companies.

Regarding the new calculation methodology, we agree that using a one-year default rate would not accurately reflect the risk that an uncreditworthy borrower will default on a long-term loan. We have, therefore, changed this aspect of our methodology and will use the average cumulative default rate for the number of years corresponding to the length of the loan, as reported in Moody's study of historical corporate bond default rates. In other words, we would use a five-year default rate for a five-year loan, a 15-year default rate for a 15-year loan, and so forth. We believe that using a default rate that is directly linked to the term of the loan is a better reflection of the risk associated with long-term lending to uncreditworthy borrowers.

Our formula for calculating the benchmark interest rate for an uncreditworthy company is based upon the assumption that a lender's expected return on all loans should be equal. Under this assumption, the interest rate differential on loans charged to

creditworthy and uncreditworthy companies is such that the lender's expected (total) return on a loan to an uncreditworthy company equals the expected (total) return on a loan to a creditworthy company, after accounting for differences in the risk of default. A second assumption is that, in the event of default, no portion of the principal or interest is recovered by the lender. The following equation relates the loan rate to a creditworthy company and the loan rate to an uncreditworthy company:

$$(1 - q_n)(1 + i_f)^n = (1 - p_n)(1 + i_b)^n,$$

Where:

n = the term of the loan;

i_b = the benchmark interest rate for uncreditworthy companies;

i_f = the long-term interest rate that would be paid by a creditworthy company;

p_n = the probability of default by an uncreditworthy company within n years; and

q_n = the probability of default by a creditworthy company within n years.

Default means any missed or delayed payment of interest and/or principal, bankruptcy, receivership, or distressed exchange. For values of p_n , we will normally rely on the average cumulative default rates reported for the Caa to C-rated categories of companies in Moody's study of historical default rates of corporate bond issuers. For values of q_n , we will normally rely on the average cumulative default rates reported for the Aaa to Baa-rated categories of companies in Moody's study of historical default rates of corporate bond issuers.

Solving for i_b in the above equation yields a formula for the benchmark interest rate that should be paid by an uncreditworthy borrower:

$$i_b = [(1 - q_n)(1 + i_f)^n / (1 - p_n)]^{1/n} - 1.$$

One commenter urged the Department to apply a risk premium also to short-term loans taken out by uncreditworthy borrowers. Another commenter supported this idea, arguing that even though long-term financing is riskier, a bank's decision on short-term loans is also based on the overall financial health of the borrower.

The fact that we are using a company-specific benchmark means that the risk associated with providing a short-term loan to a company will be reflected without any special adjustment. However, even where a company-specific benchmark is not available, we do not believe it would be appropriate to include a risk premium in the short-term benchmark calculation. Short-term lending is less risky than long-term lending and the inclusion of a risk

premium in the short-term benchmark would overcompensate for the commercial default risk. The risk of default in short-term lending is minimal because short-term lending is usually associated with specific transactions, and these transactions provide security for the lender (albeit by means of a wide variety of legal modalities). Thus, we have not adopted this suggestion.

We note that we have identified one situation where it would be appropriate to include a risk premium in a short-term benchmark. This would arise if we were forced to use a short-term interest rate as a benchmark for long-term loans to an uncreditworthy company or as a discount rate for allocating benefits received by an uncreditworthy company.

Creditworthiness Analysis

Paragraph (a)(4) sets forth the standard for determining whether a firm is uncreditworthy. In the 1997 Proposed Regulations, we made certain modifications to § 355.44(b)(6)(i) of the 1989 Proposed Regulations to clarify the analysis we intended to undertake in determining whether a company is creditworthy. Specifically, we adopted a broader definition of "uncreditworthiness" where we would find a company to be uncreditworthy if information available at the time the terms of the government-provided loan were agreed upon indicated that the firm could not have obtained long-term financing from conventional commercial sources. In this context, the term "conventional commercial sources" referred to bank loans and non-speculative grade bond issues. Hence, uncreditworthy companies were those that would be forced to resort to other sources, such as junk bonds, to raise funds. We also listed factors we would consider in making a creditworthiness determination. These factors focused on the financial position of the firm receiving the government financing, without any consideration of the purpose of the financing or whether different levels of risk might be associated with different types of projects undertaken by the firm.

We received several comments on our definition of "uncreditworthiness." Certain commenters urged the Department to retain the definition of uncreditworthiness from the 1989 Proposed Regulations, arguing that this standard was objective, uncontroversial, and easy to administer. These commenters maintained that this standard provided important guidance for petitioners who may have difficulties obtaining information on the loan options available to respondents.

The commenters also argued that the new regulation would place a nearly impossible burden of proof on petitioners to demonstrate that a respondent is uncreditworthy.

We have not adopted this suggestion. As we stated in the preamble to our 1997 Proposed Regulations, we changed the definition from the 1989 Proposed Regulations because we found that the old definition did not contain a general principle to guide our determinations of uncreditworthiness. Instead, the 1989 Proposed Regulation relied on a formulaic approach to determining creditworthiness that was too restrictive. We believe that the general principle adopted in these regulations (i.e., an uncreditworthy firm is one which could not have obtained long-term financing from conventional sources) will give us the flexibility to address situations that would not have met the formulaic approach for finding a company uncreditworthy.

However, although we changed the definition of uncreditworthiness, we did not intend to change the standard for initiating an investigation of a company's creditworthiness. Therefore, petitioners may continue to provide the same type of information we have typically relied upon.

Another commenter argued that the Department should not limit itself to examining the creditworthiness of firms as a whole, but should also give itself the flexibility to examine the creditworthiness of individual projects. This commenter argued that some foreign manufacturers, though creditworthy *per se*, are able to carry out new development projects only because they obtain government financing. The commenter argued that these manufacturers would not have been able to secure financing from commercial sources for their huge development projects because these projects are not commercially viable and would be impossible to finance without government subsidies. The commenter noted that, under the Department's traditional approach, the Department would analyze the creditworthiness of the company as a whole, not the creditworthiness of the specific project. Hence, the Department would be likely to find the foreign manufacturer creditworthy, regardless of the commercial viability of the project. The commenter argued that, in this type of situation, the Department should focus on the creditworthiness of the project, not the firm.

We share this commenter's concern and have amended the 1997 Proposed Regulations to allow for a project-specific analysis in determining

creditworthiness. For example, for loans that are provided to fund a large investment project into new products, processes, or capacity (e.g., a plant expansion or new model or product line, where repayment of a loan is contingent upon the success of the particular project being funded), our traditional analysis focusing primarily on the creditworthiness of the company as a whole may be inappropriate because the risk associated with a new project may be much higher or lower than the average risk of the company's existing operations. In these situations, we would expect commercial lenders to place greater emphasis on the expected return and risk of the project because the success or failure of the project would be the most important indicator of the borrowing firm's ability to repay the loan. This is not to say that the financial position of the firm as a whole would be irrelevant to the lender's decision, only that the primary focus would be on the project itself. Therefore, paragraph (a)(4) now allows for the possibility of focusing the creditworthiness analysis on the project being financed rather than the company as a whole.

Significance of long-term commercial loans: In the 1997 Proposed Regulations, paragraph (a)(4)(ii) provided that, if a privately-owned company received long-term commercial loans without a government loan guarantee, we would consider the presence of such commercial loans as dispositive evidence that the company was not uncreditworthy.

Two commenters criticized the Department's proposed approach. These commenters maintained that the presence of a long-term, commercial loan does not prove that a company is creditworthy. Instead they urged the Department to examine all the criteria listed in paragraphs (a)(4)(i) (A), (B), (C), and (D) without treating one of these factors as dispositive. One of the commenters argued that giving one criterion dispositive status would constitute abuse of the Department's discretion to implement the statute. The other commenter argued that the Department's proposed approach would preclude an in-depth review of the company as envisioned by the regulations. Both commenters stated that making the presence of a commercial loan a dispositive indication of creditworthiness would be particularly inappropriate if the commercial loan had characteristics different from the government loan (e.g., different requirements of security).

In general, we believe that if commercial banks are willing to provide

loans to the firm, we should not substitute our judgment and find the firm to be uncreditworthy. This does not mean, however, that if the firm has taken out a single commercial bank loan we would find that loan to be dispositive evidence that the firm was creditworthy. Instead, the intent of this paragraph is to indicate that, where the firm has recourse to commercial sources for loans, as made evident by the receipt of such loans, and the commercial loans are comparable with the government loan, those loans will be dispositive of the firm's creditworthiness. However, if, for example, the firm has obtained a single commercial loan in the year in question for a relatively small amount, and the loan has a short repayment term (e.g., less than two years), or has unusual aspects, receipt of that loan will not be dispositive of the firm's creditworthiness, and we will go on to examine the other factors listed in paragraph (a)(4)(i) B through D.

We have also made a change from the 1997 Proposed Regulations regarding the presence of guarantees and the firm's creditworthiness. We have added "explicit or implicit" to modify "government guarantee." This serves to clarify our position that if either type of guarantee is present, the commercial loans will not be viewed as dispositive of the firm's creditworthiness. We may consider a commercial loan to be covered by an implicit government guarantee where the loan contributes to the financing of a project that is being undertaken in conjunction with government loan funds or other types of government participation such as development grants. In such a scenario, while no explicit government guarantee is present, we believe that banks are likely to assume that the government will stand behind the project and ensure that creditors are repaid.

Finally, we note our longstanding practice that creditworthiness determinations are made on a year-by-year basis. For example, if we are trying to determine whether a firm is creditworthy in 1998, we will look to whether the firm has negotiated commercial loans in 1998.

One commenter suggested that purchases of equity in a company by a commercial institution should also constitute dispositive evidence of creditworthiness. The commenter reasoned that a private entity willing to invest in a company would presumably also be willing to lend money to that company because investing is riskier than lending.

We have not adopted this suggestion. By its very terms, equity differs from loans and, hence, the presence of equity

investments (even if made by private investors) is not necessarily indicative of whether the firm could obtain loans from commercial sources. As an extreme example, private owners may inject equity into their company because the debt-to-equity ratio is so high that it has become virtually impossible for the company to borrow funds. Clearly, in this situation, the presence of equity purchases by the owners would not be indicative of the firm's access to commercial loans.

We received two comments regarding the significance of the receipt of a commercial loan where we are examining the creditworthiness of a government-owned company. One commenter suggested that paragraph (a)(4)(ii) should apply also to government-owned firms. Another commenter took the opposite view, stating that it is not unusual to find commercial lenders providing loans to government-owned companies which are otherwise uncreditworthy.

We do not believe that the presence of commercial loans is dispositive of whether a government-owned firm could have obtained long-term financing from conventional commercial sources. This is because, in our view, in the case of a government-owned firm, a bank is likely to consider that the government will repay the loan in the event of default. Accordingly, paragraph (a)(4)(ii) provides that the presence of comparable commercial loans will be dispositive of creditworthiness only for privately owned companies. For government-owned firms, we will make our creditworthiness determination by examining this factor and the other factors listed in paragraph (a)(4)(i).

Significance of prior subsidies: Paragraph (a)(4)(iii) in the 1997 Proposed Regulations stated that we would ignore current and prior countervailable subsidies in determining whether a firm is uncreditworthy. In other words, we would not attempt to adjust a firm's financial data for current and prior subsidies in making a creditworthiness determination.

We received three comments on this issue, all of which urged the Department to change its approach and adjust for prior subsidies when examining a firm's creditworthiness. One of these commenters requested that the Department take prior subsidies into account to the same extent that a reasonable private lender would. This commenter argued that, by ignoring prior subsidies, the Department is not adhering to the standards of a reasonable private lender. The commenter maintained that, if a

company's financial health is due to government assistance, a private lender would examine the company's underlying performance independent of subsidies. The private lender, who would then discover that the company's financial health was superficial, might not lend money to the company unless the lender was convinced that the government would continue to provide subsidies in the future. A second commenter argued that failure to consider prior subsidies when making a creditworthiness determination underestimates the benefit received. This commenter urged the Department to estimate the recipient company's financial situation without subsidies and base its creditworthiness determination on this estimate.

We have not adopted this suggestion. Our longstanding practice has been not to take current or prior subsidies into account when determining a company's creditworthiness. We believe that trying to adjust a company's financial ratios for previously received subsidies would be an extremely difficult and highly speculative exercise.

We have made one small amendment to paragraph (a)(4)(iv) addressing the discount rate. We have changed "non-recurring grant" to "non-recurring benefit" to conform with the new nomenclature used in § 351.524.

Calculation of Benefit From Long Term Variable Rate Loans

Paragraph (a)(5) deals with long-term variable rate loans and codifies the methodology set forth in the GIA. Under paragraph (a)(5)(i), which is unchanged from the 1997 Proposed Regulations, the year in which the terms of the government-provided loan are set establishes the reference point for comparing the government-provided variable-rate loan with the comparable commercial variable-rate loan. If the interest rate on the government-provided loan is lower than the interest rate on the comparable commercial loan, a benefit exists. If the interest rate on the government-provided loan is the same or higher, no benefit exists. The rationale for basing the decision on the first-year interest rate differential is that the interest rate spread, if any, in that year generally will apply throughout the life of the loan.

Paragraph (a)(5)(ii) recognizes that there may be situations where the method described in paragraph (a)(5)(i) cannot be followed and provides the Department with the discretion to modify that method. For example, there may be no comparable commercial variable-rate loan to use for comparison purposes, or the repayment structure of

the government-provided variable-rate loan may be such that the simple interest rate comparison described in paragraph (a)(5)(i) would not yield an accurate measure of the benefit.

Allegations

Paragraph (a)(6)(i) deals with the standard for initiating an investigation of a respondent company's creditworthiness. It is unchanged from the 1997 Proposed Regulations. In accordance with our past practice, this paragraph states that the Secretary will normally require a specific allegation before the Department will consider the creditworthiness of a firm.

One commenter argued that the Department should not employ a heightened initiation standard for investigating a company's creditworthiness. Specifically, this commenter suggested that the requirement that petitioners supply information "establishing a reasonable basis to believe or suspect" that a company is uncreditworthy be replaced with information "reasonably available to petitioners."

We have not adopted this suggestion. The requirement that petitioners establish "a reasonable basis to believe or suspect" uncreditworthiness rather than merely provide "information reasonably available" to them dates back to the 1989 Proposed Regulations. Because of the additional workload involved in investigating and determining whether a company is uncreditworthy, we continue to believe that it is appropriate to impose a higher standard for uncreditworthiness allegations. This does not involve any change in our past practice—the same types of allegations that we have accepted in the past will still suffice to start a creditworthiness inquiry.

Paragraph (a)(6)(ii) establishes the evidentiary standard for investigating loans extended by government-owned banks. In the 1997 Proposed Regulations, we made a distinction between government-owned banks that are operated to meet special financing needs and government-owned commercial banks. For special purpose banks (such as national development banks), we asked that petitioners provide information reasonably available to them indicating that loans provided by such banks were specific and that the interest charged was not at commercial rates. For government-owned commercial banks, we requested that petitioners also provide information establishing a reasonable basis to believe or suspect that the loans were something more than mere commercial loans. In particular, we requested

information suggesting that such loans were provided at the direction of the government or with funds provided by the government.

Several commenters objected to the higher initiation standard for loans provided by government-owned commercial banks. They argued that the additional information required by the Department for initiating an investigation of loans from this category of banks is not reasonably available to petitioners. They contended that it should be sufficient for petitioners to demonstrate that a loan is specific and provided on terms inconsistent with commercial considerations. They suggested that the burden of proof be shifted to respondents to show that the loan involves no government funds or government direction. Another commenter asserted that the division of government-owned banks into two categories is a new approach and not part of the Department's past practice. The same commenter argued that the Department's 1997 Proposed Regulations would create a loophole because the Department's threshold for initiating an investigation of loans from government-owned commercial banks would be higher than for initiating an investigation of loans from privately-owned banks and government-owned special purpose banks.

Based on our consideration of these comments, we have decided that the distinction between government-owned special purpose banks and government-owned commercial banks may not be helpful in this context and that it is, therefore, not meaningful to retain different initiation standards for investigating loans from these two categories of banks. Paragraph (a)(6)(ii) has, thus, been changed and now provides that, for loans provided by any government-owned bank, the Secretary will require petitioners to present information reasonably available to them indicating that the loans: (1) Are specific in accordance with section 771(5A) of the Act, and (2) are provided on terms more favorable than those the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market. This initiation standard is consistent with the initiation standard for most subsidy allegations, *i.e.*, petitioner must allege (and provide reasonably available information in support of the allegation) that the subsidy is specific and that it confers a benefit. We believe that, for initiation purposes, government ownership is sufficient to indicate that funds have been provided at the direction of the government.

One commenter argued that loans provided by special purpose government-owned banks should be presumed to be specific for purposes of making a subsidy allegation because such banks promote specific and narrow objectives. This commenter stated that many petitioners cannot obtain the information needed to show that a loan is specific. In this commenter's view, the Department should instead require respondents to show that the loans are generally available.

We have not adopted this suggestion. With any presumption, there must be a factual basis for making the presumption, and none exists in this instance. The fact that special purpose banks may be set up to achieve certain objectives does not necessarily mean that they provide funds to a specific group of enterprises or industries. As with any other domestic program, petitioners must provide information reasonably available to them indicating that the bank's loans are specific and that they confer a benefit.

Timing of Receipt of Benefit

Paragraph (b) sets forth a rule regarding the point in time at which the benefit from a loan arises. The 1997 Proposed Regulations stated that we would consider the benefit as having been received on the date on which the firm is due to make a payment on the government-provided loan. In these Final Regulations, we have amended the regulation such that we will consider the benefit to have been received in the year in which the firm otherwise would have had to make a payment on the comparable commercial loan. The second sentence of paragraph (b) addresses loans with special characteristics, e.g., loans with non-commercial grace periods. With these types of loans, we believe that the benefit stream starts upon the receipt of the loan. It would not be appropriate to wait until the end of the grace period to begin assigning the benefit from such loans because the firm would have had to make loan payments during this period if the loan were provided on commercial terms.

Allocation Over Time

Paragraph (c) deals with the allocation of the benefits of a government-provided loan to a particular time period and reflects one minor change from the 1997 Proposed Regulations.

Paragraph (c)(1) provides that the benefit of a short-term loan will be allocated (expensed) to the year(s) in which the firm is due to make interest payments on the loan. This approach, which essentially treats short-term loans

as recurring subsidies, is consistent with longstanding Department practice. We have added to the paragraph the same condition that applies to long-term loans, i.e., that the amount of the subsidy conferred by a government-provided loan can never exceed the amount that would have been calculated if the loan had been given as a grant.

Paragraph (c)(2) deals with situations in which the benefit of a government-provided long-term loan stems solely from the concessionary interest rate of the loan, not from any differences in repayment terms. Where this is the case, there is no need to engage in the complicated calculations called for by § 355.49(c) of the 1989 Proposed Regulations. Instead, as paragraph (c)(2) provides, the annual benefit can be determined by simply calculating, for each year in which the loan is outstanding, the difference in interest payments between the government-provided loan and the comparison loan. The last sentence of paragraph (c)(2) restates our long-held principle that the amount of the subsidy conferred by a government-provided loan never can exceed the amount that would have been calculated if the loan had been given as a grant.

Paragraph (c)(3) deals with situations where both the government-provided loan and the comparison loan are long-term, fixed-interest rate loans, but where the two loans have dissimilar grace periods or maturities, or where the repayment schedules have different shapes (e.g., declining balance versus annuity style). Because a firm may derive a benefit from special repayment terms, in addition to any benefit derived from a concessional interest rate, we will calculate the benefit in a two-step process. First, paragraph (c)(3)(i) directs us to calculate the present value, in the year in which repayment would begin on the comparable commercial loan, of the difference between the amount that the firm is to pay on the government-provided loan and the amount that the firm would have paid on the benchmark loan (this difference is called "the grant equivalent"). Second, paragraph (c)(3)(ii) provides that we allocate this grant equivalent over time by using the allocation formula in § 351.524(d)(1). We have decided to eliminate our old loan allocation formula described in the 1989 Proposed Regulations, as part of our effort to streamline methodologies, where possible. In determining that the benefit from these types of loans occurs in the year in which the government-provided loan was received (see § 351.505(b)), the old loan formula is unnecessary, because its primary purpose was to begin assigning annual

benefit amounts in the year after the receipt of the loan.

We received two comments on this issue. Both commenters objected to our use of the number of years in the life of the government-provided loan when allocating the benefit of loans with concessionary grace or deferral periods. The commenters argued that, because of the concessionary grace/deferral period, the Department is diluting the annual benefit by including this period in the allocation period. Instead, the commenters urged the Department to allocate the benefit over the length of the benchmark loan. In addition, the commenters asked the Department to "add an additional amount to reflect the present value of the benefit from reduced interest and principal payments" due to a deferral of the repayment schedule.

We have not adopted these suggestions. With regard to the former comment, matching the allocation period with the life of the government-provided loan is a more predictable, transparent, and logical methodology. This is because we will be allocating subsidy benefits as long as the government-provided loan is on the firm's books. Using a different allocation period, such as the life of the benchmark loan, could mean that subsidy benefits would end even though the subsidized loan itself is still outstanding. Moreover, we do not share the commenters' view that our methodology dilutes the annual benefit. Although the amounts countervailed each year may be smaller under our methodology, the benefit stream will correspond to a period that matches the life of the subsidized loan.

Paragraph (c)(4) sets forth the method of calculating an annual benefit for government-provided variable-rate loans. No comments were received on this paragraph.

Contingent Liabilities

Paragraph (d) sets forth the method for calculating the annual benefit attributable to a long-term interest-free loan, for which the obligation for repayment is contingent upon the company taking some future action or achieving some goal in fulfillment of the loan's requirements, such as the achievement of a particular profit level by the firm. We have made changes to this paragraph so that our methodology for these loans conforms to the methodology for tax deferrals (see, e.g., § 351.509). In the case of tax deferrals, we recognized that if the event that triggers repayment will not occur for several years, the deferral should be treated as a long-term loan and the

benefit measured using a long-term benchmark. Contingent liability loans are analogous to tax deferrals. Consequently, our regulation now states that where the event triggering repayment will occur at a point in time after one year from receipt of the contingent liability, we will treat the contingent liability as a long-term loan.

Additionally, paragraph (d)(2) now recognizes that it may be appropriate in certain circumstances to treat contingent liabilities as grants. This would occur, if at any point in time, we determine from record evidence that the event upon which repayment depends is not a viable contingency. In this instance, we will treat the outstanding balance of the loan as a grant received in the year in which this condition manifests itself.

One commenter asked that the regulations clarify that in the event of forgiveness of a contingent liability, a new subsidy arises whose benefit is equal to the unpaid principal of the loan.

We will continue our longstanding practice and treat the entire unpaid principal of a forgiven loan and any accumulated interest, regardless of whether it is a contingent liability loan or a regular loan, as a grant bestowed at the time of the forgiveness (*see, e.g., Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany*, 58 FR 6223, 6234–35 (January 27, 1993)).

Section 351.506

Section 351.506 deals with loan guarantees. Paragraph (a)(1) sets forth the general rule for identifying and measuring the benefit attributable to a government-provided loan guarantee, and conforms to the new standard contained in section 771(5)(E)(iii) of the Act. According to this general rule, a benefit exists to the extent that the total amount a firm pays for a loan with a government-provided loan guarantee is less than what the firm would have paid for a comparable commercial loan that the firm could actually obtain on the market absent the government guarantee. In this context, “total amount” includes both the loan guarantee fee and the effective interest paid on the loan. The terms “comparable commercial loan” and “could actually obtain on the market” are defined in § 351.505(a)(2) and (3), respectively.

One commenter asked the Department to recognize that the very existence of a government loan guarantee constitutes *prima facie* evidence that a countervailable benefit exists because a government loan guarantee is only necessary when a company cannot

obtain a loan without a loan guarantee and when such a guarantee is not available from private sources.

We have not adopted this suggestion. As with other forms of financial contributions, the Department must determine that a benefit is conferred before we can find a subsidy program to be countervailable. However, we acknowledge that the presence of a government loan guarantee may affect other terms of the loan, such as the interest rate. Therefore, when we are dealing with a government-guaranteed loan, we will carefully examine all of the terms of both the government loan and the benchmark loan to ensure that we capture all of the benefit.

One commenter asked the Department to clarify that the term “comparable loan” includes both comparable size and risk level. Another commenter urged the Department to recognize that the risk to the lender would be higher without a loan guarantee and that the borrower, therefore, would have to pay a higher interest rate absent the guarantee.

We intend to interpret the term “comparable commercial loan” as it affects loan guarantees in the same manner as when we are addressing loans. The role of relative risk levels is discussed in the preamble to § 351.505. We agree with the second commenter that a lender faces greater risk if a loan is not guaranteed. We believe that this additional risk will be captured in the benefit methodology described in paragraph (a). This is because the interest rate on the guaranteed loan will be compared with either (1) the interest rate on a comparable unguaranteed (and, hence, riskier) loan that was obtained, or could have been obtained, by the firm; or (2) the interest rate on a comparable commercially guaranteed loan that was obtained, or could have been obtained, by the firm. In the latter case, we would expect that the two guaranteed loans would have similar risk levels and that the interest rates would be similar, assuming that the loans are comparable as defined above. Of course, we would also adjust for differences in guarantee fees as paragraph (a)(1) directs us to do.

Two commenters urged the Department to make sure that we capture the full benefit conferred by a government loan guarantee by measuring the difference in loan terms resulting from the government guarantee as well as the difference in the cost of the guarantees.

We believe that paragraph (a)(1) addresses the commenters’ concerns. By measuring the difference between the total amount that a firm pays for a loan

guaranteed by the government and the amount that the firm would have paid on a comparable commercial loan (including any difference in guarantee fees), we are capturing both elements brought up by the commenters.

Paragraph (a)(2) of the 1997 Proposed Regulations specified that a government loan guarantee that was given by the government in its capacity as owner (*i.e.*, not under a government guarantee program used by government-owned and privately owned companies) would not be considered countervailable if private owners normally provide guarantees in the same circumstances. In the preamble of the 1997 Proposed Regulations, we said that if the government directly guarantees the debt of a company it owns, it would fall upon the respondent to demonstrate that it is normal commercial practice for private shareholders in that country to guarantee the debt of the companies in which they own shares. The preamble further provided that in a situation where a government-owned holding company guarantees the debt of its subsidiaries, the respondent would need to show that it is normal commercial practice for non-government-owned corporations to guarantee the debt of their subsidiaries. In addition, the respondent would need to demonstrate that the holding company has sufficient internally-generated resources to serve as guarantor of the debt.

One commenter maintained that, because of their greater financial resources and also for social and political reasons, governments have a greater ability and interest in guaranteeing certain loans than private shareholders do. Therefore, the commenter argued, in a situation where a government provides a loan guarantee to a company it owns, the Department should presume that the guarantee constitutes a countervailable subsidy unless the respondent can show that the guarantee was provided on commercial terms. In addition, this commenter emphasized that the burden should be on the respondent, not on the Department, to show that it is normal commercial practice in the country under investigation to provide loan guarantees.

We have not adopted a presumption that government-provided loan guarantees to government-owned firms are countervailable subsidies. If the respondent cannot provide evidence showing that it is normal commercial practice for private owners to give comparable loan guarantees to firms they own, the Department will determine whether the government loan guarantee resulted in the borrower

receiving a loan on terms more favorable than the firm would have received on a comparable commercial loan. We have modified paragraph (a)(2) to reflect this burden.

In the preamble to the 1997 Proposed Regulations, we also stated that where the government or a government-owned holding company guarantees the debt of an "uncredit worthy" company it owns (see § 351.505(a)(4) regarding uncreditworthy companies), the respondent must provide evidence that private owners would also guarantee the debt of uncreditworthy companies they own.

Two commenters argued that in the case of uncreditworthy companies, the countervailable benefit is equal to the amount of the guaranteed loan because an uncreditworthy company would not have been able to obtain any loan at all without government loan guarantees. They urged the Department to treat the entire amount of a guaranteed loan provided to an uncreditworthy company as a grant. In addition, one of the commenters implied that the European Union follows this practice.

We have not adopted this suggestion. Subsidized loan guarantees are essentially treated as subsidized loans. Therefore, consistent with our methodology of constructing a benchmark for loans to uncreditworthy companies (see § 351.505(a)(3)(iii)), we would construct a benchmark when uncreditworthy companies are given loan guarantees.

Paragraph (b) sets forth a rule regarding the point in time at which the benefit from a loan guarantee arises. The 1997 Proposed Regulations stated that we would consider the benefit as having been received on the date on which the firm is due to make a payment on the government-guaranteed loan. In these Final Regulations, we have amended the regulation such that we will consider the benefit to have been received in the year in which the firm otherwise would have had to make a payment on the comparable commercial loan.

Paragraph (c) deals with the allocation of the benefit to a particular time period. It is unchanged from the 1997 Proposed Regulations.

Section 351.507

Section 351.507 pertains to equity infusions. The methodology reflected here has changed from that laid out in the 1997 Proposed Regulations. The changes stem from our consideration of the comments received and a reevaluation of certain fundamental assumptions regarding the nature of, and circumstances surrounding, a

government's purchase of shares in a company.

The 1997 Proposed Regulations assigned all equity infusions to one of two main methodological tracks according to whether or not a market share price for the company receiving the infusion was available. Where a market share price was available, we intended to use that price as a benchmark against which to compare the government purchase price of the stock. Any premium paid by the government was to be considered a benefit. While we expressed a preference for the use of a market price for newly issued shares which were identical or similar to the shares purchased by the government, we stated that, where such a price was not available, we would resort to using a market price for similar, pre-existing shares (i.e., a "secondary market price") as the benchmark. Where secondary market prices were to be used, we proposed using *post-infusion* prices to ensure that our analysis captured any "dilution" effects (i.e., any effects from the issue of new shares on the value of existing shares).

Where a market price for the shares purchased by the government was not available, we explained that we would first conduct our conventional equityworthiness test. If the company was deemed equityworthy, i.e., appeared capable of generating a "reasonable rate of return within a reasonable period of time," and if there were no special conditions or restrictions attached to the government's shares rendering their purchase inconsistent with the usual investment practice of private investors, the equity infusion would not confer a benefit. A finding that the company was unequityworthy would equate to a finding that the investment was inconsistent with the usual investment practice of private investors. To measure the benefit, the Department would attempt to construct a price that a reasonable private investor would theoretically have been willing to pay for the shares ("constructed private investor price" or "CPIP"). Any difference between the government purchase price and the CPIP would be considered a subsidy. If the information necessary for calculating the CPIP was not available, the Department would allocate the entire infusion amount over time, but deduct from the portion allocated to a particular year the amount of actual returns achieved by the firm in question in that year.

We received numerous comments regarding many aspects of the proposed methodology. Several comments

focused on the use of private prices: Some commenters suggested abandoning any reference to market prices in all cases; some suggested abandoning only any reference to secondary market prices; and some supported use of private market prices, but requested that a pre-infusion rather than a post-infusion price be used.

Some commenters argued that the fact that a company's previously issued shares are traded in the secondary market is not conclusive evidence of that company's ability to raise new capital from private investors. These commenters pointed to the case where an otherwise financially sound company is contemplating a new expansion project about which general sentiment among private investors is pessimistic given the increased risk or low value the expansion is expected to add to the company as a whole. In this case, private investors would not likely purchase new shares. These commenters argued that, rather than using the secondary market shares as a benchmark to measure the benefit, the Department should move straight to its equityworthiness analysis as it does when there is no benchmark.

If the Department relies on secondary market prices as a standard by which to evaluate the reasonableness of the government's equity investment, however, several commenters argued that post-infusion prices should not be used. These commenters argued that such prices are inappropriate because a reasonable private investor could not know at the time of the purchase of new shares what the subsequent market price of that stock would be. Pre-infusion, rather than post-infusion, prices are, therefore, a better standard by which to judge the reasonableness of a government equity infusion.

The vast majority of equity comments addressed the proposed methodology for measuring the benefit to unequityworthy companies. While a few commenters expressed support for the proposed methodology, many others objected, arguing that a change from the current methodology (i.e., treating the entire infusion as a benefit) is not mandated by either the SCM Agreement or the URAA, and that such a change represents a troublesome weakening of the CVD law. According to these commenters, the Department's stated legal authorities for the proposed change are not relevant to this particular issue: the GATT Panel ruling in the *Lead and Bismuth* case was rejected by the United States as inconsistent with U.S. law and the international subsidy code, and the CIT ruling in *AIMCOR* dealt only with the case of an

equityworthy firm (see *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom*, SCM/185 (November 15, 1994) and *AIMCOR, Alabama Silicon, Inc. v. United States*, 912 F. Supp. 549, 552–55 (CIT 1995) (“*AIMCOR II*”).

The central point of the commenters opposing our proposed methodology was that, once a company has been deemed unequityworthy, the full amount of any equity infusion by the government should be considered a benefit. In other words, because the company would not have received any new capital absent government involvement, the benefit to the recipient is equal to the amount of the infusion. In contrast, the proposed methodology of constructing a private investor price, and the alternative methodology of adjusting for returns, use a cost-to-government standard which has been explicitly rejected as unlawful by the CIT. See *British Steel Corp. v. United States*, 605 F. Supp. 286, 295–296 (CIT 1985). These commenters also provided further theoretical, practical and legal reasons why each of the proposed methodologies is inappropriate.

First, several commenters maintain that the proposed CPIP methodology is based on the erroneous assumption that prices of a new share issue in an unequityworthy firm could be priced low enough to yield an overall return (dividends plus capital appreciation) to the new investor comparable to a market return. If the investment in which the new capital is used is not expected to yield a market return (which is why the firm is unequityworthy), issuing new shares at a discounted price would lower the existing shareholders' expected returns by diluting their claim on the firm's total equity. The existing shareholders, from the view of a reasonable private investor, have no incentive to allow this to happen. Hence, there is no price—in theory or in practice—at which, simultaneously, private investors would be willing to buy, and current shareholders willing to sell, shares in an unequityworthy company.

Another problem with the CPIP approach, according to these commenters, is that it is subject to manipulation in the case of an equity infusion into a 100 percent government-owned firm. In such a case, the earnings per share could always be manipulated (by adjusting the number of shares purchased) to reflect a fabricated per share “market return” without any adverse consequences for the government, which, in any case, would

retain its claim on all of the company's profits.

Finally, as a practical matter, these commenters argue that the analysis called for under the CPIP approach places a significant burden on the Department. They argue that calculating the theoretical price a private investor would have been willing to pay for a stock would require a considerable level of financial expertise, would prove an inordinate drain on the Department's resources, and would involve too much conjecture on the part of the Department in matters of financial forecasting.

Several commenters also objected to the proposed alternative methodology of treating the entire infusion as a benefit, but then adjusting that benefit by actual returns. These commenters likened this methodology to the rate-of-return-shortfall (“RORS”) approach rejected by the Department in 1993. In their opinion, the arguments proffered by the Department for rejecting the RORS approach are equally valid in this case.

One such argument is that dividends (or actual returns) cannot be considered a “repayment” of the benefit conferred by the government equity infusion because dividends are, in fact, generated from that benefit. Nor can the dividends be used to reduce the amount of the benefit because the CIT has ruled that dividends are not explicitly included in the statutory list of allowable offsets. *British Steel PLC. v. United States*, 879 F. Supp. 1254, 1309 (CIT 1995).

These commenters highlighted several additional arguments, originally identified by the Department with regard to the RORS methodology, that explain why it is inappropriate to adjust for actual returns. First, the actual returns method is a *post-hoc* valuation of an investment which measures events subsequent to the equity infusion. Second, the proposed approach fails to account for later subsidies which could improve the financial status of the company, improperly reducing the benefit associated with earlier subsidies. Third, a company that was performing poorly could have an anomalous profitable year, allowing it to escape countervailing duties for that year. Fourth, the proposed approach does not measure the rate of return on the government's original equity infusion, but rather the rate of return in the period of investigation or review on the firm's total equity. Finally, the approach engenders bias in the administration of the law in that investments in unequityworthy companies will escape countervailing duties when results are unexpectedly good, but investments in equityworthy companies will not be

countervailed when the results are unexpectedly bad.

After considering all of the comments, we have decided to revise the methodology described in the 1997 Proposed Regulations for analyzing equity infusions. In large measure, we are codifying our current practice with a number of important modifications. We believe that the approach detailed below better reflects the principles set forth in the statute, SAA and the SCM Agreement, and addresses many commenters' concerns while maintaining, to the extent possible, continuity with past Department practice.

Consistent with section 771(5)(E)(i) of the Act, paragraph (a)(1) provides that a benefit is conferred by a government-provided equity infusion if the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made. As in the 1997 Proposed Regulations, our methodology for identifying and measuring the resulting benefit is divided into two methodological tracks, with the choice of methodology dependent upon whether or not actual private investor prices can serve as a benchmark for the shares purchased by the government. However, for reasons discussed in greater detail below, we have changed our proposed methodology for calculating the benefit where there are no private investor prices and we will not construct the theoretical price a private investor would pay. Therefore, we have deleted the second sentence that appeared in paragraph (a)(1) of the 1997 Proposed Regulations.

Actual Private Investor Prices Available

Paragraph (a)(2) contains rules for analyzing equity infusions when actual private investor prices (*i.e.*, market prices) are available—the first methodological track—and has retained only some portions of the language in the 1997 Proposed Regulations. Under § 351.507(a), the initial step in analyzing an equity infusion is to determine whether, at the time of the infusion, there was a market price for newly issued equity. If so, the Department would consider the equity infusion to have conferred a benefit if the price paid by the government for the newly issued equity was more than the price paid by private investors for the same new issue. For example, if a government pays \$10 per share for newly issued shares in a firm, and private investors pay \$8 per share for shares in the same share issue,

a benefit exists in the amount of \$2 per share (\$10 - \$8 = \$2).

Paragraph (a)(2)(i) also provides for the use of a "similar form" of new, contemporaneously issued shares as the basis for the reasonable private investor benchmark. As noted in the preamble to the 1997 Proposed Regulations, in the *Certain Steel* determinations the Department determined that, in appropriate circumstances, shares with similar characteristics can be compared, as long as appropriate adjustments are made. See GIA at 37252. The CIT subsequently upheld the principle of relying on a similar form of equity where the same form of equity does not exist. *Geneva Steel v. United States*, 914 F. Supp. 563, 580 (CIT 1996).

Where similar new, contemporaneously issued shares are used as the benchmark, paragraph (a)(2)(iv) provides that the Department will make a price adjustment for differences in the types of shares when it is appropriate. See, e.g., *Certain Fresh Atlantic Groundfish from Canada*, 51 FR 10047 (March 24, 1986). Moreover, paragraph (a)(2)(iii) requires that, where the Department uses the private investor prices, the amount of shares purchased by private investors must be significant so as to provide an appropriate benchmark. See, e.g., *Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Italy*, 60 FR 31992, 31994 (June 19, 1995).

An important change to paragraph (a)(2) from the 1997 Proposed Regulations is that we have eliminated any provision for the use of secondary-market share prices. As discussed in greater detail below, in cases where private investor prices for the newly issued shares are not available, we will proceed directly to an equityworthiness determination without any reference to secondary market prices. Although previous Department practice has been to prefer market-determined share prices (including secondary prices) when available and useable, we are persuaded that a revision of this practice is now warranted for the following reasons.

In our view, secondary market prices do not necessarily reflect the market value of new shares, regardless of the point in time the comparison is made. Use of secondary market prices before a government infusion does not account for the dilution of company ownership and does not take into consideration private investors' perceptions of the recipient company's intended use of the newly obtained equity capital. Use of post-infusion secondary market prices may also be problematic. For example,

the fact that the government has made an infusion may cause investors to bid up the secondary market price of the stock to a higher level than that warranted by the improved capital position of the company. The Department cannot reasonably account for such secondary market phenomena. In sum, secondary market prices are not a reliable basis for measuring the market value of newly issued equity.

Actual Private Investor Prices Unavailable

One of the most difficult methodological problems confronted by the Department in its administration of the CVD law involves the analysis of government-provided equity infusions in situations where there is no market benchmark price. Since 1982, the Department has dealt with this problem by categorizing firms as either "equityworthy" or "unequityworthy." As set forth in § 355.44(e)(2) of the 1989 Proposed Regulations, an equityworthy firm was one that showed "an ability to generate a reasonable rate of return within a reasonable period of time." An unequityworthy firm did not show such an ability. If the Department found that a firm was equityworthy, the Department would declare a government-provided equity infusion in the firm to not be countervailable. The Department would not consider whether, notwithstanding the general financial health of a firm, an excessive price was paid for government-provided equity. Conversely, if the Department found a firm to be unequityworthy, the Department would declare a government-provided equity infusion in the firm to be countervailable without further analysis.

In these Final Regulations, we have retained the equityworthy/unequityworthy distinction. Thus, in paragraph (a)(3), if actual private investor prices are not available under paragraph (a)(2), the Secretary will determine whether the firm funded by the government-provided equity was equityworthy at the time of the equity infusion. Paragraph (a)(4) sets forth the standard the Secretary will apply in determining equityworthiness, and broadly follows § 355.44(e)(2) of the 1989 Proposed Regulations.

Several commenters have argued that, under certain circumstances, the equityworthiness of the project being financed, rather than the firm as a whole, should be the focus of the Department's equityworthiness analysis. This is especially true, according to these commenters, when the investment contemplated by a firm represents a significant departure, in terms of its

riskiness or expected return, from the firm's existing operations. These commenters maintain that the riskiness of a firm's new investment can significantly impede the firm's ability to raise new capital on equity markets on commercially available terms.

We received a similar comment with respect to our creditworthiness determinations. Consistent with the position we have taken regarding loans and creditworthiness, in the case of equityworthiness determinations, we recognize the possibility that it may be appropriate, in certain circumstances, to focus on the risk and expected return of the project being financed rather than the firm as a whole. Therefore, we have included a provision that allows the Secretary to do a project analysis where appropriate, but we are maintaining the general principle that the focus of an equityworthiness determination will normally be on the firm as a whole. We will address issues relating to the appropriateness of a project-specific equityworthiness analysis in the context of specific cases.

Paragraph (a)(4)(ii) discusses the significance of the analysis performed prior to a government equity purchase. For every government equity infusion, we will analyze whether the government's decision to invest was consistent with "the usual investment practice of private investors, including the practice regarding the provision of risk capital." Section 771(5)(E)(i). Obviously, to answer this question, the basis upon which the government infusion was made must be clear. In prior CVD proceedings, governments have often failed to provide the Department any commercial rationale for their investment. This has been true for even very large infusions. In contrast, prior to making a significant equity infusion, it is the usual investment practice of a private investor to evaluate the potential risk versus the expected return, using the most objective criteria and information available to the investor. This includes an analysis of information sufficient to determine the expected risk-adjusted return and how such a return compares to that of alternative investment opportunities of similar risk. Absent such an objective analysis—performed prior to the equity infusion—it is unlikely that we would find that the infusion was in accordance with the usual investment practice of a private investor, except where we are satisfied that the lack of such an analysis is consistent with the actions of a reasonable private investor in the country.

Certain commenters have specifically requested that independent studies commissioned by foreign governments be considered by the Department in making an equityworthiness determination.

We will closely examine such studies. In order to be considered in our equityworthiness analysis, any study must have been prepared prior to the government's approval of the infusion and must be sufficiently objective and comprehensive. We intend to review such studies carefully to determine whether the government acted like a reasonable private investor, subjecting both the assumptions and the analysis to scrutiny. This will enable us to decide whether the decision to invest was commercially sound given the information at the disposal of the government.

Some independent studies commissioned to analyze the merits of a given investment may present an assessment of the company's expected returns and risks that is predicated on certain future actions by the company in question. For instance, a study might conclude that the investment in a company planning to close one outmoded plant and construct a new one in a different location is commercially viable so long as the company also reduces its workforce by half. In this case, the Department would take into consideration whether the downsizing will actually occur. If the company has known for a long time that a reduction in its workforce was a necessary condition for improved financial performance, but has consistently shown itself unwilling or incapable of making that reduction, this may prove sufficient cause to believe that the projected return is unattainable.

Some commenters cautioned the Department about relying too heavily on independent studies given their inherently speculative and subjective nature. We are well aware of the potential difficulties in using independent analyses, not least of which is the fact that independent experts often fundamentally disagree about the prospects of a given investment. In other instances, the objectivity of some studies is called into question. However, private investors are likewise usually faced with a similar variety of competing views and must exercise their own judgement with respect to the objectivity of information before them. When considering the suitability of a submitted study, we will seek to ensure the study is accurate and reliable, and exercise our own judgement with respect to a study's objectivity. Specifically, we will take

into consideration the extent to which the study's premises and conclusions differ from those of other independent studies, accepted financial analysis principles, or market sentiment in general (e.g., industry-specific business publications or general industry market studies).

Paragraph (a)(4)(iii) discusses the significance of prior subsidies in our equityworthiness determination. As in the 1997 Proposed Regulations, it states that in determining whether a firm or project was equityworthy, we will ignore current and prior subsidies received by the firm. Several commenters objected to this rule, arguing that any reasonable investor would take into consideration the role that past subsidies have played in a company's financial performance. These commenters noted that, while a company might appear to be successful, a reasonable investor may deem the company unequityworthy if he or she believes that, when forced to stand on its own (i.e., without subsidies), the company would not yield a market return.

While we recognize the potential for prior subsidies to affect the present financial performance of a company, we are continuing with our practice of not considering the impact of prior subsidies when conducting an equityworthiness test. We continue to believe that it would be too difficult and speculative a task to determine what the company's performance would have been had it not previously benefitted from a subsidy.

Paragraph (a)(5) pertains to those infusions in which the firm or project is determined to be equityworthy. In our 1997 Proposed Regulations, we stated our intent to conduct a further examination of equityworthy companies to determine whether the particular investment was consistent with usual investment practice. We adopted this policy in light of the CIT decision in *AIMCOR II*, 912 F. Supp. at 552-55, in which the Court ruled that, because of restrictions imposed on the shares bought by the government, the government's purchase of those shares was inconsistent with commercial considerations, notwithstanding the fact that the firm in question was equityworthy.

Certain commenters objected to this proposal, arguing that if a firm has been deemed to be equityworthy, any investment in that firm is *per se* consistent with usual private investment practices and should not be countervailed. However, we note that, as the Court pointed out in a previous determination, "[w]here a company is

equityworthy, as here, it does not necessarily follow that the purchase of stock from that company will be consistent with commercial considerations." See *AIMCOR v. United States*, 871 F. Supp. 447, 454 (CIT 1994) ("*AIMCOR I*"). Therefore, as provided in paragraph (a)(5), we will conduct a further analysis into whether the shares purchased by the government have special conditions or restrictions attached and, if so, whether those conditions render the investment inconsistent with usual private investment practices as stipulated in paragraph (a)(1). Any benefit found from these types of equity purchases will be determined on a case-by-case basis. In situations where the shares purchased by the government in an equityworthy firm are common shares, we will normally consider the infusion to have been consistent with usual private investment practice.

In cases where a government equity infusion has been made and the firm is unequityworthy, paragraph (a)(6) states that the amount of the benefit will be equal to the amount of the equity infusion. This is a codification of our current practice which has been in place since the 1993 steel determinations and has been upheld by the CIT in *British Steel plc v. United States*, 879 F. Supp. 1254, 1309 (CIT 1995), *aff'd in part and rev'd in part*, 127 F.3d 1471 (Fed. Cir. 1997). See, also, *Usinor Sacilor v. United States*, 893 F. Supp. 1112, 1125-26 (CIT 1995).

We believe this approach is most appropriate based mainly on the argument that, because a reasonable private investor could not expect a reasonable return on the invested capital, no such investor would provide the infusion. The CPIP approach, which we explored in the 1997 Proposed Regulations, attempted to measure the hypothetical price at which the investor would provide the funds. In the case of an unequityworthy firm or project, this hypothetical price would have to be lower than the price of existing shares. However, as explained in the summary of comments above, from the perspective of the existing shareholders of the company that received the infusion, such a lower price would be unacceptable. These shareholders would generally not allow the new shares to be issued at a reduced price because this would simultaneously lower the expected return on their existing investment. There is, therefore, no mutually acceptable price at which the transaction would take place between two private investors, and the investment would not occur.

Thus, the benefit to the operations of the recipient firm is the entire amount of the government infusion. That is not to say that the shares received by the government are worthless; they may have value. However, the comparison here is what the company actually received with what the company would have received absent the government intervention. In the case of an unequityworthy firm, the amount the company would have received is zero. Thus, although the government equity infusion is not *per se* a grant, it is appropriate to consider the full amount of the infusion as the benefit because the government provided a sum of money that would not have been provided by a private investor. This is the fundamental point overlooked by the GATT panel report. (See *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany, and the United Kingdom*, SCM/185 (November 15, 1994) (unadopted).)

Paragraph (a)(7) pertains to allegations regarding equity infusions and is based on § 355.44(e)(3) of the 1989 Proposed Regulations.

Paragraph (b) provides that the Secretary normally will consider the benefit from an equity infusion to have been received on the date on which the firm received the infusion. Paragraph (c) pertains to the allocation of the benefit to particular years and provides that the benefit conferred by an equity infusion will be allocated as if it were a non-recurring subsidy, using the methodology set forth in § 351.524(d).

Section 351.508

Section 351.508 deals with assumptions or forgiveness of debt. Paragraph (a), which deals with the identification and measurement of the benefit attributable to government-provided debt assumptions or forgiveness, is little changed from § 355.44(k) of the 1989 Proposed Regulations and from § 351.507 of the 1997 Proposed Regulations. Paragraph (b) describes when the benefit from debt assumption or forgiveness will be deemed to have been received. Paragraph (c) provides that the Secretary will normally treat the benefit from debt assumption or forgiveness as a non-recurring subsidy for allocation purposes. However, paragraph (c)(2) provides that, where the government is assuming interest under certain narrowly drawn circumstances, the interest assumption will be treated as a reduced-interest loan and allocated according to the loan allocation rules. Although it has undergone some

refinement, this exception is consistent with the policy articulated by the Department in the 1993 *Certain Steel* determinations.

Section 351.509

Section 351.509 deals with subsidy programs that provide a benefit in the form of relief from direct taxes. ("Direct tax" is defined in § 351.102.) Such relief includes exemptions, remissions, and deferrals of direct taxes. The most common form of a direct tax is an income tax, and the subsidy programs most frequently encountered are those that provide special income tax exemptions, deductions, or credits. With respect to the benefit provided by these types of programs, paragraph (a)(1) of § 351.509 retains the standard set forth in § 355.44(i)(1) of the 1989 Proposed Regulations, *i.e.*, a benefit exists to the extent that the taxes paid by a firm as the result of a program are less than the taxes the firm would have paid in the absence of the program. See 1989 Proposed Regulations at 23372 and related cases cited.

Paragraph (a)(2) deals with another type of direct tax program: the deferral of direct taxes owed. Although § 355.44(i)(1) of the 1989 Proposed Regulations included tax deferrals with exemptions and remissions of direct taxes, the Department has consistently used a different methodology for identifying and measuring the benefits of deferrals by treating deferrals as government-provided loans. We have normally treated deferrals of one year or less as short-term loans, while multi-year deferrals have been treated as short-term loans rolled over on the anniversary date(s) of the deferral.

We received two comments on the deferral of direct taxes. One commenter maintained that it would be more appropriate to treat multi-year tax deferrals as long-term loans rather than as a series of rolled-over short-term loans. The commenter observed that the Department had not explained why multi-year tax deferrals should be treated as a series of short-term loans, arguing that this approach enables the recipient company to receive long-term benefits that are countervailed using a short-term benchmark interest rate. The commenter stated that long-term interest rates are typically higher than short-term rates and that the Department, therefore, should use the long-term rate as the benchmark rate. The second commenter argued that multi-year tax deferrals should be treated as long-term loans because such deferrals are authorized only once for the entire period of deferral. However, the second commenter stated, even if a multi-year

deferral were authorized annually on a routine basis, the benefit would resemble a long-term loan and, therefore, a long-term interest rate should be used as the benchmark rate.

We agree that, in certain circumstances, where it is reasonable to conclude from the record that a deferral will extend over more than one year, multi-year deferrals should be viewed as long-term loans. For example, if the firm knows at the time the taxes would normally be due that the firm would not become liable for the taxes until five years later, it would be appropriate to view the deferral as a five-year loan and to use the appropriate benchmark. Moreover, if it is known at the time of the deferral that the deferral will be longer than one year, but the term is indefinite, we will also use a long-term benchmark to calculate the benefit in each year. However, if the deferral has an uncertain endpoint, we will examine whether it is appropriate to view the deferral as a short-term or long-term loan.

As in the past, tax deferrals of one year or less will be treated as short-term loans, using a short-term interest rate as the benchmark rate in accordance with § 351.505(a). Similarly, if it is not known if a tax deferral will extend over more than one year (*e.g.*, if the firm's payment of taxes is made contingent upon some future event) and we have no reasonable basis to conclude that the deferral will extend over more than one year, such tax deferral will be treated as a short-term loan.

In the 1997 Proposed Regulations, we identified one aspect of direct tax subsidy programs that might warrant modification. We stated that, in the case of special accelerated depreciation allowances, a firm typically experiences tax savings in the early years of an asset's life and tax increases in the latter years of the asset's life. In the past, the Department has focused on the tax savings but has not acknowledged the later tax increases. In the 1997 Proposed Regulations, we discussed adopting a methodology that accounts for both the early tax savings and the later tax increases by calculating the net present value of the expected tax savings at the outset of the accelerated depreciation period. However, we stated that we wanted to obtain the views of the public before changing our methodology.

We received several comments on this issue, all of which contained objections to our proposed change of methodology. The comments focused on four areas. First, the commenters characterized our proposed methodology as speculative because the Department cannot be certain that the benefits of an

accelerated depreciation program will be offset by higher taxes in the future. The commenters pointed to factors such as changes in tax provisions and government tax policies, the provision of additional future tax benefits, and the possibility that the recipient company would incur losses in the future, all of which might prevent higher taxes from materializing in the future. One commenter pointed to the Department's findings in *Extruded Rubber Thread from Malaysia*, 57 FR 38472 (August 25, 1992) ("Malaysian Rubber Thread"), where a hypothetical tax burden in later years did not prevent the Department from countervailing tax benefits provided during the period of investigation. In sum, these commenters argued that the Department should not give a company credit for a contingent tax liability that we could not be sure the company ever would incur.

Second, some of the commenters maintained that the Department's proposed change would be contrary to the central purpose of the CVD law, *i.e.*, to discourage the provision of subsidies. According to these commenters, the proposed methodology would encourage foreign governments to modify their tax programs so that future tax payments would appear to offset current countervailable tax benefits.

Third, some commenters asserted that it would be unlawful for the Department to offset countervailable benefits with higher future tax payments. These commenters pointed to the statutory list of permissible offsets, which does not include future tax payments. They also argued that our proposed methodology would be akin to taking secondary tax effects into account, which would be contrary to § 351.527 of the 1997 Proposed Regulations (this section, which deals with the tax consequences of benefits, is included in § 351.503(e) of these Final Regulations).

Fourth, a few commenters pointed to the administrative burden that the Department would assume if it were to adopt the proposed methodology. One commenter stated that it would be difficult to track companies' future tax payments. Another commenter portrayed it as unlikely that the Department would verify that higher taxes were actually paid in future years. Finally, one commenter recommended that the Department adopt a regulation saying that benefits resulting from accelerated depreciation may *not* be offset by a potentially higher tax burden in the future.

Based on the comments we have received, we are not changing our methodology. We will, therefore, continue our current methodology for

calculating the tax benefits from accelerated depreciation schemes on a year by year basis.

In the 1997 Proposed Regulations, we also sought public comment on how we should address tax subsidies when the recipient company is incurring losses, including loss carryforwards and losses under accelerated depreciation. We received only a few comments on these issues. All the commenters agreed that losses should be dealt with according to the same underlying principle that guides the rest of the Department's direct tax methodology, *i.e.*, the Department should treat as a countervailable benefit the difference between the amount of taxes actually paid and the amount of taxes that would have been paid in the absence of the countervailable tax benefit. With respect to loss carryforwards, the commenters outlined two scenarios under which such carryforwards can convey countervailable benefits: (1) When a company is allowed to carry forward a greater value of losses from one year to the next than other companies, and (2) when a company is allowed to carry forward losses for a longer period of time than other companies. In both cases, the commenters urged the Department to follow the underlying principle described above, *i.e.*, to countervail the difference between the actual taxes paid and the taxes that would have been paid under normal circumstances. Regarding losses associated with accelerated depreciation, the commenters requested the Department to countervail the accelerated depreciation allowance only to the extent that it results in a reduction of taxes paid.

We agree with the commenters that our guiding principle is to treat as a countervailable benefit the difference between the taxes a company actually pays and the taxes it would have paid if it had not incurred a loss or a diminished profit as a result of accelerated depreciation or a loss carryforward (provided that these tax benefits are specific). We intend to follow the approach used in *Malaysian Rubber Thread*. We do not see any need to change or to add to our regulations in this respect.

Paragraph (b) of § 351.509 deals with the question of when the benefit from a direct tax subsidy is considered to have been received by a firm. In our 1997 Proposed Regulations, we proposed to consider the benefit as having been received on the date the firm knew the amount of its tax liability. However, as stated in the 1989 Proposed Regulations, the date the firm knows its tax liability normally is the date on which it files its

tax return. In these Final Regulations, we have decided that, with respect to a full or partial tax exemption or remission, we will consider the benefit as having been received on the date on which the recipient firm would otherwise have had to pay the taxes associated with the exemption or remission, which is usually the date it files its tax return. This conforms the regulations to our experience.

With respect to deferrals, under paragraph (b)(2), the Secretary normally will treat the deferral of a direct tax as a loan, and will treat the benefit as received, as follows. The Secretary normally will treat a tax deferral of one year or less as a short-term loan received on the date the tax originally was due and repaid when the tax was actually paid. The Secretary normally will consider the benefit from a multi-year deferral as having been received on the anniversary date(s) of the deferral.

Paragraph (c) deals with the allocation of the benefits of direct tax subsidies to particular time periods. As under the 1997 Proposed Regulations, the Department normally will allocate such benefits to the year in which the benefits are considered to have been received under paragraph (b).

Finally, the Department will apply § 351.509 consistently with WTO rules concerning direct tax measures. Thus, for example, in the case of a foreign tax measure that exempts from taxation (either in whole or in part) income attributable to economic processes (including transactions involving exported goods) located outside the territorial limits of the exporting country, the Department would not consider such a measure to be an export subsidy, provided that the measure complied with other relevant WTO rules.

Section 351.510

Section 351.510 deals with programs that provide full or partial exemptions from, and deferrals of, indirect taxes or import charges. ("Indirect tax" and "import charge" are defined in § 351.102.) However, § 351.510 deals only with programs that potentially would be considered import substitution subsidies or domestic subsidies under section 771(5A)(C) or section 771(5A)(D) of the Act, respectively. Sections 351.517 through 351.519 deal with programs that potentially would be considered export subsidies under section 771(5A)(B) of the Act because separate guidelines must be applied when examining export subsidy programs that involve exemptions or rebates of indirect taxes or import charges.

Paragraph (a)(1) of § 351.510 is based on § 355.44(i)(2) of the 1989 Proposed Regulations, and continues to provide that a benefit exists to the extent that the taxes or import charges paid by a firm as the result of a program are less than the taxes the firm would have paid in the absence of the program. As in the case of direct taxes under § 351.509, deferrals of indirect taxes and import charges will be treated under paragraph (a)(2) as government-provided loans. Normally, we will use a short-term interest rate as the benchmark for deferrals of one year or less and a long-term interest rate as the benchmark for multi-year deferrals. The treatment of multi-year deferrals represents a change from the 1997 Proposed Regulations and is discussed in detail in the preamble to § 351.509.

Paragraph (b) of § 351.510 is based on § 355.48(b)(6) of the 1989 Proposed Regulations, and continues to provide that the Secretary will consider the benefit from a full or partial exemption of indirect taxes or import charges to have been received on the date when the recipient firm otherwise would have had to pay the tax or charge. In the case of deferrals of one year or less, the Secretary normally will consider the benefit to have been received when the deferred amount becomes due. For multi-year deferrals, the benefit is received on the anniversary date(s) of the deferral.

Paragraph (c) deals with allocation to a particular time period, and provides that the Secretary normally will expense the benefits attributable to the types of subsidy programs covered by § 351.510 in the year of receipt.

Section 351.511

Section 351.511 deals with the provision of goods and services. Prior to the URAA, section 771(5)(A)(ii)(II) of the Act provided that the provision of goods or services constituted a subsidy if such provision was "at preferential rates." Now, under section 771(5)(E)(iv) of the Act, a subsidy exists if such provision is "for less than adequate remuneration." Under section 771(5)(E) of the Act, the adequacy of remuneration is to be determined:

"in relation to prevailing market conditions for the good or service being provided * * * in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale."

In our 1997 Proposed Regulations, we designated paragraph (a) as "(reserved)," stating that we wished to acquire some experience with the new statutory provision before codifying our

methodology in the form of a regulation. We received several comments expressing disappointment in the lack of a regulation on this topic. While these parties recognized that our relative lack of experience with the new statutory provision made it difficult to promulgate a regulation, they requested guidance as to how we intend to identify and measure adequate remuneration.

Several commenters stressed the importance of basing the adequate remuneration benchmark on market prices that have not been distorted by the government's involvement in the market. According to these commenters, where government involvement has distorted prices, the Department should either adjust the price to account for the distortion or resort to the use of an alternative price. These commenters also argued that the benchmark used should include all delivery charges and, if necessary, import duties.

We also received several comments in response to our stated intention of continuing to employ a preferential type analysis where the government is the sole provider of goods or services such as electricity, water, or natural gas. One commenter supported such an approach and encouraged us to codify it. Other commenters argued that the preferential approach does not sufficiently capture the benefit mandated by the adequate remuneration standard. That is, it does not adequately measure the differential between the price paid for the input and the full market value of the input.

Since issuing the 1997 Proposed Regulations, the Department has gained some experience in applying the adequate remuneration standard. See, e.g., *Steel Wire Rod from Germany*, 62 FR 54990, 54994 (October 22, 1997), *Steel Wire Rod from Trinidad and Tobago*, 62 FR 55003, 55006-07 (October 22, 1997), and *Steel Wire Rod from Venezuela*, 62 FR 55014, 55021-22 (October 22, 1997) ("*Venezuelan Wire Rod*"). Based on our experience in these cases and on the comments received on this issue, we are providing guidance on how we intend to apply this new standard. Accordingly, paragraph (a) outlines the conceptual approach we will follow to measure the benefit from governmental provision of goods or services.

Paragraph (a)(1) states that a benefit exists to the extent that the good or service is provided for less than adequate remuneration. Paragraph (a)(2)(i) provides that our preference is to compare the government price to market-determined prices stemming from *actual* transactions within the

country. Such market-determined prices include actual sales involving private sellers and actual imports. They may also include, in certain circumstances, actual sales from government-run competitive bidding. The circumstances where such prices would be appropriate are where the government sells a significant portion of the goods or services through competitive bid procedures that are open to everyone, that protect confidentiality, and that are based solely on price. In choosing actual transactions, the Secretary will consider product similarity, quantities sold or imported, and other factors affecting comparability.

We normally do not intend to adjust such prices to account for government distortion of the market. While we recognize that government involvement in a market may have some impact on the price of the good or service in that market, such distortion will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market. Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy.

Paragraph (a)(2)(ii) provides that, if there are no useable market-determined prices stemming from *actual* transactions, we will turn to world market prices that *would be available* to the purchaser. We will consider whether the market conditions in the country are such that it is reasonable to conclude that the purchaser could obtain the good or service on the world market. For example, a European price for electricity normally would not be an acceptable comparison price for electricity provided by a Latin American government, because electricity from Europe in all likelihood would not be available to consumers in Latin America. However, as another example, the world market price for commodity products, such as certain metals and ores, or for certain industrial and electronic goods commonly traded across borders, could be an acceptable comparison price for a government-provided good, provided that it is reasonable to conclude from record evidence that the purchaser would have access to such internationally traded goods.

Where there is more than one commercially available world market price to be used as a benchmark, we intend to average these prices to the extent practicable, with due allowance for factors affecting comparability. If the

most appropriate benchmarks are for products that are dumped or subsidized in the country where the subject merchandise is produced, we will adjust the benchmarks to reflect the dumping or subsidization. However, we will only make an adjustment to reflect a determination of dumping or subsidization made by the importing country with respect to the input product imported from the country from which the world market price is derived.

Paragraph (a)(2)(iii) provides that, in situations where the government is clearly the only source available to consumers in the country, we normally will assess whether the government price was established in accordance with market principles. Where the government is the sole provider of a good or service, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles through an analysis of such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination. We are not putting these factors in any hierarchy, and we may rely on one or more of these factors in any particular case. In our experience, these types of analyses may be necessary for such goods or services as electricity, land leases, or water, and the circumstances of each case vary widely. See, e.g., *Pure Magnesium and Alloy Magnesium from Canada*, 57 FR 30946, 30954 (July 13, 1992) and *Venezuelan Wire Rod*.

We believe that this approach addresses the concerns raised by commenters about potentially continuing the use of the preferential standard by shifting the focus of our inquiry toward whether the government employed market principles in setting prices. Although we do not have enough experience with the adequate remuneration standard to state when a price discrimination analysis may be appropriate, we believe there may be instances where government prices are the most reasonable surrogate for market-determined prices. We would only rely on a price discrimination analysis if the government good or service is provided to more than a specific enterprise or industry, or group thereof.

Paragraph (a)(2)(iv) provides that, in determining the adequacy of remuneration, the Department will adjust comparison prices to reflect the price a company would pay if it imported the good or service. This

adjustment will account for delivery charges and import duties. In addition, if the price of the imported good includes antidumping or countervailing duties imposed by the country in question, we would use the price inclusive of those duties for comparison purposes. Absent the imposition of antidumping or countervailing duties by the country in question, however, we would not adjust the import prices to reflect alleged dumping or subsidies.

Paragraph (b) is based on § 355.48(b)(2) of the 1989 Proposed Regulations, and continues to provide that the benefit from a government-provided good or service is considered received when the firm pays, or is due to pay, for the good or service. Paragraph (c), which also is consistent with existing practice, provides that the Secretary normally will expense the benefit of a government-provided good or service to the year of receipt. However, benefits conferred by the provision of non-general infrastructure normally will be allocated over time.

Paragraph (d) deals with the provision of general infrastructure. Section 355.43(b)(4) of the 1989 Proposed Regulations contained a special test for determining whether government-provided infrastructure was specific and, therefore, countervailable. In our 1997 Proposed Regulations, we explained that, unlike the pre-URAA statute, section 771(5) of the Act, as amended by the URAA, expressly mentions certain types of government-provided infrastructure. However, it does so not in the context of specificity, but in the context of "financial contribution," one of the prerequisites for a subsidy. Section 771(5)(D)(iii) of the Act, which implements Article 1.1(a)(1)(iii) of the SCM Agreement, provides that the term "financial contribution" includes the provision of "goods or services, other than general infrastructure." In other words, the provision of "general infrastructure" does not constitute a "financial contribution," and, thus, does not constitute a subsidy.

We noted in our 1997 Proposed Regulations that, in light of the change in the statute, the countervailability of infrastructure depends on the definition of "general infrastructure." However, because of our inexperience in applying this definition and our uncertainty regarding the extent to which the principles reflected in the 1989 Proposed Regulations remained useful analytical tools for distinguishing potentially countervailable infrastructure from non-countervailable general infrastructure, we opted not to issue a regulation on infrastructure.

We received several comments regarding the definition of general infrastructure. One commenter argued that the word "general" essentially describes *types* of infrastructure—such as roads, bridges, railroads, etc.—which would never be countervailable. This commenter maintained that the word "general" should not be interpreted as relating to the question of specificity and argued that to do so would be to ignore the plain language of the statute. Several other commenters argued that the language in the SCM Agreement regarding general infrastructure was meant to codify the U.S. practice of countervailing specific infrastructure.

We disagree with the proposition that certain *types* of infrastructure automatically constitute general infrastructure and, thus, are not countervailable. Roads, bridges, and railroads do not necessarily constitute "general infrastructure" and can provide benefits to particular industries, as in the case where a road or bridge is built in an industrial park or port facility that is used only by one industry, or a group of industries. See, e.g., *Certain Steel Products from Korea*, 58 FR 37338, (July 9, 1993) ("*Korean Steel*"). Therefore, the type of infrastructure *per se* is not dispositive of whether the government provision constitutes "general infrastructure." Rather, the key issue is whether the infrastructure is developed for the benefit of society as a whole.

Paragraph (d) defines "general infrastructure" as infrastructure that is created for the broad societal welfare of a country, region, state, or municipality. For example, interstate highways, schools, health care facilities, sewage systems, or police protection would constitute general infrastructure if we found that they were provided for the good of the public and were available to all citizens or to all members of the public. Because we have no experience with the new concept of general infrastructure, we are not establishing more precise criteria at this time. However, we intend to follow these broad principles in future cases and we may develop more detailed criteria as we gain more experience.

Any infrastructure that satisfies this public welfare concept is general infrastructure and therefore, by definition, is not countervailable and not subject to any specificity analysis. Any infrastructure that does not satisfy this public welfare concept is not general infrastructure and is potentially countervailable. The provision of industrial parks and ports, special purpose roads, and railroad spur lines, to name some examples (some of which

we have encountered in our cases), that do not benefit society as a whole, does not constitute general infrastructure and will be found countervailable if the infrastructure is provided to a specific enterprise or industry and confers a benefit. See, e.g., *Korean Steel*.

Section 351.512

Section 351.512 deals with the purchase of goods. Section 771(5)(E)(iv) of the Act provides that the purchase of goods by a government can confer a benefit if the goods are purchased "for more than adequate remuneration." As with the provision of goods and services, our lack of experience in applying the adequate remuneration standard led us to designate this section "[reserved]" in the 1997 Proposed Regulations. Unlike the case with the provision of goods and services, however, we have not had the opportunity to gain sufficient experience applying the new standard in the context of government purchases. In addition, while government procurement potentially was a countervailable subsidy prior to the URAA, allegations of procurement subsidies were extremely rare. Thus, we still do not have experience on such matters as the "timing" of procurement subsidies or the allocation of such subsidies to a particular time period. Therefore, given our lack of experience with procurement subsidies we are not issuing regulations concerning the government purchase of goods. Instead, we have continued to designate § 351.512 as "[reserved]."

One commenter, however, encouraged the Department to provide further guidance regarding how it intended to apply the adequate remuneration standard in the context of the government purchase of goods. In particular, this commenter advocated a definition of adequate remuneration which focuses on a comparison of comparable prices for the good or service provided based on prevailing market conditions in the country subject to investigation or review.

As noted above, we are hesitant to promulgate a regulation dealing with the purchase of goods by a government because of our relative lack of experience in this area. However, our intended approach toward the measurement of the adequacy of remuneration is outlined in detail in § 351.511 (government provision of goods or services). While we have not codified this approach with respect to government purchases, we expect that any analysis of the adequacy of remuneration will follow the same basic principle, i.e., will focus on what a

market-determined price for the good in question would be.

We also received one comment regarding the threshold for initiating an investigation into whether government purchases have been made for more than adequate remuneration. In particular, this commenter argued for a "reasonable basis to believe or suspect" standard. In other words, a petitioner would be required to allege facts that give the Department a reasonable basis to believe or suspect that government purchases have been made for more than adequate remuneration.

We disagree that a heightened initiation threshold should be employed for this type of subsidy. Because we have virtually no experience with this type of subsidy, it would be inappropriate to require petitioners to meet a higher threshold for initiation than that imposed by the statute. According to section 702(b)(1) of the Act, the petitioner need only allege the elements necessary for the imposition of the duty (i.e., the existence of a countervailable subsidy) and support the allegation with reasonably available information.

One additional commenter stated that the government purchase of services should be treated similarly to the government purchase of goods. In the discussion of this point in the preamble to the 1997 Proposed Regulations, we noted that only government purchase of goods is identified as a financial contribution under section 771(5)(D)(iv) of the Act and Article 1.1(a)(1)(iii) of the SCM Agreement. This commenter argued, however, that according to the statute and the SCM Agreement, a subsidy can exist where there is either a financial contribution or an income or price support. A governmental purchase of services, according to this commenter, can be considered an income support and, therefore, can result in a subsidy.

We have not adopted this suggestion. We believe that if governmental purchases of services were intended to be treated similarly to the government purchase of goods, the statute and the SCM Agreement would specifically mention services as they do with the government provision of goods and services.

Finally, we received one comment arguing that if we chose to promulgate a regulation regarding government purchases, we should make clear that purchases by government monopolies are included. While we are not issuing a regulation on this subject, we agree that purchases by government monopolies can constitute subsidies

provided there is a benefit and the benefit is specific.

Section 351.513

Section 351.513 deals with worker-related subsidies. Under paragraph (a), the Department will identify and measure the benefit of government-provided assistance to workers based on the extent such assistance relieves the firm of an obligation it otherwise normally would incur. The comments we received dealt mainly with the form the obligation must take in order for worker-related assistance to be countervailable.

All commenters agreed that the Department should continue its practice of countervailing worker-related assistance when there is a pre-existing obligation for the company to provide such assistance. However, the commenters differed in how they defined the term "obligation." Some commenters asked the Department to adopt a broad definition of the term "obligation" and not limit it to only contractual or statutory obligations, whereas others argued that an obligation must be contractual or statutory in order for the Department to find the assistance to be countervailable.

As in our 1997 Proposed Regulations, we continue to take the position that "obligation" should be interpreted broadly. Even though an obligation is not binding in a contractual or statutory sense, an exemption from it may nevertheless provide a benefit to a firm. As an example, social or political conditions in a country may be such that, although no legal or contractual obligation exists, it is normal practice that companies make severance payments to laid-off workers. If the government decides to shoulder all or part of such payments, then the government relieves the company of a payment it otherwise would have incurred. In this situation, we will find that a countervailable subsidy exists, as long as the government's action is specific.

A related issue arises in situations where a company's obligations to its workers are negotiated by labor and management with the knowledge that the government will make a contribution. We encountered this situation in *Certain Steel Products from Germany*, 58 FR 38318 (July 9, 1993) ("*Certain Steel from Germany*"), where we concluded that the parties' knowledge of the government's willingness to make a contribution had an impact on the outcome of the negotiations. In the absence of the government's payment, the company would likely have agreed to pay the

workers more. Because the additional amount would depend upon the relative negotiating strengths of labor and management, we found it reasonable to assume that workers and management held approximately equal negotiating strength. We, therefore, decided to split the difference and concluded that in the absence of the government's contribution, the company would have had to pay the workers 50 percent of the amount paid by the government. As a result, we decided that 50 percent of the government's contribution was countervailable because it relieved the company of a payment it otherwise would have had to make.

Some commenters asked the Department to continue to apply the methodology used in *Certain Steel from Germany* whereas another commenter maintained that this approach is too generous to respondents and that the Department should countervail the full amount of the government's contribution. In opposition, other commenters characterized the methodology as speculative and urged the Department not to countervail governmental social aid at all.

As in the 1997 Proposed Regulations, we have declined to codify the approach used in *Certain Steel from Germany*. We believe, and the CIT has found, that where a company's obligations to its workers are negotiated with the knowledge that the government will make a contribution, it is reasonable to conclude that the government's commitment, and the negotiating parties' awareness of the commitment, have an impact on the outcome of the negotiations (see *LTV Steel v. United States*, 985 F. Supp. 95 (1997)). However, we believe it is necessary to examine the facts in each case before determining whether it is appropriate to countervail 50 percent of the government's contribution or some other amount.

Paragraph (b) deals with the form and timing of worker-related subsidies. Even though we did not receive any comments on these issues, we are making the following clarifications: Although most worker-related subsidies are provided in the form of cash payments, we consider the term "payment" in paragraph (b) to include non-cash benefits. With respect to timing, the Secretary will consider the subsidy to have been received by the firm on the date on which the payment is made that relieves the firm of an obligation that it normally would have incurred.

Paragraph (c) deals with the allocation of worker-related subsidies to a particular time period. As in the past, these subsidies will normally be

considered to provide recurring benefits and they will be allocated to the year of receipt (expensed) in accordance with § 351.524(a).

Section 351.514

Section 351.514 contains the standard for determining when a subsidy is an export subsidy, as opposed to a domestic or import substitution subsidy. Consistent with section 771(5A)(B) of the Act, paragraph (a) of § 351.514 codifies the expansion of the definition of an export subsidy to include any subsidy that is, in law or in fact, contingent upon export performance, alone or as one of two or more conditions. Paragraph (b) has been added, incorporating the previously separate regulation regarding general export promotion.

We received a number of comments regarding the expanded definition of export subsidy in the 1997 Proposed Regulations. Several commenters supported the expanded definition in the 1997 Proposed Regulations but suggested that language be added to the regulation making it clear that an export requirement need not be an explicit condition of the program as long as the facts indicated that the benefits were contingent upon actual or anticipated exportation. These commenters highlighted several factual scenarios under which the Department should find an export subsidy to exist. These include subsidies provided to "for-export" industries; subsidies provided in situations where the export market is the only market for the subject merchandise; and subsidies provided where a substantial portion of a subsidized project will be devoted to export production.

Several other commenters were opposed to the expanded definition. These commenters argued that, if narrowly applied, the definition would disproportionately penalize exporting countries which may have broad policy statements referring to exports. With the growing economic integration of the North American market under the North American Free Trade Agreement ("NAFTA"), firms in these countries may base their investment decisions on servicing the NAFTA market rather than a domestic and export market, and, as such, the assistance is not truly contingent upon export performance. Further, these commenters argued that mere consideration of possible exportation as one of the factors considered by the government in granting the benefit does not mean that the benefit is "contingent" upon export performance. As support, they cited footnote 4 to Article 3.1(a) of the SCM Agreement which states that "the mere

fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision." One commenter argued that "contingent upon actual or anticipated exportation or export earnings" should be limited to situations where the subsidy is conferred only upon actual exportation or is lost if the recipient is unable to demonstrate that the goods were exported.

Finally, one commenter suggested that the regulations should include illustrative (but not all-inclusive) guidance regarding the factors that the Department will consider in its analysis of *de facto* export subsidies. In this commenter's view, the regulations should also incorporate language that clarifies the distinction between a *de jure* and a *de facto* analysis.

While we have made minor changes to more closely conform the language of the 1997 Proposed Regulations with the language in the SCM Agreement and the statute, we have made no changes in response to these comments. However, in applying the standard contained in § 351.514, we will distinguish between broad development goals or economic policy, and specific program objectives and criteria. For purposes of our analysis, we have developed a list of factors that we may consider. This list is non-exhaustive and includes: (1) The stated purpose or purposes of the subsidy as put forth in the governing laws or regulations; (2) the selection criteria and reasons for approval/disapproval; (3) application and approval documents, including market or economic viability studies; (4) the existence and nature of any monitoring or enforcement mechanism; (5) governmental collection of data regarding the program recipients' exports (other than the customary collection of export and import data); (6) the exporting history of recipient firms or industries; and (7) other evidence that the Department deems relevant to consider. We need not examine all of the factors to determine that the program is an export subsidy if our examination of one or more factors provides sufficient evidence to determine that the program is a *de facto* export subsidy.

In situations where the government evaluates multiple criteria under a program, § 351.514 would require an analysis different from that described in *Extruded Rubber Thread from Malaysia*, 57 FR 38472 (August 25, 1992). In that case, the Malaysian Government considered 12 criteria in evaluating

whether a particular company should receive "Pioneer" status. Two of these criteria addressed the export potential of a product or activity. In addition, in certain situations, companies were required to agree to export commitments. In analyzing the Pioneer program, the Department examined the criteria being applied with respect to a particular company. If one or more of the criteria applied by the Government included favorable prospects for export, but the export criteria did not carry preponderant weight, we did not consider the award of Pioneer status to constitute an export subsidy. However, under the new standard contained in § 351.514, if exportation or anticipated exportation was either the sole condition or one of several conditions for granting Pioneer status to a firm, we would consider any benefits provided under the program to the firm to be export subsidies unless the firm in question can clearly demonstrate that it had been approved to receive the benefits solely under non-export-related criteria. In such situations, we would not treat the subsidy to that firm as an export subsidy.

We have not adopted the suggestion to limit the interpretation of the phrase "contingent upon actual or anticipated export performance" to situations where the subsidy is conferred only upon actual exportation or is lost if the recipient is unable to demonstrate that the goods were exported. Such language would effectively negate the phrase "tied to * * * anticipated exportation or export earnings" and directly conflicts with the intent of Congress and the language of the SCM Agreement. The SCM Agreement states that a *de facto* export subsidy exists "when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings." See Footnote 4 to Article 3.1 of the SCM Agreement (emphasis added).

One commenter protested that the 1997 Proposed Regulations failed to provide a mechanism for notifying export subsidies discovered during an investigation to the Office of the U.S. Trade Representative ("USTR") for submission to the WTO. We do not believe a regulation is needed given the clear language of the statute which requires the Department to notify USTR of any subsidies which are "prohibited" under Article 3 of the SCM Agreement. (See section 281(b)(1) of the Act (19 U.S.C. 3571(b)(1) and (c)(1).)

General Export Promotion: Paragraph (b) contains an exception to the general

rule which codifies the Department's practice with respect to certain types of government export promotion activities. In the 1997 Proposed Regulations, this paragraph was a separate section (see, § Section 351.520). However, we have decided it fits more appropriately as an exception to our discussion of what constitutes an export subsidy. As we have observed in the past, most countries maintain general export promotion programs. As long as these programs provide only general information services, such as information concerning export opportunities or government advocacy efforts on behalf of a country's exporters, they do not confer a benefit for purposes of the CVD law. However, if such activities promote particular products or provide financial assistance to a firm, a benefit could exist.

For example, government guides on how to export, overseas marketing reports, and marketing opportunity bulletins would be considered to be general promotion activities and, as such, would not be countervailable. Similarly, certain advocacy efforts, such as country image events or country product displays, could also be considered to be general promotion activities. However, image events or product displays that focus on individual products or which provide financial assistance to participants would not meet the exception for general export promotion. See, e.g., the discussion regarding the treatment of two ProChile trade promotions, "Event Bon Appetit" and "Summer Harvest" in *Fresh Atlantic Salmon from Chile*, 63 FR 31437, 31440 (June 9, 1998).

Two commenters argued that the regulation should be modified first to identify what constitutes countervailable export promotion assistance and then to identify the criteria for potentially non-countervailable export promotion assistance. Another commenter argued that the regulation should be revised to make it clear that general export promotion programs never constitute export subsidies because such programs can never be considered to be contingent upon export results. According to the commenter, such treatment would be consistent with the "green box" treatment of general marketing and promotional programs under the WTO Agricultural Agreement. This commenter further suggested that the focus of the regulation should be on programs rather than activities. The commenter also argued that even where an export promotion program confers a benefit, the program should be considered to be non-countervailable if

it is non-specific. Another commenter argued that even if an export promotion program is superficially generally available but upon examination is *de facto* specific, then it is countervailable.

Having clarified the exception for general export promotion by incorporating that proposed regulation into the general export subsidies regulation, we are not adopting the suggested modification regarding the identification of countervailable export promotion assistance. We also disagree that the regulation should be revised to state that general export promotion activities can never be countervailable because they are never contingent upon export results. As discussed in response to a similar comment posed by this commenter with respect to the general definition of an export subsidy contained in paragraph (a), the phrase "contingent upon actual or anticipated export performance" is not limited to actual exportation. Assistance to promote exports, even of a general nature, is designed to result in actual export performance.

With respect to whether the regulation should refer to export promotion programs rather than export promotion activities, we do not see the need to make this change. We often examine and make determinations with respect to certain aspects of, or activities under, a program, and as a result may find one project or activity under a program to be countervailable while finding another project or activity under the same program to be not countervailable.

Finally, with respect to the comments regarding the "specificity" of export promotion assistance, we do not need to reach this issue. All export promotion programs, even those of a general nature, are specific under section 771(5A)(B) of the Act. However, as noted above, as long as these programs provide only information services, such as information concerning export opportunities, or government advocacy efforts on behalf of a country's exporters, they do not confer a benefit for purposes of the CVD law.

Section 351.515

Section 351.515 corresponds to paragraph (c) of the Illustrative List, and deals with preferential internal transport and freight charges on export shipments. It is unchanged from the 1997 Proposed Regulations. Paragraph (a)(1) restates the general principle that a benefit exists to the extent that a firm pays less for the transport of goods destined for export than it would for the transport of goods destined for domestic consumption. In addition, paragraph

(a)(2), which is based on § 355.44(g)(2) of the 1989 Proposed Regulations, provides that the Secretary will not consider a benefit to exist if differences in charges are the result of an arm's-length transaction or are commercially justified.

Paragraph (b) provides that the Secretary will consider the benefit to have been received on the date on which the firm pays or, in the absence of payment, was due to pay the transport or freight charges. Paragraph (c) provides that the Secretary will normally allocate (expense) the benefit to the year in which the benefit is received.

Section 351.516

Section 351.516 deals with the government provision of goods or services on favorable terms or conditions to exporters. Like its predecessor, § 355.44(h) of the 1989 Proposed Regulations, § 351.516 is based on paragraph (d) of the Illustrative List, and reflects the changes to paragraph (d) made as part of the Uruguay Round. Paragraph (a) contains the standard for determining the existence and amount of the benefit attributable to these types of subsidy programs. As paragraph (a)(2) makes clear, in determining whether the domestically sourced input is being provided on more favorable terms than are commercially available on world markets, the Department will add to the world market price delivery charges to the country in question. In our view, delivered prices offer the best measure of prices that are commercially available to exporters in that country. Paragraphs (b) and (c) contain rules regarding the timing of benefit receipt and the allocation of the benefit to a particular time period, respectively. As discussed below, one change has been made to paragraph (a)(1) of the 1997 Proposed Regulations.

As noted in the 1997 Proposed Regulations, one commenter argued that the Department should provide that all export subsidy payments are prohibited *per se* under the SCM Agreement and U.S. law, and that nothing in paragraph (d) permits them. According to this commenter, in the past, foreign governments have claimed an exception to paragraph (d) for practices that protect domestic markets while promoting subsidized exports of agricultural and manufactured goods. As an example, this commenter cited the European Union program providing "export restitution" payments or "export refunds" on durum wheat, the primary agricultural product used in the production of pasta. The commenter

stated that these refunds were prohibited because paragraph (d) applies only to the "provision" of goods and/or services, not export payments, and that the Department's regulations should clearly prohibit export "payments."

This argument is identical to one put forth by petitioners in the 1985 administrative review on *Certain Iron-Metal Castings from India*, 55 FR 50747, 50748 (December 10, 1990). In that case, India's International Price Reimbursement Scheme ("IPRS") provided payments to castings exporters, refunding the difference between the price of raw materials purchased domestically and the price exporters otherwise would have paid on the world market. We refused to examine whether the IPRS met the criteria for non-countervailability under the exception in item (d) and countervailed the IPRS payments in their entirety.

Exporters and importers challenged the Department's determination, and, in its decision in *Creswell Trading Co. v. United States*, 783 F. Supp. 1418 (1992), the CIT remanded the case to the Department with instructions to analyze the consistency of the IPRS with item (d). The Federal Circuit discussed this decision with approval in connection with an appeal from a second CIT decision in this same case. See *Creswell Trading Co. v. United States*, 15 F. 3d 1054 (1994) ("*Creswell*"). Therefore, based on the above judicial precedent, we disagree with the commenter that paragraph (d) does not apply to programs where a government reimburses an exporter for the difference between a higher domestic price for an input and a lower price that the exporter would have paid on the world market, as opposed to providing the input itself.

Also consistent with the Federal Circuit's decision in *Creswell*, where a program exists that provides inputs for exported goods at a lower price than is available for inputs for use in the production of goods for domestic consumption, the burden will be on respondents to provide evidence that the lower price reflects the price that is commercially available on world markets.

In the preamble to the 1997 Proposed Regulations, we asked parties to comment on whether dumped or subsidized prices should be considered to be commercially available world market prices suitable for use as a benchmark to determine whether a government is providing price preferences for inputs used for exports. Several commenters opposed using

dumped or subsidized prices as a benchmark because it would understate the subsidy, undermine the purpose of the SCM Agreement and would be inconsistent with our proposed upstream subsidy methodology. Other commenters argued that subsidized or dumped prices should be considered as a possible benchmark because they represent "commercially available" prices.

Where there is more than one commercially available world market price to be used as a benchmark, we intend to average these prices to the extent practicable, making due allowance for factors affecting comparability. If the most appropriate benchmarks are for products that are dumped or subsidized in the country where the subject merchandise is produced, we will adjust the benchmark. However, we will only make an adjustment to reflect a determination of dumping or subsidization made by the importing country with respect to the input product imported from the country from which the world market price is derived.

A number of parties commented on the Department's inclusion of delivery charges in determining the commercially available world market price benchmark. While some commenters supported the inclusion of delivery charges in the benchmark arguing that it more accurately reflected the price available to exporters in that country, others disagreed arguing that delivery charges merely reflect the distance the good is being transported. The difference in delivery costs between a locally sourced product and an imported product is not due to the government subsidy; rather it reflects the comparative advantage the domestic product has over the imported product with respect to geographic proximity.

Consistent with our past practice in evaluating such subsidies, we intend to continue to include delivery charges in the commercially available world market price benchmark used to measure price preferences for inputs used for exports. Item (d) of the Illustrative List specifically sets the benchmark as the price "commercially available on world markets to their exporters." By its very terms, the price they would pay would include freight.

This practice was upheld by the Federal Circuit in *Creswell v. the United States*, 141 F.3d 1471 (Fed. Cir. 1998) ("*Creswell II*"), a case which involves IPRS and exporters of iron-metal castings in India. According to the Court:

Item (d) thus recognizes that foreign governments may subsidize their domestic industries to allow them to compete effectively on the world market as long as the extent of the subsidization is not more favorable to their exporters than if those exporters had to participate in the world market without assistance. If the amount of the subsidization exceeds this point, it is excessive and this excessive amount is countervailable under Item (d). Accordingly, Item (d) mandates a comparison between the terms and conditions under which product was supplied to exporters by their governments and the terms and conditions to which those exporters would have been subject had they instead participated in the world market.

The Court explained that:

A castings manufacturer procuring pig iron on the world market would have to pay the FOB price for the pig iron itself, plus the cost of shipping that iron to India. Accordingly, the world market price must include the cost of shipping. To the extent that the Indian government's world market price did not include oceanic shipping costs, its world market price was artificially low and its rebate artificially high by this amount. The price of pig iron that is not delivered to India cannot be fairly compared with the price of pig iron that is delivered. Thus, because of the omission of oceanic shipping costs from the calculation of the world market price, the IPRS program has in effect provided pig iron to India's castings manufacturers on terms more favorable than had those manufacturers actually procured pig iron on the world market.

One commenter stated that, consistent with the SCM Agreement, § 351.516(a)(1) should be amended to include government-provided services. We have adopted this suggestion and have amended § 351.516(a)(1) to include services.

This same commenter also stated that when a foreign government charges less than the commercially available price on world markets, the Department should countervail the full amount of the difference between the price the government charges to domestic producers and that charged to exporters, not just the difference between the government price and the delivered commercially available world market price benchmark. Such an approach would be consistent with the Court's decision in *RSI (India) Pvt., Ltd. v. United States*, 687 F. Supp. 605, 611 (CIT 1988) ("RSI").

We have not adopted this suggestion. Where there is a government-mandated scheme in place, the benefit to the recipient from price preferences for inputs used in the production of goods for export is the difference between what the producer actually pays and what the producer would otherwise pay (*i.e.*, the commercially available price

on the world market). We disagree that the suggested approach is consistent with the Federal Circuit's decision in *RSI*. In *RSI*, the Court was addressing a situation where the record was deficient, and it found that the Department was under no obligation to make calculations that should have been made by respondents. However, consistent with *RSI* and the Federal Circuit's decision in *Creswell II*, we continue to take the position that the respondents must provide evidence establishing that the lower price being charged by the government reflects the price that is commercially available on world markets.

Section 351.517

Section 351.517 deals with the exemption, remission or rebate upon export of indirect taxes. ("Indirect tax" is defined in § 351.102.) Section 351.517 is consistent with longstanding U.S. practice, (*see Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978)), and is based on paragraph (g) of the Illustrative List. The regulation has been changed to reflect paragraph (g) of the Illustrative List by adding that it also applies to the exemption of indirect taxes, as well as to their remission. Paragraph (g) deals with indirect taxes on the production or distribution of the exported merchandise, such as value added taxes, and provides that the remission or rebate of such taxes constitutes an export subsidy only if the amount of the remittance or rebate is excessive; *i.e.*, if it exceeds the amount of indirect taxes levied on like products sold for domestic consumption. For example, if a government imposes a \$7 tax on a widget sold for domestic consumption and provides a \$10 rebate if the same type of widget is exported, an export subsidy exists in the amount of \$3. In accordance with paragraph (g), the non-excessive exemption or remission upon export of indirect taxes does not constitute a subsidy. *See* note 1 of the SCM Agreement.

Paragraph (b) provides that the benefit from an excessive exemption or rebate of indirect taxes is deemed to be received on the date of exportation. Paragraph (c) provides that the Secretary will normally expense these types of subsidies in the year of receipt.

Section 351.518

While § 351.517 deals with the exemption or remission of indirect taxes in general, § 351.518 deals with the exemption, remission, or deferral of prior-stage cumulative indirect taxes and has been changed from the 1997 Proposed Regulations, as described below. ("Prior-stage indirect tax" and

"cumulative indirect tax" are defined in § 351.102.) Section 351.518 is based on paragraph (h) of the Illustrative List, and reflects certain changes made to paragraph (h) as part of the Uruguay Round negotiations. Section 351.518 is consistent with paragraph (h) and the Guidelines on Consumption of Inputs in the Production Process (Annex II to the SCM Agreement).

Section 351.518 is drafted to address separately exemptions, remissions and deferrals of prior stage cumulative indirect taxes. Paragraph (a) deals with whether a benefit is received and how it is calculated. Paragraph (a)(1) deals with exemptions and states that where inputs are exempt from prior stage cumulative indirect taxes, a benefit exists to the extent that the exemption extends to inputs not consumed in the production of the exported product, as defined in accordance with the SAA and Annex II to the SCM Agreement, making normal allowance for waste, or where the exemption covers taxes other than indirect taxes. ("Consumed in the production process" is defined in § 351.102.) Where a benefit exists, it is equal to the amount of the taxes the firm would otherwise pay on inputs not consumed in the production of the exported product.

Paragraph (a)(2) addresses remissions of indirect taxes and states that a benefit exists to the extent that the amount remitted exceeds the amount of prior stage cumulative indirect taxes paid on inputs that are consumed in the production of the exported product, making normal allowance for waste. Where a benefit exists, paragraph (a)(2) sets forth a general rule to the effect that the amount of the benefit normally will equal the difference between the amount remitted and the amount of prior stage cumulative indirect taxes on inputs that are consumed in the production of the exported product.

Paragraph (a)(3) deals with the amount of the benefit attributable to a deferral of prior-stage cumulative indirect taxes. We have modified paragraph (a)(3) in response to comments that the regulation should identify the practice considered countervailable before addressing the exception. Consistent with footnote 59 to the SCM Agreement, the first sentence of paragraph (a)(3) provides that a deferral gives rise to a benefit if the deferral extends to inputs that are not consumed in the production of the exported product, making normal allowance for waste, and the government does not charge the appropriate interest on the taxes deferred.

Another commenter urged the Department to treat multi-year deferrals as long-term loans, because using a short-term interest rate as a benchmark understates the benefit to the recipient. For the reasons discussed in § 351.509 regarding deferrals of direct taxes, we have adopted this position. Consequently, § 351.518(a)(3) permits us to use long-term benchmark rates for determining the benefit conferred by deferrals of prior stage cumulative indirect taxes, where appropriate.

We have also modified the exception outlined in paragraph (a)(4) in response to a comment that the 1997 Proposed Regulations erroneously applies procedures set out in Annex II to the SCM Agreement only to remissions of indirect taxes and should apply as well to exemptions and deferrals. We agree that Annex II to the SCM Agreement applies not only to remissions but also to exemptions and deferrals.

Accordingly, paragraph (a)(4) has been changed and directs that, based on Annex II to the SCM Agreement, the Secretary may consider the entire amount of an exemption, remission or deferral of prior-stage cumulative taxes to be a benefit if the Secretary determines that the foreign government has not examined the inputs in order to confirm which inputs are consumed in the production of exported products and in what amounts, and the taxes that are imposed on those inputs. This qualification is essentially a modified version of the Department's "linkage test," a test upheld in *Industrial Fasteners Group, American Importers Ass'n v. United States*, 710 F.2d 1576 (Fed. Cir. 1983). The test has been modified to conform to the guidelines of Annex II. Under the modified test, we will first examine whether the exporting government has a system in place that confirms which inputs are consumed in the production of the exported product, and in what amounts, and which taxes are imposed on the inputs consumed in production. Where we find that such a system is in operation, we will examine the system to determine whether it is reasonable, effective, and based on generally accepted commercial practices in the exporting country. Where such a system is not in operation, or where the system is not reasonable or effective, the government of the exporting country may examine the actual inputs involved to demonstrate that the exemption, remission or deferral of indirect taxes reflects only those inputs consumed in the production of the exported product, the quantity of those inputs consumed in production, including a normal allowance for waste, and only those

indirect taxes imposed on the input product.

Paragraph (b) deals with the time of receipt of the benefit. Paragraph (b)(1) provides that in the case of a tax exemption, the benefit is received on the date of exportation. Paragraph (b)(2) provides that in the case of a tax remission, the benefit arises as of the date of exportation. Paragraphs (b)(3) and (b)(4) address deferrals and state that the benefit from deferrals of less than one year will be received on the date the deferred tax becomes due. For multi-year deferrals, the benefit is received on the anniversary date(s) of the deferral.

Paragraph (c) deals with the allocation of the benefit to a particular time period, and provides that the Secretary normally will allocate (expense) the benefit from an exemption, remission or deferral of prior-stage cumulative indirect taxes to the year in which the benefit is considered to have been received under paragraph (b).

Two commenters argued that § 351.518(a)(2) should state that the system, procedure or methodology of examination used by foreign governments to confirm the consumption of inputs in the production process is subject to the further examination by the Department, including verification. We have not adopted the suggested language regarding verification. We see no need to add this language. As with any information relied upon by the Department for its determinations, this information is subject to verification.

Section 351.519

Section 351.519 deals with the remission or drawback of import charges. The regulation has been changed to clarify that the term "remission or drawback" includes full or partial exemptions and deferrals of import charges. Section 351.519 is generally consistent with prior Department practice, but contains some revisions to reflect changes made to paragraph (i) of the Illustrative List during the Uruguay Round negotiations. Section 351.519 is based on paragraph (i), the Guidelines on Consumption of Inputs in the Production Process, and the Guidelines in the Determination of Substitution Drawback Systems as Export Subsidies (Annex III to the SCM Agreement).

Paragraph (a)(1) reflects the longstanding principle that governments may remit or drawback import charges paid on imported inputs consumed in production when the finished product is exported. However, if the amount remitted or drawn back exceeds the

amount of import charges paid, a benefit exists. In addition, paragraph (a)(1) now incorporates exemptions and deferrals of import charges on inputs consumed in the production of exported products.

Paragraph (a)(2) deals with so-called "substitution drawback." Under a substitution drawback system, a firm may substitute domestic inputs for imported inputs without losing its eligibility for drawback. However, a benefit exists if the amount drawn back exceeds the amount of import charges levied on imported inputs, or if the export of the finished product does not occur within a reasonable time (not to exceed two years) of the import of the inputs.

Paragraph (a)(3) deals with the calculation of the amount of benefit. Paragraph (a)(3)(i) sets forth the rule for calculating the benefit from an excessive remission or drawback and states that the amount of the benefit equals the difference between the amount remitted or drawn back and the amount of import charges paid on the inputs consumed in production for which the remission or drawback is claimed. For example, assume that a firm imports a widget which is an input consumed in the production of a gizmo, and pays \$2 in import duties on the widget. If, when the firm exports the finished gizmo, the firm receives \$5 in drawback, the benefit equals \$3 (\$5 - \$2 = \$3). Paragraphs (a)(3)(ii) and (iii) deal with calculation of the benefit from an exemption or deferral of import charges and parallel the language set forth in § 351.518.

However, paragraph (a)(4) provides that in certain circumstances, the Secretary may consider the amount of the benefit to equal the amount of the exemption, deferral, remission or drawback. Paragraph (a)(4) provides for a "linkage" test, and is essentially identical to § 351.518(a)(4). See discussion of § 351.518(a)(4), above.

One commenter suggested that language be added to § 351.519(a)(4) to clarify further the type of system or procedure referred to by the regulation. This commenter and another commenter also argued that the Department should state that the system, procedure or methodology of examination used by foreign governments to confirm the consumption of inputs in the production process is subject to further examination by the Department, including verification.

We have not adopted this clarifying language in § 351.519(a)(4). We believe that clarification regarding the type of system or procedure is unnecessary because any system, regardless of the

type, must meet the standards set forth in paragraph (a)(4) in order to be non-countervailable. We will examine all such systems carefully to ensure full compliance with these standards. With respect to the suggested language regarding verification, we have not adopted this language. As with any information relied upon by the Department for its determinations, this information is subject to verification.

Paragraph (b) deals with the time of receipt of the benefit. Paragraph (b)(1) provides that, in the case of remission or drawback, the Secretary normally will consider the benefit to have been received as of the date of exportation. Paragraphs (b)(2), (b)(3) and (b)(4) have been added to reflect the addition of exemptions and deferrals of import charges to this section. The timing of receipt of the benefit from an exemption or deferral of import charges parallels § 351.518. Paragraph (c) provides that the Secretary normally will allocate this benefit to the year in which the benefits are considered to have been received under paragraph (b).

Section 351.520

Section 351.520 deals with export insurance and is unchanged from the 1997 Proposed Regulations. Paragraph (a), which deals with the benefit attributable to export insurance, is based on paragraph (j) of the Illustrative List. Paragraph (a) differs from the section of the 1989 Proposed Regulations dealing with export insurance, § 355.44(d). First, to reflect changes made to the Illustrative List during the Uruguay Round, the word "manifestly" has been deleted.

Second, § 355.44(d)(1) of the 1989 Proposed Regulations required that an export insurance program must have exhibited losses for a five-year period before the Secretary would consider the program a countervailable subsidy. We have not included the five-year loss requirement in these regulations, because, depending on how an export insurance program is structured, it may be evident within less than five years that premiums will be inadequate to cover the long-term operating costs and losses of the program. On the other hand, where the program is structured in such a way that expected premiums can cover expected long-term operating costs and losses, we anticipate that we will continue to apply the five-year rule. For example, we would continue to apply the five-year rule to programs like Israel's Exchange Rate Risk Insurance Scheme. With respect to this program, we originally determined that it was structured so as to be self-balancing in the sense that it could reasonably be

expected to break even over the long term. See Potassium Chloride from Israel, 49 FR 36122, 36124 (September 14, 1984). Therefore, we did not find a countervailable subsidy despite losses in the early years of the program. *Id.* However, after observing losses for five years, we concluded that the premiums charged were inadequate, and we determined that the scheme conferred a countervailable benefit. See Industrial Phosphoric Acid from Israel, 52 FR 25447, 25449-50 (July 7, 1987).

Finally, § 355.44(d)(1) of the 1989 Proposed Regulations stated that the Department would take into account income from other insurance programs operated by the entity in question. As discussed in the Preamble to the 1997 Proposed Regulations, we have reconsidered this policy, and, although we do not have much experience in this regard, have concluded that this requirement may be overly restrictive. For example, there may be instances where the insuring entity operates on a commercial basis, except for the export insurance function that may be specifically underwritten by the government. In such a situation, it would be inappropriate to take into account the insuring company's income from other insurance programs.

One commenter suggested that the Department's regulations should clearly state that the Department's evaluation of whether export insurance programs are being subsidized will be limited to those programs and not other insurance programs which may be offered by the insurer.

Section 351.520(a)(1) states, "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." (Emphasis added). We do not see a need to clarify the regulation any further.

Section 351.521

Section 771(5A)(C) of the Act defines an "import substitution subsidy" as "a subsidy that is contingent upon the use of domestic goods over imported goods, alone or as 1 of 2 or more conditions." As stated in the Senate Report, "the category of import substitution subsidies is a new one that is neither part of the 1979 Subsidies Code nor included in current law." S. Rep. No. 103-412, at 93 (1994). Under the new law, import substitution subsidies are automatically considered to be specific.

In the 1997 Proposed Regulations, we stated that we were not issuing a regulation on import substitution subsidies due to our lack of experience

in dealing with this new category of subsidies.

One commenter supported the Department's decision not to issue a regulation on this topic but asked that we explain in these Final Regulations our reasons for not doing so. This commenter also requested that we reiterate our view, as expressed in the 1997 Proposed Regulations, that section 771(5A)(C) of the Act does not limit the definition of import substitution subsidies to include only *de jure* subsidies. Another commenter urged us to issue a regulation to clarify that both *de jure* and *de facto* import substitution subsidies are countervailable.

Because of our lack of experience in dealing with import substitution subsidies, we have continued to designate § 351.521 as "reserved." We intend to develop our practice regarding import substitution subsidies on a case-by-case basis. As we stated in the 1997 Proposed Regulations, the plain language of section 771(5A)(C) of the Act does not limit the definition of import substitution subsidies to only those subsidies that are contingent "in law" upon the use of domestic goods. Moreover, the absence of a regulation making explicit the coverage of *de facto* import substitution subsidies should not be construed as an indication that the Department believes that section 771(5A)(C) applies only to *de jure* import substitution subsidies.

A third commenter contended that investigations of import substitution subsidies would be very complex and time-consuming and that they, therefore, would divert attention and resources from the main countervailing duty investigation. For this reason, the commenter argued, the Department should not initiate an investigation of import substitution subsidies absent a specific allegation by petitioners that gives the Department a reasonable basis to believe or suspect that such subsidies have been bestowed.

We have not adopted this suggestion. Contrary to the commenter's view, we believe that investigation of import substitution subsidies may place less of a burden on the Department and respondents because import substitution subsidies are *per se* specific. Consequently, we would only need to investigate the existence and amount of any benefit. Therefore, we see no basis for employing a heightened initiation standard.

A fourth commenter asked that the regulations clarify that the term "domestic goods" should also apply to purchases within a customs union of which the subsidizing country is a member. The commenter argued that

this definition of "domestic" would be consistent with the definition of "country" in section 771(3) of the Act. The commenter noted that the Department has countervailed subsidies provided by the European Union in the past. According to the commenter, a regulation that includes purchases from within a customs union in the term "domestic goods" would, therefore, be consistent with the Department's past practice.

Import substitution subsidies generally protect domestic input producers by imposing requirements or providing incentives for companies to use these inputs. It seems unlikely that one country would provide incentives to use inputs from another country, even if the other country is in the same customs union. However, if the subsidy is provided by the customs union itself, we can reach that program directly through the definition of "country," as defined further in the preamble to § 351.523 on upstream subsidies. Furthermore, we believe the commenter's analysis of the relationship between "domestic goods" as used in section 771(5A)(C) and "country" as used in section 771(3) may have merit, and we will look carefully at this suggestion if the situation is presented in a specific case.

Section 351.522

Section 351.522 of the 1997 Proposed Regulations, entitled "Certain agricultural subsidies," codified particular aspects of how the Department intends to analyze "green box" subsidies. We did not promulgate proposed regulations governing the non-countervailable status of "green light" subsidies because we considered the statute and the SAA sufficiently clear with respect to these exceptions in the countervailing duty law. However, based on comments received, as discussed below, we have codified certain standards concerning our analysis of green light research and environmental subsidies in §§ 351.522(b) and 351.522(c). To reflect these changes from the 1997 Proposed Regulations, we have renamed § 351.522 "Green Light and Green Box Subsidies," and we have added paragraphs (b) and (c) in these Final Regulations.

Certain agricultural subsidies: Section 771(5B)(F) of the Act implements Article 13(a)(i) of the WTO Agreement on Agriculture regarding the non-countervailable status of certain "domestic support measures." Under Article (6)(1) of the Agreement on Agriculture, domestic support measures that meet the policy-specific criteria and conditions of Annex 2 of the WTO

Agreement on Agriculture are exempt from member countries' commitments to reduce subsidies. In addition, Article 13(a)(i) of the Agreement on Agriculture directs that these subsidies, commonly referred to as "green box" subsidies, will be non-countervailable during the nine-year implementation period described in Article 1(f) of the Agreement on Agriculture.

Consistent with Article 13(a)(i) of the Agreement, section 771(5B)(F) of the Act provides that the Secretary will treat as non-countervailable domestic support measures that (1) are provided with respect to products listed in Annex 1 to the Agreement on Agriculture, and (2) the Secretary "determines conform fully to the provisions of Annex 2" to that Agreement. To implement section 771(5B)(F) of the Act, § 351.522(a) sets out the criteria the Secretary will consider in determining whether a particular domestic support measure conforms fully to the provisions of Annex 2.

One commenter argued that the Department should clarify that, in order to obtain green box status, a subsidy must truly be designed for agriculture because the Agreement on Agriculture makes a distinction between support provided to raw products and support provided to processed products. Specifically, the Department should make clear that a grant to upgrade a facility for processing agricultural products, while technically covered by the Agreement on Agriculture, would not receive green box treatment.

We have not adopted this proposal because neither Annex 1 nor Annex 2 of the Agreement on Agriculture draws a distinction between raw and processed agricultural products for purposes of green box treatment. Annex 1 covers products from HS Chapters 1–24 and various other HS Codes and Headings. These tariff categories include numerous forms of both raw and processed agricultural products. The policy-specific criteria and other conditions set forth in Annex 2 are not product-specific. Hence, a domestic support measure provided with respect to the specific agricultural products identified only in Annex 1, whether raw or processed, may warrant green box treatment as long as the measure fully conforms to the relevant criteria in Annex 2.

One commenter argued that the regulations should require the Department to consider whether or not an alleged green box subsidy has trade-distorting effects. Further, the commenter noted that the SAA enumerates certain U.S. programs that meet the green box criteria. According

to the commenter, the regulations should explicitly treat as non-countervailable a foreign program that is similar to an enumerated U.S. program. This same commenter also argued that the list of eight types of direct payments to producers included in Annex 2 is illustrative, not exclusive. The commenter stated that the regulations should provide "precise, objective and even-handed" criteria for determining whether a particular subsidy is a green box subsidy.

Another commenter disputed the suggestion that the regulations should include a list of agricultural programs that the Department automatically would consider as non-countervailable. According to this commenter, there is no basis in the statute for automatically exempting particular programs from the CVD law. Instead, this commenter argued, the Department should assess whether particular programs meet the green box criteria on a case-by-case basis.

We believe there is little to be gained from enumerating in the regulations specific types of programs that would qualify automatically as green box subsidies. Annex 2 of the Agreement provides explicit criteria that a program must meet in order to receive green box status, and § 351.522(a) incorporates these criteria. Consistent with section 771(5B)(F) of the Act and the Agreement on Agriculture, paragraph (a) of § 351.522 provides that we will treat as non-countervailable a subsidy provided to an agricultural product listed in Annex 1 of the Agreement if the subsidy fully conforms to both the basic criteria of subparagraphs (a) and (b) of paragraph 1 of Annex 2 of the Agreement on Agriculture and the relevant policy-specific criteria and conditions set out in paragraphs 2 through 13 of that Annex.

We received two comments concerning the so-called "peace clause" in the Agreement on Agriculture. Specifically, Articles 13(b) and (c) of that Agreement require WTO member countries to exercise "due restraint" in initiating CVD proceedings on agricultural subsidies provided by a member whose total non-green box agricultural subsidies (both domestic and export) are within that member's reduction commitments. See SAA at 723–25. The obligation to exercise "due restraint" exists only during the "implementation period," defined in Article 1(f) of the Agreement on Agriculture.

One commenter argued that the Department's regulations should ensure that the Department exercise due restraint by not self-initiating CVD

investigations on products that benefit from subsidies described in Articles 13(b) and (c). A second commenter argued that the Department should interpret the due restraint clause narrowly.

We do not believe that a regulation is necessary. The Department understands the due restraint requirement to entail a commitment to refrain from self-initiating CVD investigations with respect to agricultural subsidies described in Articles 13(b) and (c) during the implementation period, and the Department will administer the statute accordingly. See SAA at 937.

Green light subsidies in general: Under section 771(5B) of the Act, which implements Article 8 of the SCM Agreement, certain domestic subsidies and domestic subsidy programs that meet all the requirements may be treated as non-countervailable. There are three categories of these so-called "green light" subsidies: (1) Research subsidies (see section 771(5B)(B) of the Act); (2) subsidies to disadvantaged regions (see section 771(5B)(C) of the Act); and (3) subsidies for adaptation of existing facilities to new environmental requirements (see section 771(5B)(D) of the Act).

The non-countervailable status of these green light subsidies can be established in two ways. First, a WTO Member country can notify a subsidy program to the WTO SCM Committee in accordance with Article 8.3 of the SCM Agreement. Once notified, section 771(5B)(E) of the Act provides that a green light subsidy program "shall not be subject to investigation or review" by the Department. However, an exception to this rule exists in situations where a Member country has successfully challenged in the WTO a claim for green light status. In the event of a successful challenge, section 751(g) and section 775 of the Act establish mechanisms for promptly including the subsidy or subsidy program in an existing CVD proceeding should there be reason to believe that merchandise subject to the proceeding may be benefitting from the subsidy or subsidy program.

We received one comment on subsidy notifications. The commenter requested that the Department ensure that public subsidy notifications under Article 8.3 are made available and are circulated promptly upon receipt. We have adopted this suggestion. The Subsidies Enforcement Office within Import Administration intends to promptly add to the Subsidies Library all derestricted subsidy notifications, including those reported under Article 8.3. The Subsidies Library can be accessed via

the Internet at http://www.ita.doc.gov/import_admin/records/esel/.

The second method for obtaining green light status involves situations where a subsidy or subsidy program has not been notified to the SCM Committee. In the case of a subsidy given under a non-notified program, the subsidy is non-countervailable if the Secretary determines in a CVD investigation or review that the subsidy satisfies the relevant green light criteria contained in subparagraphs (B), (C) or (D) of section 771(5B) of the Act (or a WTO panel determines in a dispute settlement proceeding that the relevant criteria of Article 8 of the SCM Agreement are met). The Secretary must determine that the subsidy satisfies all of the relevant criteria before a given subsidy will be treated as non-countervailable. See section 771(5B)(A) of the Act; SAA at 936. Moreover, as discussed in the SAA, in investigations and reviews of non-notified subsidies, the burden will be on the party claiming green light status to present evidence demonstrating that a particular subsidy meets all of the relevant criteria. SAA at 936. In addition, under section 771(5B)(A) of the Act, green light status may be claimed only in proceedings involving merchandise imported from a WTO Member country.

In the 1997 Proposed Regulations, we stated that, in accordance with the Administration's commitment in the SAA, we intend to construe strictly the various green light provisions to "limit the scope of the provision[s] to only those situations which clearly warrant non-countervailable treatment." SAA at 935. Thus, the Department "will not limit its analysis * * * to a narrow review of the technical criteria of Article 8 of the SCM Agreement, but will analyze all aspects of the subsidy program and its implementation to ensure that the purposes and terms of Article 8 have been respected." SAA at 937.

Two commenters argued that the green light provisions should not be construed more restrictively than other CVD law provisions. Therefore, these commenters stated that the Department should either eliminate any references to a strict interpretation of these provisions or explain why this different treatment is necessary, appropriate, and justified.

We reaffirm our commitment to interpret these provisions strictly as required by the SAA. The legislative history recognizes that complete exemption from the CVD law of government programs that meet the definition of a countervailable subsidy and that cause injury is extraordinary.

Strict interpretation is needed both to prevent circumvention and to preserve the balance of commitments negotiated in the SCM Agreement. For these reasons, where there is a question regarding the green light status of a particular subsidy, we will ensure that the subsidy clearly qualifies before according it green light status. Moreover, a determination that a particular subsidy received by a firm is a green light or green box subsidy would not necessarily mean that we would find that the entire program under which the subsidy is provided satisfies all of the applicable green light criteria in all cases.

Certain commenters suggested that the Department "incorporate fully" in the regulations the discussion of green light subsidies contained in the SAA or the preamble to the 1997 Proposed Regulations. Another commenter suggested that the Department publish a regulation stating that green light is set to expire unless extended.

We have not adopted these suggestions. As with other areas of these regulations, unless we have determined that a particular aspect of our CVD methodology warrants clarification, we have not repeated language from the statute or the SAA. In response to the latter comment, the statute, at section 771(5B)(G), is explicit regarding the provisional application of the green light provisions.

Investigation of notified subsidies: One commenter, noting the text of section 771(5B)(E) of the Act, suggested that the Department should refrain from investigating notified subsidy programs. According to the commenter, a failure to "screen out" notified subsidies prior to the initiation of an investigation would result in a waste of Departmental resources and unnecessary burdens on foreign governments.

In response, several commenters argued that if there is any ambiguity regarding whether a subsidy alleged by a petitioner does, in fact, qualify as a notified green light subsidy, the Department should include the subsidy in its CVD investigation or review to determine whether it qualifies for a green light exemption. One example given by these commenters is a situation where a petitioner presents evidence that a subsidy program has been modified subsequent to its notification to the SCM Committee. These commenters also suggested that it may simply be unclear whether an alleged subsidy is the same as the notified subsidy, in which case the Department should include the alleged subsidy in the investigation to make this determination.

We reaffirm our position in the preamble to the 1997 Proposed Regulations that section 771(5B)(E) of the Act and the SAA make clear that, if a subsidy program has been notified under Article 8.3 of the SCM Agreement, any challenge regarding its eligibility for green light treatment, whether due to later modification or otherwise, must be made through the review procedures under the WTO rather than in the context of a CVD proceeding. As described above, the Department may not initiate a CVD investigation or review of a notified subsidy program (which appears to benefit subject merchandise) unless informed by USTR that a violation has been determined under the procedures of Article 8.

However, as we explained further in the preamble to the 1997 Proposed Regulations, the identity of a subsidy is a different matter. If there is a legitimate question as to whether a subsidy alleged in a petition is, in fact, a subsidy provided under a program that has been notified under Article 8.3, pre-initiation consultations may be used to clarify that a subsidy or subsidy program contained in the petition was, in fact, notified. If consultations do not resolve the question, the Department will include the subsidy in a CVD investigation or review until the party claiming green light status demonstrates that a subsidy has been notified. If the party fails to establish that the alleged subsidy or subsidy program has been notified, then we will analyze the subsidy's eligibility for green light status in the same manner as for any other non-notified subsidy. To clarify the Department's procedure for investigating alleged subsidy programs notified under Article 8.3, as set forth below, we have codified § 351.301(d)(7) as an interim final rule.

Policy for investigating non-notified subsidies: One commenter argued that the Department should adopt a regulation providing that, whenever a petition includes a potential green light subsidy that has not been notified under Article 8.3, the Department will conduct a full investigation to determine whether the subsidy meets the relevant requirements of section 771(5B) of the Act. This commenter and others emphasized that the regulations also should include the SAA's express requirement that the party claiming green light status has the burden of presenting evidence demonstrating compliance with all of the relevant criteria for any particular subsidy category. See SAA at 936.

While we agree with the policy espoused, we do not believe that this policy must be codified in the

regulations. As discussed above, the SAA is clear that in investigations and reviews of subsidies that have not been notified under Article 8.3 of the SCM Agreement, the party claiming green status must provide evidence demonstrating that a particular subsidy meets all of the relevant criteria for non-countervailable status.

Another commenter argued that all non-notified programs should be presumed countervailable. We have not adopted this suggestion. The SCM Agreement and the URAA make clear that there are two ways to achieve green light status—WTO notification and pursuant to a CVD investigation. We see no basis for presuming that a program is countervailable simply because a foreign government elects not to use the notification procedures established under Article 8.

Alleged green light subsidies not used during the period of investigation or review: As we stated in the preamble to the 1997 Proposed Regulations, in an investigation or a review of a CVD order or suspended investigation, we will not consider claims for green light status if the subject merchandise did not benefit from the subsidy during the period of investigation or review. Instead, consistent with the Department's existing practice, the green light status of a subsidy will be considered only in an investigation or review of a time period where the subject merchandise did benefit from the subsidy.

One commenter supported this position and argued that it should be codified. However, we continue to believe that a regulation is not needed to clarify this issue.

Research subsidies: Prior to the enactment of the URAA, we treated assistance provided by a government to finance research and development ("R&D") as non-countervailable if the R&D results were (or would be) made available to the public, including the U.S. competitors of the recipient of the assistance. This policy, sometimes referred to as the public availability test, was described by the Department in § 355.44(l) of the 1989 Proposed Regulations.

In the 1997 Proposed Regulations, we elected not to retain the public availability test. We stated that the objectives served by the public availability test were better met by applying the criteria listed in section 771(5B)(B) of the Act and Article 8.2(a) of the SCM Agreement. Two commenters supported our decision not to codify the public availability test, and two commenters argued that the Department should reinstate the public availability test. One commenter

requested clarification of whether the public availability test would apply to the aircraft sector in light of the fact that the R&D green light provisions of the SCM Agreement do not apply to aircraft. In this commenter's view, the public availability test should be abandoned completely.

In these Final Regulations, we confirm our decision not to retain the public availability test for any sector. We believe the public availability test is inconsistent with the concept of benefit which underlies the SCM Agreement and statute, and which we have codified in § 351.503. According to § 351.503, a benefit is conferred when a firm pays less for its "inputs" than it otherwise would pay in the absence of the government-provided input or earns more than it otherwise would earn. A research and development subsidy would reduce the firm's input costs, whether or not the results of the research were made publicly available. This same rationale applies to the aircraft industry. Consequently, even though the R&D green light provisions of the SCM Agreement do not apply to aircraft, we do not intend to apply the public availability standard to the aircraft sector.

One commenter suggested that the Department should adopt an assumption that only grants will qualify for green light status under the R&D provisions; tax breaks and subsidized loans usually will not qualify. We have not adopted this proposal because neither the statute nor the SAA limits R&D green light provisions to grants.

One commenter argued that, in determining whether a given research subsidy falls within the 75 and 50 percent maximums allowed under section 771(5B)(B) of the Act, the Department should base its analysis on the total costs incurred over the duration of the project in question. Under this reasoning, the Department would not countervail a subsidy if the 75 or 50 percent maximum were exceeded in the particular year covered by the investigation or review, provided that the applicable threshold "is not exceeded over the life of the project." This commenter further argued that, if the Department determined that the applicable threshold was exceeded over the life of the project, only the amount of subsidy in excess of the relevant "maximum" should be countervailed.

Several commenters challenged these arguments. First, they argued that the Department should evaluate the 75 and 50 percent maximums based on the costs already incurred at the time of the relevant investigation or administrative review, and not on the basis of expected

costs over the lifetime of the project. Second, these commenters argued that, if the Department determined that the applicable threshold had been exceeded, the entire benefit—not just the excess over the relevant threshold—should be countervailed. According to these commenters, the SAA states clearly that all of the relevant criteria must be met for a given program to receive green light status, and that a failure to meet all relevant criteria would result in the “entire subsidy” being countervailable in full. See SAA at 936.

We agree in part with the first commenter, and in part with the latter commenters. With respect to the proper frame of reference for determining whether a given research subsidy has exceeded the specified statutory thresholds, section 771(5B)(B)(iii)(II) of the Act instructs the Department to base its analysis on “the total eligible costs incurred over the duration of a particular project.” Thus, it would be improper for the Department to limit its analysis to only those costs incurred as of the time period covered by an investigation or administrative review. We recognize that a finding of non-countervailability may be based on projected or estimated costs. Given the Agreement’s ceilings on government support, we expect that such projections will have been required by the program’s administrators. On the basis of a reasonably-supported allegation in a subsequent review, we will revisit this finding to ensure that actual costs expended did not differ from the estimates upon which an earlier finding of green light status was based. Changes or amendments to the original project will be carefully scrutinized to ensure consistency with these provisions. We agree that, if it becomes clear at any point during the life of the project that the subsidy will exceed the relevant statutory threshold, the entire amount of the subsidy would be countervailable, not merely the excess.

Subsidies to disadvantaged regions: One commenter argued that the Department should clarify that the green light category regarding subsidies to disadvantaged regions is not limited to subsidies provided by national governments, but also includes subsidies granted by subnational levels of government, such as states or provinces. This commenter further argued that, in determining whether a subsidy provided by a state or province to a disadvantaged region meets the criteria of section 771(5B)(C) of the Act, the Department should assess the criteria within the framework of the subnational government’s jurisdiction.

In response, other commenters argued that the Department should assess the green light criteria in relation to the investigated country as a whole, not just in relation to the jurisdiction of the subsidizing government if that government is at the subnational level. According to these commenters, the statute and the SAA instruct the Department to evaluate the relevant green light criteria in relation to the “average for the country subject to investigation or review.”

We agree with the first commenter that the green light categories include subsidies granted by governments at the subnational level and that, in the case of the regional green light category, we should assess the relevant criteria in relation to the jurisdiction of the granting authority. In discussing the language in section 771(5B)(C)(ii) of the Act regarding the “average for the country subject to investigation or review,” the SAA explains that, where a CVD proceeding involves a member of a customs union, the term “country” shall be defined in accordance with the structure of the regional assistance program. SAA at 934–35. For example, if we were to investigate a product from Luxembourg, the term “country” would refer to the EU as a whole if the subsidy being investigated were received under an EU regional assistance program. Thus, the SAA indicates that the Department should make its determinations based on averages for the jurisdiction granting the regional assistance subsidy.

Other commenters argued that where certain regions receiving assistance under a program do not meet the criteria for green light treatment, that should not prejudice the green light treatment of assistance to regions that do meet the criteria.

Because we have only limited experience in administering the regional green light provisions, we are not prepared to adopt a formal policy at this time. However, we find persuasive the argument that some regions that meet the jurisdiction’s general framework of economic development but do not otherwise meet the green light criteria could potentially be given aid without automatically disqualifying all regions from green light treatment.

The language in section 771(5B)(C) of the Act states that a subsidy provided to a person in a disadvantaged region, “pursuant to a general framework of regional development,” shall be treated as non-countervailable. This implies that some of the regions within the general framework may not necessarily meet the statutory criteria to be considered “disadvantaged.” However,

if the number of regions that do not qualify for green light treatment but continue to receive assistance is significant, this may call into question the basic principles of the general framework itself and, therefore, the eligibility for green light treatment of any subsidies provided under it.

Subsidies for adaptation of existing facilities to new environmental requirements: Certain commenters argued that, with respect to the Department’s criteria for green light environmental subsidies described in section 771(5B)(D) of the Act, the Department should treat as non-countervailable those subsidies given to upgrade existing facilities to environmental standards that are higher than the minimum standards imposed by law or regulation. According to these commenters, governments should be allowed to encourage higher environmental standards than the minimum required by law by sharing the additional costs of achieving the higher environmental standards. Moreover, according to these commenters, the language of the statute does not limit green light treatment to subsidies that allow companies to meet, rather than exceed, standards. These commenters believe that the Department should retain the flexibility to find non-countervailable subsidies that assist in upgrading existing facilities to higher environmental standards than the minimum imposed by law or regulation.

Several commenters disputed this suggestion, claiming that section 771(5B)(D)(i) of the Act specifically limits green light status for environmental subsidies to those that are “provided to promote the adaptation of existing facilities to new environmental requirements * * *.” According to these commenters, the Department has no authority to broaden the scope of environmental subsidies eligible for green light treatment. One commenter further argued that where the environmental subsidy exceeds the amount necessary to meet the minimum regulatory requirements of the law, even by a *de minimis* amount, the Department should confirm its intent to find countervailable the entire subsidy.

Although we acknowledge that governments have the flexibility to encourage higher environmental standards, we agree with the latter commenters. As noted above, section 771(5B)(D)(i) of the Act provides that non-countervailable environmental subsidies are those that are “provided to promote the adaptation of existing facilities to new environmental requirements that are imposed by statute or by regulation.” According to

the SAA, "strict application of these requirements is essential in order to limit the scope of the provision to only those situations which clearly warrant non-countervailable treatment." SAA at 935. Given the clear language of the statute and the SAA, we believe that subsidies given to upgrade existing facilities to environmental standards in excess of legal requirements are countervailable. In response to the last comment on subsidies which exceed the amount necessary to meet the minimum statutory or regulatory requirements, we agree that the full amount of the subsidy would be countervailable.

One commenter suggested that the regulations should specify that environmental subsidies will receive green light treatment only if: (1) Required by law or regulations (administrative practice should not be sufficient); (2) limited to investments absolutely needed to meet new requirements; (3) limited to the adaptation of equipment and plant facilities; and (4) directly linked to the new investment.

Because we have received no green light claims for environmental subsidies and, therefore, have no experience in administering these provisions, we are not adopting the proposed criteria. Without experience, we cannot judge what impact the proposed criteria would have. Therefore, we are not yet prepared to adopt criteria such as these at this time. However, we do not rule out the possibility that such criteria may be adopted at a later time. With respect to the first proposed criterion (required by law or regulation, as opposed to practice), section 771(5B)(D)(i) of the Act and the SAA already include such a limitation.

One commenter argued that when a respondent can show that environmental assistance is not relieving a company of an obligation and that the assistance does not benefit the manufacture, production, or exportation of the subject merchandise, such assistance should not be countervailable. We disagree with the commenter's attempt to expand the criteria, which are clearly stated in the SCM Agreement, statute, and the SAA, under which the Department would find environmental assistance non-countervailable.

Finally, we have concluded that procedural rules setting forth the deadlines and obligations for filing green light and green box claims are necessary to ensure efficient and orderly administration of these new provisions in the CVD statute. As discussed in the Explanation of the Final Rules, we are issuing these procedural rules as interim

final rules effective on their date of publication in the **Federal Register**. In keeping with our decision to consolidate antidumping and countervailing duty procedures, these interim final rules amend § 351.301(d) of the Department's regulations.

Section 351.301(d)(6) sets forth time limits for filing green light and green box claims. These time limits parallel the deadlines for filing new countervailable subsidy allegations in investigations and reviews. Consistent with the evidentiary burden to establish the validity of such claims, § 351.301(d)(6) also clarifies that all green light and green box claims must be made by the competent government with the full participation of the administering authority of the relevant program. We note that examinations of green light and green box requests require the full participation of the administering governments. Section 301(d)(7) clarifies procedures for investigating subsidies or subsidy programs notified under Article 8.3 of the SCM Agreement.

Section 351.523

Section 351.523 deals with the identification and measurement of upstream subsidies. Because the URAA did not significantly amend the corresponding statutory provision (section 771A of the Act), § 351.523 is based largely on § 355.45 of the 1989 Proposed Regulations, except for the deletion of language that merely repeats the statute. We have, however, adopted new terminology in § 351.523(a). Specifically, "affiliation" replaces "control" as the standard for when we will have a reasonable basis to believe or suspect that a competitive benefit is bestowed on the subject merchandise. This also represents a change from our 1997 Proposed Regulations, where the standard was "cross-ownership" (see discussion of cross-ownership in preamble to § 351.525 below). We believe the new definition of "affiliated persons" contained in section 771(33) of the Act is sufficient to meet the threshold for deciding whether a competitive benefit is bestowed for purposes of initiating an upstream subsidy investigation. In addition, because we have changed our attribution rules regarding cross-owned input and downstream suppliers, it is no longer appropriate to use the "cross-ownership" standard.

With regard to the upstream subsidy provision in general, one commenter requested that the Department issue a regulation making clear its ability to apply an upstream subsidy analysis even where the subsidized input

producer is located in a separate country from the producer of the subject merchandise. We agree that the statute provides the Department the flexibility to perform such an analysis in two specific circumstances. First, where two or more foreign countries are organized as a customs union, section 771A(a) clearly states that the Department may treat the customs union as a single country in conducting an upstream subsidy analysis if the countervailable subsidy is provided by the customs union. In addition, the definition of "country" in section 771(3) of the Act does not limit this reading of "country" to situations in which the subsidy is provided by the customs union itself. Second, where an international consortium is engaged in the production of the subject merchandise, section 701(d) of the Act allows the Department to cumulate the subsidies provided to members of the consortium by their respective home countries. We interpret this provision to include the receipt by members of the consortium of upstream subsidies provided by the member's own country or (where appropriate) customs union. Therefore, we see no need to include a regulation on this issue.

Another commenter suggested that the Final Regulations should expressly state that the Department is not required to investigate upstream subsidies further than one stage back in the chain of production. This commenter cites to legislative history which indicates Congress' intent to limit the scope of an upstream inquiry to the stage prior to final manufacture or production, unless information demonstrates the significance of subsidies at earlier stages. H.R. Rep. No. 725, 98th Cong., 2d Sess. 33-34 (1984).

We do not believe it is necessary to issue a regulation on this topic. Section 351.523(a)(iii) already requires a demonstration of the significance of prior-stage subsidies in order for the Department to initiate an upstream subsidy investigation. As one moves back in the chain of commerce, it is less and less likely that the subsidies will have a significant effect on the cost of manufacturing or producing the subject merchandise and, therefore, less likely that we would initiate an upstream subsidy investigation. However, in those circumstances where a party is able to demonstrate the significance of subsidies at earlier stages, we will investigate accordingly.

As noted in the 1997 Proposed Regulations, one aspect of these regulations which differs from the 1989 Proposed Regulations involves the standard for determining whether a

competitive benefit exists. In this regard, section 771A(b)(1) of the Act provides that a competitive benefit has been bestowed when:

The price for the (subsidized) input product * * * is lower than the price that the manufacturer or producer of merchandise which is the subject of a countervailing duty proceeding would otherwise pay for the product in obtaining it from another seller in an arms-length transaction.

In addition, section 771A(b)(2) of the Act provides that when the Secretary has determined in a previous proceeding that a countervailable subsidy is paid or bestowed on the comparison input product, the Department "may (A) where appropriate, adjust the price that the manufacturer or producer of merchandise which is the subject of such proceeding would otherwise pay for the product to reflect the effects of the countervailable subsidy, or (B) select in lieu of that price a price from another source."

In the past, as reflected in § 355.45(d) of the 1989 Proposed Regulations, we preferred to base our comparisons upon the price charged for unsubsidized inputs produced by other producers in the same country as the producer of the subject merchandise. If we had determined in a prior CVD proceeding that a countervailable subsidy had been bestowed in the subject country on the comparison input, our next preferred alternative was to adjust the price of the input product to reflect the subsidy. As a final alternative, we could select a "world market price for the input product." We interpreted the phrase "world market price" broadly to include (1) actual prices charged for the input product by producers located in other countries, and (2) average import prices. Additionally, because the statute did not preclude, for comparison purposes, the use of prices of subsidized, imported inputs, we had determined that it would be "inappropriate to exclude all subsidized producers, even assuming that we could identify them." Circular Welded Non-Alloy Steel Pipe From Venezuela, 57 FR 42964, 42967-68 (September 17, 1992) ("Venezuelan Steel Pipe").

We have revised our approach regarding "competitive benefit" in the following manner. Under paragraph (c)(1)(i), we will rely first upon the actual price charged or offered for an unsubsidized input product, regardless of whether the producer of that input is located in the same country as the producer of the subject merchandise. We will make due allowance for quantities, physical characteristics, and other factors that affect comparability.

Upon further reflection, we see no justification for distinguishing between input products based on the country of production. Section 771A(b)(1) of the Act merely requires the Department to compare the price paid for the subsidized input product to the price that the producer "would otherwise pay for the product in obtaining it from another seller in an arms-length transaction." The price that the producer "would otherwise pay" could include the actual price paid by the producer of subject merchandise to an unrelated supplier or a bid offered by an unrelated supplier, regardless of the location of that supplier. However, we will examine quantities, physical characteristics, and other factors that may affect the comparability of the prices.

While several commenters argued against the use of offered prices, asserting that such prices do not reflect the true cost of alternative purchases, we have left this provision unchanged. Our preference, of course, is to use a price resulting from an actual sale; however, a *bona fide* price offer made at a time reasonably corresponding to the time of the purchase of the input does constitute a commercial alternative to the subsidized input product and, as such, is an acceptable benchmark.

Other comments concerning the use of actual or offered prices focused on the extent to which such prices are "representative." Essentially, these commenters defined a "representative" price as a price that is not less than the world market price. Therefore, they argued that if the actual unsubsidized price is less than the world market price, the Department should presume that the price is not representative and use the world market price.

We have not adopted this suggestion. As noted above, an actual price charged or offered represents the best example of what a downstream producer would "otherwise pay" for the subsidized input product. However, we are willing to entertain arguments during the course of a proceeding pertaining to whether an actual price or offer is anomalous or otherwise not comparable, including arguments that such price may be dumped or subsidized.

If actual prices or offers for unsubsidized inputs are not available, we will rely upon a world market price, *i.e.*, generally an average of publicly available prices for unsubsidized inputs from different countries or some other surrogate price deemed appropriate by the Department. See paragraph (c)(1)(ii). One commenter objected to the use of an average price, arguing that it is more reasonable to assume that the

downstream producer would purchase the input product at the lowest publicly available price. Another commenter supported the use of an average world market price, but urged the Department to make it a weighted-average price.

We have made no change in response to these comments. Absent an actual price or offer for an unsubsidized product, we are in a position of having to construct the price that a company would "otherwise pay." We cannot assume that the downstream producer would always be able to purchase its inputs at the lowest publicly available price. Such a price might be an anomaly resulting from unusual market circumstances which may not always be available to the producer in question. Therefore, it is more appropriate to use an average of the publicly available prices. The use of weighted-average prices, however, is impractical because we are unlikely to have the information with which to weight the publicly available prices. Although we will generally use an average of available world market prices, we will consider arguments that certain world market prices may be inappropriate.

Finally, if there are no prices for unsubsidized inputs available from any source, we will resort to prices of subsidized input products, adjusted to reflect the countervailable subsidy. In such a case, under paragraph (c)(1)(iii), we first will rely upon the actual price that the producer of the subject merchandise otherwise would pay for the input product adjusted to reflect the subsidy, regardless of the country in which the input product is produced. If such a price is not available, under paragraph (c)(1)(iv), we would use an average price for the input product from different countries adjusted to reflect the subsidy or some other adjusted surrogate price. When no adjustable price is available (*e.g.*, the only available price is a published price reflecting an average of both subsidized and non-subsidized prices), we may include the price of a subsidized input in our analysis or we may resort to any other reasonable price. See paragraph (c)(1)(v).

We believe that this new approach for measuring the competitive benefit better reflects the overall purpose of the upstream subsidies provision, which is to account, when appropriate, for upstream subsidies provided on input products used in the production or manufacture of subject merchandise. The language of section 771A itself does not express a preference regarding the selection of a comparison input price, and grants the Department wide latitude in determining when to adjust the price

of the comparison product to reflect known countervailable subsidies. However, parts of the legislative history underlying the Trade and Tariff Act of 1984, which added section 771A to the Act, support a preference for using the price of an unsubsidized input, and support making adjustments for subsidies when there is no price for unsubsidized inputs. See, e.g., 130 Cong. Rec. S13970 (daily ed. Oct. 9, 1984) (statement of Sen. Dole). Although, as described above, we are revising our practice regarding the identification and measurement of a competitive benefit, the preference for using the price of unsubsidized inputs also was reflected in our earlier practice. See, e.g., *Certain Agricultural Tillage Tools From Brazil*, 50 FR 24270, 24273 (June 10, 1985).

In determining whether a price is subsidized, we will rely primarily on CVD findings made by the United States or the investigating authorities of other countries in the recent past (*i.e.*, within the past five years).

As we noted in the 1997 Proposed Regulations, in determining whether there is a competitive benefit, we will adjust prices upward to account for delivery charges (*e.g.*, c.&f.). We received a number of comments concerning this point. Several commenters expressed support of this policy. One commenter objected, however, arguing that the inclusion of delivery charges could result in the Department finding a competitive benefit which results solely from the difference in the cost of transporting the subsidized versus unsubsidized goods, rather than from the subsidy to the input product.

Although the statute does not specify the precise basis for calculating a benchmark price for the input product, section 771A(b)(1) does require the use of the price that the manufacturer or producer of the subject merchandise "would otherwise pay." In our view, this requires the use of a price that represents a commercial alternative to the producer of the subject merchandise, and *f.o.b.* prices do not provide a measurement of the commercial alternative to the downstream producer. See, e.g., *Venezuelan Steel Pipe*.

As the Federal Circuit recently stated in upholding the Department's inclusion of freight charges in determining the world price under Item (d) of the Illustrative List of Export Subsidies, "A castings manufacturer procuring pig iron on the world market would have to pay the *f.o.b.* price for the pig iron itself, plus the cost of shipping that iron to India. Accordingly, the

world market price must include the cost of shipping." *Creswell Trading Co. v. United States*, 141 F.3d 1471, 1478 (Fed. Cir. 1998). For these reasons, we have not changed the position taken in the 1997 Proposed Regulations.

Section 351.524

In the 1997 Proposed Regulations, the Department's method for allocating benefits from subsidies was included in the grant section (see § 351.503(c) of the 1997 Proposed Regulations). For these Final Regulations, however, we have decided to issue a separate regulation on allocation because this issue concerns all types of subsidies, not only grants. Therefore, unless otherwise specified in §§ 351.504–523, the Secretary will allocate benefits to a particular time period in accordance with this section.

Which Benefits Are Allocated Over Time

Section 351.524 retains the distinction between "recurring" and "non-recurring" benefits. Although more precise terms might be "non-allocable" and "allocable," we are retaining the terms "recurring" and "non-recurring" because they are widely understood in the international trading community. Paragraph (a) provides that the Secretary will allocate a recurring benefit to the year in which the subsidy is considered to have been received, a practice usually referred to as "expensing." Paragraph (b) provides that, with one exception (discussed as "the 0.5 percent test" below), the Secretary will allocate non-recurring benefits over time.

Paragraph (c) contains a test for distinguishing between recurring and non-recurring benefits. In the 1997 Proposed Regulations, we proposed to codify the test applied by the Department in the GIA. Under the GIA standard, if a benefit is exceptional, *i.e.*, not received on a regular or predictable basis, or if it requires express government authorization or approval, the Department will consider it as non-recurring. Otherwise, the Department will treat it as a recurring benefit. However, as stated in the preamble to the 1997 Proposed Regulations, we were considering:

* * * whether there might be a better standard for distinguishing between these two types of benefits. An important purpose of the recurring/non-recurring test is to reduce the burden on the Department and interested parties by limiting the amount of information requested on subsidies bestowed prior to the period of investigation or review. However, the Department is increasingly facing arguments regarding its application of the standard described in the GIA. At some point, the burden of applying the GIA

standard may well outweigh the benefits. Therefore, we particularly invite comments on this issue. We note that the Department has considered other options in the past including: (1) Developing a list of the types of subsidies that would be allocated and those that would be expensed; (2) allocating any grant-like benefit that exceeds 0.5 percent * * * ; and (3) allocating only those grant-like subsidies that are tied to the purchase of fixed assets.

We received a number of comments on this issue. (Because this and the other allocation issues discussed below were included in the grant section of our 1997 Proposed Regulations, the comments consistently refer to "grants." Our responses, however, are more generally drafted and refer not only to grants, but also to the allocation of other types of subsidies.)

One commenter argued that the regulation should include a provision that there will be a rebuttable presumption that certain grants will be expensed and others allocated. This commenter supported the option of developing an illustrative list showing which types of grants will be expensed and which will be allocated. According to the commenter, this approach would make the application of the law more predictable and consistent, and would reduce the administrative burden on the Department. Another commenter opposed the inclusion of an illustrative list as a rebuttable presumption, arguing that this would unfairly benefit respondents who control all information relating to the purpose and use of a subsidy.

Most commenters asked the Department to retain the GIA test for determining whether a grant is recurring or non-recurring. They argued that this methodology is both predictable and flexible and that it has worked well in the past. One commenter, however, asked the Department to take into consideration two factors which were included in the preamble to the Department's 1989 Proposed Regulations, but not in the GIA: (1) Whether the program is of a longstanding nature, and (2) whether there is reason to believe that the program will continue in the future.

Most of the commenters rejected our three suggested alternatives to the GIA test. They argued that the first option (*i.e.*, to develop a list of different types of subsidies) would be rigid, unworkable, inconsistent with commercial reality, and subject to abuse. In addition, they felt that it would be very difficult for the Department to compile a binding list, which would not only have to identify and categorize every type of subsidy we

have ever encountered, but which would also have to anticipate future grant programs. However, one commenter suggested that, as an alternative, the Department could develop a non-binding informative list, based on previous practice, as a complement to the GIA test.

These commenters agreed that the second option (to allocate all grants that exceed 0.5 percent *ad valorem*) would create unnecessary work since the Department would have to obtain historical information for all grant programs regardless of their nature and the Department's past treatment of identical or similar programs. One commenter argued that the courts are likely to find such a methodology arbitrary, adding that it was Congress' intent that only non-recurring subsidies be allocated over time.

The commenters agreed that the third option (*i.e.*, to allocate only grants that can be tied to the purchase of fixed assets) would be inconsistent with commercial reality since it would be based upon a flawed assumption, namely that only fixed assets continue to provide benefits after the year of receipt. In addition, this methodology would require the Department to abandon its longstanding practice of not considering the effect of a subsidy, the commenters stated.

We agree with the commenters that none of the three options listed in the 1997 Proposed Regulations provides a more reliable basis for determining whether a subsidy benefit should be treated as recurring or non-recurring than that in the GIA test. However, we do not think that the GIA test, on its own, should be the sole basis for determining whether a subsidy is recurring or non-recurring. If we applied only the GIA test, we believe we would run the risk of expensing some subsidies in the year of receipt that are more appropriately allocated over time, as explained in further detail below. In addition, the GIA test alone may lead to unnecessary arguments over which subsidies are recurring or non-recurring. We also do not agree with the commenter who asked us to modify the GIA test by resurrecting two standards from our 1989 Proposed Regulations (*i.e.*, to examine whether a program is longstanding and if there is reason to believe that it will continue in the future). As stated in the GIA, we changed our approach for distinguishing between recurring and non-recurring benefits in Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from France, 58 FR 6221 (January 27, 1993). In that determination, we explained that the two standards from the 1989

Proposed Regulations had not proven helpful in determining the nature of a benefit and that they had been difficult to interpret and apply in practice. Nothing in our subsequent experience has changed our view on this matter.

However, we find persuasive the comment that suggested developing a non-binding illustrative list as a complement to the GIA test. We believe that non-binding lists illustrating which types of subsidies we will normally treat as providing recurring benefits, and which types of subsidies we will normally treat as providing non-recurring benefits, would offer valuable guidance on how the Department views different types of subsidies. Since they are non-binding, the lists do not have to cover every single type of subsidy that we have encountered in the past, nor do they have to anticipate all conceivable new subsidies that we might come across in the future.

Therefore, for illustrative purposes we have added to paragraph (c) non-binding lists of subsidies which we will normally treat as providing recurring benefits, and subsidies which we will normally treat as providing non-recurring benefits. These lists have been developed based upon our past experience and our findings described in the GIA. Because these lists are non-binding, paragraph (c) also provides that parties may argue that the benefit from a subsidy on the recurring list should be considered non-recurring, or that the benefit from a subsidy on the non-recurring list should be considered recurring.

Our determination of whether a recurring subsidy should be treated as non-recurring, or vice versa, will rely principally on the test set forth in the GIA. However, because we have decided to codify these illustrative lists, we have reevaluated the GIA test to ensure that it covers all of the factors that should be considered in determining whether a subsidy should be treated as recurring or non-recurring. Based on this reevaluation, and the comments we received, we have determined that it is appropriate to expand the criteria that will be considered in applying the test of whether a subsidy traditionally considered as recurring should be treated as non-recurring, or whether a subsidy traditionally considered as non-recurring should be treated as recurring. Therefore, in addition to examining whether the subsidy is exceptional, or whether express government authorization or approval is provided or required, we will also examine whether the subsidy was provided for, or tied to, the capital structure or capital assets of the company. In this context, capital

structure is considered to be the combination of common equity (including retained earnings), preferred stock, and long-term debt that comprises a firm's financial framework. Capital assets are the plant and equipment which produce other goods, and include industrial buildings, machinery and equipment. Thus, it is appropriate to consider the benefit from a subsidy provided for, or tied to, the capital structure or capital assets of a firm to be non-recurring because these types of subsidies generally benefit the creation, expansion, and/or continued existence of a firm.

The addition of this criterion to the GIA test in no way envisions or requires an examination of the effects or uses of the subsidy. Rather, we will examine whether, at the point of bestowal, the subsidy was provided to, or tied to, the company's capital structure or capital assets. For example, debt forgiveness benefits the capital structure of a company by reducing long-term liabilities, and thus increasing net worth. Similarly, a government's coverage of a company's losses benefits its capital structure because the company need not cover the losses out of its retained earnings.

If the government provides a grant expressly for the purchase of an industrial building, the capital assets of the firm are benefitted and, as such, it is reasonable to conclude that the benefit from the grant should be considered non-recurring. In the same vein, if the government provides import duty exemptions tied to major capital equipment purchases, it may be reasonable to conclude that, because these duty exemptions are tied to capital assets, the benefits from such duty exemptions should be considered non-recurring, even though import duty exemptions are on the list of recurring subsidies.

While we agree with the commenters who argued that one of the proposed options—allocating only those grant-like subsidies tied to the purchase of fixed assets—is based on a flawed assumption that only fixed assets continue to provide benefits after the year of receipt, we do not consider that our addition to the GIA test in these Final Regulations reflects the same flawed assumption. By including not only capital assets, but also capital structure, in our examination of whether a subsidy is recurring or non-recurring, we will be better able to identify those subsidies that continue to benefit a company after the year of receipt.

Under paragraph (c), a party may argue that a subsidy included on the illustrative list of recurring subsidies be

treated as non-recurring or that a subsidy on the non-recurring list be treated as recurring. If such arguments are presented to us and supported by sufficient information, we will apply the standards set forth in the regulation. In other words, we will examine whether the program is exceptional, whether it requires express government authorization or approval, or whether, at the point of bestowal, the subsidy was provided for, or was tied to, the capital structure or capital assets of the company. If a subsidy is not on either list, the Secretary will apply the standards set forth in the regulation to determine if it should be treated as recurring or non-recurring.

The 0.5 Percent Test and the Expensing of Small Subsidies

Although we normally will allocate non-recurring benefits over time, paragraph (b)(2) retains the so-called 0.5 percent test with a few minor modifications which are discussed below. See § 355.49(a)(3)(i) of the 1989 Proposed Regulations and the GIA at 37226. Under this test, we will expense non-recurring benefits under a particular subsidy program in the year of receipt if the total amount of such benefits is less than 0.5 percent *ad valorem*, as calculated under § 351.525.

We consider this test to be an important part of our efforts to simplify countervailing duty proceedings and to reduce the burdens on all parties involved. By expensing small non-recurring benefits in the year of receipt, we avoid the need to: (1) Collect, analyze, and verify the data needed to allocate such benefits over time; and (2) keep track of the allocation calculations for minuscule subsidies from year to year. If considered only in the context of a single case, the burdens imposed by this activity may not appear to be particularly onerous. However, when considered across all investigations and administrative reviews, the cumulative burden becomes considerable.

Since the 1993 Certain Steel investigations, we have performed the 0.5 percent test using the so-called "program-by-program" approach. Under this approach, we add the *ad valorem* rates for all subsidies received by a company under a single program in that year. If the resulting sum is below 0.5 percent, we expense the benefits in the year of receipt. An alternative approach would be to add the *ad valorem* rates for all subsidies approved under all programs for each company in a given year and examine whether this total rate is below 0.5 percent (the so-called "company-by-company" approach). In the 1997 Proposed Regulations, we

stated that we intended to retain the program-by-program approach, but that we wanted to preserve "the flexibility to take a different approach in situations where petitioners are able to point to clear evidence that the foreign government has deliberately structured its subsidy programs so as to reduce the exposure of its exporters to countervailing duties."

We received three comments on the 0.5 percent test, all of which urged us to administer the test on a company-by-company basis. One commenter argued that the current program-by-program test could lead to anomalous results. For example, a company that received several small non-recurring grants, all below 0.5 percent of the company's total sales, would face a countervailing duty rate different from a company that received the same total amount of money in the form of one large non-recurring grant. Such anomalies would allow foreign governments to evade the countervailing duty law by providing several small subsidies instead of one large subsidy, according to the commenter. All three commenters agreed that the administrative convenience of expensing small non-recurring grants would be outweighed by the potential for abuse.

The same commenters also criticized the exception to the 0.5 percent rule as outlined in the 1997 Proposed Regulations, *i.e.*, that petitioners must show the intent of the foreign government if the Department is to deviate from the rule. These commenters argued that the standard imposes an improper burden on petitioners, who cannot be expected to divine the intent of a foreign government.

As explained above, the administrative burden on the Department to collect the information necessary to allocate very small non-recurring benefits over time would be considerable. This burden cannot be justified given that, after careful consideration, we believe that in most cases there would be little demonstrable impact in aggregating all programs on a company-specific basis. However, we agree that some potential for manipulation exists with the program-by-program approach. We also agree that petitioners may have difficulty demonstrating the intent of a foreign government. To address these concerns, we have made several changes to the 1997 Proposed Regulations.

Paragraph 351.524(b)(2) now states that the Secretary will normally expense non-recurring benefits in the year of receipt if the total of the benefits from subsidies approved in each year under

a program is less than 0.5 percent *ad valorem* of the relevant sales. The relevant sales that we use to calculate the *ad valorem* rate are either the firm's total sales or, if the subsidy is tied, the sales of the product(s) or the sales to the market to which the subsidy is tied. In the case of an export subsidy program, we use the firm's export sales. The new paragraph adds the word "normally" and makes clear that we will apply the 0.5 percent test to all benefits associated with a particular program, not each individual benefit, if there are more than one. We have also changed the word "received" to "approved" with respect to all benefits associated with a particular program. This is intended to cover the situation where a government approves a subsidy in one year but disburses the funds in installments over a period of years. We will apply the 0.5 percent test to the full amount approved, not to each individual installment. In our experience, governments often make one-time approvals for large grants, but disburse the funds over a period of years. This is often the case in research and development programs. As such, basing our 0.5 percent test on disbursements could result in certain large non-recurring subsidies being expensed rather than allocated. To avoid this, it is more appropriate to base our determination of whether the subsidy should be allocated over time on the full amount approved, rather than on periodic installments. However, we will continue to countervail according to the amount received by the company in each year. The only difference is that once the 0.5 percent test has been applied to the approved amount and the subsidy exceeds 0.5 percent of sales, all disbursements will be allocated over time.

In addition, we have abandoned the requirement that petitioners show, in order to convince the Department to abandon the program-by-program approach, that a government deliberately structured its subsidy program so as to reduce exposure to countervailing duties. Instead, we intend to follow the program-by-program method, but we will consider aggregating all programs on a company-specific basis where the application of the 0.5 percent rule would have a significant impact on the results of the investigation or review. Since we have no experience in determining what constitutes a significant impact, we will examine this on a case-by-case basis in response to comments or on our own initiative.

The Time Period Over Which Non-Recurring Benefits Are Allocated

As described below, we have made changes in the methods used to determine certain variables included in our formula for allocating non-recurring benefits over time. In a departure from our current practice and from the 1997 Proposed Regulations, we have adopted a rebuttable presumption that non-recurring benefits will be allocated over the number of years corresponding to the average useful life ("AUL") of a firm's renewable physical assets, as set forth for the industry concerned in the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (Rev. Proc. 77-10, 1977-1, C.B. 548 (RR-38)) ("the IRS tables method"), as updated by the Department of Treasury, unless the parties establish that the IRS tables do not reasonably reflect the AUL of a firm's assets. Parties may rebut the presumption to use the IRS tables by demonstrating either that the company-specific AUL or country-wide AUL for the industry in the respondent country differs by one year or more from the AUL in the IRS tables for the industry under investigation. Before describing the criteria that we will consider in determining whether the presumption has been rebutted, we will first explain why we have decided to change the 1997 Proposed Regulations, which stated that we would use a company-specific AUL.

Selection of AUL Method

Before 1995, we allocated non-recurring benefits over the AUL listed in the IRS tables in accordance with our 1989 Proposed Regulations. We believed, and continue to believe, that the IRS tables method offers consistency and predictability and that it is simple to administer. However, for purposes of the 1997 Proposed Regulations, we decided to change our practice due to several CIT decisions which ruled against our use of the IRS tables method (see, e.g., *Ipsco v. United States*, 687 F. Supp. 614, 626 (CIT 1988)) ("*Ipsco*"). One common theme of these decisions was that because the IRS tables method was not a company-specific approach, it failed to reflect adequately the benefit of a subsidy to a particular firm. Another common theme was that the IRS tables method could not be affirmed in the absence of a properly promulgated regulation (see *Ipsco*). In the 1997 Proposed Regulations, we also cited the findings in an unadopted GATT panel report (United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France,

Germany, and the United Kingdom, SCM/185, Nov. 15, 1994) ("Leaded Bar") which criticized the way in which the Department applied the IRS tables method.

Although we did not necessarily agree with the reasoning of these decisions, we decided to develop an alternative method. Among several options, we chose to allocate non-recurring subsidies over the company-specific AUL of productive assets because we believed that this methodology would be more administrable and predictable than the alternatives and, also, that it would be easily calculable from a firm's accounting records. Consequently, in the 1997 Proposed Regulations, we codified our recent practice of allocating non-recurring benefits over a period corresponding to the company-specific AUL of productive assets.

We received many comments on the AUL method. Several commenters, including respondents, urged the Department to return to the use of the IRS tables or, alternatively, to use the IRS tables as a rebuttable presumption or a fallback methodology in situations where a company-specific AUL could not be calculated. These commenters argued that the main reason for the CIT's rejection of the IRS tables was that the Department had failed to codify its methodology into a regulation pursuant to the Administrative Procedure Act. One commenter observed that the GATT panel report referred to in the 1997 Proposed Regulations did not find that the Department was barred from using the IRS tables. Rather, the panel determined that the use of this methodology in *Leaded Bar* had not been supported by sufficient reasoning on the record.

The main arguments in favor of codifying the IRS tables methodology presented by the commenters were that this approach offers consistency and predictability and that the Department's use of the IRS tables has not been controversial in the vast majority of cases. In contrast, the commenters stated, the company-specific AUL methodology would produce inconsistent and unpredictable results, among other things, due to the respondents' varying accounting practices. In addition, it would increase the workload for all parties. Also, it would not be possible to use the methodology universally, e.g., when respondent companies do not collect the information needed to calculate the AUL, when they do not use straight-line depreciation, or when they write down the value of their assets. Furthermore, one of the commenters pointed to problems allegedly associated with the

Department's calculation of the gross book value of a firm's assets. The same commenter was also troubled by the fact that all of a company's assets are included in the asset base, as opposed to only those assets that are used to produce the subject merchandise.

We also received comments on our statement in the 1997 Proposed Regulations that, in certain situations, it might "be necessary to make normalizing adjustments for factors that may distort the calculation of an AUL" (e.g., adjustments for extraordinary asset write-downs or hyperinflation). Some commenters expressed misgivings about such adjustments which, they said, might compromise the reliability of the data. One commenter also argued that relying on a company-specific AUL would allow respondents to manipulate the data and that the methodology, therefore, would lead to more litigation.

Other commenters suggested other approaches. One commenter argued that the Department should not limit its discretion to use one method or the other. Rather, the commenter suggested, the Department should make a case-by-case determination of the appropriate methodology after requiring respondents to report the average useful life of assets used in the production of the subject merchandise. In this commenter's view, the burden should be on respondents to show that their reported data are superior to the IRS tables.

Another commenter argued that unless challenged by respondents, the Department should use the AUL of fixed assets alleged in the petition, which generally would be the number of years set forth in the IRS tables. This commenter cited the significant burden that would be put on all parties, particularly respondents, and on the Department if the company-specific methodology were codified.

One group of commenters urged the Department not to return to the IRS tables methodology. One of these commenters supported the company-specific AUL methodology, arguing that this approach is more accurate than the IRS tables methodology, thus rendering fairer and more equitable results. The other commenters in this group expressed a preference for either of the two alternative methods for determining the allocation period which were outlined in our 1997 Proposed Regulations (i.e., the company-specific average maturity of long-term debt and the company-specific weighted-average use of funds). These commenters' chief arguments against the IRS tables methodology were (1) that it had been struck down by the CIT and a GATT

panel, and (2) that it does not accurately reflect the benefit conferred upon the actual recipient of the subsidy.

Another commenter conveyed general criticism of what it claimed was the U.S. practice of assessing subsidy benefits over an "inordinate" number of years. This commenter stated that countervailing duties are intended to be remedial, not punitive, and urged the Department to achieve a fairer, more transparent, and more consistent regime. A second commenter argued that data from outside a certain country can never be used to evaluate subsidies within that country except in the absence of data from the country in question, which seems to suggest that in this commenter's view, the IRS tables should only be used as "facts available."

We have gained some experience with the company-specific AUL method over the last few years. In some cases, this method has turned out to be more burdensome than we had envisioned. We have also found that the method may not be appropriate for companies that have been sold and that it presents problems when a company revalues its assets, for example as a result of declaring bankruptcy (see, *e.g.*, Steel Wire Rod from Germany, 62 FR 54990 (October 22, 1997)). The results we have obtained using the company-specific AUL method have been mixed: in some cases, they have been close to the IRS tables, whereas in other cases we have found anomalies within the same industry.

Taking into account our experience with the use of the company-specific AUL method and our review of the numerous comments and concerns raised by both petitioner and respondent parties, we have decided to codify the IRS tables method as a rebuttable presumption. In our view, the IRS tables method offers consistency, predictability, and simplicity, and presents a reasonable substitute for the AUL of assets in specific industries around the world. Furthermore, we agree with the comment that one important reason behind the CIT's decisions regarding the IRS tables method was that it had not been codified into a final regulation. With respect to the GATT panel report, it is true that the panel found fault with the way the Department applied the IRS tables method. However, it is also true, as suggested by one commenter, that the panel concluded that it was not necessarily inconsistent with GATT's Guidelines on Amortization and Depreciation (Committee on Subsidies and Countervailing Measures, April 1985) for a signatory to apply a standard period as the average useful life of assets

in a given industry, provided that such standard period was not established on an arbitrary basis and that it was applied with a degree of flexibility, taking into account the circumstances of a given case.

Therefore, as set forth in paragraph (d)(2), we will use the AUL listed in the IRS tables for the industry under investigation, unless parties claim and establish that these tables do not reasonably reflect the AUL of the renewable physical assets for the firm or industry under investigation. Since it is quite likely that the IRS tables, which are based on industry averages, will never exactly match a firm's AUL, we will not allow parties to claim that the IRS tables do not reflect the firm's AUL unless they can demonstrate either: (1) That the AUL for the firm differs by one year or more from the AUL listed for the industry in the IRS tables, or (2) that the relevant authorities in the respondent country have in place a system, equivalent to the IRS tables, for determining the actual AUL of assets in specific industries, and the respondent country's tables show that the AUL for the industry under investigation differs by one year or more from the IRS tables.

By requiring any party objecting to the application of the IRS tables to show that either the company-specific AUL, or the industry AUL in that country, differs by one year or more from the IRS tables, we will reduce the burden on all parties, as well as the Department, in analyzing, commenting on, and challenging claims that, even if ultimately accepted, would have relatively little impact on the calculation.

Although most commenters focused on some variation of the AUL method as the appropriate period over which to allocate non-recurring subsidies, one commenter urged the Department to adopt a special rule for determining the period over which to allocate subsidies that are tied to the development of a new product or which fund a specific project. This commenter maintained that the proper allocation period in cases where a subsidy is provided for the development of a specific product is the life of the product, and not the life of the renewable physical assets used to manufacture the product. The commenter stated that subsidies for the development of a new product continue to benefit the recipient over the life of the product and have no relationship to the recipient's AUL.

The same commenter noted that under the Department's methodology, regardless of whether it uses the IRS tables or the company-specific AUL, the allocation period begins with the receipt

of the subsidy. The commenter argued that the allocation period should begin with the sale of the first product that has been developed with the aid of the subsidy, which may be several years after the initial provision of the subsidy. In the commenter's view, the Department's standard calculation methodology severely understates the duration of the benefit.

In our experience, we have found that for most industries and most types of subsidies, the IRS tables have provided an accurate and fair approximation of the AUL of assets in the industry in question, and that the AUL of assets represents a reasonable reflection of the duration of the benefit from a non-recurring subsidy. We recognize, however, that for certain types of industries or certain types of subsidies, the AUL of assets may not represent the best reflection of the duration of the benefit. In addition, with respect to certain types of subsidies, even if we were to use the AUL of assets, it is not clear when the benefit stream should commence.

It is reasonable to assume that the AUL of assets closely approximates the duration of the benefit in mature or traditional industries. For example, if a government provides a grant to a chair producer to purchase electric saws and wood-carving equipment, it is reasonable to assume that the grant will continue to benefit the chair producer as long as the equipment lasts. In this instance, the focus of the government's attention is to provide the means for the company to produce already developed products, or modest innovations in the manufacturing process of developed products. Often, both the equipment and the products made from the equipment have already been developed. There is usually only a relatively short lead time between receipt of the subsidy and production. In comparison with the total investment, research and development and marketing expenses are likely to be relatively low. In addition, the level of risk associated with the investment may be lower than that associated with the type of investment described below.

However, when a government provides a subsidy to fund the development of certain new technologies, or to fund an extraordinarily large project for the development of new products that encompasses not only basic research and development, but also implementation and commercialization, the duration of the benefit may not necessarily be related to the AUL of assets in that industry. For one thing, by definition, estimates of the AUL of

assets are based on existing equipment used to make existing products. The assets needed to develop new technologies, or to produce a new product may not even have been designed yet, and certainly the product is not yet developed. Often there is a significant lead time between receipt of the subsidy and development of the product and between the development of the product and the product's commercialization (e.g., the first commercial sale); in some industries, these lead times can be several years. In these instances, even if we were to rely on the AUL of assets, there is a question as to when the benefit stream should begin: at the time the grant is received or at the time the product reaches commercial production.

For these reasons, we have added an exception to paragraph (d). Under paragraph (d)(2)(iv), we will consider arguments, with respect to subsidies to develop certain new technologies, or to fund extraordinarily large development projects that require extensive research and development prior to implementation of production, that we should rely on allocation periods other than AUL, or that the benefit stream should begin at some time other than the date the subsidy is received.

Calculation of a Company-Specific AUL

As noted above, in order to rebut the presumption that the IRS tables reasonably reflect the AUL of assets of the respondent company, a party must provide information showing either that a company-specific AUL differs by one year or more from the AUL listed in the IRS tables for that industry, or that the AUL of the industry in the respondent country differs by one year or more from the AUL in the IRS tables. The criteria that the Department will apply in deciding whether the presumption has been rebutted are discussed below and are set forth in paragraphs (d)(2)(ii) and (iii).

Because firms usually do not calculate the "actual" AUL of assets in the normal course of business, and requiring firms to calculate this figure for purposes of a countervailing duty proceeding could pose an extremely onerous burden on firms with thousands of individual assets, and on the Department to verify the accuracy of those calculations, we intend to continue relying on the basic method for calculating company-specific AUL which has been used by the Department since the remand determination in the 1993 *Certain Steel Investigations* (see, *British Steel v. United States*, 929 F. Supp. 426, 432-34 (CIT 1996)). Under this method, which is set forth in general terms in paragraph

(d)(2)(iii), a firm calculates an AUL as follows. First, the annual average gross book value of the firm's depreciable productive fixed assets (which is usually based on acquisition cost) is cumulated, for a period considered appropriate by the Department. In the preamble to the 1997 Proposed Regulations, we indicated that we had been requesting 10 years of data to calculate a company-specific AUL; however, we are still evaluating whether 10 years of data are necessary or appropriate. Second, the firm's annual charges to accumulated depreciation for the same time period are summed. Third, the sum of the annual average gross book values is divided by the sum of annual depreciation charges. The resulting number is a company-specific AUL. As we gain more experience in addressing the calculation of AULs under these regulations, we may make refinements to the approach described above.

The Secretary will attempt to exclude fixed assets that are not depreciable (such as land or construction in progress) and assets that have been fully depreciated and that are no longer in service. However, assets that are in service would be included even if they have been fully depreciated. There may be situations in which the company-specific AUL calculated in the manner described above is not representative of the company's actual AUL. For example, if a firm's depreciation is not based on an estimate of the actual useful life of its assets, the calculation described above is not a reasonable method of calculating AUL. Similarly, AUL cannot be calculated in this manner if the firm does not use straight-line depreciation unless additions to the firm's asset pool are regular and even. In addition, we will not use a company-specific AUL where we conclude that the company-specific AUL is aberrational, or in some other way not usable. As noted above, we have found that company-specific AULs may not be usable in the face of a recent change in ownership or bankruptcy.

It may also be necessary to make normalizing adjustments for factors that distort the calculation of an AUL. We are not in a position at this time to provide additional detail in the regulation itself on when we will make normalizing adjustments and how such adjustments will be made because the types of necessary adjustments will likely vary based on the facts of a particular case. However, certain obvious normalizing adjustments that come to mind are situations in which a firm may have charged an extraordinary write-down of fixed assets to

depreciation, or where the economy of the country in question has experienced persistently high inflation.

If a party can show that a company's AUL meets all of the requirements set forth in paragraph (d)(2)(iii), and that the company-specific AUL differs from the IRS tables by one year or more, we will consider that the presumption has been rebutted and will use the company's own AUL for purposes of its analysis. Because petitioners may not have access to translated financial statements (which is where much of the required information on asset values and depreciation is reported), petitioners will be allowed to base their arguments that the IRS tables are not representative of a company's AUL either on the financial statements they submit in the petition, or on information submitted by respondents in their initial questionnaire responses. We recognize that, by waiting until the initial questionnaire response to examine claims to rebut the IRS tables presumption, we may be faced with a situation where we will need to collect additional years of information on the alleged subsidy programs. If that situation arises, we will determine on a case-by-case basis whether this provides sufficient reason to declare an investigation extraordinarily complicated in accordance with section 703(c) of the Act.

In addition to rebutting the presumption to use the IRS tables through the calculation of a company-specific AUL, we will also permit the respondent government to demonstrate that it has a system in place which reasonably reflects the AUL for industries. The government must demonstrate that the system was set up to determine the AUL of industries in the country, that it has conducted reliable surveys and/or studies to gather information from the companies on their AULs, and that it has ensured the accuracy of any reported information and of any calculations performed. If the respondent government's system meets these standards, and the AUL for the industry under investigation differs by one year or more from the IRS tables, we will consider that the presumption has been rebutted, and will use the AUL from the respondent government's system for the industry under investigation.

As is the case for any other information included in a response to a countervailing duty questionnaire, a firm's calculation of its AUL, or a government's system for determining the AULs of its industries, would be subject to verification by the Department and comment by parties to

the proceeding. The regulation setting forth the use of the IRS tables as a rebuttable presumption is in paragraph (d)(2)(i); the standards we will apply to determine if the presumption has been rebutted are set forth in paragraphs (d)(2)(ii) and (iii).

Several commenters who objected to the use of a company-specific AUL also submitted comments on the method for calculating the company-specific AUL should the Department decide to retain this methodology. Although we have decided to use the IRS tables as a rebuttable presumption to determine the allocation period, parties will be able to use the company-specific AUL method to rebut the presumption. As such, we address these additional comments below regarding the calculation and application of a company-specific AUL.

One commenter argued that, in a situation where the petition is based upon the IRS tables and the company-specific AUL exceeds the AUL in the IRS tables, the Department must investigate all subsidies provided during the allocation period, and the petitioners must have a reasonable amount of time after the Department has made its AUL determination to allege additional subsidies from earlier years. To this effect, the commenter suggested that the investigation be declared extraordinarily complicated in accordance with the Department's regulations for postponing preliminary and final countervailing duty determinations when the company-specific AUL exceeds the AUL in the IRS tables.

In cases where the petition is based upon the AUL listed in the IRS tables, and where a party rebuts that presumption based on the factors discussed above, it is our intention to give the parties a reasonable amount of time to provide information concerning subsidies received in the earlier period (see the rules regarding the time limits for submission of factual information in § 351.301(b) of Antidumping Duties; Countervailing Duties; Final rule, 62 FR 27296 (May 19, 1997)). We will decide on a case-by-case basis if rebutting the use of the IRS tables provides sufficient reason to declare an investigation extraordinarily complicated in accordance with section 703(c) of the Act.

The same commenter asked that the regulations clearly state that the company-specific AUL method will be used only if the respondent (1) bases its depreciation charges on an estimate of the actual useful life of its productive assets, and (2) employs a straight-line depreciation methodology. Another commenter argued that there are two

circumstances under which the Department should be precluded from using the company-specific AUL method: (1) When additions to a firm's asset pool are irregular and uneven, and (2) when the number of producers and exporters is so large that the Department uses aggregate data, as was the case in, *e.g.*, *Live Swine from Canada*, 62 FR 18087 (April 14, 1997).

As stated in the 1997 Proposed Regulations and reiterated previously, there are certain situations in which a company cannot compute its AUL using the methodology described above. For example, if a firm's depreciation is not based on an estimate of the actual useful life of its assets, the methodology cannot be used. Similarly, an AUL cannot be calculated in this manner if the firm does not use straight-line depreciation and additions to the firm's asset pool are irregular and uneven. With respect to the last comment about aggregate cases, we have found that in some aggregate cases it is possible to calculate an AUL based on combined data from a large number of companies (see, *e.g.*, *Fresh Atlantic Salmon from Chile*, 63 FR 31437 (June 9, 1998)). However, because we now intend to use the AUL in the IRS tables as a rebuttable presumption in all investigations, parties in an aggregate case that wish to rebut the presumption would have to provide the same type of information outlined above.

One commenter criticized the Department's practice of including fully depreciated assets that are still in service in the asset base used to calculate the company-specific AUL. The commenter argued that the Department would have to assign an actual value to a fully depreciated asset to be used as a substitute for its acquisition cost which would involve complicated calculations. The commenter asked that the Department instead exclude fully depreciated assets from the asset base for purposes of the AUL calculation.

We note that, in cases where assets are fully depreciated, yet remain in service, their useful life is simply longer than the depreciation period used by the respondent for accounting purposes. By including fully depreciated assets that are still in service, our calculation more accurately reflects the assets' useful life. With respect to the commenter's concern that we would have to assign a value to a fully depreciated asset in lieu of its acquisition cost, this is simply incorrect. As explained above, one element of our calculation of the AUL of productive fixed assets is the gross book value of these assets, which is based on their acquisition cost. We will

still use the gross book value when the asset has been written off, just as we will use the aggregated depreciation of the asset. Thus, there is no need to assign a fictional value to a fully depreciated asset that is still in use for purposes of calculating the company-specific AUL.

The 1997 Proposed Regulations stated that, in administrative reviews, we would recalculate the AUL for non-recurring subsidies received after the period of investigation based upon updated information. One commenter labeled this approach as misguided and argued that there is no need to undertake such recalculation. Moreover, the commenter argued, this approach would lead to anomalous results, *e.g.*, in cases where a company that received two identical subsidies in two different years might face different countervailing duty rates based solely upon the company's financial structure and accounting practices.

We disagree that this approach would lead to anomalous results. Even if the subsidy amounts are identical, if they are provided in two different years, they will have different discount rates and, consequently, different benefit streams regardless of the allocation period. However, because we have limited experience in this area, we are continuing to evaluate whether we should recalculate the allocation period for new subsidies, and we will address this issue in the context of individual cases.

Calculation of the Benefit Stream

Once we have determined that a benefit is non-recurring and that it should not be expensed under the 0.5 percent rule under paragraph (b)(2), we will calculate the amount of the benefit that will be assigned to a particular year according to the formula described in paragraph (d)(1).

We noted in the 1997 Proposed Regulations that we had recently received comments on our allocation formula and that we intended to address the comments we had received in these Final Regulations. Those comments and our position follow.

One commenter, who argued that the Department's traditional calculation methodology is biased in favor of respondents, outlined four alternatives for determining when a grant is received: (1) In the beginning of the year of receipt, (2) at the end of the year of receipt, (3) on the actual date of receipt, or (4) in the middle of the year of receipt. The commenter maintained that because our traditional methodology is based on the implicit assumption that grants are received in the beginning of

the year of receipt, it favors respondents because it undervalues the benefit and artificially shortens the amortization period. The commenter also found our methodology to be inconsistent with commercial realities and with § 351.503(b) of the 1997 Proposed Regulations.

Regarding the second alternative (*i.e.*, basing the benefit calculation on the assumption that grants are received at the end of the year of receipt), the commenter stated that this would also be inconsistent with commercial realities and would unfairly favor petitioners. The third alternative (*i.e.*, using the actual date of receipt) was described as a neutral methodology that would favor neither petitioners nor respondents. According to the commenter, this approach is consistent with commercial reality, with the Department's past practice, and with § 351.503(b) of the 1997 Proposed Regulations. However, the commenter noted that this methodology would be burdensome and urged the Department to adopt the fourth alternative, *i.e.*, the mid-year methodology. The commenter maintained that this option is neutral, consistent with commercial realities, and would require only minor changes in the calculation formula. On average, the mid-year option would produce the same result as the actual date of receipt alternative and would thus be a fair methodology, according to the commenter. (A detailed explanation of how to calculate the annual benefit in accordance with the mid-year approach was also provided.)

A second commenter agreed with the previous argument that the Department's traditional calculation methodology favors respondents by undervaluing the benefit and preventing the Department from fully offsetting the benefit received. However, this commenter argued that the Department should change its calculation methodology to reflect the assumption that the benefit is received at the end of the year. The commenter asked that this underlying assumption should control unless respondents can establish the actual date of receipt.

We have not adopted any of the proposed alternatives to our current formula. Our current formula for allocating non-recurring benefits over time, which is shown in paragraph (d)(1), was developed as a result of the CIT's examination of our previous allocation method in *Michelin Tire Corp. v. United States*, 6 CIT 320 (1983). The formula first appeared in the Subsidies Appendix to Certain Cold-Rolled Carbon Steel Flat Products from Argentina, 49 FR 18006 (April 26, 1984)

and has since been part of the Department's longstanding practice. This methodology has been uncontroversial and has worked well in past cases. We, therefore, do not see any compelling need to change it. Moreover, we disagree with the commenters' specific proposals, including the proposed calculation formula developed by the first commenter. We find this commenter's methodology unduly complicated because it involves three different calculation formulas to be used at different times during the allocation period. Furthermore, the commenter's formula is not consistent with the declining balance methodology, which has been an important part of the Department's past practice.

Selection of Discount Rate

Paragraph (d)(3) deals with the selection of a discount rate. Consistent with the GIA at 37227, paragraph (d)(3)(ii) provides that, in the case of an uncreditworthy firm, the Secretary will use as a discount rate an interest rate with a "risk premium" included.

Section 351.525

Section 351.525 deals with the calculation of the *ad valorem* subsidy rate and the attribution of a subsidy to a particular product. While § 351.525 is based roughly on § 355.47 of the 1989 Proposed Regulations, it contains changes that reflect further refinements in the Department's practice since 1989.

Paragraph (a) deals with the calculation of the *ad valorem* subsidy rate, and continues to provide that the Secretary will calculate the rate by dividing the amount of the subsidy benefit by the sales value of the product or products to which the subsidy is attributed. For example, if a firm receives an untied domestic subsidy for which the benefit in the period of investigation or review is \$100 and the firm's total sales in that period amount to \$1,000, the *ad valorem* subsidy rate would be 10 percent ($\$100 \div \$1,000 = 10$ percent).

The second and third sentences of paragraph (a) deal with the basis on which the Secretary will determine the sales value of a product. The Department's longstanding practice has been to determine the sales value for products that are exported on an f.o.b. (port) basis in order to correspond to the basis on which the Customs Service assesses duties. However, in the GIA, we announced that we would begin using sales values as recorded in a firm's financial statements. We did so with the belief that this approach would be more accurate, would reduce the burden on the firms involved, and

would allow us to account for the fact that shipping expenses might be subsidized. However, in order to ensure that the Customs Service collected the correct amount of duties based on an f.o.b. (port) basis, we found it necessary to adjust the calculated *ad valorem* subsidy rate based on a ratio of the invoice value of exports to the United States to the f.o.b. value of exports to the United States. In the end, only one of the respondents in the 1993 steel investigations had the information needed to calculate this ratio. Therefore, for all other firms in those cases, the Department resorted to its traditional f.o.b. (port) methodology.

Because our experiment with a different basis was not successful, in the second sentence of paragraph (a) we have reverted to our standard practice of determining sales value on an f.o.b. (port) basis in the case of products that are exported. In the case of products that are sold for domestic consumption, we would determine sales value on an f.o.b. factory basis. While this method imposes a bit more work on firms than does a method that relies on booked values, we believe that the burden can be mitigated by relying on aggregate figures and reasonable allocations of those figures across markets (*e.g.*, subtracting total freight and insurance expenses—expenses that usually are maintained in ledgers that are separate from sales information).

In addition, there is no compelling reason for allocating subsidy benefits over sales values that include freight and other shipping costs. Although there may be rare instances where the movement component of a transaction is subsidized, we can deal with those instances on a case-by-case basis. Accordingly, the third sentence of paragraph (a) provides that the Secretary may make appropriate adjustments to the *ad valorem* subsidy rate to account for movement subsidies.

Paragraph (b) deals with the attribution of a subsidy to a particular product. Paragraphs (b)(2) through (b)(7) set forth general rules of attribution that the Secretary will apply to a given factual situation. We have taken this approach because, depending on the facts, several of the different rules may come into play at the same time. If we tried to account for all the possible permutations in advance, the result would be an extremely lengthy set of rules that might prove unduly rigid.

On the other hand, we appreciate that there needs to be a certain degree of predictability as to how the Department will attribute subsidies. We believe that the rules set forth in paragraph (b) are sufficiently precise that parties can

predict with a reasonable degree of certainty how we will attribute subsidies to particular products in a given factual scenario. In this regard, our intent is to apply these rules as harmoniously as possible, recognizing that unique and unforeseen factual situations may make complete harmony among these rules impossible.

With respect to the attribution rules themselves, they are consistent with the concept of "benefit" described in § 351.503, *i.e.*, that a benefit generally is conferred when a firm pays less than it otherwise would pay in the absence of the government-provided input or when a firm receives more revenue than it otherwise would earn. In light of this, subsidies are by these rules attributed, to the extent possible, to the sales for which costs are reduced (or revenues increased). For example, an export subsidy reduces the costs of a firm's exports and is, therefore, attributed only to export sales. Similarly, a subsidy provided by a government for a specific product is attributed only to sales of that product for which the subsidy was provided (and any downstream products produced from that product), as it reduces the costs of a firm's sales of those products. This attribution principle applies equally to the current benefit from non-recurring subsidies allocated over time. For example, the current benefit of an untied subsidy will be attributed to the firm's total sales, even if the products produced by the firm differ significantly from the time the subsidy was provided. We will not, therefore, examine whether product lines have been expanded or terminated, or whether and to what extent the corporate structure of the firm has changed over time.

The principle of attributing a subsidy to sales of a particular product or products is embodied in the Department's longstanding practice concerning the "tying" of subsidies. See, *e.g.*, § 355.47 of the 1989 Proposed Regulations. As discussed below, there are various ways in which a subsidy can be tied. However, regardless of the method, we attribute a subsidy to sales of the product or products to which it is tied. In this regard, one can view an "untied" subsidy as a subsidy that is tied to sales of all products produced by a firm. For example, we consider certain subsidies, such as payments for plant closures, equity infusions, debt forgiveness, and debt-to-equity conversions, to be untied because they benefit all production.

Paragraphs (b)(2) through (b)(7) set forth rules that we will apply to different types of tying situations. For example, paragraph (b)(2) contains an

attribution rule regarding export subsidies. Because an export subsidy is, by definition, limited to exports, paragraph (b)(2) provides that the Secretary will attribute an export subsidy only to the sales of products exported by a firm.

As noted above, we intend to apply paragraphs (b)(2) through (b)(7) consistently with each other, to the extent practicable. As an example, assume that a government provides an export subsidy on exports of widgets to Country X. Here, three attribution rules come into play. Under paragraph (b)(2), the subsidy would be attributed to the export sales of a firm. Under paragraph (b)(4), the subsidy would be attributed to products sold by a firm to Country X. Under paragraph (b)(5), the subsidy would be attributed to widgets sold by a firm. Putting the three rules together, the subsidy in this example would be attributed to the firm's export sales of widgets to Country X.

Certain commenters have identified potential scenarios where the Department should allow itself the flexibility to deviate from these tying rules (*e.g.*, where subsidies allegedly "tied" to non-subject merchandise or markets are actually meant to benefit the overall operations of the company).

We recognize that there may be many scenarios where these attribution rules do not fit precisely the facts of a particular case. Furthermore, we are extremely sensitive to potential circumvention of the countervailing duty law. We intend to examine all tying claims closely to ensure that the attribution rules are not manipulated to reduce countervailing duties. If the Secretary determines as a factual matter that a subsidy is tied to a particular product, then the Secretary will attribute that subsidy to sales of that particular product, in accordance with paragraph (b)(5). If subsidies allegedly tied to a particular product are in fact provided to the overall operations of a company, the Secretary will attribute the subsidy to sales of all products by the company. This example illustrates that the rules as proposed, and as finalized here, do serve their intended purpose, but that the facts of each case must be carefully examined.

The rules set forth in paragraphs (b)(5) and (b)(6) warrant additional explanation because of the special nomenclature that is being used. In all other sections of these regulations, the term "firm" is used to describe the recipient of the subsidy. See § 351.102. However, for purposes of certain attribution rules, where we are describing how subsidies will be attributed within firms, "firm" is too

broad. Therefore, for purposes of paragraphs (b)(5) and (b)(6), we are using the term "corporation." In so doing, we are not intending to limit the application of these rules to firms that are organized as corporations. However, based on our experience, most of the firms we investigate are organized as corporations. Therefore, our use of the term "corporation" makes these attribution rules as clear as possible. If a respondent is not organized as a corporation, we will address any attribution issues covered by the rules in paragraphs (b)(5) and (b)(6) based on the facts of that case, while following as closely as possible the rules and principles set forth in paragraphs (b)(5) and (b)(6).

Paragraph (b)(5) sets out our rules regarding product tying. Paragraph (b)(5)(i) states our longstanding general rule that where a subsidy is tied to production of a particular product, the subsidy will be attributed to sales of that product. One commenter argued that the regulations should make clear that where a subsidy is provided to develop a specific model of a product (or to modernize a particular production facility), the subsidy should be attributed to sales of that model (or to production from that facility). We believe that this commenter's concerns may already be addressed by the proposed product-tying rule. If subsidies are provided for a specific model, they can be tied to that model. If a countervailing duty case is brought solely against that model, the subsidy would be attributed to that model, and a model-specific rate will, in effect, be calculated. However, if the case is brought against several models that comprise the subject merchandise, we would normally blend the model-specific rates to arrive at a single rate to apply to all merchandise covered by the countervailing duty order.

Our 1997 Proposed Regulations contained an exception to the general product tying rule which provided that, if an input product is produced within the same corporation, subsidies tied to the input product would be attributed to sales of both the input and the downstream products. Our stated intention was to limit this exception to situations where production of the input and downstream product occur within the same corporation. We took the position that if the input product is produced by a separately incorporated company, regardless of the level of affiliation or "cross-ownership" (as discussed further below), subsidies to the input product would only be considered in the context of an upstream subsidy investigation initiated

on the basis of a sufficient allegation from the petitioner.

We received numerous comments objecting to such an approach, arguing that the rule elevates form over substance. These commenters suggested that the rule creates a loophole whereby vertically integrated businesses could avoid countervailing duty exposure for input subsidies simply by separately incorporating the division that makes the input. In their opinion, where there is cross-ownership between the input supplier and the downstream product, subsidies to the input supplier should be automatically attributed to the downstream product. In situations where the cross-ownership standard is not met, but the corporations are nonetheless affiliated, the Department should determine whether to attribute the subsidies between the two companies according to the particular facts of the case.

Paragraph (b)(5)(ii) of these Final Regulations maintains the exception to the product tying rule whereby we will attribute a subsidy tied to the input product to the sales of both the input and downstream products where the production of the input and downstream products occurs within the same corporation. However, upon consideration of the comments received and a careful review of the upstream subsidy provision of the statute, we have decided to modify our practice regarding separately incorporated input and downstream producers.

The main concern we have tried to address is the situation where a subsidy is provided to an input producer whose production is dedicated almost exclusively to the production of a higher value added product—the type of input product that is merely a link in the overall production chain. This was the case with stumpage subsidies on timber that was primarily dedicated to lumber production and subsidies to semolina primarily dedicated to pasta production. (See *Certain Softwood Lumber Products from Canada*, 57 FR 22570, 22578 (May 28, 1992) and *Certain Pasta from Italy*, 61 FR 30287–309 (June 14, 1996).) We believe that in situations such as these, the purpose of a subsidy provided to the input producer is to benefit the production of both the input and downstream products. Accordingly, where the input and downstream production takes place in separately incorporated companies with cross-ownership (see discussion below defining cross-ownership) and the production of the input product is primarily dedicated to the production of the downstream product, paragraph (b)(6)(iv) requires the Department to

attribute the subsidies received by the input producer to the combined sales of the input and downstream products (excluding the sales between the two corporations).

Where we are dealing with input products that are not primarily dedicated to the downstream products, however, it is not reasonable to assume that the purpose of a subsidy to the input product is to benefit the downstream product. For example, it would not be appropriate to attribute subsidies to a plastics company to the production of cross-owned corporations producing appliances and automobiles. Where we are investigating products such as appliances and automobiles, we will rely on the upstream subsidy provision of the statute to capture any plastics benefits which are passed to the downstream producer. Moreover, we believe that the upstream subsidy provision is still applicable when dealing with lower levels of affiliation. Therefore, if the relationship between the input and downstream producers meets the affiliation standard but falls short of cross-ownership, even if the input product is primarily dedicated to the downstream product, we will only consider subsidies to the input producer in the context of an upstream subsidy investigation.

Paragraph (b)(6) deals with situations where cross-ownership exists between corporations. We have decided to codify the definition of cross-ownership outlined in the preamble to the 1997 Proposed Regulations. Accordingly, paragraph (b)(6)(vi) makes clear that the relationships captured by the cross-ownership definition include those where the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same ways it can use its own assets (or subsidy benefits). For example, cross-ownership exists where corporation A owns corporation B (or *vice versa*), or where A and B are both owned by corporation C. Cross-ownership does not require one corporation to own 100 percent of the other corporation. Normally, cross-ownership will exist where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. In certain circumstances, a large minority voting interest (for example, 40 percent) or a “golden share” may also result in cross-ownership.

As we noted in the 1997 Proposed Regulations, the term “cross-ownership” as it is used here clearly

differs from “affiliation,” as that term is defined in section 771(33) of the Act. In response to this, one commenter protested that reliance upon cross-ownership for attribution purposes will unlawfully limit the affiliated party standard as outlined in section 771(33) of the Act. Another commenter asked the Department to revise the definition of cross-ownership such that cross-ownership will be found when one “affiliated” company exercises control over another.

We believe that the definition of cross-ownership in these Final Regulations is a more useful basis than mere affiliation for identifying the types of relationships where it is reasonable to presume that subsidies to one corporation could benefit another corporation. The underlying rationale for attributing subsidies between two separate corporations is that the interests of those two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same ways it can use its own assets (or subsidy benefits). The affiliation standard does not sufficiently limit the relationships we would examine to those where corporations have reached such a commonality of interests. Therefore, reliance upon the affiliated party definition would result in the Department expending unnecessary resources collecting information from corporations about subsidies which are not benefitting the production of the subject merchandise, or diluting subsidies more properly attributed to input producers by allocating such subsidies over the production of remotely related and affected downstream producers. In response to the second comment, we note that varying degrees of control can exist in any relationship. Therefore, we believe the more precise definition of cross-ownership that we have adopted in these Final Regulations is more appropriate.

Contrary to the assertions of the commenters, in limiting our attribution rules to situations where there is cross-ownership, we are not reading “affiliated” out of the CVD law—we simply do not find the affiliation standard to be a helpful basis for attributing subsidies. Nowhere in the statute or the SAA is there any indication that the affiliated party definition was intended to be used for subsidy attribution purposes. Rather, it identifies the broadest category of relationships which might be relevant to either an antidumping or a countervailing duty analysis. Therefore,

we intend to include in our questionnaires a request for respondents to identify all affiliated parties. Also, persons affiliated with companies that shipped during the period of investigation will not be entitled to request a new shipper review under section 751(a)(2)(B) of the Act. However, we do not intend to investigate subsidies to affiliated parties unless cross-ownership exists or other information, such as a transfer of subsidies, indicates that such subsidies may in fact benefit the subject merchandise produced by the corporation under investigation.

Paragraph (b)(6) begins by stating a general rule, which is followed by four exceptions to that rule deriving from the rationale described above. Paragraph (b)(6)(i) states that the Secretary will normally attribute a subsidy received by a corporation to the products produced by that corporation. Hence, for example, if corporation A receives a subsidy, then that subsidy will normally be attributed to the sales of products produced by corporation A.

However, under paragraph (b)(6)(ii), if two (or more) corporations with cross-ownership produce the subject merchandise, then subsidies received by either or both of those corporations will be attributed to the combined sales of the two corporations. Thus, for example, if corporation A and corporation B are both owned by corporation C and both A and B produce widgets, benefits to A and B will be combined to determine the subsidy on widgets and the subsidy will be attributed to the combined production of A and B.

Paragraph (b)(6)(iii) addresses a second instance where subsidies received by one corporation might be attributed to sales of another corporation with cross-ownership. This is where the subsidy is received by a holding company. The term "holding company" is intended to mean any company that owns or controls subsidiaries through the ownership of voting stock or other means. In paragraph (b)(6)(iii) of these Final Regulations, we have clarified that the term "holding company" includes investment companies with no business of their own (commonly referred to as holding companies) as well as companies with their own operations (commonly referred to as parent companies). Under paragraph (b)(6)(iii), subsidies to a holding company will normally be attributed to the consolidated sales of the holding company (including the sales of subsidiaries). However, if the Department determines that the holding company is merely serving as a conduit

for government-provided funds to one (or more) of its subsidiaries, then the subsidy will be attributed to the production of that subsidiary.

Analogous to the situation of a holding or parent company is the situation where a government provides a subsidy to a non-producing subsidiary (e.g., a financial subsidiary) and there are no conditions on how the money is to be used. Consistent with our treatment of subsidies to holding companies, we would attribute a subsidy to a non-producing subsidiary to the consolidated sales of the corporate group that includes the non-producing subsidiary. See, e.g., *Certain Steel Products from Belgium*, 58 FR 37273, 37282 (July 9, 1993) ("*Certain Steel from Belgium*").

Paragraph (b)(6)(iv) incorporates the change in practice with regard to separately incorporated input producers discussed previously. This rule allows the Department to attribute the subsidies received by the input producer to the input and downstream products produced by both corporations when the input is primarily dedicated to the production of the downstream product.

Finally, where the exceptions contained in paragraphs (b)(6)(i)–(iv) have not been met, subsidies received by one corporation may still be attributed to sales of another corporation with cross-ownership if the Secretary determines under paragraph (b)(6)(v) that the corporation receiving the subsidy transfers it to the corporation producing the subject merchandise. Such a transferral could be shown by some form of extraordinary transaction between the two companies, e.g., a transfer of assets, an assumption of debt, or a significant loan. Where we find such transfer mechanisms, we will attribute the subsidy to the combined sales of the two corporations.

Although cross-ownership is broadly defined, permitting us to include corporations under common government ownership, we expect that common government ownership will not normally be viewed as cross-ownership. Instead, we intend to continue our longstanding practice of treating most government-owned corporations as the government itself, and not as corporations that transfer subsidies received from the government to other government-owned corporations through loans or other financial transactions. For example, where a government-owned corporation producing the product under investigation purchases electricity from a government-owned utility, a subsidy is conferred if the utility does not

receive adequate remuneration. However, given the complexity and variety of the government-owned corporate structures that we have encountered, the nature of the allegation may determine the nature of the analysis and the level at which the analysis should be applied. The situations where we would normally expect to apply the cross-ownership rules to common government ownership are: (1) Government-owned corporations producing the same product (see § 351.525(b)(6)(ii)) and (2) government-owned corporations producing different products where the corporations are under the control of the same ministry or within a corporate group containing producers of similar products (see § 351.525(b)(6)(v)).

Although the rules described in paragraphs (b)(2)–(b)(7) of § 351.525 deal with tying, § 351.525 does not contain a definition of "tied." In the past, the Department has described this concept in a variety of ways. For example, in Appendix 2 to *Certain Steel Products from Belgium*, 47 FR 39304, 39317 (September 7, 1982), we stated that "a grant 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." In the preamble to the 1989 Proposed Regulations at 23374, we stated that a "tied" subsidy benefit is "e.g., a benefit bestowed specifically to promote the production of a particular product."

Given the wide variety of factual scenarios that we have encountered in the past, and are likely to encounter in the future, we are not promulgating an all-encompassing definition of "tied." Moreover, the absence of a definition of "tied" has not proven to be a problem in practice, and Annex IV to the SCM Agreement, which refers to "tied" subsidies in paragraph 3, also lacks a definition of this term. While the preamble to the 1997 Proposed Regulations requested comments regarding what factors are relevant to the Department's determination of whether benefits are tied, we received no such comments. For these reasons, at this time we intend to apply the term "tied" on a case-by-case basis, using the guidelines in this section.

Virtually every comment submitted on attribution-related issues included a reference to the fungibility of money. Certain commenters argued that because money is fungible, the Department should not allow subsidies to be tied to particular products or to particular export markets. In their view, the only distinction that should be made is between export and domestic subsidies. Other commenters invoked the

fungibility principle in support of their position that untied capital infusions to companies with multinational production should be attributed to worldwide sales of the firm.

While we agree with these commenters that money is fungible, these comments are somewhat misplaced. Fungibility has to do with the issue of whether we could, or should, trace the use of specific funds to determine whether such funds were used for their stated purpose, or the purpose that we evince from record evidence. We have generally stated that we will not trace the use of subsidies through a firm's books and records. Rather we analyze the purpose of the subsidy based on information available at the time of bestowal. Once the firm receives the funds, it does not matter whether the firm used the government funds, or *some of its own funds that were freed up as a result of the subsidy*, for the stated purpose or the purpose that we evince. This is what we mean when we say that money is fungible. Fungibility does not mean that we cannot attribute subsidies to particular portions of a firm's activities. This interpretation of fungibility would undermine congressional intent to attribute subsidies to the products that directly benefit from the subsidy. See, e.g., H.R. Rep. No. 96-317, at 74-75 (1979) ("[W]ith regard to subsidies which provide an enterprise with capital equipment or a plant * * * the net amount of the subsidy should be * * * assessed in relation to the products produced with such equipment or plant * * *").

For example, if we were to adopt some of the suggestions made by the commenters, there should be no distinction between export and domestic subsidies. Yet, this agency's consistent and, for the most part, non-controversial practice over the past 18 years has been to attribute export subsidies to the sales value of exported products and domestic subsidies to all products sold. As additional examples, over time, we also have adopted the practices of attributing subsidies that can be tied to particular products to sales of those products and attributing subsidies that can be tied to particular markets to products sold to those markets.

Our tying rules recognize that a government subsidy may not benefit all products or corporate entities equally. At the same time, they recognize that a subsidy may provide benefits to persons, products, or entities, not specifically named in a government program. Our tying rules are an attempt at a simple, rational set of guidelines for

reasonably attributing the benefit from a subsidy based on the stated purpose of the subsidy or the purpose we evince from record evidence at the time of bestowal.

Section 351.525(b)(7) addresses the attribution of subsidies received by companies with multinational production. As we stated in the 1997 Proposed Regulations, it is our continued position, based upon our past administrative experience, that:

The government of a country normally provides subsidies for the general purpose of promoting the economic and social health of that country and its people, and for the specific purposes of supporting, assisting or encouraging domestic manufacturing or production and related activities (including, for example, social policy activities such as the employment of its people).

GIA at 37231. Moreover, a government normally will not provide subsidies to firms that refuse to use them as the government wants, and firms receiving subsidies will not use them in a way that would contravene the government's purposes, as they otherwise risk losing future subsidies. Consistent with this, § 351.525(b)(7) states that we normally will attribute subsidies to sales of merchandise produced within the jurisdiction of the granting authority. However, where a respondent can demonstrate that the purpose of the subsidy was to benefit more than domestic production (*i.e.*, the subsidy was tied to more than domestic production), the subsidy will be attributed to multinational sales.

One commenter argued that it is inappropriate to assume that untied subsidies received by a multinational holding company benefit only the national operations of the company because such subsidies release resources for international as well as domestic operations. This argument, however, rests on the principle that money is fungible and, as discussed above, we do not believe that fungibility should be the guiding principle for attributing subsidies. Moreover, the presumption that domestic subsidies benefit domestic production has been a well-established practice since the *Certain Steel* investigations and has been upheld by the CIT. See GIA at 37231; *see also British Steel plc v. United States*, 929 F. Supp. 426, 453-55 (CIT 1996), *appeal pending sub nom. Inland Steel Industries, Inc. v. United States*, Nos. 98-1230, 1259 (Fed. Cir.).

The same commenter objected to the change from the rebuttable presumption adopted in 1993. We note that under the 1993 practice, a respondent was required to show that a subsidy was *not tied* to domestic production. If a

respondent successfully demonstrated this, the subsidy would be attributed to multinational production. Under the proposed paragraph (b)(7), however, respondents were required to demonstrate that the subsidies were tied to foreign production. If we found the subsidy to be tied to foreign production, it would not be countervailed. The final rule, which is worded slightly differently, still requires affirmative evidence that the purpose of the subsidy was to benefit more than domestic production. We continue to believe that the shift in emphasis will bring our practice with respect to multinational companies more in line with the other attribution rules that require evidence of tying, as opposed to evidence that a subsidy is not tied.

Another commenter, while not objecting to the proposed change in the formulation of the presumption, objected to our statement that, if the Department found a subsidy tied to foreign production, it would not be countervailed. This commenter argued that if the Department maintains a countervailing duty order covering exports from the country in which the foreign production occurred, it should countervail those subsidies.

We have not adopted this suggestion because the statute permits countervailing subsidies provided by one government for the benefit of production in another country only in limited circumstances. See § 351.527 (transnational subsidies). However, this comment did prompt a closer examination of the proposed rule. Recognizing that governments are not likely to provide subsidies solely for the benefit of foreign production, we believe that the purpose, even of subsidies which may be tied to foreign production, is in fact to benefit multinational operations, including those in the subsidizing jurisdiction. Therefore, we have revised the rule so that if a respondent demonstrates that a subsidy is tied to more than domestic production, the subsidy will be attributed to multinational sales including sales in the subsidizing jurisdiction. We will examine such claims closely to ensure that the subsidy was, in fact, tied to more than domestic production. Respondents must show that, in the authorization and/or approval documents, the government explicitly stated that the subsidy was being provided for more than domestic production. Simply approving a loan to a company with multinational production, or providing an equity infusion to the company, is not sufficient to demonstrate that the subsidy was tied to more than domestic

production. The documentation must show that, at the point of bestowal, one of the express purposes of the subsidy was to provide assistance to the firm's foreign subsidiaries. Absent such a demonstration, all subsidies, whether tied or untied, will be attributed to the appropriate category of domestically-produced sales as mandated by the rules contained in paragraphs (b)(1) through (b)(6).

We received one comment requesting the Department to include language in its Final Regulations which would allow the agency to tie regional subsidies to production in a particular region—essentially to calculate factory-specific subsidy rates. This commenter points to *Live Swine from Canada*, 61 FR 26879 (May 29, 1996) (“*Live Swine from Canada*”) in support of this proposal. In that case, the Department allocated regional benefits over regional production and then calculated a single country-wide rate based on each region's exports to the United States.

We have not adopted this suggestion. The calculation methodology employed in *Live Swine from Canada* was particular to the facts of that case “an aggregate case in which the majority of subsidy programs examined were regionally provided. If such a methodology were to be universally applied, foreign companies could easily escape payment of countervailing duties by selling the production of a subsidized region domestically, while exporting from a facility in an unsubsidized region.

Another commenter argued that if it were true that governments normally will not provide subsidies to firms that refuse to use them as the government wants, then even “untied” subsidies are worth less than their face value by virtue of the fact that the subsidy is inherently “restricted” in its use. This commenter appears to be seeking to have the Department reduce the value of the subsidy because of potential constraints placed on its receipt. We note that such a reduction is not an allowable offset under the statute.

Finally, we note that we have added a paragraph to this section which codifies our longstanding practice regarding the attribution of subsidies to trading companies. See, e.g., *Certain Stainless Steel Cooking Ware from the Republic of Korea*, 51 FR 42867 (November 26, 1986) and *Certain Steel Wire Nails from Thailand*, 52 FR 36987 (October 2, 1987). Although we did not receive any comments on this issue and our practice has been non-controversial, we believe it is important to codify those practices that we intend to continue. Therefore, paragraph (c) has

been added which states that benefits from subsidies provided to trading companies (or any firm that only sells and does not produce subject merchandise) will be cumulated with benefits from subsidies provided to the producer of subject merchandise, regardless of whether the trading company and the producer are affiliated.

Section 351.526

Section 351.526 deals with program-wide changes, and is almost identical to § 355.50 of the 1989 Proposed Regulations.

One commenter suggested that the Department should add specific language to the regulation stating that the cash deposit rate will not be adjusted for a terminated program, unless the respondent has presented positive evidence demonstrating that no residual benefits will be bestowed and that no transitional program has been, or will be enacted. The commenter further suggested that the regulation also clearly set forth that the Department will not adjust the cash deposit rate based on mere assertion or announcement of a government's intent to terminate a program.

We agree with the commenter that program-wide changes must be documented by the respondent, beyond mere assertion. However, we do not feel that it is necessary to codify this position through an amended regulation. Given the general nature of this policy and our current practice, to which the commenter does not object, there is no reason to amend the current regulation.

A second commenter argued that § 351.526 should allow for the possibility that evidence of a program-wide change received subsequent to the period of investigation or review, but before the preliminary determination or preliminary results of an administrative review, may change the final determination or final results of the review. For example, when a program has been terminated and no residual benefits exist, the Department's final determination or final results should be negative (assuming that there is only one program). The commenter asserted that the 1997 Proposed Regulations, which would require the Department to render an affirmative determination with a zero cash deposit rate, is inconsistent with the overall purpose of the U.S. countervailing duty law. The commenter further argued that the Department should not have the discretion to determine that a “substitute program” continues to provide benefits; a substitute program

must be considered only in a new investigation or upon an allegation in an administrative review.

We have not adopted the suggested changes of this commenter. It has been our longstanding practice to impose (or not to impose) a CVD order based exclusively on the subsidy rate in effect during the period of investigation. In *Pipe and Tube from Malaysia*, where the period of investigation rate was zero, we rendered a negative determination, even though we knew other benefits existed after the period of investigation. See, *Standard Pipe, Line Pipe, Light-Walled Rectangular Tubing and Heavy-Walled Rectangular Tubing from Malaysia*, 53 FR 46904, 46906 (November 21, 1988). If a subsidy exists during the period of investigation, we will issue a CVD order (where any required injury determination is affirmative) regardless of whether the program and the subsidy are eliminated after the period of investigation, but before our final determination. In regard to substitute programs, it is our practice to consider whether such programs exist when adjusting deposit rates. If we did not have such discretion to determine whether a substitute program offers the same benefits as a terminated program, then governments could terminate investigated or reviewed programs and replace them with other programs to obtain a lower deposit rate.

Section 351.527

Section 351.527, which is based on § 355.44(o) of the 1989 Proposed Regulations, provides that so-called “transnational subsidies” are not countervailable. Subsidies of this type include situations where the funding for the subsidy is provided (a) by the government of a country other than the country in which the recipient firm is located, or (2) by an international lending or development institution. Except for the addition of the phrase “ * * * supplied in accordance with, and as part of, a program or project funded,” which we discuss below, § 351.527 is the same as the provision in the 1997 Proposed Regulations and § 355.44(o) of the 1989 Proposed Regulations.

Paragraph (o)(2) of § 355.44(o) of the 1989 Proposed Regulations essentially duplicated what is now section 701(d) of the Act, a provision that deals with subsidies to international consortia. In light of our decision to avoid regulations that merely repeat the statute, § 351.527 merely references, but does not repeat, section 701(d).

One commenter stated that paragraph (a) in the 1997 Proposed Regulations should be clarified to apply solely to

foreign aid; otherwise any subsidy provided by the government of one country to a recipient located in another country would be not countervailable. The commenter argued that, as written, the regulation would prevent the Department from conducting an upstream analysis in a case where a subsidy is provided by the government of one country to an input producer in that country, that producer sells the input to a firm in another country, and this last firm ultimately sells subject merchandise to the United States. Another commenter stated that the statutory basis for not countervailing subsidies provided by one country to an entity producing or manufacturing the subject merchandise in another country no longer exists following the repeal of section 303 by the URAA and, prior to the URAA, did not exist for Subsidies Code members covered by section 701, notwithstanding previous assertions by the Department to the contrary. Therefore this commenter suggests striking paragraph (a) in its entirety. Both commenters supported paragraph (b), which addresses subsidies funded by international lending or development institutions.

Section 351.527 derives from prior section 303(a)(1) of the Act (now repealed), which stated:

Whenever any country * * * shall pay or bestow, directly or indirectly, any bounty of grant upon the manufacture or production or export of any article * * * manufactured or produced in such country * * * there shall be levied a duty equal to the net amount of such bounty or grant * * * .

19 U.S.C. section 1303(a)(1)(1994)(emphasis added).

In our view, neither the successorship of section 701 for Subsidies Code members, nor the repeal of section 303 by the URAA, eliminated the transnational subsidies rule, and there is no other indication that Congress intended to eliminate this rule. In addition, § 351.527 does not preclude the Department from conducting an upstream analysis in a case where a subsidy is provided by the government of one country to an input producer in that country, that producer sells the input to a firm in another country, and this last firm ultimately sells subject merchandise to the United States. As explained in the preamble to § 351.523, section 701(d), the international consortia provision of the statute, allows the Department to countervail such subsidies where both countries are "members (or other participating entities)" in an international consortium and the subsidy on the input product "assisted, permitted, or otherwise enabled" the participation of that

producer in the consortium. Furthermore, section 771A, the upstream subsidies provision of the statute, allows the Department to reach subsidies provided by one country that is a member in a customs union to an input produced in that country for incorporation into subject merchandise produced in another country that is a member of the same customs union.

With respect to § 351.527(b), we agree with the commenters that a subsidy does not exist if the funding for the subsidy is provided by an international lending or development institution. Common examples of this type of international funding include the construction of a dam, a hydroelectric plant, or some other large infrastructure project. The exemption in § 351.527 applies if sufficient evidence is provided showing that the funding for the subsidy is supplied in accordance with, and as part of, a program or project funded by another government or by an international lending or development institution. If, however, the recipient government decides on its own, outside of such a program or project, to provide a subsidy, that subsidy will be subject to the countervailing duty law. At the same time, the provision of transnational funds to a government does not in and of itself create a presumption of subsidization. We have amended § 351.527 to reflect the limited application of this exemption and to clarify that national government subsidy programs, if they meet the statutory criteria for a countervailable subsidy, will not escape countervailing duties.

Comments Relating to Procedural Regulations

We received comments arguing that remand determinations, like other determinations, should be published in the **Federal Register**. Although this issue was addressed in *Antidumping Duties; Countervailing Duties; Final rule*, 62 FR 27295, 27330 (May 19, 1997) ("Procedural Regulations"), these commenters assert that the alternatives described therein do not provide sufficient access to remand determinations. The commenters argue that the publication of remand determinations is crucial as they correct previously published determinations found to be unsupported by substantial evidence or not in accordance with the law. Moreover, remand decisions often include new analysis or expanded discussions of the Department's methodology which is not included in published decisions.

While we understand the concerns of the commenters, given the high cost of

publishing notices in the **Federal Register**, we do not agree that remand determinations should be published in the **Federal Register**. At this time, we will continue the current plan of posting final remand determinations on the Import Administration web site (http://www.ita.doc.gov/import_admin/). After this system has been in place for a reasonable period of time, we will evaluate whether this system provides adequate distribution of the determinations, or if another system would provide better public access.

We also received a comment encouraging the Department to codify and follow all procedures relating to the issuance of deposit instructions to Customs. Under § 351.211(b) of the Department's *Procedural Regulations*, the Department is obligated to issue deposit instructions within seven days of a final affirmative ITC determination, and promptly after final review results. However, the commenter stated that the Department frequently misses these deadlines, and parties have no remedy. Also, the commenter noted that the regulations do not address changes resulting from remands. The commenter stated that in some cases, deposit rates are not amended until all appeals are exhausted, and that this harms petitioners. According to the commenter, a fair rule would be to issue amended deposit rates immediately after the remand results are approved by the Court, if the amended rate is higher than the rate calculated in the previous segment. If that higher rate is eventually determined to be incorrect, then the difference can be refunded.

We agree that we should issue deposit instructions promptly. With regard to changes in deposit rates after remand results are affirmed, our policy has been to follow the decision in *Timken v. United States*, 893 F.2d 337 (Fed. Cir. 1990). Pursuant to our interpretation of this case, we do not change deposit instructions following a remand determination until all appeals are exhausted. If, however, the remand changes a negative determination to an affirmative determination, we will instruct Customs to suspend liquidation at a zero rate until all appeals are exhausted.

Subpart G—Effective Dates

Subpart G currently consists of a single § 351.701, which established the dates on which the new substantive AD and procedural AD and CVD regulations published on May 19, 1997, became effective. Section 701 also explains the extent to which the previous AD and procedural regulations govern segments of proceedings to which the new

regulations do not apply and the limited role of the new regulations in such proceedings.

We are now adding a new § 351.702 to establish effective dates for the new CVD substantive regulations. Because the procedural regulations published on May 19, 1997, apply to CVD proceedings, the effective dates in the substantive CVD regulations are structured as an exception to the effective dates in the procedural regulations.

Section 351.702(a) provides that the new substantive CVD regulations will apply to all investigations initiated pursuant to petitions filed more than 30 days after the date on which they are published. In addition, § 351.702(a) provides that the new regulations will apply to all administrative reviews initiated on the basis of requests filed in the month following the month in which the date 30 days after publication of this notice falls (in other words, the month following the month in which the regulations otherwise become effective). The slight difference in effective dates for requested administrative reviews is to avoid confusion over whether the new regulations apply to administrative reviews requested by different parties on different days during the month in which the new regulations become effective. Finally § 351.702(a) applies to all investigations or reviews that the Department self-initiates more than 30 days after the date on which the new regulations are published.

Section 351.702(b) provides that investigations and reviews to which the substantive CVD regulations do not apply will continue to be governed by the Department's previous CVD methodology, except to the extent that the previous methodology was invalidated by the URAA. Although there are no previous CVD substantive regulations, the Department's previous methodology generally is described in the proposed substantive CVD regulations published May 31, 1989. In situations where the previous methodology was invalidated by the URAA, the new regulations will serve as a restatement of the Department's interpretation of the Act as amended by the URAA. The 1997 Proposed Regulations have no role as precedent for any CVD determinations.

Classification

E.O. 12866

This final rule has been determined to be significant under E.O. 12866.

Regulatory Flexibility Act

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule will not have a significant economic impact on a substantial number of small entities. The Department does not believe that there will be any substantive effect on the outcome of AD and CVD proceedings as a result of the streamlining and simplification of their administration. With respect to the substantive amendments implementing the URAA, the Department believes that these regulations benefit both petitioners and respondents without favoring either, and, therefore, would not have a significant economic effect. As such, an initial regulatory flexibility analysis was not prepared.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. This final rule does not contain any new reporting or recording requirements subject to the Paperwork Reduction Act.

There are three separate collections of information contained in this rule. Each is currently approved by the Office of Management and Budget. The *Petition Format for Requesting Relief Under U.S. Antidumping Laws*, OMB Control No. 0625-0105, is estimated to impose an average public reporting burden of 40 hours. The information submitted is used to assess the petitioner's allegations of unfair trade practices and to determine whether an investigation is warranted. The information requested relates to the existence of sales at less than fair value and injury to the affected U.S. industry. Second, the *Format for Petition Requesting Relief Under the Countervailing Duty Law* is approved under OMB Control No. 0625-0148. This format is used to elicit the information required by the Tariff Act of 1930, as amended, and its implementing regulations, for the initiation of a CVD investigation. Specifically, the *Format* requests information about the imported product, a description of the alleged subsidies to the imported product, and the extent to which the domestic industry is being injured by the imported product. Finally, OMB Control No. 0625-0200, *Antidumping and*

Countervailing Duties, Procedures for Initiation of Downstream Product Monitoring, provides for the filing of a petition requesting the review of a "downstream" product. A downstream product is one that has incorporated as a component part, a part that is covered by a U.S. antidumping or countervailing duty finding. To be eligible to file a petition, the petitioner must produce a product like the component part or the downstream product. It is estimated to require 15 hours per petition.

These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to the Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC. 20230, or to OMB Desk Officer, New Executive Office Building, Washington, DC. 20503.

E.O. 12612

This final rule does not contain federalism implications warranting the preparation of a Federalism Assessment.

List of Subjects

19 CFR Part 351

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

19 CFR Part 353

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

19 CFR Part 355

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

Dated: November 10, 1998.

Robert S. LaRussa,
Assistant Secretary for Import Administration.

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

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.* and 19 U.S.C. 3538.

2. Section 351.102 (Definitions) is amended by adding new definitions to read as follows:

§ 351.102 Definitions

* * * * *

(b) * * *

Consumed in the production process. Inputs “consumed in the production process” are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the product.

Cumulative indirect tax. “Cumulative indirect tax” means a multi-staged tax levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production.

* * * * *

Direct tax. “Direct tax” means a tax on wages, profits, interests, rents, royalties, and all other forms of income, a tax on the ownership of real property, or a social welfare charge.

* * * * *

Export insurance. “Export insurance” includes, but is not limited to, insurance against increases in the cost of exported products, nonpayment by the customer, inflation, or exchange rate risks.

Firm. For purposes of subpart E (Identification and Measurement of Countervailable Subsidies), “firm” is used to refer to the recipient of an alleged countervailable subsidy, including any individual, company, partnership, corporation, joint venture, association, organization, or other entity.

* * * * *

Government-provided. “Government-provided” is a shorthand expression for an act or practice that is alleged to be a countervailable subsidy. The use of the term “government-provided” is not intended to preclude the possibility that a government may provide a countervailable subsidy indirectly in a manner described in section 771(5)(B)(iii) of the Act (indirect financial contribution).

Import charge. “Import charge” means a tariff, duty, or other fiscal charge that is levied on imports, other than an indirect tax.

* * * * *

Indirect tax. “Indirect tax” means a sales, excise, turnover, value added, franchise, stamp, transfer, inventory, or equipment tax, a border tax, or any other tax other than a direct tax or an import charge.

* * * * *

Loan. “Loan” means a loan or other form of debt financing, such as a bond.

Long-term loan. “Long-term loan” means a loan, the terms of repayment for which are greater than one year.

Prior-stage indirect tax. “Prior-stage indirect tax” means an indirect tax levied on goods or services used directly or indirectly in making a product.

* * * * *

Short-term loan. “Short-term loan” means a loan, the terms of repayment for which are one year or less.

* * * * *

3. A new subpart E is added to 19 CFR part 351, to read as follows:

Subpart E—Identification and Measurement of Countervailable Subsidies

Sec.

- 351.501 Scope.
- 351.502 Specificity of domestic subsidies.
- 351.503 Benefit.
- 351.504 Grants.
- 351.505 Loans.
- 351.506 Loan guarantees.
- 351.507 Equity.
- 351.508 Debt forgiveness.
- 351.509 Direct taxes.
- 351.510 Indirect taxes and import charges (other than export programs).
- 351.511 Provision of goods or services.
- 351.512 Purchase of goods. [Reserved]
- 351.513 Worker-related subsidies.
- 351.514 Export subsidies.
- 351.515 Internal transport and freight charges for export shipments.
- 351.516 Price preferences for inputs used in the production of goods for export.
- 351.517 Exemption or remission upon export of indirect taxes.
- 351.518 Exemption, remission, or deferral upon export of prior-stage cumulative indirect taxes.
- 351.519 Remission or drawback of import charges upon export.
- 351.520 Export insurance.
- 351.521 Import substitution subsidies. [Reserved]
- 351.522 Green light and green box subsidies.
- 351.523 Upstream subsidies.
- 351.524 Allocation of benefit to a particular time period.
- 351.525 Calculation of *ad valorem* subsidy rate and attribution of subsidy to a product.
- 351.526 Program-wide changes.
- 351.527 Transnational subsidies.

Subpart E—Identification and Measurement of Countervailable Subsidies**§ 351.501 Scope.**

The provisions of this subpart E set forth rules regarding the identification and measurement of countervailable subsidies. Where this subpart E does not expressly deal with a particular type of alleged subsidy, the Secretary will identify and measure the subsidy, if any, in accordance with the underlying principles of the Act and this subpart E.

§ 351.502 Specificity of domestic subsidies.

(a) *Sequential analysis.* In determining whether a subsidy is *de facto* specific, the Secretary will examine the factors contained in section 771(5A)(D)(iii) of the Act sequentially in order of their appearance. If a single factor warrants a finding of specificity, the Secretary will not undertake further analysis.

(b) *Characteristics of a “group.”* In determining whether a subsidy is being provided to a “group” of enterprises or industries within the meaning of section 751(5A)(D) of the Act, the Secretary is not required to determine whether there are shared characteristics among the enterprises or industries that are eligible for, or actually receive, a subsidy.

(c) *Integral linkage.* Unless the Secretary determines that two or more programs are integrally linked, the Secretary will determine the specificity of a program under section 771(5A)(D) of the Act solely on the basis of the availability and use of the particular program in question. The Secretary may find two or more programs to be integrally linked if:

- (1) The subsidy programs have the same purpose;
- (2) The subsidy programs bestow the same type of benefit;
- (3) The subsidy programs confer similar levels of benefits on similarly situated firms; and
- (4) The subsidy programs were linked at inception.

(d) *Agricultural subsidies.* The Secretary will not regard a subsidy as being specific under section 771(5A)(D) of the Act solely because the subsidy is limited to the agricultural sector (domestic subsidy).

(e) *Subsidies to small-and medium-sized businesses.* The Secretary will not regard a subsidy as being specific under section 771(5A)(D) of the Act solely because the subsidy is limited to small firms or small-and medium-sized firms.

(f) *Disaster relief.* The Secretary will not regard disaster relief as being specific under section 771(5A)(D) of the

Act if such relief constitutes general assistance available to anyone in the area affected by the disaster.

§ 351.503 Benefit.

(a) *Specific rules.* In the case of a government program for which a specific rule for the measurement of a benefit is contained in this subpart E, the Secretary will measure the extent to which a financial contribution (or income or price support) confers a benefit as provided in that rule. For example, § 351.504(a) prescribes the specific rule for measurement of the benefit of grants.

(b) *Other subsidies.*—(1) *In general.* For other government programs, the Secretary normally will consider a benefit to be conferred where a firm pays less for its inputs (e.g., money, a good, or a service) than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn.

(2) *Exception.* Paragraph (b)(1) of this section is not intended to limit the ability of the Secretary to impose countervailing duties when the facts of a particular case establish that a financial contribution (or income or price support) has conferred a benefit, even if that benefit does not take the form of a reduction in input costs or an enhancement of revenues. When paragraph (b)(1) of this section is not applicable, the Secretary will determine whether a benefit is conferred by examining whether the alleged program or practice has common or similar elements to the four illustrative examples in sections 771(5)(E)(i) through (iv) of the Act.

(c) *Distinction from effect of subsidy.* In determining whether a benefit is conferred, the Secretary 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.

(d) *Varying financial contribution levels.*—(1) *In general.* Where a government program provides varying levels of financial contributions based on different eligibility criteria, and one or more of such levels is not specific within the meaning of § 351.502, a benefit is conferred to the extent that a firm receives a greater financial contribution than the financial contributions provided at a non-specific level under the program. The preceding sentence shall apply only to the extent the Secretary determines that the varying levels of financial contributions are set forth in a statute, decree, regulation, or other official act; that the levels are clearly delineated and identifiable; and that the firm would

have been eligible for the non-specific level of contributions.

(2) *Exception.* Paragraph (d)(1) of this section shall not apply where the statute specifies a commercial test for determining the benefit.

(e) *Tax consequences.* In calculating the amount of a benefit, the Secretary will not consider the tax consequences of the benefit.

§ 351.504 Grants.

(a) *Benefit.* In the case of a grant, a benefit exists in the amount of the grant.

(b) *Time of receipt of benefit.* In the case of a grant, the Secretary normally will consider a benefit as having been received on the date on which the firm received the grant.

(c) *Allocation of a grant to a particular time period.* The Secretary will allocate the benefit from a grant to a particular time period in accordance with § 351.524.

§ 351.505 Loans.

(a) *Benefit.*—(1) *In general.* In the case of a loan, a benefit exists to the extent that the amount a firm pays on the government-provided loan is less than the amount the firm would pay on a comparable commercial loan(s) that the firm could actually obtain on the market. See section 771(5)(E)(ii) of the Act. In making the comparison called for in the preceding sentence, the Secretary normally will rely on effective interest rates.

(2) *"Comparable commercial loan" defined.*—(i) *"Comparable" defined.* In selecting a loan that is "comparable" to the government-provided loan, the Secretary normally will place primary emphasis on similarities in the structure of the loans (e.g., fixed interest rate v. variable interest rate), the maturity of the loans (e.g., short-term v. long-term), and the currency in which the loans are denominated.

(ii) *"Commercial" defined.* In selecting a "commercial" loan, the Secretary normally will use a loan taken out by the firm from a commercial lending institution or a debt instrument issued by the firm in a commercial market. Also, the Secretary will treat a loan from a government-owned bank as a commercial loan, unless there is evidence that the loan from a government-owned bank is provided on non-commercial terms or at the direction of the government. However, the Secretary will not consider a loan provided under a government program, or a loan provided by a government-owned special purpose bank, to be a commercial loan for purposes of selecting a loan to compare with a government-provided loan.

(iii) *Long-term loans.* In selecting a comparable loan, if the government-provided loan is a long-term loan, the Secretary normally will use a loan the terms of which were established during, or immediately before, the year in which the terms of the government-provided loan were established.

(iv) *Short-term loans.* In making the comparison required under paragraph (a)(1) of this section, if the government-provided loan is a short-term loan, the Secretary normally will use an annual average of the interest rates on comparable commercial loans during the year in which the government-provided loan was taken out, weighted by the principal amount of each loan. However, if the Secretary finds that interest rates fluctuated significantly during the period of investigation or review, the Secretary will use the most appropriate interest rate based on the circumstances presented.

(3) *"Could actually obtain on the market" defined.*—(i) *In general.* In selecting a comparable commercial loan that the recipient "could actually obtain on the market," the Secretary normally will rely on the actual experience of the firm in question in obtaining comparable commercial loans for both short-term and long-term loans.

(ii) *Where the firm has no comparable commercial loans.* If the firm did not take out any comparable commercial loans during the period referred to in paragraph (a)(2)(iii) or (a)(2)(iv) of this section, the Secretary may use a national average interest rate for comparable commercial loans.

(iii) *Exception for uncreditworthy companies.* If the Secretary finds that a firm that received a government-provided long-term loan was uncreditworthy, as defined in paragraph (a)(4) of this section, the Secretary normally will calculate the interest rate to be used in making the comparison called for by paragraph (a)(1) of this section according to the following formula:

$$i_b = [(1 - q_n)(1 + i_f)^n / (1 - p_n)]^{1/n} - 1,$$

where:

n = the term of the loan;

i_b = the benchmark interest rate for uncreditworthy companies;

i_f = the long-term interest rate that would be paid by a creditworthy company;

p_n = the probability of default by an uncreditworthy company within n years; and

q_n = the probability of default by a creditworthy company within n years.

"Default" means any missed or delayed payment of interest and/or principal,

bankruptcy, receivership, or distressed exchange. For values of p_n , the Secretary will normally rely on the average cumulative default rates reported for the Caa to C-rated category of companies in Moody's study of historical default rates of corporate bond issuers. For values of q_n , the Secretary will normally rely on the average cumulative default rates reported for the Aaa to Baa-rated categories of companies in Moody's study of historical default rates of corporate bond issuers.

(4) *Uncreditworthiness.*—(i) *In general.* The Secretary will consider a firm to be uncreditworthy if the Secretary determines that, based on information available at the time of the government-provided loan, the firm could not have obtained long-term loans from conventional commercial sources. The Secretary will determine uncreditworthiness on a case-by-case basis, and may, in appropriate circumstances, focus its creditworthiness analysis on the project being financed rather than the company as a whole. In making the creditworthiness determination, the Secretary may examine, among other factors, the following:

(A) The receipt by the firm of comparable commercial long-term loans;

(B) The present and past financial health of the firm, as reflected in various financial indicators calculated from the firm's financial statements and accounts;

(C) The firm's recent past and present ability to meet its costs and fixed financial obligations with its cash flow; and

(D) Evidence of the firm's future financial position, such as market studies, country and industry economic forecasts, and project and loan appraisals prepared prior to the agreement between the lender and the firm on the terms of the loan.

(ii) *Significance of long-term commercial loans.* In the case of firms not owned by the government, the receipt by the firm of comparable long-term commercial loans, unaccompanied by a government-provided guarantee, will normally constitute dispositive evidence that the firm is not uncreditworthy.

(iii) *Significance of prior subsidies.* In determining whether a firm is uncreditworthy, the Secretary will ignore current and prior subsidies received by the firm.

(iv) *Discount rate.* When the creditworthiness of a firm is considered in connection with the allocation of non-recurring benefits, the Secretary will rely on information available in the

year in which the government agreed to provide the subsidy conferring a non-recurring benefit.

(5) *Long-term variable rate loans.*—(i) *In general.* In the case of a long-term variable rate loan, the Secretary normally will make the comparison called for by paragraph (a)(1) of this section by relying on a comparable commercial loan with a variable interest rate. The Secretary then will compare the variable interest rates on the comparable commercial loan and the government-provided loan for the year in which the terms of the government-provided loan were established. If the comparison shows that the interest rate on the government-provided loan was equal to or higher than the interest rate on the comparable commercial loan, the Secretary will not consider the government-provided loan as having conferred a benefit. If the comparison shows that the interest rate on the government-provided loan was lower, the Secretary will consider the government-provided loan as having conferred a benefit, and, if the other criteria for a countervailable subsidy are satisfied, will calculate the amount of the benefit in accordance with paragraph (c)(4) of this section.

(ii) *Exception.* If the Secretary is unable to make the comparison described in paragraph (a)(5)(i) of this section or if the comparison described in paragraph (a)(5)(i) of this section would yield an inaccurate measure of the benefit, the Secretary may modify the method described in paragraph (a)(5)(i) of this section.

(6) *Allegations.*—(i) *Allegation of uncreditworthiness required.* Normally, the Secretary will not consider the uncreditworthiness of a firm absent a specific allegation by the petitioner that is supported by information establishing a reasonable basis to believe or suspect that the firm is uncreditworthy.

(ii) *Government-owned banks.* The Secretary will not investigate a loan provided by a government-owned bank absent a specific allegation that is supported by information reasonably available to petitioners indicating that:

(A) The loan meets the specificity criteria in accordance with section 771(5A) of the Act; and

(B) A benefit exists within the meaning of paragraph (a)(1) of this section.

(b) *Time of receipt of benefit.* In the case of loans described in paragraphs (c)(1), (c)(2), and (c)(4) of this section, the Secretary normally will consider a benefit as having been received in the year in which the firm otherwise would have had to make a payment on the comparable commercial loan. In the

case of a loan described in paragraph (c)(3) of this section, the Secretary normally will consider the benefit as having been received in the year in which the firm receives the proceeds of the loan.

(c) *Allocation of benefit to a particular time period.*—(1) *Short-term loans.* The Secretary will allocate (expense) the benefit from a short-term loan to the year(s) in which the firm is due to make interest payments on the loan. In no event may the present value (in the year of receipt of the loan) of the amounts calculated under the preceding sentence exceed the principal of the loan.

(2) *Long-term fixed-rate loans with concessionary interest rates.* Except as provided in paragraph (c)(3) of this section, the Secretary normally will calculate the subsidy amount to be assigned to a particular year by calculating the difference in interest payments for that year, i.e., the difference between the interest paid by the firm in that year on the government-provided loan and the interest the firm would have paid on the comparison loan. However, in no event may the present value (in the year of receipt of the loan) of the amounts calculated under the preceding sentence exceed the principal of the loan.

(3) *Long-term fixed-rate loans with different repayment schedules.*—(i) *Calculation of present value of benefit.* Where the government-provided loan and the loan to which it is compared under paragraph (a) of this section are both long-term, fixed-interest rate loans, but have different grace periods or maturities, or where the shapes of the repayment schedules differ, the Secretary will determine the total benefit by calculating the present value, in the year that repayment would begin on the comparable commercial loan, of the difference between the amount that the firm is to pay on the government-provided loan and the amount that the firm would have paid on the comparison loan. In no event may the total benefit calculated under the preceding sentence exceed the principal of the loan.

(ii) *Calculation of annual benefit.* With respect to the benefit calculated under paragraph (c)(3)(i) of this section, the Secretary will determine the portion of that benefit to be assigned to a particular year by using the formula set forth in § 351.524(d)(1) and the following parameters:

A_k = the amount countervailed in year k ,

y = the present value of the benefit (see paragraph (c)(3)(i) of this section),

n = the number of years in the life of the loan,
 d = the interest rate on the comparison loan selected under paragraph (a) of this section, and
 k = the year of allocation, where the year that repayment would begin on the comparable commercial loan = 1.

(4) *Long-term variable interest rate loans.* In the case of a government-provided long-term variable-rate loan, the Secretary normally will determine the amount of the benefit attributable to a particular year by calculating the difference in payments for that year, *i.e.*, the difference between the amount paid by the firm in that year on the government-provided loan and the amount the firm would have paid on the comparison loan. However, in no event may the present value (in the year of receipt of the loan) of the amounts calculated under the preceding sentence exceed the principal of the loan.

(d) *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.

§ 351.506 Loan guarantees.

(a) *Benefit.*—(1) *In general.* In the case of a loan guarantee, a benefit exists to the extent that the total amount a firm pays for the loan with the government-provided guarantee is less than the total amount the firm would pay for a comparable commercial loan that the firm could actually obtain on the market absent the government-provided

guarantee, including any difference in guarantee fees. See section 771(5)(E)(iii) of the Act. The Secretary will select a comparable commercial loan in accordance with § 351.505(a).

(2) *Government acting as owner.* In situations where a government, acting as the owner of a firm, provides a loan guarantee to that firm, the guarantee does not confer a benefit if the respondent provides evidence demonstrating that it is normal commercial practice in the country in question for shareholders to provide guarantees to their firms under similar circumstances and on comparable terms.

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

(c) *Allocation of benefit to a particular time period.* In allocating the benefit from a government-provided loan guarantee to a particular time period, the Secretary will use the methods set forth in § 351.505(c) regarding loans.

§ 351.507 Equity.

(a) *Benefit.*—(1) *In general.* In the case of a government-provided equity infusion, a benefit exists to the extent that the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made. See section 771(5)(E)(i) of the Act.

(2) *Private investor prices available.*—

(i) *In general.* Except as provided in paragraph (a)(2)(iii) of this section, the Secretary will consider an equity infusion as being inconsistent with usual investment practice (see paragraph (a)(1) of this section) if the price paid by the government for newly issued shares is greater than the price paid by private investors for the same (or similar form of) newly issued shares.

(ii) *Timing of private investor prices.* In selecting a private investor price under paragraph (a)(2)(i) of this section, the Secretary will rely on sales of newly issued shares made reasonably concurrently with the newly issued shares purchased by the government.

(iii) *Significant private sector participation required.* The Secretary will not use private investor prices under paragraph (a)(2)(i) of this section if the Secretary concludes that private investor purchases of newly issued shares are not significant.

(iv) *Adjustments for "similar" form of equity.* Where the Secretary uses private investor prices for a form of shares that is similar to the newly issued shares purchased by the government (see paragraph (a)(2)(i) of this section), the Secretary, where appropriate, will adjust the prices to reflect the differences in the forms of shares.

(3) *Actual private investor prices unavailable.*—(i) *In general.* If actual private investor prices are not available under paragraph (a)(2) of this section, the Secretary will determine whether the firm funded by the government-provided equity was equityworthy or unequityworthy at the time of the equity infusion (see paragraph (a)(4) of this section). If the Secretary determines that the firm was equityworthy, the Secretary will apply paragraph (a)(5) of this section to determine whether the equity infusion was inconsistent with the usual investment practice of private investors. A determination by the Secretary that the firm was unequityworthy will constitute a determination that the equity infusion was inconsistent with usual investment practice of private investors, and the Secretary will apply paragraph (a)(6) of this section to measure the benefit attributable to the equity infusion.

(4) *Equityworthiness.*—(i) *In general.* The Secretary will consider a firm to have been equityworthy 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. The Secretary may, in appropriate circumstances, focus its equityworthiness analysis on a project rather than the company as a whole. In making the equityworthiness determination, the Secretary may examine the following factors, among others:

(A) Objective analyses of the future financial prospects of the recipient firm or the project as indicated by, *inter alia*, market studies, economic forecasts, and project or loan appraisals prepared prior to the government-provided equity infusion in question;

(B) Current and past indicators of the recipient firm's financial health calculated from the firm's statements and accounts, adjusted, if appropriate, to conform to generally accepted accounting principles;

(C) Rates of return on equity in the three years prior to the government equity infusion; and

(D) Equity investment in the firm by private investors.

(ii) *Significance of a pre-infusion objective analysis.* For purposes of making an equityworthiness determination, the Secretary will request and normally require from the respondents the information and analysis completed prior to the infusion, upon which the government based its decision to provide the equity infusion (see, paragraph (a)(4)(i)(A) of this section). Absent the existence or provision of an objective analysis, containing information typically examined by potential private investors considering an equity investment, the Secretary will normally determine that the equity infusion received provides a countervailable benefit within the meaning of paragraph (a)(1) of this section. The Secretary will not necessarily make such a determination if the absence of an objective analysis is consistent with the actions of reasonable private investors in the country in question.

(iii) *Significance of prior subsidies.* In determining whether a firm was equityworthy, the Secretary will ignore current and prior subsidies received by the firm.

(5) *Benefit where firm is equityworthy.* If the Secretary determines that the firm or project was equityworthy (see paragraph (a)(4) of this section), the Secretary will examine the terms and the nature of the equity purchased to determine whether the investment was otherwise inconsistent with the usual investment practice of private investors. If the Secretary determines that the investment was inconsistent with usual private investment practice, the Secretary will determine the amount of the benefit conferred on a case-by-case basis.

(6) *Benefit where firm is unequityworthy.* If the Secretary determines that the firm or project was unequityworthy (see paragraph (a)(4) of this section), a benefit to the firm exists in the amount of the equity infusion.

(7) *Allegations.* The Secretary will not investigate an equity infusion in a firm absent a specific allegation by the petitioner which is supported by information establishing a reasonable basis to believe or suspect that the firm received an equity infusion that provides a countervailable benefit within the meaning of paragraph (a)(1) of this section.

(b) *Time of receipt of benefit.* In the case of a government-provided equity infusion, the Secretary normally will consider the benefit to have been received on the date on which the firm received the equity infusion.

(c) *Allocation of benefit to a particular time period.* The benefit

conferred by an equity infusion shall be allocated over the same time period as a non-recurring subsidy. See § 351.524(d).

§ 351.508 Debt forgiveness.

(a) *Benefit.* In the case of an assumption or forgiveness of a firm's debt obligation, a benefit exists equal to the amount of the principal and/or interest (including accrued, unpaid interest) that the government has assumed or forgiven. In situations where the entity assuming or forgiving the debt receives shares in a firm in return for eliminating or reducing the firm's debt obligation, the Secretary will determine the existence of a benefit under § 351.507 (equity infusions).

(b) *Time of receipt of benefit.* In the case of a debt or interest assumption or forgiveness, the Secretary normally will consider the benefit as having been received as of the date on which the debt or interest was assumed or forgiven.

(c) *Allocation of benefit to a particular time period.*—(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).

(2) *Exception.* Where an interest assumption is tied to a particular loan and where a firm can reasonably expect to receive the interest assumption at the time it applies for the loan, the Secretary will normally treat the interest assumption as a reduced-interest loan and allocate the benefit to a particular year in accordance with § 351.505(c) (loans).

§ 351.509 Direct taxes.

(a) *Benefit.*—(1) *Exemption or remission of taxes.* In the case of a program that provides for a full or partial exemption or remission of a direct tax (e.g., an income tax), or a reduction in the base used to calculate a direct tax, a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program.

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

term interest rate as the benchmark for tax deferrals of more than one year.

(b) *Time of receipt of benefit.*—(1) *Exemption or remission of taxes.* In the case of a full or partial exemption or remission of a direct tax, the Secretary normally will consider the benefit as having been received on the date on which the recipient firm would otherwise have had to pay the taxes associated with the exemption or remission. Normally, this date will be the date on which the firm filed its tax return.

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

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

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

(a) *Benefit.*—(1) *Exemption or remission of taxes.* In the case of a program, other than an export program, that provides for the full or partial exemption or remission of an indirect tax or an import charge, a benefit exists to the extent that the taxes or import charges paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program.

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

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

otherwise would be required to pay the indirect tax or import charge.

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

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

§ 351.511 Provision of goods or services.

(a) *Benefit.*—(1) *In general.* In the case where goods or services are provided, a benefit exists to the extent that such goods or services are provided for less than adequate remuneration. See section 771(5)(E)(iv) of the Act.

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

(ii) *Actual market-determined price unavailable.* If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability.

(iii) *World market price unavailable.* If there is no world market price available to purchasers in the country in question, the Secretary will normally measure the adequacy of remuneration

by assessing whether the government price is consistent with market principles.

(iv) *Use of delivered prices.* In measuring adequate remuneration under paragraph (a)(2)(i) or (a)(2)(ii) of this section, the Secretary will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.

(b) *Time of receipt of benefit.* In the case of the provision of a good or service, the Secretary normally will consider a benefit as having been received as of the date on which the firm pays or, in the absence of payment, was due to pay for the government-provided good or service.

(c) *Allocation of benefit to a particular time period.* In the case of the provision of a good or service, the Secretary will normally allocate (expense) the benefit to the year in which the benefit is considered to have been received under paragraph (b) of this section. In the case of the provision of infrastructure, the Secretary will normally treat the benefit as non-recurring and will allocate the benefit to a particular year in accordance with § 351.524(d).

(d) *Exception for general infrastructure.* A financial contribution does not exist in the case of the government provision of general infrastructure. General infrastructure is defined as infrastructure that is created for the broad societal welfare of a country, region, state or municipality.

§ 351.512 Purchase of goods. [Reserved]

§ 351.513 Worker-related subsidies.

(a) *Benefit.* In the case of a program that provides assistance to workers, a benefit exists to the extent that the assistance relieves a firm of an obligation that it normally would incur.

(b) *Time of receipt of benefit.* In the case of assistance provided to workers, the Secretary normally will consider the benefit as having been received by the firm on the date on which the payment is made that relieves the firm of the relevant obligation.

(c) *Allocation of benefit to a particular time period.* Normally, the Secretary will allocate (expense) the benefit from assistance provided to workers to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.514 Export subsidies.

(a) *In general.* The Secretary will consider a subsidy to be an export subsidy if the Secretary determines that

eligibility for, approval of, or the amount of, a subsidy is contingent upon export performance. In applying this section, the Secretary will consider a subsidy to be contingent upon export performance if the provision of the subsidy is, in law or in fact, tied to actual or anticipated exportation or export earnings, alone or as one of two or more conditions.

(b) *Exception.* In the case of export promotion activities of a government, a benefit does not exist if the Secretary determines that the activities consist of general informational activities that do not promote particular products over others.

§ 351.515 Internal transport and freight charges for export shipments.

(a) *Benefit.*—(1) *In general.* In the case of internal transport and freight charges on export shipments, a benefit exists to the extent that the charges paid by a firm for transport or freight with respect to goods destined for export are less than what the firm would have paid if the goods were destined for domestic consumption. The Secretary will consider the amount of the benefit to equal the difference in amounts paid.

(2) *Exception.* For purposes of paragraph (a)(1) of this section, a benefit does not exist if the Secretary determines that:

(i) Any difference in charges is the result of an arm's-length transaction between the supplier and the user of the transport or freight service; or

(ii) The difference in charges is commercially justified.

(b) *Time of receipt of benefit.* In the case of internal transport and freight charges for export shipments, the Secretary normally will consider the benefit as having been received by the firm on the date on which the firm paid, or in the absence of payment was due to pay, the charges.

(c) *Allocation of benefit to a particular time period.* Normally, the Secretary will allocate (expense) the benefit from internal transport and freight charges for export shipments to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.516 Price preferences for inputs used in the production of goods for export.

(a) *Benefit.*—(1) *In general.* In the case of a program involving the provision by governments or their agencies, either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, a benefit exists to the extent that the Secretary determines that

the terms or conditions on which the products or services are provided are more favorable than the terms or conditions applicable to the provision of like or directly competitive products or services for use in the production of goods for domestic consumption unless, in the case of products, such terms or conditions are not more favorable than those commercially available on world markets to exporters.

(2) *Amount of benefit.* In the case of products provided under such schemes, the Secretary will determine the amount of the benefit by comparing the price of products used in the production of exported goods to the commercially available world market price of such products, inclusive of delivery charges.

(3) *Commercially available.* For purposes of paragraph (a)(2) of this section, *commercially available* means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

(b) *Time of receipt of benefit.* In the case of a benefit described in paragraph (a)(1) of this section, the Secretary normally will consider the benefit to have been received as of the date on which the firm paid, or in the absence of payment was due to pay, for the product.

(c) *Allocation of benefit to a particular time period.* Normally, the Secretary will allocate (expense) benefits described in paragraph (a)(1) of this section to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.517 Exemption or remission upon export of indirect taxes.

(a) *Benefit.* In the case of the exemption or remission upon export of indirect taxes, a benefit exists to the extent that the Secretary determines that the amount remitted or exempted exceeds the amount levied with respect to the production and distribution of like products when sold for domestic consumption.

(b) *Time of receipt of benefit.* In the case of the exemption or remission upon export of an indirect tax, the Secretary normally will consider the benefit as having been received as of the date of exportation.

(c) *Allocation of benefit to a particular time period.* Normally, the Secretary will allocate (expense) the benefit from the exemption or remission upon export of indirect taxes to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.518 Exemption, remission, or deferral upon export of prior-stage cumulative indirect taxes.

(a) *Benefit.*—(1) *Exemption of prior-stage cumulative indirect taxes.* In the case of a program that provides for the exemption of prior-stage cumulative indirect taxes on inputs used in the production of an exported product, a benefit exists to the extent that the exemption extends to inputs that are not consumed in the production of the exported product, making normal allowance for waste, or if the exemption covers taxes other than indirect taxes that are imposed on the input. If the Secretary determines that the exemption of prior-stage cumulative indirect taxes confers a benefit, the Secretary normally will consider the amount of the benefit to be the prior-stage cumulative indirect taxes that otherwise would have been paid on the inputs not consumed in the production of the exported product, making normal allowance for waste, and the amount of charges other than import charges covered by the exemption.

(2) *Remission of prior-stage cumulative indirect taxes.* In the case of a program that provides for the remission of prior-stage cumulative indirect taxes on inputs used in the production of an exported product, a benefit exists to the extent that the amount remitted exceeds the amount of prior-stage cumulative indirect taxes paid on inputs that are consumed in the production of the exported product, making normal allowance for waste. If the Secretary determines that the remission of prior-stage cumulative indirect taxes confers a benefit, the Secretary normally will consider the amount of the benefit to be the difference between the amount remitted and the amount of the prior-stage cumulative indirect taxes on inputs that are consumed in the production of the export product, making normal allowance for waste.

(3) *Deferral of prior-stage cumulative indirect taxes.* In the case of a program that provides for a deferral of prior-stage cumulative indirect taxes on an exported product, a benefit exists to the extent that the deferral extends to inputs that are not consumed in the production of the exported product, making normal allowance for waste, and the government does not charge appropriate interest on the taxes deferred. If the Secretary determines that a benefit exists, the Secretary will normally treat the deferral as a government-provided loan in the amount of the tax deferred, according to the methodology described in § 351.505. The Secretary will use a short-term interest rate as the benchmark for tax deferrals of one year

or less. The Secretary will use a long-term interest rate as the benchmark for tax deferrals of more than one year.

(4) *Exception.* Notwithstanding the provisions in paragraphs (a)(1), (a)(2), and (a)(3) of this action, the Secretary will consider the entire amount of the exemption, remission or deferral to confer a benefit, unless the Secretary determines that:

(i) The government in question has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported products and in what amounts, and to confirm which indirect taxes are imposed on these inputs, and the system or procedure is reasonable, effective for the purposes intended, and is based on generally accepted commercial practices in the country of export; or

(ii) If the government in question does not have a system or procedure in place, if the system or procedure is not reasonable, or if the system or procedure is instituted and considered reasonable, but is found not to be applied or not to be applied effectively, the government in question has carried out an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, in what amounts, and which indirect taxes are imposed on the inputs.

(b) *Time of receipt of benefit.* In the case of the exemption, remission, or deferral of prior-stage cumulative indirect taxes, the Secretary normally will consider the benefit as having been received:

(1) In the case of an exemption, as of the date of exportation;

(2) In the case of a remission, as of the date of exportation;

(3) In the case of a deferral of one year or less, on the date the deferred tax became due; and

(4) In the case of a multi-year deferral, on the anniversary date(s) of the deferral.

(c) *Allocation of benefit to a particular time period.* The Secretary normally will allocate (expense) the benefit of the exemption, remission or deferral of prior-stage cumulative indirect taxes to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.519 Remission or drawback of import charges upon export.

(a) *Benefit.*—(1) *In general.* The term “remission or drawback” includes full or partial exemptions and deferrals of import charges.

(i) *Remission or drawback of import charges.* In the case of the remission or

drawback of import charges upon export, a benefit exists to the extent that the Secretary determines that the amount of the remission or drawback exceeds the amount of import charges on imported inputs that are consumed in the production of the exported product, making normal allowances for waste.

(ii) *Exemption of import charges.* In the case of an exemption of import charges upon export, a benefit exists to the extent that the exemption extends to inputs that are not consumed in the production of the exported product, making normal allowances for waste, or if the exemption covers charges other than import charges that are imposed on the input.

(iii) *Deferral of import charges.* In the case of a deferral, a benefit exists to the extent that the deferral extends to inputs that are not consumed in the production of the exported product, making normal allowance for waste, and the government does not charge appropriate interest on the import charges deferred.

(2) *Substitution drawback.* "Substitution drawback" involves a situation in which a firm uses a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them. Substitution drawback does not necessarily result in the conferral of a benefit. However, a benefit exists if the Secretary determines that:

(i) The import and the corresponding export operations both did not occur within a reasonable time period, not to exceed two years; or

(ii) The amount drawn back exceeds the amount of the import charges levied initially on the imported inputs for which drawback is claimed.

(3) *Amount of the benefit.*—(i) *Remission or drawback of import charges.* If the Secretary determines that the remission or drawback, including substitution drawback, of import charges confers a benefit under paragraph (a)(1) or (a)(2) of this section, the Secretary normally will consider the amount of the benefit to be the difference between the amount of import charges remitted or drawn back and the amount paid on imported inputs consumed in production for which remission or drawback was claimed.

(ii) *Exemption of import charges.* If the Secretary determines that the exemption of import charges upon export confers a benefit, the Secretary normally will consider the amount of the benefit to be the import charges that otherwise would have been paid on the inputs not consumed in the production

of the exported product, making normal allowance for waste, and the amount of charges other than import charges covered by the exemption.

(iii) *Deferral of import charges.* If the Secretary determines that the deferral of import charges upon export confers a benefit, the Secretary will normally treat a deferral as a government-provided loan in the amount of the import charges deferred on the inputs not consumed in the production of the exported product, making normal allowance for waste, according to the methodology described in § 351.505. The Secretary will use a short-term interest rate as the benchmark for deferrals of one year or less. The Secretary will use a long-term interest rate as the benchmark for deferrals of more than one year.

(4) *Exception.* Notwithstanding paragraph (a)(3) of this section, the Secretary will consider the entire amount of an exemption, deferral, remission or drawback to confer a benefit, unless the Secretary determines that:

(i) The government in question has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported products and in what amounts, and the system or procedure is reasonable, effective for the purposes intended, and is based on generally accepted commercial practices in the country of export; or

(ii) If the government in question does not have a system or procedure in place, if the system or procedure is not reasonable, or if the system or procedure is instituted and considered reasonable, but is found not to be applied or not to be applied effectively, the government in question has carried out an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, and in what amounts.

(b) *Time of receipt of benefit.* In the case of the exemption, deferral, remission or drawback, including substitution drawback, of import charges, the Secretary normally will consider the benefit as having been received:

(1) In the case of remission or drawback, as of the date of exportation;

(2) In the case of an exemption, as of the date of the exportation;

(3) In the case of a deferral of one year or less, on the date the import charges became due; and (4) In the case of a multi-year deferral, on the anniversary date(s) of the deferral.

(c) *Allocation of benefit to a particular time period.* The Secretary normally will allocate (expense) the

benefit from the exemption, deferral, remission or drawback of import charges to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.520 Export insurance.

(a) *Benefit.*—(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.

(2) *Amount of the benefit.* If the Secretary determines under paragraph (a)(1) of this section that premium rates are inadequate, the Secretary normally will calculate the amount of the benefit as the difference between the amount of premiums paid by the firm and the amount received by the firm under the insurance program during the period of investigation or review.

(b) *Time of receipt of benefit.* In the case of export insurance, the Secretary normally will consider the benefit as having been received in the year in which the difference described in paragraph (a)(2) of this section occurs.

(c) *Allocation of benefit to a particular time period.* The Secretary normally will allocate (expense) the benefit from export insurance to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.521 Import substitution subsidies. [Reserved]

§ 351.522 Green light and green box subsidies.

(a) *Certain agricultural subsidies.* The Secretary will treat as non-countervailable domestic support measures that are provided to certain agricultural products (*i.e.*, products listed in Annex 1 of the WTO Agreement on Agriculture) and that the Secretary determines conform to the criteria of Annex 2 of the WTO Agreement on Agriculture. See section 771(5B)(F) of the Act. The Secretary will determine that a particular domestic support measure conforms fully to the provisions of Annex 2 if the Secretary finds that the measure:

(1) Is provided through a publicly-funded government program (including government revenue foregone) not involving transfers from consumers;

(2) Does not have the effect of providing a price support to producers; and (3) Meets the relevant policy-specific criteria and conditions set out in paragraphs 2 through 13 of Annex 2.

(b) *Research subsidies.* In accordance with section 771(5B)(B)(iii)(II) of the Act, the Secretary will examine the total eligible costs to be incurred over the

duration of a particular project to determine whether a subsidy for research activities exceeds 75 percent of the costs of industrial research, 50 percent of the costs of precompetitive development activity, or 62.5 percent of the costs for a project that includes both industrial research and precompetitive activity. If the Secretary determines that, at some point over the life of a particular project, these relevant thresholds will be exceeded, the Secretary will treat the entire amount of the subsidy as countervailable.

(c) *Subsidies for adaptation of existing facilities to new environmental requirements.* If the Secretary determines that a subsidy is given to upgrade existing facilities to environmental standards in excess of minimum statutory or regulatory requirements, the subsidy will not qualify for non-countervailable treatment under section 771(5B)(D) of the Act and the Secretary will treat the entire amount of the subsidy as countervailable.

§ 351.523 Upstream subsidies.

(a) *Investigation of upstream subsidies.*—(1) *In general.* Before investigating the existence of an upstream subsidy (see section 771A of the Act), the Secretary must have a reasonable basis to believe or suspect that all of the following elements exist:

(i) A countervailable subsidy, other than an export subsidy, is provided with respect to an input product;

(ii) One of the following conditions exists:

(A) The supplier of the input product and the producer of the subject merchandise are affiliated;

(B) The price for the subsidized input product is lower than the price that the producer of the subject merchandise otherwise would pay another seller in an arm's-length transaction for an unsubsidized input product; or

(C) The government sets the price of the input product so as to guarantee that the benefit provided with respect to the input product is passed through to producers of the subject merchandise; and

(iii) The *ad valorem* countervailable subsidy rate on the input product, multiplied by the proportion of the total production costs of the subject merchandise accounted for by the input product, is equal to, or greater than, one percent.

(b) *Input product.* For purposes of this section, "input product" means any product used in the production of the subject merchandise.

(c) *Competitive benefit.*—(1) *In general.* In evaluating whether a

competitive benefit exists under section 771A(b) of the Act, the Secretary will determine whether the price for the subsidized input product is lower than the benchmark input price. For purposes of this section, the Secretary will use as a benchmark input price the following, in order of preference:

(i) The actual price paid by, or offered to, the producer of the subject merchandise for an unsubsidized input product, including an imported input product;

(ii) An average price for an unsubsidized input product, including an imported input product, based upon publicly available data;

(iii) The actual price paid by, or offered to, the producer of the subject merchandise for a subsidized input product, including an imported input product, that is adjusted to account for the countervailable subsidy;

(iv) An average price for a subsidized input product, including an imported input product, based upon publicly available data, that is adjusted to account for the countervailable subsidy; or

(v) An unadjusted price for a subsidized input product or any other surrogate price deemed appropriate by the Secretary.

For purposes of this section, such prices must be reflective of a time period that reasonably corresponds to the time of the purchase of the input.

(2) *Use of delivered prices.* The Secretary will use a delivered price whenever the Secretary uses the price of an input product under paragraph (c)(1) of this section.

(d) *Significant effect.*—(1) *Presumptions.* In evaluating whether an upstream subsidy has a significant effect on the cost of manufacturing or producing the subject merchandise (see section 771A(a)(3) of the Act), the Secretary will multiply the *ad valorem* countervailable subsidy rate on the input product by the proportion of the total production cost of the subject merchandise that is accounted for by the input product. If the product of that multiplication exceeds five percent, the Secretary will presume the existence of a significant effect. If the product is less than one percent, the Secretary will presume the absence of a significant effect. If the product is between one and five percent, there will be no presumption.

(2) *Rebuttal of presumptions.* A party to the proceeding may present information to rebut these presumptions. In evaluating such information, the Secretary will consider the extent to which factors other than price, such as quality differences, are

important determinants of demand for the subject merchandise.

§ 351.524 Allocation of benefit to a particular time period.

Unless otherwise specified in §§ 351.504–351.523, the Secretary will allocate benefits to a particular time period in accordance with this section.

(a) *Recurring benefits.* The Secretary will allocate (expense) a recurring benefit to the year in which the benefit is received.

(b) *Non-recurring benefits.* (1) *In general.* The Secretary will normally allocate a non-recurring benefit to a firm over the number of years corresponding to the average useful life ("AUL") of renewable physical assets as defined in paragraph (d)(2) of this section.

(2) *Exception.* The Secretary will normally allocate (expense) non-recurring benefits provided under a particular subsidy program to the year in which the benefits are received if the total amount approved under the subsidy program is less than 0.5 percent of relevant sales (e.g., total sales, export sales, the sales of a particular product, or the sales to a particular market) of the firm in question during the year in which the subsidy was approved.

(c) *"Recurring" versus "non-recurring" benefits.*—(1) *Non-binding illustrative lists of recurring and non-recurring benefits.* The Secretary normally will treat the following types of subsidies as providing recurring benefits: Direct tax exemptions and deductions; exemptions and excessive rebates of indirect taxes or import duties; provision of goods and services for less than adequate remuneration; price support payments; discounts on electricity, water, and other utilities; freight subsidies; export promotion assistance; early retirement payments; worker assistance; worker training; wage subsidies; and upstream subsidies. The Secretary normally will treat the following types of subsidies as providing non-recurring benefits: equity infusions, grants, plant closure assistance, debt forgiveness, coverage for operating losses, debt-to-equity conversions, provision of non-general infrastructure, and provision of plant and equipment.

(2) *The test for determining whether a benefit is recurring or non-recurring.* If a subsidy is not on the illustrative lists, or is not addressed elsewhere in these regulations, or if a party claims that a subsidy on the recurring list should be treated as non-recurring or a subsidy on the non-recurring list should be treated as recurring, the Secretary will consider the following criteria in determining whether the benefits from the subsidy

should be considered recurring or non-recurring:

(i) Whether the subsidy is exceptional in the sense that the recipient cannot expect to receive additional subsidies under the same program on an ongoing basis from year to year;

(ii) Whether the subsidy required or received the government's express authorization or approval (*i.e.*, receipt of benefits is not automatic), or

(iii) Whether the subsidy was provided for, or tied to, the capital structure or capital assets of the firm.

(d) *Process for allocating non-recurring benefits over time.*—(1) *In general.* For purposes of allocating a non-recurring benefit over time and determining the annual benefit amount that should be assigned to a particular year, the Secretary will use the following formula:

$$A_k = \frac{y/n + [y - (y/n)(k - 1)]d}{1 + d}$$

Where:

A_k = the amount of the benefit allocated to year k ,

y = the face value of the subsidy,

n = the AUL (see paragraph (d)(2) of this section),

d = the discount rate (see paragraph (d)(3) of this section), and

k = the year of allocation, where the year of receipt = 1 and $1 \leq k \leq n$.

(2) *AUL.*—(i) *In general.* The Secretary will presume the allocation period for non-recurring subsidies to be the AUL of renewable physical assets for the industry concerned as listed in the Internal Revenue Service's ("IRS") 1977 Class Life Asset Depreciation Range System (Rev. Proc. 77-10, 1977-1, C.B. 548 (RR-38)), as updated by the Department of Treasury. The presumption will apply unless a party claims and establishes that the IRS tables do not reasonably reflect the company-specific AUL or the country-wide AUL for the industry under investigation, subject to the requirement, in paragraph (d)(2)(ii) of this section, that the difference between the company-specific AUL or country-wide AUL for the industry under investigation and the AUL in the IRS tables is significant. If this is the case, the Secretary will use company-specific or country-wide AULs to allocate non-recurring benefits over time (see paragraph (d)(2)(iii) of this section).

(ii) *Definition of "significant."* For purposes of this paragraph (d), *significant* means that a party has demonstrated that the company-specific AUL or country-wide AUL for the industry differs from AUL in the IRS tables by one year or more.

(iii) *Calculation of a company-specific or country-wide AUL.* A calculation of a company-specific AUL will not be accepted by the Secretary unless it satisfies the following requirements: the company must base its depreciation on an estimate of the actual useful lives of assets and it must use straight-line depreciation or demonstrate that its calculation is not distorted through irregular or uneven additions to the pool of fixed assets. A company-specific AUL is calculated by dividing the aggregate of the annual average gross book values of the firm's depreciable productive fixed assets by the firm's aggregated annual charge to accumulated depreciation, for a period considered appropriate by the Secretary, subject to appropriate normalizing adjustments. A country-wide AUL for the industry under investigation will not be accepted by the Secretary unless the respondent government demonstrates that it has a system in place to calculate AULs for its industries, and that this system provides a reliable representation of AUL.

(iv) *Exception.* Under certain extraordinary circumstances, the Secretary may consider whether an allocation period other than AUL is appropriate or whether the benefit stream begins at a date other than the date the subsidy was bestowed.

(3) *Selection of a discount rate.* (i) *In general.* The Secretary will select a discount rate based upon data for the year in which the government agreed to provide the subsidy. The Secretary will use as a discount rate the following, in order of preference:

(A) The cost of long-term, fixed-rate loans of the firm in question, excluding any loans that the Secretary has determined to be countervailable subsidies;

(B) The average cost of long-term, fixed-rate loans in the country in question; or

(C) A rate that the Secretary considers to be most appropriate.

(ii) *Exception for uncreditworthy firms.* In the case of a firm considered by the Secretary to be uncreditworthy (see § 351.505(a)(4)), the Secretary will use as a discount rate the interest rate described in § 351.505(a)(3)(iii).

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

(a) *Calculation of ad valorem subsidy rate.* The Secretary will calculate an *ad valorem* subsidy rate by dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period of the product or products to which the Secretary attributes the subsidy under

paragraph (b) of this section. Normally, the Secretary will determine the sales value of a product on an f.o.b. (port) basis (if the product is exported) or on an f.o.b. (factory) basis (if the product is sold for domestic consumption). However, if the Secretary determines that countervailable subsidies are provided with respect to the movement of a product from the port or factory to the place of destination (*e.g.*, freight or insurance costs are subsidized), the Secretary may make appropriate adjustments to the sales value used in the denominator.

(b) *Attribution of subsidies.* (1) *In general.* In attributing a subsidy to one or more products, the Secretary will apply the rules set forth in paragraphs (b)(2) through (b)(7) of this section.

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

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

(4) *Subsidies tied to a particular market.* If a subsidy is tied to sales to a particular market, the Secretary will attribute the subsidy only to products sold by the firm to that market.

(5) *Subsidies tied to a particular product.* (i) *In general.* If a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product.

(ii) *Exception.* If a subsidy is tied to production of an input product, then the Secretary will attribute the subsidy to both the input and downstream products produced by a corporation.

(6) *Corporations with cross-ownership.* (i) *In general.* The Secretary normally will attribute a subsidy to the products produced by the corporation that received the subsidy.

(ii) *Corporations producing the same product.* If two (or more) corporations with cross-ownership produce the subject merchandise, the Secretary will attribute the subsidies received by either or both corporations to the products produced by both corporations.

(iii) *Holding or parent companies.* If the firm that received a subsidy is a holding company, including a parent company with its own operations, the Secretary will attribute the subsidy to the consolidated sales of the holding company and its subsidiaries. However, if the Secretary finds that the holding company merely served as a conduit for the transfer of the subsidy from the government to a subsidiary of the holding company, the Secretary will attribute the subsidy to products sold by the subsidiary.

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

(v) *Transfer of subsidy between corporations with cross-ownership producing different products.* In situations where paragraphs (b)(6)(i) through (iv) of this section do not apply, if a corporation producing non-subject merchandise received a subsidy and transferred the subsidy to a corporation with cross-ownership, the Secretary will attribute the subsidy to products sold by the recipient of the transferred subsidy.

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

(7) *Multinational firms.* If the firm that received a subsidy has production facilities in two or more countries, the Secretary will attribute the subsidy to products produced by the firm within the country of the government that granted the subsidy. However, if it is demonstrated that the subsidy was tied to more than domestic production, the Secretary will attribute the subsidy to multinational production.

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

§ 351.526 Program-wide changes.

(a) *In general.* The Secretary may take a program-wide change into account in establishing the estimated countervailing duty cash deposit rate if:

(1) The Secretary determines that subsequent to the period of investigation or review, but before a preliminary determination in an investigation (see § 351.205) or a preliminary result of an administrative review or a new shipper review (see

§§ 351.213 and 351.214), a program-wide change has occurred; and

(2) The Secretary is able to measure the change in the amount of countervailable subsidies provided under the program in question.

(b) *Definition of program-wide change.* For purposes of this section, "program-wide change" means a change that:

(1) Is not limited to an individual firm or firms; and

(2) Is effectuated by an official act, such as the enactment of a statute, regulation, or decree, or contained in the schedule of an existing statute, regulation, or decree.

(c) *Effect limited to cash deposit rate.*—(1) *In general.* The application of paragraph (a) of this section will not result in changing, in an investigation, an affirmative determination to a negative determination or a negative determination to an affirmative determination.

(2) *Example.* In a countervailing duty investigation, the Secretary determines that during the period of investigation a countervailable subsidy existed in the amount of 10 percent *ad valorem*. Subsequent to the period of investigation, but before the preliminary determination, the foreign government in question enacts a change to the program that reduces the amount of the subsidy to a *de minimis* level. In a final determination, the Secretary would issue an affirmative determination, but would establish a cash deposit rate of zero.

(d) *Terminated programs.* The Secretary will not adjust the cash deposit rate under paragraph (a) of this section if the program-wide change consists of the termination of a program and:

(1) The Secretary determines that residual benefits may continue to be bestowed under the terminated program; or

(2) The Secretary determines that a substitute program for the terminated program has been introduced and the Secretary is not able to measure the amount of countervailable subsidies provided under the substitute program.

§ 351.527 Transnational subsidies.

Except as otherwise provided in section 701(d) of the Act (subsidies provided to international consortia) and section 771A of the Act (upstream subsidies), a subsidy does not exist if the Secretary determines that the funding for the subsidy is supplied in accordance with, and as part of, a program or project funded:

(a) By a government of a country other than the country in which the recipient firm is located; or

(b) By an international lending or development institution.

4. Section 351.301 of subpart C is amended by adding the following paragraphs (d)(6) and (7) to read as follows:

§ 351.301(d) Time limits for submission of factual information.

* * * * *

(d) * * *

(6) *Green light and Green box claims.*

(i) *In general.* A claim that a particular subsidy or subsidy program should be accorded non-countervailable status under section 771(5B), (C), or (D) of the Act ("green light subsidies") or under section 771(5B)(F) of the Act ("green box subsidies") must be made by the competent government with the full participation of the government authority responsible for funding and/or administering the program. Such claims are due no later than:

(i) In a countervailing duty investigation, 40 days before the scheduled date of the preliminary determination, or

(ii) In an administrative review, new shipper review, or changed circumstance review, 20 days after all responses to the initial questionnaires are filed with the Department, unless the Secretary alters this time limit.

(7) *Investigation of notified subsidies.* If the Secretary determines that there is insufficient evidence to demonstrate that an alleged subsidy or subsidy program has been notified under Article 8.3 of the WTO Subsidies and Countervailing Measures Agreement, the alleged subsidy or subsidy program will be included in the countervailing duty investigation or administrative, new shipper, or changed circumstance review. If the government authority claiming green light status establishes to the Secretary's satisfaction that the alleged subsidy or subsidy program has been notified, the Secretary will terminate the investigation of the notified subsidy.

5. Subpart G (Applicability Dates) is amended by adding the following § 351.702, to read as follows:

§ 351.702 Applicability dates for countervailing duty regulations.

(a) Notwithstanding § 351.701, the regulations in subpart E of this part apply to:

(1) All CVD investigations initiated on the basis of petitions filed after December 28, 1998;

(2) All CVD administrative reviews initiated on the basis of requests filed on

or after the first day of January 1999;
and

(3) To all segments of CVD
proceedings self-initiated by the
Department after December 28, 1998.

(b) Segments of CVD proceedings to
which subpart E of this part does not

apply will continue to be guided by the
Department's previous methodology (in
particular, as described in the 1989
Proposed Regulations), except to the
extent that the previous methodology
was invalidated by the URAA, in which
case the Secretary will treat subpart E of

this part as a restatement of the
Department's interpretation of the
requirements of the Act as amended by
the URAA.

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