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DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 950306068–6185–03]

RIN 0625–AA45

Countervailing Duties

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice of proposed rulemaking and request for public comments.

SUMMARY: The Department of Commerce (''the Department'') proposes to establish regulations to conform the Department's existing countervailing duty regulations to the Uruguay Round Agreements Act, which implemented the results of the Uruguay Round multilateral trade negotiations. In addition to conforming changes, the Department has sought to issue regulations that: (1) 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; (2) 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 (3) codify certain administrative practices determined to be appropriate under the new statute and under the President's Regulatory Reform Initiative.

DATES: Written comments will be due on April 28, 1997.

ADDRESSES: Address written comments to Robert S. LaRussa, Acting Assistant Secretary for Import Administration, Central Records Unit, Room 1870, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW, Washington, DC 20230. Comments should be addressed: Attention: Proposed Regulations/Uruguay Round Agreements Act—Countervailing Duties. Each person submitting a comment is requested to include his or her name and address, and give reasons for any recommendation.

FOR FURTHER INFORMATION CONTACT: Jennifer A. Yeske at (202) 482–0189 or Penelope Naas at (202) 482-3534.

SUPPLEMENTARY INFORMATION:

Background

This notice, which deals with countervailing duty (''CVD'') methodology, constitutes part of a larger 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. Following an extension of the comment period, on May 11, 1995, the Department published interim-final rules that dealt with a limited number of new or revised procedures resulting from the URAA. On February 8, 1996, the Department published proposed rules (''APO Regulations'') that, among other things, revised procedures relating to administrative protective orders in AD and CVD proceedings. Finally, on February 27, 1996, the Department published proposed rules dealing with AD and CVD procedures and AD methodology (''AD Proposed Regulations'').[1]

In these proposed regulations, the Department has continued to be guided by the objectives described in the AD 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's existing ''regulations'' consist largely of the proposed regulations published 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.

As described in the AD Proposed Regulations, we have 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. We anticipate that the consolidation of the AD and CVD regulations will make the regulations easier to use and, by reducing their sheer size, will make the regulations more accessible to the non-expert.

Comments—In General

The Department wishes to emphasize that the regulations contained in this notice are *proposed* regulations only. While they reflect our best judgment at this time regarding the appropriate style and content of regulations dealing with CVD methodology, we remain open-minded on the various issues raised herein. Therefore, we are very interested in receiving public comment on these proposed regulations. We have found the dialogue that commenced with the advance notice to be extremely useful, and we hope and expect that it will continue.

Comments—Format and Number of Copies

Each person submitting a comment should include his or her name and address, and give reasons for any recommendation. To facilitate their consideration by the Department, comments regarding these proposed regulations should be submitted in the following format: (1) Identify each comment by reference to the section and/or paragraph of these proposed

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[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 (Jan. 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 (Feb. 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 (Feb. 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); and 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).

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

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

regulations to which the comment pertains;[4] (2) begin each comment on a separate page; (3) concisely state the issue identified and discussed in the comment; and (4) provide a brief summary of the comment (a maximum of 3 sentences) and label this section ''summary of the comment.''

To help simplify the processing and distribution of comments, the Department encourages the submission of documents in electronic form accompanied by an original and two copies in paper form. We request that documents filed in electronic form be on DOS formatted 3.5″ diskettes and prepared in either WordPerfect format or a format that the WordPerfect program can convert and import into WordPerfect. Please submit comments on a separate file on the diskette and identify each comment in the manner described in the preceding paragraph.

Comments received on diskette will be made available to the public on the Internet at the following address: http://www.ita.doc.gov/import__admin/records/.

In addition, the Department will make comments available to the public on 3.5″ diskettes, with specific instructions for accessing compressed data, at cost, and paper copies will be available for reading and photocopying in Room B–099 of the Central Records Unit. Any questions concerning file formatting, document conversion, access on the Internet, or other file requirements should be addressed to Andrew Lee Beller, Director of Central Records, (202) 482–0866.

Explanation of the Proposed Rules

Section 351.102

These proposed 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''). However, a few definitions warrant comment.

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.

Similarly, *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 provided directly by a government.

Loan is defined to include forms of debt financing other than what one normally considers as a ''loan,'' such as bonds, overdrafts, etc. 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 Cold-Rolled Carbon Steel Flat Products from Austria (General Issues Appendix)*, 58 FR 37062, 37254 (''*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 (Ct. Int'l Trade 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.

Section 351.501

Section 351.501 restates very generally the subject matter of subpart E. To be a bit more specific, the arrangement of subpart E is as follows. After dealing with the specificity of domestic subsidies in § 351.502, §§ 351.503 through 351.512 deal with the identification and measurement of various general types of subsidy practices. Sections 351.513 through 351.519 focus on export subsidies, incorporating the appropriate standards from the Illustrative List. Section 351.520 deals with general export promotion activities of governments. Sections 351.521 through 351.523 deal with import substitution subsidies (currently designated as ''Reserved''), certain agricultural subsidies, and upstream subsidies, respectively. Section 351.524 sets forth rules regarding the calculation of an *ad valorem* subsidy rate and the attribution of a subsidy to a product. Finally, §§ 351.525 through 351.527 contain rules regarding program-wide changes, transnational subsidies, and the tax consequences of benefits, respectively.

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 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 was previously missing.

Second, under section 771(5)(B) and Article 1.1(b) of the SCM Agreement, the financial contribution (or income or price support) must confer a benefit. Although the concept of a ''benefit to the recipient'' is not new to U.S. CVD law, in some cases the meaning of this concept had become obscured. The new law clarifies this concept and eliminates any possibility of confusing the ''benefit'' of a subsidy with the ''effect'' of a subsidy. In particular, section 771(5)(E) of the Act and Article 14 of the SCM Agreement, through their description of the various standards (or ''benchmarks'') used to identify and measure the benefits attributable to different types of subsidy practices, make clear that 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. 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)(ii) 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

[4] If a comment does not pertain to a particular proposed regulation, please clearly identify the comment as ''Other,'' followed by a brief description of the issue to which the comment pertains; *e.g.*, ''Other—Infrastructure.''

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.

In this regard, 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, *i.e.*, money, a good, or a service. We do not mean to suggest, as has sometimes been argued, that one must consider the overall impact of government actions on a firm in determining whether a particular government action confers a benefit. Neither the statute nor the SCM Agreement supports such an analysis.

For example, assume that a government puts in place new environmental requirements 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; *i.e.*, the net effect of the new environmental requirements and the subsidies leaves the firm with costs that are higher than they previously were.

In this situation, 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) 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.

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) expressly provides that the Department ''is not required to consider the effect of a subsidy in determining whether a subsidy exists.'' This message is driven home by the SAA at 256, 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.''

As stated above, a benefit exists where a firm pays less for an input than it otherwise would pay in the absence of the financial contribution (or receives revenues beyond the amount it otherwise would earn). 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. However, we have not closed our minds here and we would welcome comment on this issue.

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 discussed in more detail below, 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 volume of litigation concerning this heavily litigated issue.

Regarding the coverage of subpart E, we should note two topics that are not addressed by these regulations: indirect subsidies (with the exception of upstream subsidies) and privatization. The topic of ''indirect subsidies'' refers generally to situations where a government provides a financial contribution through a private body, and involves the application of section 771(5)(B)(iii) of the Act. Several comments were received on this topic, including particular suggestions regarding the possible contents of a regulation. Although the issues raised by the commenters are important ones, we are not addressing them at this time. We note that the legislative history clearly calls for the Department to proceed on a case-by-case basis. See SAA at 255–56. Our decision not to address these comments serves, in part, to preserve this flexibility and discretion, and allows us the opportunity to request comments specifically pertaining to the factors we should consider in making our case-by-case determinations.

The topic of privatization typically involves situations where ownership of a government-owned firm is transferred to a private entity. Privatization raises the question of the extent to which previously bestowed subsidies which are allocated over time remain countervailable after the privatization, and involves the application of section 771(5)(F) of the Act, the new section in the URAA addressing this subject.

In these proposed regulations, we have not included a provision dealing with privatization. However, we are evaluating whether a regulation on this topic is appropriate. Therefore, in the discussion that follows, we describe and discuss certain issues that we believe are raised by section 771(5)(F). We begin with a review of the methods we have used to date for addressing prior subsidies and privatization. We then turn to the new legislation.

Agency Practice

Although there were earlier administrative precedents, the recent history of the privatization issue began in January 1993, with the Department's final CVD determinations in the *Lead and Bismuth* cases (see, in particular, *Certain Hot-rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 58 FR 6237). In those determinations, the Department ruled that the sale of a firm (or a ''productive unit'' of a firm), even if at arm's length, does not alter the countervailability of previously bestowed subsidies. The Department reasoned that it ''does not examine the impact of subsidies on particular assets or tie the benefit level of subsidies to changes in the company under investigation. Therefore, it follows that when a company sells a productive unit, the sale does nothing to alter the subsidies enjoyed by that productive unit.'' *Id.*, at 6240.

In the July 1993 final CVD determinations in the *Certain Steel* cases, the Department modified the approach taken in the *Lead and Bismuth* cases. The Department concluded that once a subsidy is bestowed, the Act precludes a reevaluation of the amount or countervailability of a subsidy based on subsequent events, such as a change in the ownership of a firm. The Department stated: ''Accordingly, whether subsidies convey a demonstrable competitive benefit upon recipients, in the year of receipt or any subsequent year, is irrelevant—the statute embodies the irrebutable presumption that subsidies confer a countervailable benefit upon goods produced by their recipients.'' The Department further ruled that ''a private party purchasing all or part of a government-owned company (*e.g.*, a productive unit) can repay prior subsidies on behalf of the company as part or all of the sales price.'' *GIA* at 37262. Put differently, a portion of previously bestowed subsidies might not ''travel to a new home'' depending on the price paid for a firm by the buyer.

To determine the amount of previously bestowed subsidies that pass through to the privatized firm, the Department developed a repayment method. Under that method, the Department determines the amount of subsidies repaid based on a ratio of the privatized firm's subsidies to the firm's net worth over a period of time. Subsidies that are not repaid continue to benefit the merchandise produced by the privatized firm. *Id.*, at 37263. Only non-recurring subsidies (*i.e.*, subsidies allocated over time) are included in the pass through and repayment calculations.

New Law

In June, 1994, the U.S. Court of International Trade (''CIT'') overturned the Department's determinations in the *Lead and Bismuth* cases. In *Inland Steel Bar Co.* v. *United States*, 858 F. Supp. 179, *rev'd*, 86 F.3d 1174 (Fed. Cir. 1996) (''*Inland*''), and *Saarstahl AG* v. *United States*, 858 F. Supp. 187, *rev'd*, 78 F.3d 1539 (Fed. Cir. 1996) (''*Saarstahl*''), the CIT declared the Department's privatization methodology to be unlawful ''to the extent it states previously bestowed subsidies are passed through to a successor company sold in an arm's length transaction.'' This decision meant that if a firm is privatized in an arm's length transaction, previously bestowed subsidies are extinguished.

When the CIT issued its decisions in *Inland* and *Saarstahl*, the Administration and Congress were in the process of drafting, under ''fast track'' procedures, H.R. 5110, the bill that ultimately would become the URAA. As of June 1994, the draft CVD legislation did not contain any provisions that dealt expressly with the issue of privatization, and no such provisions were contemplated. However, following the CIT's decisions, a new provision was added that became section 771(5)(F) of the Act.

As enacted, section 771(5)(F) provides as follows:

> *Change in ownership*.—A change in the ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the (Department) that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

The SAA at 928 offered the following explanation of section 771(5)(F):

> Section 771(5)(F) provides that a change in the ownership of ''all or part of a foreign enterprise'' (*i.e.*, a firm or a division of a firm) or the productive assets of a firm, even if accomplished through an arm's-length transaction, does not by itself require Commerce to find that past countervailable subsidies received by the firm no longer continue to be countervailable. For purposes of section 771(5)(F), the term ''arm's-length transaction'' means a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties.
>
> Section 771(5)(F) is being added to clarify that the sale of a firm at arm's length does not automatically, and in all cases, extinguish any prior subsidies conferred. Absent this clarification, some might argue that all that would be required to eliminate any countervailing duty liability would be to sell subsidized productive assets to an unrelated party. Consequently, it is imperative that the implementing bill correct and prevent such an extreme interpretation.
>
> The issue of the privatization of a state-owned firm can be extremely complex and multifaceted. While it is the Administration's intent that Commerce retain the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies, Commerce must exercise this discretion carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied.

In addition to this passage in the SAA, the Senate Report on the URAA stated as follows:

> The Committee believes that this provision serves the important purpose of making clear that the sale of a firm at ''arm's length'' does not automatically extinguish any previously-conferred subsidies. New section 771(5)(F) stands in contrast to such an interpretation, which would result in an end to the countervailability of prior subsidies otherwise allocable to the merchandise. The sale of subsidized goods or assets to an unrelated party should not in and of itself permit the avoidance of duties. The Commerce Department should continue to have the discretion to determine whether, and to what extent (if any), actions such as the ''privatization'' of a government-owned company actually serve to eliminate such subsidies. It is the Committee's expectation that Commerce will exercise this discretion carefully and make its determination based on the facts of each case, developing a methodology consistent with the principles of the countervailing duty statute.

S. Rep. No. 412, 103d Cong., 2d Sess. 92 (1994).

Approach Under the New Law

Based on our reading of section 771(5)(F) and the legislative history of that provision, we believe that the new law overturns the approach adopted by the CIT in *Inland* and *Saarstahl*, *i.e.*, that an arm's length transaction, in and of itself, is sufficient to extinguish prior subsidies. We would further note that in March, 1996, the Court of Appeals for the Federal Circuit reversed the CIT's decision, holding that ''the [CIT] erred in holding that as a matter of law a subsidy cannot be passed through during an arm's length transaction'' (*Saarstahl, AG* v. *United States*, 78 F.3d 1539, 1544). Hence, under the pre- and post-URAA statute, the Department's position is that even if a privatization is accomplished by means of an arm's length transaction, previously bestowed subsidies are not automatically, and in all cases, extinguished.

By the same token, it has been suggested that the language in the SAA and the Senate Report directing Commerce to consider ''the facts of each case'' in determining whether and to what extent privatization of a government-owned firm eliminates any previously conferred subsidies may preclude an approach whereby all prior subsidies would automatically, and in all cases, be passed through to the privatized company.

Instead of establishing automatic rules in determining the extent to which prior subsidies pass through or are extinguished by privatization, a more flexible approach would be to examine a broad array of factors specific to the individual case. This may include examining the circumstances surrounding the privatization transaction, as well as the impact of prior subsidies on current market conditions.

Having said this, however, we do not believe that Congress intended that the Department's privatization determinations be made on an *ad hoc* basis. As stated in the Senate Report, it was expected that the Department would develop ''a methodology consistent with the principles of the countervailing duty statute.'' S. Rep. No. 412, 103d Cong., 2d Sess. 92 (1994). Thus, the question to which we now turn is what facts would be relevant to determining the effect that a change in ownership has on previously bestowed subsidies.

One starting point for consideration of the appropriate approach under the new law is the method previously adopted by the Department. As discussed above, we have recognized that privatization has some impact on previously bestowed subsidies and have employed a repayment formula to determine the extent to which those subsidies pass through to the privatized firm. We have indicated in recent cases our position that the repayment method is permissible under the new law (see, in particular, Certain Hot-rolled Lead and Bismuth Carbon Steel Products from the United Kingdom; Final Results of Countervailing Duty Administrative Review, 61 FR 58377, 58379. Some have questioned the Department's method for calculating the amount of repayment. For example, in computing the share of the sales price that repays past subsidies, the Department averages several years data on subsidies and the net worth of the firm.

- Should this average be weighted to give greater weight to the years immediately preceding the privatization? Or, should the average be abandoned and replaced with information on subsidies and net worth at the time of privatization?
- Are there other ways of determining whether repayment has occurred (*e.g.*, whether repayment must be made by the firm as opposed to the purchasers of the firm) and are there more accurate means of calculating such repayment?

Besides the facts that are relevant to the repayment method discussed above, there may be a number of considerations that should be evaluated in determining the extent to which previously bestowed subsidies are extinguished or passed through by means of privatization. For example, while the new statutory provision rules out the possibility that an arm's length transaction, in and of itself, is sufficient to extinguish past subsidies in all cases, it leaves open the question of what importance (if any) we should assign to the fact that a privatization does or does not occur at arm's length.

- Should the arm's length criterion alter the extent to which the Department considers previously bestowed subsidies to be countervailable with respect to merchandise produced by the privatized firm? Under the methodology currently applied by the Department, the presence or absence of an arm's length transaction does not affect our repayment calculation.
- In situations where the privatization transaction is not an arm's length transaction, is it more likely that prior subsidies pass through to the privatized company, or that a larger amount of the prior subsidies pass through? What factors would determine the extent, if any, to which prior subsidies pass through?
- Is it necessary for a privatization to be an arm's length transaction before the Department could even consider that previously bestowed subsidies are extinguished by the privatization? Conversely, if the privatization transaction is not at arm's length, should the Department even consider that any previously bestowed subsidies could have been extinguished?
- Under what circumstances and what privatization techniques does the transaction give rise to new subsidies to the purchasers? Would these new subsidies be in addition to any prior subsidies that pass through to the purchaser?

In addition to considering whether the privatization is an arm's length transaction, there may be other circumstances of the privatization transaction relevant to determining the extent to which previously bestowed subsidies pass through to the privatized firm. For example, it has been argued that when the privatization process occurs in a competitive market setting, the purchasers may be paying the full value of the company, including the current value of any previously bestowed subsidies.

- Can a competitive market setting, in and of itself, extinguish past subsidies? Under what circumstances would this occur?
- What elements might give rise to a competitive market setting and what is the relevance of those elements in determining the extent to which prior subsidies are passed through.
- Is it important to look at the nature of the auction, public stock offering, or other type of sale of the firm, including the number of bidders? Where there are few bidders, would it be important to consider whether the privatizing government placed restriction on who could purchase the company (*e.g.*, whether certain classes of buyers were precluded from participating)?
- Is it important that the privatization be carried out in an open, transparent manner? What elements might be important to this consideration?
- What role should independent valuations of the firm (*e.g.*, valuations by independent auditors) play? What if the winning bid for the firm being privatized was less than the value established in independent assessments?
- Given that equity markets may be more advanced in some countries than in others, should the Department account for the effect of the state of market development on the competitive bid process?
- Does the method of payment matter? For example, if the seller accepts debt or vouchers as payment for the privatized firm, should that be viewed differently than accepting cash?

Beyond these circumstances relating to the mechanics of the privatization transaction are events leading up to the privatization. These might include actions taken by the government to make the firm more attractive to potential purchasers. For example, the government might forgive debt owed to it by the firm in order to "clean up the balance sheet." Or, the government may undertake the expense of closing certain inefficient operations and sell off only the more modern plants.

- Are these types of actions taken in anticipation of privatization relevant to a determination of whether subsidies pass through to the privatized firm?
- Should such actions be separated from what would otherwise be considered "prior" subsidies in determining the extent to which subsidies pass through or are extinguished?

Similarly, the government may impose post-privatization restrictions on the privatized firm. For example, the new owners may be required to produce particular goods or services, to operate in particular locations, to purchase particular supplies from particular suppliers, to retain a certain number of workers or to undertake a certain level of investment in the privatized firm. Or, government restrictions on the privatized firm may take the form of a "golden share" whereby the government retains the right to make decisions about the certain specified operations of the firm, although ownership and control has otherwise passed to the new owners.

- Should these types of conditions on the sale be considered in determining whether, and the extent to which, prior subsidies pass through?

It has also been argued that certain government-owned companies benefit from government preferences, be it through low, government-guaranteed input prices or preferential access to government-controlled credit.

- Should the Department be concerned with whether the privatized firm will continue to benefit from such preferences? Or, would it be necessary for the government to eliminate the preferences before privatization?

Finally, the issue has been raised that in the privatization scenarios typically encountered by the Department, excess global capacity exists because one or more foreign governments have created or maintained productive assets that would not exist in the absence of government subsidization. Because of this, some would argue, even if the buyer of a firm pays a market price, the prior subsidies to the privatized company result in an unfairly low price being received for the firm.

- In a situation where subsidies have led to the creation of excess capacity (thereby lowering the market price for the firm being privatized), are those facts relevant to determining whether and to what extent the prior subsidies pass through to the privatized firm?

- How would the Department determine that excess global capacity has been created? How would excess capacity be defined and measured?
- It has also been argued that if excess capacity created by subsidies is relevant to the issue of privatization, then reductions to capacity made possible by subsidies should also be relevant. What relevance should the nature of the subsidy (*i.e.*, whether it contributes to or reduces capacity) have in determining whether and to what extent prior subsidies pass through to the privatized firm?

Conclusion

These lines of inquiry are consistent with section 771(5)(F) and with the recognition in the SAA, at 928, that the privatization issue ''can be extremely complex and multifaceted.''

In addition, it is consistent with the emphasis in both the SAA and the Senate Report on the importance of considering the facts of individual cases. We wish to emphasize that our list is not meant to be all-inclusive and we invite commenters to offer their views on other factors they consider to be relevant. Also, commenters should explain how these factors would be incorporated into a framework for analyzing privatizations and calculating subsidies to privatized firms.

We further invite comment on whether we should attempt to promulgate a final rule on the topic of privatization and what that rule might look like. Regarding the latter question, commenters are invited to address whether precise formulae should be used to determine the extent to which, if any, prior subsidies pass through or whether a case-by-case approach integrating some or all of the considerations identified in this preamble should be adopted. Commenters may want to address whether a formulaic approach could be developed that would be sufficiently comprehensive to account for special circumstances, or whether a formulaic approach would be undesirably rigid. Commenters may also want to address the consequences of the uncertainty resulting from a case-by-case approach.

In conclusion, we would like to repeat that the Department is carefully considering whether to issue a final regulation on the subject of privatization. To that end, the foregoing discussion is intended to stimulate, rather than foreclose, further thinking on this topic. We appreciate the comments that have been submitted on this topic thus far, and the fact that we may not have identified a particular suggestion should not be construed as an indication that we have rejected the suggestion.

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. This is due to the fact that 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 in than there were in 1989, and, thus, less need for regulations. Accordingly, § 351.502 deals with certain aspects of the specificity test that are not addressed expressly in the statute or the SAA.

Paragraph (a) is based on § 355.43(b)(8) of the 1989 Proposed Regulations, and continues to provide that the Secretary will not consider a subsidy as being specific merely 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 receives disproportionately large amounts of the subsidy. *See Lamb Meat from New Zealand*, 50 FR 37708, 37711 (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 (Ct. Int'l Trade 1991). In light of this judicial affirmance, and given the absence of any indication that Congress intended to change the Department's practice or overturn *Roses*, we are retaining the special specificity rule for agricultural subsidies.

Paragraph (b) is based on § 355.43(b)(7) of the 1989 Proposed Regulations, and continues to provide that the Secretary will not consider a subsidy as being 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.

Paragraph (c) 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 (c) has no counterpart in the 1989 Proposed Regulations, the rule contained in paragraph (c) has been part of the Department's specificity practice since *Certain Steel Products from Italy*, 47 FR 39356, 39360 (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 (c), 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 (1993).

The Department received several comments regarding the issue of specificity, most of which had to do with the specificity of domestic subsidies. For ease of discussion, we have divided these comments up by sub-issue.

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 those foreign subsidies which are truly broadly available and widely used throughout the economy.'' SAA at 259–260, citing *Carlisle Tire & Rubber Co.* versus *United States*, 564 F. Supp. 834 (Ct. Int'l Trade 1983).

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* section 102(d) of the URAA), 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

Two commenters suggested that in applying the specificity test, the Department should employ certain presumptions. One commenter maintained that the Department should presume that domestic subsidy programs are specific, and that the burden should be on respondent interested parties to prove otherwise. The second commenter stated that, for each domestic subsidy program under investigation, the Department should request information concerning applications and approvals made since the inception of the program. In the absence of such information, according to this commenter, the Department should presume that the foreign government in question exercises discretion in the administration of the program, and that the program is specific. Similarly, when the Department is analyzing newly instituted programs with few users, it should employ a rebuttable presumption that the program is specific. Both commenters made the point that information regarding the distribution of program benefits normally is not available to a petitioner prior to the filing of a petition.

Other commenters argued that there is no legal basis for making such presumptions. With respect to *de facto* specificity, for example, 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 261. 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 old law, a petitioner that includes a domestic subsidy in a petition must provide reasonably available information supporting the specificity allegation. *See* section 702(c) of the Act. On the other hand, the Department recognizes that because detailed information regarding the distribution of program benefits usually is either not published or is not widely available, it 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 its investigation, the Department carefully considers the information the petitioner has put forward, the reasons why 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.

Where domestic subsidy programs are included in an investigation, the Department will not presume the program is specific. Instead, the Department will seek in its questionnaire all of the information necessary to apply the specificity test according to section 771(5A)(D) of the Act. Based on its analysis of the information provided in the questionnaire responses, verification, and other information that may be collected, the Department will make the necessary specificity determination. If a respondent refuses to provide the information requested by the Department to conduct its specificity analysis, the Department may draw adverse inferences in the application of the ''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.

Sequential Analysis

Some commenters argued that the Department should codify the ''sequential approach'' to specificity. Under the sequential approach, as reflected in the 1989 Proposed Regulations, if a subsidy was *de jure* specific or met any one of the enumerated *de facto* specificity factors, further analysis was unnecessary and was not undertaken. In support of their position, these commenters emphasized the language contained in both 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 exist. SAA at 261. Furthermore, these commenters noted, 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 the sequential approach. SAA at 259; S. Rep. No. 412, 103d Cong., 2d Sess. 93–94 (1994). Finally, these commenters cited the legislative history of the North American Free Trade Agreement (NAFTA) as endorsing the sequential approach.

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 261. 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.

We believe that the Act and the SAA are sufficiently clear that, 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. Therefore, while the Department will continue its practice of collecting information regarding each of the four *de facto* specificity factors, our analysis of the issue will stop if the Secretary determines 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.

In this regard, however, the Department does not agree that a finding of specificity automatically may be based solely on the fact that some measure of discretion may have been exercised in the administration of a subsidy program. Indeed, such an approach would be inconsistent with the purpose of the specificity test, as articulated in *Carlisle*. 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 261.

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 (*i.e.,* discretion) in evaluating the facts 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 become practically meaningless, because virtually every subsidy program in the world could be declared specific on the basis of the discretion factor alone. This would produce the very sort of absurd results warned against in *Carlisle.*

As indicated in the SAA at 261, the discretion factor is generally more valuable as an analytical tool that enhances the analysis of the other *de facto* specificity factors and criteria. For example, in the case of a new subsidy program for which there have been few applicants and few recipients, the Department must make a judgment as to the likely future distribution of benefits under the program. The manner in which authorities have exercised their discretion in the early days of a new program would inform the Department in making this type of judgment. *See* SAA at 261.

Purposeful Government Action

Some commenters, citing such cases as *Saudi Iron and Steel Co. (Hadeed)* v. *United States,* 675 F. Supp. 1362, 1367 (Ct Int'l Trade 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. In a similar vein, they cited the statute and its legislative history for the proposition that the fact that program usage may be limited by the ''inherent characteristics'' of the thing being provided by the government should be deemed irrelevant. SAA at 262; S. Rep. No. 412, 103d Cong., 2d Sess. 94 (1994). Finally, these same commenters argued that the Department should analyze the availability and use of a subsidy in the context of the economy as a whole and not in the context of the universe of potential subsidy recipients.

Other commenters insisted that the Department must look behind the distribution of subsidy benefits and explore the reasons why the use of a subsidy may be limited. According to these commenters, ''purposeful government action'' should be critical to a finding of specificity.

In our view, the SAA and other legislative history make it very clear that the Department does not need to find ''targeting'' or ''purposeful government action'' to conclude that a domestic subsidy is specific. *See* SAA at 262 (''[E]vidence of government intent to target or otherwise limit benefits would be irrelevant in a *de facto* specificity analysis.''). Except 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. 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 262; S. Rep. No. 412, 103d Cong., 2d Sess. 94 (1994).

Characteristics of a ''Group''

Citing *PPG Industries, Inc.* v. *United States,* 978 F.2d 1232, 1240–41 (Fed. Cir. 1992) *(''PPG II''),* several commenters argued that to be consistent with judicial precedent, the Department must examine the ''actual make-up'' of a group of beneficiaries when performing a specificity 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, 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 argue 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 *Carlisle* purpose of the specificity test; 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 maintain that the Department has on several occasions found subsidy programs specific even when the ''group'' of recipients have not shared common characteristics. *Steel Wheels from Brazil* 54 FR 15523, 15526 (1989); *Cold-Rolled Carbon steel Flat-Rolled Products from Korea,* 49 FR 47284, 47287 (1984).

We disagree with the first set of comments. In determining whether a subsidy is *de jure* or *de facto* specific, the Department is not required to evaluate the actual make-up of those firms that are eligible for, or actually receive, a subsidy.

With respect to *PPG II,* assuming *arguendo* that it is relevant under the new law, we note that the decision upheld the Department's determination of the non-specificity of a program. 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 FICORCA program being investigated. Therefore, when looked at in terms of the number of enterprises, the actual recipients were not limited. However, this conclusion says nothing as to whether the number of industries that received FICORCA benefits was limited. To answer this question, the Department (and the court) correctly focussed on the makeup of the users. If the numerous enterprises that received benefits had comprised a limited number of industries, then FICORCA would have been specific. However, because the users represented numerous and diverse industries, FICORCA was found not to be specific. We see no basis in *PPG II* or in the language of section 771(5A)(D) of the Act for imposing a requirement that the limited users also share similar characteristics. Moreover, we believe that such a requirement would undermine the purpose of the specificity test as articulated in the SAA.

Integral Linkage

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.

Although the Department did not receive any comments, pro or con, regarding the integral linkage test, we have decided not to incorporate § 355.43(b)(6) into these regulations. Questions of integral linkage were relatively rare, and when they did arise, we did not find the factors set forth in § 355.43(b)(6) particularly helpful.

However, the fact that we are not recodifying § 355.43(b)(6) does not mean that we never would consider two or more ostensibly separate subsidy programs as constituting a single program for specificity purposes, although we anticipate that the circumstances leading to such a combination of programs will seldom arise. In situations where the subsidy programs have the same particular purpose (*e.g.,* to promote technological innovation), bestow the same type of benefits (*e.g.,* long-term loans or tax credits), and confer similar levels of benefits on similarly situated firms, treating the programs as a single program may be appropriate. However, when an interested party believes that two or more programs should be considered in combination for purposes of the Department's specificity analysis, it will have the burden of identifying the relevant programs and providing information and documentation regarding their purposes and types and levels of benefit.

Section 351.503

Section 351.503 deals with the benefit attributable to the most basic type of subsidy, a grant. Paragraph (a), which is based on § 355.44(a) of the 1989 Proposed Regulations, provides that in the case of a grant, a benefit exists in the amount of a grant. Paragraph (b), which is based on § 355.48(b)(1) of the 1989 Proposed Regulations, sets forth the rule for determining when a firm is considered to have received a subsidy provided in the form of a grant.

Paragraph (c) deals with the allocation of the benefit to a particular time period. Although paragraph (c) is based on § 355.49 of the 1989 Proposed Regulations, it also contains certain changes in approach that merit comment.

Which Grants Are Allocated Over Time

Paragraph (c) retains the distinction between ''recurring'' and ''non-recurring'' grants. *See* § 355.49(a) of the 1989 Proposed Regulations. Paragraph (c)(1) provides that the Secretary will allocate a recurring grant to the year in which the subsidy is considered as having been received, a practice usually referred to as ''expensing.'' Paragraph (c)(2) provides that, with one exception (discussed below), the Secretary will allocate non-recurring grants over time.

Paragraph (c)(3) contains a test for distinguishing between recurring and non-recurring grants, and is based on the standard applied by the Department in the *GIA*. Under this standard, if a benefit is exceptional or requires express government approval, the Department will consider it as non-recurring. As explained in the *GIA:*

> Under the modified test, we are attempting to analyze the frequency and ''automaticity'' with which a benefit is provided. ''Exceptional'' benefits are those types of benefits which are not received on a regular and predictable basis; the recipient cannot expect to receive the benefits on an ongoing basis from review period to review period. The element of ''government approval'' relates to the issue of whether the program provides benefits automatically, essentially as an entitlement, or whether it requires a formal application and/or specific government approval prior to the provision of each yearly benefit. The approval of benefits under the latter type of program cannot be assumed and is not automatic. The receipt of a benefit after merely filling out the appropriate forms (*e.g.*, tax benefits) or, after initial qualification for yearly benefits under a program (*e.g.*, some types of price support programs), would meet the automaticity part of the test.

Id. If a grant is not non-recurring under this standard, the Department will treat it as a recurring grant.

In these proposed regulations, we have codified the standard contained in the *GIA* for distinguishing between recurring and non-recurring benefits. However, we continue to consider 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 0.50 percent (discussed below); and (3) allocating only those grant-like subsidies that are tied to the purchase of fixed assets. *See* Memorandum from Staff to Joseph Spetrini, Acting Assistant Secretary for Import Administrations and Barbara R. Stafford, Deputy Assistant Secretary for Investigations, dated May 17, 1993, regarding Countervailing Duty Investigations of Certain Steel Products, How to Make the Expense vs. Allocate Decision; Investigations, C–100–004, Public Document. Regarding the first option, *i.e.*, development of a list of the types of subsidies that would be allocated and those that would be expensed, the Department has given examples of the two types of subsidies in the preamble to § 355.49(a)(2) of the 1989 Proposed Regulations and in the *GIA* at 37226.

The 0.50 Percent Test and the Expensing of Small Grants

Although the Department normally will allocate non-recurring grants over time, paragraph (c)(2)(ii) retains (with some stylistic changes) the so-called 0.50 percent test. *See* § 355.49(a)(3)(i) of the 1989 Proposed Regulations; *GIA* at 37226. Under this test, the Department will expense non-recurring grants received under a particular subsidy program to the year of receipt if the total amount of such grants is less than 0.50 percent *ad valorem*, as calculated under § 351.525.

The Department considers this test to be an important part of its efforts to simplify CVD proceedings and to reduce the burdens on all parties involved. By expensing small non-recurring grants to the year of receipt, the Department avoids the need to: (1) Collect, analyze, and verify the data needed to allocate such grants 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.

Certain commenters have argued that the 0.5 test should be applied on an aggregated basis; *i.e.*, that non-recurring subsidies should be expensed only when the total of benefits under all programs is less than 0.5 percent. In their view, this would prevent foreign governments from evading countervailing duties by awarding ''small'' benefits under numerous programs.

To address this concern, we have written § 351.503(c)(2)(ii) to say that the Secretary will ''normally'' expense non-recurring grants received under a program if the grants are less than 0.5 percent. Thus, although we intend to continue to apply the 0.5 percent rule on a program basis, we have given ourselves 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.

The Time Period Over Which Non-Recurring Grants Are Allocated

Once the Department has determined that a grant is non-recurring, it will calculate the amount of subsidy to be assigned to a particular year according to the formula described in paragraph (c)(4). The formula is the same one that appeared in § 355.49(b)(1) of the 1989 Proposed Regulations. We note that comments were received recently on this formula. We have not addressed those comments here, but intend to do so for the final regulations.

As described below, we have made changes in the methods used to determine certain variables used in the formula. In a departure from past practice, paragraph (c)(2) provides that the Secretary will allocate a non-recurring grant over the number of years corresponding to a firm's AUL, a term that is defined in paragraph (c)(4)(ii) as the average useful life of a firm's productive assets. Before describing how the Department will calculate a firm-specific AUL, we first should discuss why we are changing our practice.

Selection of the AUL Method

It has often been suggested that there is no single correct method for determining the number of years over which a subsidy should be allocated. For example, in paragraph 2 of its *Guidelines on Amortization and Depreciation,* BISD 32S/154 (1984–85) (''*Guidelines*''), the Tokyo Round Committee on Subsidies and Countervailing Measures stated: ''Financial and accounting theory and practice do not provide any single acceptable method of determining the appropriate time-period over which subsidies should be allocated.'' Similarly, in the *Subsidies Appendix* annexed to *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina,* 49 FR 18016, 18018 (1984), the Department stated that ''[t]here are no economic or financial rules that mandate the choice of an allocation period.''

In addition, there has been little guidance from Congress on this issue. The legislative history of the Trade Agreements Act of 1979 refers to the selection of ''a reasonable period based on the commercial and competitive benefit to the recipient as a result of the subsidy,'' S. Rep. No. 249, 96th Cong., 1st Sess. 86–87 (1979), and reliance on ''generally accepted accounting principles.'' H.R. Rep. No. 317, 96th Cong., 1st Sess. 74–75 (1979); H.R. Doc. No. 153, Pt. II, 96th Cong., 1st Sess. 433 (1979). However, this advice does not of itself supply concrete answers, particularly in light of the fact that, as suggested above, generally accepted accounting principles do not provide rules for allocating subsidies over time.

Against this conceptual and legal background, in the *Subsidies Appendix,* the Department chose the so-called ''IRS tables method'' of selecting an allocation period. Under this method, the Department allocated a subsidy over the number of years corresponding to the average useful life of a firm's renewable physical assets (equipment), as set forth 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). Subsequently, the Department codified this method in § 355.49(b)(3) of the 1989 Proposed Regulations. At the time, the Department believed that the IRS tables method offered ''consistency and predictability,'' although the Department expressed a willingness to consider other approaches. *See* 54 FR at 23376–77.

The IRS tables method has not been a subject of controversy in the vast majority of CVD proceedings in which the Department has used that method. However, in those proceedings where one or more parties did challenge the IRS tables method, the Department has been unable to successfully defend that method in court. Beginning with *British Steel Corp.* v. *United States,* 632 F. Supp. 59, 68 (1986), and continuing up to *Usinor Sacilor* v. *United States,* 893 F. Supp. 1112 (1995), the CIT repeatedly has struck down the use of the IRS tables method. In addition, in *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 (Unadopted), a panel convened pursuant to the Tokyo Round Subsidies Code found fault with the IRS tables method as applied by the Department. The common theme of these adverse decisions appears to be that because the IRS tables method is not a company-specific approach, it fails to adequately reflect the benefit of a subsidy to a particular firm.

While we do not necessarily agree with the reasoning of these decisions, the inability of the IRS tables method to pass judicial muster undermines the consistency and predictability that are the most attractive features of that method. Pending a resolution of this issue by the U.S. Court of Appeals for the Federal Circuit, which could be a long time in coming, every determination by the Department relying on the IRS tables method would be vulnerable to litigation, a process that is expensive and time-consuming not only for the Department, but also for the private parties that the CVD law is intended to serve.

Accordingly, the Department has determined to abandon the IRS tables method. In identifying a replacement method, one obvious consideration is that the method must relate sufficiently to the ''commercial and competitive benefit to the recipient as a result of the subsidy,'' the phrase from the legislative history to which the courts, rightly or wrongly, have assigned great significance. It is also important that the method must be sufficiently administrable so as not to impose undue burdens on private parties and the Department.

With these criteria in mind, we have considered alternatives to the IRS tables method that have been suggested in comments submitted as part of this rulemaking, as well as in past and pending litigation. *See, e.g., Final Results of Redetermination Pursuant to Court Remand on General Issue of Allocation* in *British Steel plc.* v. *United States,* Consol. Ct. No. 93–09–00550–CVD (Ct. Int'l Trade June 30, 1995) (''*British Steel Remand*''). The principal alternatives are: (1) Company-specific average useful life of productive assets; (2) company-specific average maturity of long-term debt; (3) company-specific weighted-average use of funds; and (4) the IRS tables as a rebuttable presumption.

We have chosen the first alternative, the company-specific average useful life of productive assets, or ''AUL.'' First, we believe that the AUL method will be more administrable and predictable than the other alternatives, because, as discussed in more detail below, it should be easily calculable from a firm's accounting records. With respect to the long-term debt alternative, based on our experience, many of the firms that we investigate do not have access to long-term debt financing (except possibly as a result of government support). Therefore, as a practical matter, this alternative would frequently lead us to use non-company-specific, surrogate measures of life of debt. With respect to the use of funds alternative, this alternative appears unduly complicated, requiring both private parties and the Department to calculate multiple allocation periods, including a company-specific AUL, and then take a weighted-average of those figures. Finally, with respect to using the IRS tables as a rebuttable presumption, this alternative likely would waste the time of private parties and the Department in arguments over whether or not the allocation period called for by the IRS tables had been effectively ''rebutted'' by a firm's own AUL.

Second, the AUL method has been recognized internationally as a reasonable method of determining the appropriate time period over which subsidies should be allocated. As stated in ¶ 5.1 of the *Guidelines,* ''[w]hile the benefit of a grant (that is, elimination of financial obligations the recipient company would otherwise incur) has no exact correlation to the life of any assets purchased with the grant, allocating the grant over the average life of renewable physical assets is one generally practical, fair, and consistent method of allocation.'' Although the *Guidelines* are no longer in effect due to the termination of the Tokyo Round

Subsidies Code, we consider it significant that the United States and its major trading partners went on record as endorsing the AUL method as an acceptable method of determining an allocation period for subsidies.

Finally, we note that the Department's use of company-specific AUL was recently affirmed in *British Steel PLC* v. *United States,* 929 F. Supp. 426 (Ct. Int'l Trade 1996).

Calculation of a Company-Specific AUL

Paragraph (c)(4)(ii) describes the manner in which the Department will calculate a company-specific AUL. Normally, firms will not calculate their ''actual'' AUL in the normal course of business, and requiring firms to calculate this figure for purposes of a CVD proceeding could pose an extremely onerous burden on firms with thousands of individual assets. Therefore, what is needed is a calculation method that results in reasonable reporting requirements, while at the same time produces a reasonable estimate of a firm's actual AUL.

We believe that paragraph (c)(4)(ii) achieves these dual objectives. Under paragraph (c)(4)(ii), a firm's AUL will be calculated by dividing the firm's depreciable productive assets by the firm's average annual charge to accumulated depreciation. As indicated in the second sentence of paragraph (c)(4)(ii), this calculation will be based on data covering a period considered appropriate by the Secretary. Because this is a new method with which the Department has little experience, we are reluctant to provide more detail at this time in the form of a regulation. Instead, we intend to include detailed instructions in our CVD questionnaires concerning the calculation of an AUL. Once we have gained more experience with this method, we may add additional detail to the regulation.

We should note, however, that we currently intend to include in our initial CVD questionnaires a request that a firm calculate its average AUL over a period of ten years, a period that would include the period of investigation and the nine preceding years. Based on the results of this calculation, the firm then would provide information on its non-recurring subsidies for a time period corresponding to the average AUL it calculated. For example, if a firm calculated that its average AUL for the ten-year period described above was 15 years, the firm would provide data on its subsidies for the period of investigation and the 14 preceding years. If the investigation results in a CVD order, the AUL will be recalculated for non-recurring subsidies received after the period on investigation (''POI'') based on updated information. For example, if a non-recurring grant is received in the third year after the original POI, the allocation period for that subsidy would be the average AUL for the year that subsidy is received and the nine previous years.

As in the case of any other piece of data included in a response to a CVD questionnaire, a firm's calculation of its AUL would be subject to verification by the Department and comment by parties to the proceeding.

As set forth in the third sentence of paragraph (c)(4)(ii), 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.

In addition, it may be necessary to make normalizing adjustments for factors that may distort the calculation of an AUL. Again, we are not in a position at this time to provide additional detail in the regulation itself, because the types of adjustments necessary likely will 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 due, or where the economy of the country in question can be characterized as hyperinflationary.

Finally, there may be situations in which an AUL cannot be calculated in the manner described above (assets divided by depreciation). 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 would not be a reasonable method of calculating AUL. Similarly, AUL could not be calculated in this manner if the firm does not use straightline depreciation and additions to the firm's asset pool are irregular and uneven. Indeed, there may be cases where there is no reasonable method of calculating a *company-specific* AUL. In such cases, the Department will consider, among other things, any alternative calculation methods for AUL offered by parties to the proceeding, including the IRS table method previously used by the Department. Such alternative methods will not be limited to those that are company-specific.

In addition, we should note that because petitioners may not be in a position to calculate a potential respondent's AUL at the time a petition is filed, petitioners may not know how many years back they can go in alleging countervailable subsidies. To provide more certainty to petitioners, the Department will accept the period specified in the IRS tables for purposes of making subsidy allegations in a petition.

Calculation of the Benefit Stream

Paragraph (c)(4)(iii) deals with the selection of a discount rate. Consistent with the *GIA* at 37227, paragraph (c)(4)(iii)(B) 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 351.504

Section 351.504 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 for determining whether a government-provided loan confers a benefit. Additionally, paragraph (a)(1) restates the Department's current practice, as reflected in § 355.44(b)(8) of the 1989 Proposed Regulations, that in making this comparison the Secretary normally will seek to compare effective interest rates rather than nominal rates. ''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, the Department intends that, if effective rates are not available, the Secretary 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), the Department normally will treat the yield on the bond as the effective interest rate.

Paragraphs (a)(2) and (a)(3) elaborate on the criteria for selecting the benchmark. As the reader quickly will ascertain, the criteria contained in paragraphs (a)(2) and (a)(3) 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 required information was seldom available.

Paragraph (a)(2) sets out the criteria the Department will normally consider in selecting a comparable commercial loan. We received the following comments relating to this issue: (1) If the Department modifies its current benchmark hierarchies, any new hierarchies or benchmark selection criteria should take account of the maturity and corresponding level of risk associated with the government-provided loan being analyzed; (2) requiring *identical* financing is impractical and undermines the Department's discretion; (3) in the case of foreign currency loans, which typically are long-term in nature, the Department's selection of a comparable loan should be based explicitly on the comparable currency, and should only be based on the domestic currency in certain unique situations; and (4) the Department should make clear its policy of selecting as its benchmark a loan that was taken out (or could have been taken out) at the same point in time as the government-provided loan.

With respect to these comments, we agree that a comparable commercial loan used as a benchmark 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 point in time. We believe that this type of approach will ensure a reasonable comparison, because the comparable loan will exhibit the same basic characteristics of maturity, risk, and currency denomination that are embodied in the allegedly subsidized financing. In addition, we agree with the commenter that recommended that the Department specify the time period from which it will select comparable financing. See paragraphs (a)(2)(iii) and (a)(2)(iv). With respect to those comments suggesting refinements to the benchmark hierarchies contained in the 1989 Proposed Regulations, as explained above, we have discarded those hierarchies in favor of a more flexible approach. However, we believe that our new approach is consistent with the objectives underlying the comments.

Several commenters suggested that loans under a government program, even if the program is not specific, should not be considered ''commercial'' loans. We agree with these commenters, and have incorporated their suggestion into paragraph (a)(2)(ii). We note, however, that we do not equate a ''loan provided under a government program'' with a ''loan from a government-owned bank.'' Consistent with § 355.44(b)(9) of the 1989 Proposed Regulations, which is discussed further below in connection with paragraph(a)(6)(ii), the Secretary normally will consider loans from government-owned banks as commercial loans.

The commenters disagreed over the selection of a comparable commercial loan in the case of a suspension agreement, some commenters arguing that special rules should be used in the case of a suspension agreement, because: (1) a suspension agreement is forward-looking, and (2) the use of a retrospective benchmark undermines the utility of a suspension agreement.

We agree that a suspension agreement is forward-looking, but we do not believe that this fact requires special rules governing the selection of comparable commercial loans. Typically, in its administration of a suspended investigation, the Department will monitor developments in commercial benchmarks outside of the normal administrative review process. This monitoring activity ensures that the commercial benchmarks used are timely. *See Roses and Other Cut Flowers From Colombia; Miniature Carnations From Colombia,* 61 FR 9429 (March 8, 1996).

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 practice for short-term loans. As described in § 355.44(b)(3) of the 1989 Proposed Regulations, the Department has used national average interest rates to determine the benefit from government-provided short-term loans. However, at the time the 1989 Proposed Regulations were promulgated, the Department announced that it 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.

One commenter argued that a benchmark hierarchy for short-term loans should emphasize company-specific rates and should rely on country-wide rates only as a last resort. In response to these comments, another commenter argued that mandating the use of company-specific rates has no basis in the statute and may be inappropriate in cases involving a large number of companies.

We disagree that there is no basis in the statute for using company-specific benchmarks for short-term loans. To the contrary, we see the use of company-specific benchmarks as being more consistent with the requirement that the benefit be determined by looking at a loan (or loans) the firm actually could obtain. In large cases, *e.g.,* cases with numerous respondents, it may become necessary to use a national average rate. If so, paragraph (a)(3)(i) provides sufficient flexibility to do so.

Paragraph (a)(3)(iii) deals with the long-term loans to firms considered to be uncreditworthy. In a change from the practice described in § 355.44(b)(6)(iv) of the 1989 Proposed Regulations, paragraph (a)(3)(iii) describes a new method for calculating the benchmark the Department will use in identifying and measuring the benefit attributable to a government-provided long-term loan received by an uncreditworthy firm.

The new method 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) captures the increased probability of default by adjusting upward the rate of interest a creditworthy company would pay in the country in question.

In making this adjustment, the Department is 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 the Department has used since 1984, we are proposing to rely on information regarding the U.S. debt market. In particular, we have used the weighted average one-year default rate for speculative grade bonds between 1970 and 1994, as reported by Moody's Investor Service. This average default rate is 4.3 percent. This rate is reflected indirectly in the formula, which is based on the probability that these risky loans will be repaid (*i.e.,* 1—.043 = .957).

Although the uncreditworthy benchmark we adopted in 1984 and included in the 1989 Proposed Regulations has not been controversial, we believe that the method we are proposing here offers a more accurate measure of risk involved in lending to firms with little or no access to commercial bank loans. By adjusting the interest rate that a healthy, low-risk company would pay in the country in question upward to account for the greater likelihood of default by an uncreditworthy borrower, we capture more precisely the speculative nature of loans to uncreditworthy companies and the premium they would have to pay the lender to assume that risk.

Paragraph (a)(4) sets forth the standard for determining when a firm is uncreditworthy. Paragraph (a)(4)(i) is based on § 355.44(b)(6)(i) of the 1989 Proposed Regulations, but has been modified to clarify the analysis the Department intends to undertake in determining whether a company is creditworthy. In § 355.44(b)(6)(i) of the 1989 Proposed Regulations we stated that the Secretary would deem a firm uncreditworthy if that ''firm did not have sufficient revenues or resources to meet its costs and fixed financial obligations in the three years prior to the year in which the firm and the government agreed upon the terms of the loan.'' We have replaced this statement with an explanation of what we mean by ''uncreditworthiness.'' Specifically, we will find a company to be uncreditworthy if information available at the time the government-provided loan is made indicates that the firm could not have obtained long-term financing from conventional commercial sources. In this context, ''conventional commercial sources'' is meant to refer to bank loans and non-speculative grade bond issues. Hence, uncreditworthy companies are those that would be forced to resort to other sources, such as junk bonds, to raise funds. The Department will make its creditworthiness finding based on the information described in paragraphs (a)(5)(ii) (A), (B), (C), and (D), which are unchanged from the comparable paragraphs in § 355.44(b)(6) of the 1989 Proposed Regulations.

Paragraph (a)(4)(ii) is based on the last sentence of § 355.44(b)(6)(i) of the 1989 Proposed Regulations. However, the word ''normally'' has been replaced by the phrase ''In the case of firms not owned by the government * * * .'' Also, the term ''government-provided guarantee'' replaces ''explicit government guarantee.'' With respect to the first change, the deletion of ''normal ly'' reflects the Department's consistent practice considering commercial financing to a firm to be dispositive evidence of a firm's creditworthiness only if the firm is privately-owned. With respect to the second change, this is intended to indicate that the Department will consider the circumstances surrounding the financing as a whole, instead of relying on one factor in determining whether the financing shows that the firm is creditworthy.

Paragraphs (a)(4)(iii) and (a)(6)(i) are based on §§ 355.44(b)(6) (ii) and (iii) of the 1989 Proposed Regulations. Paragraph (a)(4)(iii) states that the Secretary will ignore current and prior countervailable subsidies in determining whether a firm is uncreditworthy. In other words, the Secretary will not attempt to adjust a firm's financial data for current and prior subsidies in making a creditworthiness determination. Paragraph (a)(6)(i) continues to require a specific allegation before the Secretary will consider the uncreditworthiness of a firm.

Paragraph (a)(5) deals with long-term variable rate loans, and codifies a methodology set forth in the *GIA*. Under paragraph (a)(5)(i), 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) is not appropriate 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.

Paragraph (a)(6)(ii) establishes an evidentiary standard for investigations of loans extended by government-owned banks, and is based on § 355.44(b)(9) of the 1989 Proposed Regulations. *See also* paragraph (a)(2)(ii), discussed above. In this regard, some commenters argued that the Department should investigate all loans from government-owned, or government-supported, banks, and that the Department should abandon its requirement that evidence be presented that such loans were provided under a specific government program. According to the commenters, because this type of information is not reasonably available to petitioners, the burden of proving that a company has not received subsidized loans from a government-owned bank should be shifted to respondent interested parties. In addition, these commenters argued that the Department should consider financing provided by a bank that is partially funded by the government to be countervailable even in the absence of a particular government program.

In response, one commenter argued that the Department should continue to require reasonable evidence that loans from government-owned banks are provided at government direction or from government funds and on subsidized terms. According to this commenter, the adoption of a looser approach would create a *per se* rule that the lending practices of government-owned banks are in and of themselves suspect. Additionally, shifting the burden of proof to respondents to show that such loans are not countervailable would be a violation of the ''positive evidence'' approach outlined in Article 2.4 of the SCM Agreement and the ''substantial evidence'' requirement of section 516A(b)(1)(B) of the Act.

Under our past practice, we have distinguished between government-owned banks that are operated to meet special financing needs and commercial banks that are government-owned. For the former (*i.e.*, special purpose banks such as national development banks), petitioners are asked to provide information reasonably available to them to show that loans being provided by such banks are specific and that the interest being charged is not at commercial rates. For the latter (*i.e.*, commercial banks that are government-owned), we have additionally requested that petitioners provide reasonably available information that the loans in question are something more than mere commercial loans. In particular, we request information suggesting that such loans are being provided at the direction of the government or with funds provided by the government.

We believe this approach is appropriate because we have no basis to presume that loans given under the commercial operations of government-owned banks confer a subsidy. Moreover, we do not believe that our request for this additional information places an unreasonable burden on petitioners; they need only provide reasonably available information that the government-owned bank, for example, administers government loan programs that could be the source of the loan in question.

Thus, with the exception of special purpose banks (as discussed above), we agree with the commenters who argued that the Department should investigate loans from a government-owned bank only when a petitioner provides information suggesting that such loans are being provided at the direction of the government or with funds provided by the government. Accordingly, paragraph (a)(6)(ii) reaffirms the Department's prior approach with respect to government-owned banks.

Paragraph (b) sets forth a rule regarding the point in time at which the benefit from a loan arises, and is based on § 355.48(b)(3) of the 1989 Proposed Regulations. The second sentence of paragraph (b) addresses loans with special characteristics, such as loans with preferential grace periods. In the case of these types of loans, we do not believe that it is appropriate to wait until the end of the grace period to begin assigning subsidy amounts, because the longer the grace period, the greater the subsidy benefit and the greater the time before countervailing duties can be assessed.

Paragraph (c) deals with the allocation of the benefits of a government-provided loan to a particular time period. While paragraph (c) is based, in part, on § 355.49 of the 1989 Proposed Regulations, it contains several changes.

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.

Paragraph (c)(2) deals with situations in which the benefit of a government-provided 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 the principle reflected in § 355.49(c)(2) of the 1989 Proposed Regulations 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 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, for these loans we will continue to calculate what was described as the ''grant equivalent'' in § 355.49(c) of the 1989 Proposed Regulations. However, instead of adopting the loan allocation formula from the 1989 Proposed Regulations, we intend to use the grant allocation formula described in § 351.503(c) (except that the allocation period will be the life of the government-provided loan). The elimination of the old loan formula reflects our desire to streamline methodologies, where possible. Moreover, by timing the receipt of the benefit from these types of loans to the year in which the government-provided loan was received (*see* § 351.504(b)), the old loan formula becomes unnecessary, because its primary purpose was to begin assigning annual subsidy amounts in the year after the receipt of the loan.

Paragraph (c)(4) sets forth the method of calculating an annual benefit for government-provided variable-rate loans, and is little changed from § 355.49(d) of the 1989 Proposed Regulations.

Several commenters suggested that instead of using the life of the loan as the allocation period for long-term loans, the Department should use the same allocation period as used for other types of non-recurring subsidies. Given that, as discussed above, the Department has adopted the AUL method for non-recurring grants, if the Department were to adopt this suggestion it would mean allocating the benefit of a long-term loan over the average useful life of a firm's renewable assets.

For the following reasons, we have not adopted this suggestion. First, as part of our streamlining effort, we are not, as a general matter, calculating grant equivalents. Therefore, our new methodology does not lend itself to allocating loan subsidies over any period other than the life of the loan. Moreover, while ¶ 4.2 of the *Guidelines* recognizes that the allocation of the benefit of a long-term loan over the life of assets is a reasonable method, ¶ 4.1 recognizes that allocation over the life of the loan is also a reasonable method. In addition, the life-of-the-loan method imposes less of a burden on private parties and Department staff than other alternatives, because it is a comparatively easy matter to determine the life of a loan. The Department's longstanding practice of allocating a long-term loan benefit over the life of the loan has been relatively non-controversial and litigation-free, and we are reluctant to change this practice absent a persuasive demonstration that an alternative method is superior to existing practice. In this instance, we do not believe that such a demonstration has been made.

Paragraph (d) sets forth a method for calculating the annual benefit attributable to a long-term interest-free loan, the obligation for repayment of which is contingent upon subsequent events, such as the achievement of a particular profit level by the firm. Paragraph (d) is based on § 355.49(f) of the 1989 Proposed Regulations, and continues to provide that the Secretary will treat any outstanding balance on one of these types of loans as an interest-free, short-term loan (using a short-term loan benchmark), and will expense any benefit(s) to the year(s) in which interest would have been paid on the short-term loan.

Section 351.505

Section 351.505 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.

One commenter argued that in choosing a comparable commercial loan by which to identify and measure the benefit attributable to a government-provided loan guarantee, the Department should use a loan with a comparable commercial guarantee. This same commenter also recommended that the Department continue the approach described in § 355.44(c)(2) of the 1989 Proposed Regulations. Under this practice, if the government was the owner of the firm and it was normal commercial practice in the country for owners or shareholders to provide loan guarantees comparable to the government-provided guarantee, the Department did not consider the government-provided guarantee as giving rise to a benefit. In response, one commenter argued that the Department's practice in this regard is inconsistent with the government's involvement in the transaction in that, unless a subsidy was being provided, the firm would have obtained the loan through a commercial guarantor.

We agree that in determining whether a government-provided loan guarantee confers a benefit, the Department should determine whether it is a normal commercial practice in the country in question for a private owner, or parent company, to guarantee a loan. We have drafted paragraph (a)(2) accordingly. A government-provided guarantee should not be considered countervailable if it is 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) and if private owners normally provide guarantees in the same circumstances. For example, if the government directly guaranteed the debt of a company it owned, it would fall upon the respondent to demonstrate that private shareholders in that country also would normally guarantee the debt of the companies in which they own shares. 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 sufficient internally-generated resources to serve as guarantor of the debt. Where the government or a government-owned holding company guaranteed the debt of an ''uncreditworthy'' company it owned (*see* § 351.504(a)(4) regarding uncreditworthy companies), the respondent would need to provide evidence that private owners would also guarantee the debt of uncreditworthy companies they own.

The Department normally will not consider whether the behavior of a government owner/guarantor represents normal commercial practice unless a respondent provides adequate supporting information. Such information can include statements by independent sources such as financial or banking experts, tax experts or academics in the field of business. Absent such a demonstration, the Department will identify and measure the benefit from a government-provided loan guarantee by comparing the guaranteed loan to a comparable commercial loan in the same manner as under § 351.504. In addition, to conform to new section 771(5)(E)(iii) of the Act, paragraph (a)(1) provides that the Department will adjust for any difference in the guarantee fees. Therefore, we do not agree with the first comment that we should decide which loans are comparable on the basis of the comparability of the loan guarantees.

Paragraphs (b) and (c) deal, respectively, with the time at which the benefit from a loan guarantee is considered to have been received and the allocation of the benefit to a particular time period. Both paragraphs essentially apply the methodology for loans set forth in paragraphs (b) and (c) of § 351.504.

Section 351.506

Section 351.506 deals with equity infusions. Paragraph (a) deals with the identification and measurement of the benefit attributable to a government-provided equity infusion. Like § 355.44(e) of the 1989 Proposed Regulations, paragraph (a) is divided into two methodological tracks, the choice of methodology depending on whether or not there are actual private investor prices to serve as a benchmark for shares of a firm purchased by a government. However, paragraph (a)(1) retains the existing preference for private investor prices as a benchmark.

Actual Private Investor Prices Available

Paragraph (a)(2) contains rules for analyzing equity infusions when actual private investor prices are available, the first methodological track, and is largely based on § 355.44(e)(1) of the 1989 Proposed Regulations. Under § 355.44(e)(1), the first question in analyzing an equity infusion was whether, at the time of the infusion, there was a market price for newly-issued equity. If so, and if the shares purchased on the market were in the same form as the shares purchased by the government, the Department determined the amount of the benefit by comparing the price paid by government for its shares with the market price. In an exceptional situation, however, the Department could find the volume of a firm's traded shares to be so low as to preclude the use of those shares as a benchmark.

Paragraph (a)(2) is not intended to alter any of these basic principles. It does, however, elaborate on them in two respects. First, it addresses the use of prices of shares that are not in the same form as the shares provided to the government as benchmarks. Second, it permits the Department to use as a benchmark the market price of publicly-traded shares that the firm had previously issued.

The Department considered these last two issues in the 1993 steel determinations. With regard to the use of shares that are not identical to the shares being purchased by the government, the Department determined that in appropriate circumstances, shares with similar characteristics can be compared. *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. at 580 (1996).

With respect to secondary market shares, in the *GIA* at 37250, the Department explained that its practice was to ''resort to the use of secondary market share prices in instances where private investors did not purchase new shares from the firm at the same time they were issued to the government.'' The Department reaffirmed this practice, holding that, ''(a)s long as the market price benchmark at the time of the infusion has not been shown to be deficient or tainted * * * a government equity infusion must be determined to be made on an equityworthy basis whenever the government purchases shares at (the secondary market) price.'' *Id*. at 37251. This practice, too, has been sustained by the courts. *Geneva Steel* v. *United States*, 914 F. Supp. at 581 (1996).

The URAA did not modify these general principles. Section 771(5)(E)(i) states that a benefit shall normally be treated as conferred if, in the case of an equity infusion, ''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.'' Market-determined share prices, when available and useable, provide the best gauge as to the usual investment practice of private investors, including practices regarding the provision of risk capital.

Therefore, under paragraph (a)(2)(i)(A), an equity infusion confers a benefit if the price paid by the government for newly-issued equity is more than the price paid by private investors for newly-issued equity of the same (or similar) form. For example, if a government pays $10 per share for newly-issued shares in a firm, and private investors pay $5 per share for the same shares, a benefit exists in the amount of $5 per share ($10 − $5 = $5).

If there is no private investor price for newly-issued equity, under paragraph (a)(2)(i)(B), an equity infusion confers a benefit if the price paid by the government for newly-issued equity is less than the market-determined price, at such time as permits a reasonable comparison, of previously issued publicly-traded shares of the same (or similar) form. We continue to believe that market prices should be preferred as benchmarks, because such prices incorporate private investors' perceptions of a firm's future earning potential and worth.

In this regard, however, we intend that in applying this private investor standard, the amount of shares purchased by private investors must be sufficiently significant so as to provide an appropriate benchmark. *See* paragraph (a)(2)(iii). For an example of a situation where the Department found sufficient private participation to warrant use of the prices paid by private investors as the benchmark, *see Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Italy,* 60 FR 31922, 31994 (1995). Also, the use of a ''similar'' share as the basis of the benchmark neither precludes nor requires a price adjustment for differences in the types of shares. However, under paragraph (a)(2)(iv), the Department intends to make the adjustment when it is appropriate and reasonably quantifiable. For an example of an adjustment to account for differences in the types of shares, see *Certain Atlantic Groundfish from Canada,* 51 FR 10047 (1986).

Two commenters, citing *AIMCOR* v. *United States,* 871 F. Supp. 447 (Ct. Int'l Trade 1994) (''*AIMCOR I*''), stated that the Department should ''clarify'' its equity methodology so as to preclude the use of previously issued, publicly-traded shares as benchmarks. These commenters claim that merely because a company has previously issued publicly-traded shares does not imply that the company could obtain fresh equity capital on the same terms from reasonable private investors. They claim that the Department's use of the price of outstanding shares is flawed because it recognizes neither the concept of earnings dilution (*i.e.,* the fact that newly-issued shares dilute the claims attributable to previously issued shares) nor the difference between replacement cost and market value. Finally, they argue that the Department's current methodology does not take into account differences between ''hybrid'' equity-like instruments issued to the government and previously issued equity instruments that do not have ''hybrid'' features.

With respect to these comments, paragraph (a)(2)(i) reflects a distinction between the *AIMCOR I* problem, where the ownership rights conferred upon the private shareholders differed from the ownership rights conferred upon the government, and the question of whether the publicly-traded price of previously issued shares is an adequate proxy for the price of newly-issued shares. Paragraph (a)(2)(i) recognizes the *AIMCOR I* problem by requiring that the Department use the same or ''similar'' shares for its benchmark, and by permitting the Department to make an adjustment for differences between the shares used as the benchmark and the government-provided equity.

As for the use of secondary market prices, the Department believes that it can improve the accuracy of the secondary market price benchmark by altering the timing of the calculation. In particular, we are proposing to use secondary market prices in the period immediately following a government equity infusion. We believe use of these prices will allow us to capture private investors' perceptions as to what the newly infused capital will allow the firm to achieve, and also will enable us to measure any dilution of ownership. In our view, paragraph (a)(2)(iv) is sufficiently flexible so as to permit the Department to calculate a benchmark based on prices paid during a time period that will permit a reasonable comparison with the government equity infusion. However, we are particularly interested in public comments on this issue.

Actual Private Investor Price Not Available

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. This problem typically arises in the case of firms that are wholly owned by the government. 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 be not 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 regulations, we have retained the equityworthy/unequityworthy distinction. Thus, under paragraph (a)(3), if actual private investor prices are not available under paragraph (a)(2), the Secretary will determine whether the firm in question was equityworthy. Paragraph (a)(4) sets forth the standard the Secretary will apply in determining equityworthiness, and is virtually identical to § 355.44(e)(2) of the 1989 Proposed Regulations.

This distinction between equityworthy and unequityworthy firms has certain administrative advantages. However, as applied by the Department in the past, it was, to some extent, a rather simplistic approach to a complex problem. This point was driven home by the decision in *AIMCOR, Alabama Silicon, Inc.* v. *United States,* 912 F. Supp. 549 (Ct. Int'l Trade 1995) (''*AIMCOR II*''), in which the court ruled that, because of restrictions imposed on certain ''Class E'' shares, the government's purchase of those shares was inconsistent with commercial considerations, notwithstanding the fact that the firm in question was equityworthy. As stated previously by the court in *AIMCOR I,* ''[w]here a company is equity-worthy, as here, it does not necessarily follow that the purchase of stock from that company will be consistent with commercial considerations.'' 871 F. Supp. at 454.

While we do not necessarily agree with the court's resolution of the factual issue in *AIMCOR II (i.e.,* whether the purchase of Class E shares was inconsistent with commercial considerations), we do agree with the basic principle articulated by the court. Put in terms of the new statute, where a company is equityworthy, it does not necessarily follow that the purchase of stock from that company will be consistent with the usual investment practice of private investors. Accordingly, paragraph (a)(5) provides that if the Secretary finds a firm to be equityworthy, the Secretary will conduct a further examination to determine whether the particular investment was consistent with usual investment practice. Our intent here is not to conduct a further analysis if the government has purchased common shares in a firm. Instead, we will conduct a further analysis in situations, like *AIMCOR I,* in which the government has purchased shares to which special conditions or restrictions are attached.

Thus far, we have been discussing firms determined by the Department to be equityworthy. However, unequityworthy firms present the same problem: just as the Department's practice has oversimplified government-provided equity to equityworthy companies, it has also oversimplified government-provided equity to unequityworthy companies because it assumes that the shares purchased by the government are worthless. We have reconsidered this practice, adopted in the 1993 steel determinations, and have proposed in these regulations an approach that is consistent with our general rule for equity which directs that consistency with the usual investment practice will normally be determined by reference to the price a private investor would pay for the shares.

This new approach, reflected in paragraph (a)(6)(i), provides that if the Secretary determines that a firm is unequity-worthy, the Secretary normally will measure the benefit conferred by a government equity infusion by estimating the price that a reasonable private investor would have paid for the shares purchased by the government. If the price paid by the government exceeds this estimated price, the amount of the benefit will be the difference between the two prices. In estimating the price that a reasonable private investor would have paid, the Secretary will rely only on information and analysis that existed at the time of the equity infusion, because this is the information that would have been available to a reasonable private investor.

At this time, we have not been able to develop a method for calculating the price that a reasonable private investor would have paid for the shares purchased by the government. Among the methods we have considered is an options pricing model, in which possible future returns would be valued using a standard pricing formula for equity call options. To use such a model, we would need to develop estimates for the underlying value of the option and the volatility of expected returns. We would especially welcome comments on the use of such a model for estimating share prices or any alternative methods.

It has long been recognized that the ideal approach to equity infusions in unequityworthy firms would be to estimate the price that a private investor would have paid for shares purchased by the government. *See* Holmer *et al., Identifying and Measuring Subsidies Under the Countervailing Duty Law: An Attempt at Synthesis,* in *The Commerce Department Speaks on Import Administration and Export Administration 1984* (Practising Law Institute 1984), at 444. This approach, which we will refer to as the ''constructed private investor price'' method (''CPIP'), corresponds most closely to the preferred methodology. However, in the past, the CPIP method has been rejected as impractical. *Id.*

Upon further consideration, we have concluded that before rejecting the CPIP method as impractical, we first should attempt to use it in actual cases. Our conclusion is reinforced by the fact that while our prior practice may not be unreasonable as a legal matter, it is even more reasonable to rely on a methodology that recognizes that, at least in some cases, shares of an unequityworthy firm may have some value.

We recognize that there may be instances in which the information necessary to estimate what a reasonable private investor would have paid simply does not exist or does not provide an appropriate basis for making such an estimate. Therefore, paragraph (a)(6)(ii) provides an alternative method for measuring the benefit conferred by an equity infusion in an unequityworthy firm. Under this alternative method, the Secretary would allocate the equity infusion to two or more years in accordance with paragraph (c)(2) (discussed below), and would adjust the amount allocated to a particular year by the amount of subsequent after-tax returns achieved in that year by the firm in question. The reason for accounting for subsequent returns is that under our preferred methodology, we are attempting to account for the reasonable private investor's expectations, at the time of the equity infusion in question, regarding a firm's future returns. If available information does not allow us to estimate those expected returns, the best proxy is the actual return earned on the investment. While this approach lacks the conceptual purity of the CPIP method, we believe it is preferable to the grant methodology, which treats *all* equity infusions in *all* unequityworthy firms as automatically worthless.

Although several comments were filed on our methodology for government-provided equity in unequityworthy companies, they fell into one of two camps. One group called for the Department to codify the grant methodology adopted in the 1993 steel cases. These commenters pointed to the fact that the grant methodology has been upheld by the CIT in *British Steel plc* v. *United States,* 879 F.Supp. 1254, 1309 (Ct. Int'l Trade 1995). *See also, Usinor Sacilor* v. *United States,* 893 F.Supp. 1112, 1125–26 (Ct. Int'l Trade 1995). They further maintained that this practice is consistent with the new law.

The other group of commenters urged the Department to return to the methodology it employed prior to the 1993 steel investigations, the so-called ''rate of return shortfall'' (''RORS'') methodology. In their view, the RORS methodology offers the best proxy for determining the amount by which the government overpaid for its shares. These commenters also cited to a GATT Panel Report that, in their view, squarely rejected the grant methodology. (*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 (Nov.15, 1994) (unadopted).

Although the CIT has upheld the grant methodology for government-provided equity to unequityworthy firms, *AIMCOR I* led us to review our equity methodology in its entirety. We concluded that a finding of ''equityworthiness'' or ''unequityworthiness'' is not by itself a sufficient basis for measuring the benefit conferred by government-provided equity. Specifically, a finding that a firm is equityworthy does not mean that the government paid the price a private investor would have paid for the particular shares in question. Similarly, a finding that a firm is unequityworthy does not mean that a private investor would have paid nothing for the shares purchased by the government. Merely because the government could not expect a reasonable rate of return given the price it paid for its shares, it does not follow that the expected return on the investment is zero. In this respect, we believe that the grant methodology, like the RORS methodology it replaced, does not adequately account for the expectation held by the reasonable private investor, at the time of the infusion, of the company's future rate of return.

The methodology we have proposed in these regulations for both equityworthy and unequityworthy firms reflects our goal of determining the price a private investor would have paid in either an equityworthy or unequityworthy situation. We believe this approach is preferable to RORS because it attempts to use information available at the time of the government's equity purchase regarding the firm's expected return to calculate the price the government should have paid for the shares it purchased. Moreover, where a CPIP cannot be determined, we believe that the alternative methodology proposed in paragraph (a)(6)(ii) is a better reflection of the benefit conferred on an unhealthy (*i.e.*, unequityworthy) firm receiving government-provided equity than the RORS methodology. This is because, given our finding that the firm is unequityworthy, the best prediction we can make is that the value of the shares is zero. Our prediction may be wrong, and paragraph (a)(6)(ii) allows us to take into account the return we were not able to predict, but the prediction we make of a zero-share price is the best estimate we can make based on information that would have been available to investors at the time the government made its equity purchase. Moreover, we believe that our willingness to take into account the return actually earned by the government addresses the concern raised by the GATT Panel.

Paragraph (a)(7) deals with allegations regarding equity infusions, and is based on § 355.44(e)(3) of the 1989 Proposed Regulations. In our view, § 355.44(e)(3) has not posed an undue burden on petitioners nor prevented the filing of meritorious allegations. However, it does ensure that allegations will consist of something more than a mere statement that a government owns a firm in whole or in part.

Paragraph (b) provides that the Secretary normally will consider the benefit from an equity infusion to have been received as of the date on which the firm received the infusion.

Paragraph (c) deals with the allocation of the benefit to particular years and provides in (c)(1) a general rule that the Secretary will normally allocate the benefit of an equity infusion over the same allocation period that would be used for a non-recurring grant. Paragraph (c)(2) provides that where the Secretary has measured the benefit by reference to actual or constructed private investor prices (and, thus, has calculated a premium that can be viewed as a grant), the Secretary will allocate the benefit as if it were a non-recurring grant, using the methodology set forth for such grants in § 351.503(c)(2). This approach is consistent with § 355.49(a)(3)(i) of the 1989 Proposed Regulations, which also required that equity infusions be treated as grants if a market-determined price was used to identify and measure the benefit.

Paragraph (c)(3) applies to equity infusions in unequityworthy firms in situations where the Secretary cannot use the CPIP method under paragraph (a)(6)(i). Paragraph (c)(2) also provides for the allocation of the equity infusion as if it were a non-recurring grant, but references the fact that the Secretary will adjust the allocated amount in accordance with paragraph (a)(6)(ii).

Section 351.507

Section 351.507 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. 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 grant for allocation purposes. However, 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 steel determinations.

Section 351.508

Section 351.508 deals with subsidy programs that provide a benefit in the form of relief from direct taxes. (''Direct tax'' is defined in § 351.102.) 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, 54 FR at 23372, and cases cited therein.

Another type of direct tax program is the deferral of direct taxes owed. Although § 355.44(i)(1) 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, treating deferrals as government-provided loans. Therefore, consistent with our practice, paragraph (a)(2) directs that the loan methodology described in § 351.504 will be applied to direct tax deferrals. Normally, deferrals of one year or less will be treated as short-term loans, while multi-year deferrals will be treated as short-term loans rolled over on the anniversary date(s) of the deferral.

Although the Department did not receive any private sector comments regarding direct tax subsidy programs, the Department has identified one aspect of its practice that might warrant modification. 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. The Department is considering 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. Before doing so, however, the Department would like to obtain the views of the private sector. We are also seeking private sector views on how the direct tax methodology should address losses, including loss carryforwards and treatment of losses under accelerated depreciation. Therefore, on these matters in particular, we encourage public comment.

Paragraph (b) of § 351.508 deals with the question of when the benefit from a direct tax subsidy is considered to have been received by a firm, and is based on § 355.48(b)(4) of the 1989 Proposed Regulations. As under current practice, the Secretary will consider the benefit from a tax exemption, deduction, or credit to have been received as of the date when the recipient firm can calculate the amount of the benefit, which normally will be when the firm files its tax return. In the case of a tax deferral of one year or less, the Secretary normally will consider the benefit to have been received when the deferred tax becomes due. For a multi-year deferral, the benefit is 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 current practice, the Department normally will allocate such benefits to the year in which the benefits are considered to have been received under paragraph (b).

Section 351.509

Section 351.509 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, § 351.509 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 351.516–518 deal with programs that potentially would be considered export subsidies under section 771(5A)(B) of the Act because they provide for an exemption or rebate of indirect taxes or import charges when a product is exported.

Paragraph (a)(1) of § 351.509 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 § 351.508, deferrals of indirect taxes and import charges will be treated under paragraph (a)(2) as government-provided loans. Normally, deferrals of one year or less will be treated as short-term loans, while multi-year deferrals will be treated as short-term loans rolled over on the anniversary date(s) of the deferral.

Paragraph (b) of § 351.509 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 as of 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 allocate (expense) to the year of receipt the benefits attributable to the types of subsidy programs covered by § 351.509.

Section 351.510

Section 351.510 deals with the provision of goods and services. As explained below, we have designated paragraph (a) as ''[Reserved]'' in order to first acquire some experience with the relevant statutory provision before codifying our methodology in the form of regulations. 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 to be 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 will expense the benefit of a government-provided good or service to the year of receipt.

Adequate Remuneration

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.

One commenter suggested that we provide guidance in the regulations concerning how the Department intends to identify and measure adequate remuneration. Other commenters debated whether the Department is required to define adequate remuneration as the price that would exist absent government intervention in the marketplace. At this time, however, we are reluctant to go beyond the terms of the statute and the SAA. Instead, we intend to apply this new standard on a case-by-case basis. Once we have gained sufficient experience in actual cases, a codification of methodology may be appropriate. However, for the time being, we have designated paragraph (a) as ''[Reserved].''

We should note, however, that while ''adequate remuneration'' has replaced ''preferential'' as the standard, we do not believe this precludes us from continuing to apply certain preferentiality-based analyses we have used in the past. *See Pure Magnesium and Alloy Magnesium from Canada,* 57 FR 30946, 30949 (1992); and *Certain Fresh Cut Flowers from the Netherlands,* 52 FR 3301, 3302 (1987). There is no indication that Congress intended to change our practice with respect to government-provided goods and services such as electricity, water, or natural gas; *i.e.*, goods and services provided to a wide variety of users by a government-owned company that is usually the sole provider of the good or service.

We note further that where adequate remuneration is being ascertained by reference to the prices of goods (or services) imported into the country in question, we would propose to use the amount actually paid for the import. Hence, if the price of the imported good included 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/countervailing duties by the country in question, however, we would not adjust the import prices to reflect alleged subsidies or dumping.

Infrastructure

We received several comments regarding the special specificity test for government-provided infrastructure set forth in § 355.43(b)(4) of the 1989 Proposed Regulations. Although the commenters suggested different modifications to this test, they all used § 355.43(b)(4) as a starting point.

Unlike the prior statute, section 771(5) of the Act, as amended by the URAA, expressly mentions 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. Specifically, 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.

In light of the change in the statute, the countervailability of infrastructure depends on the definition of ''general infrastructure.'' However, we have no experience in applying this definition, and we are uncertain regarding the extent to which the principles reflected in § 355.43(b)(4) remain useful analytical tools for distinguishing potentially countervailable ''infrastructure'' from non-countervailable ''general infrastructure.'' Therefore, we are not issuing regulations on infrastructure at this time. Instead, we will apply the statutory definition on a case-by-case basis.

Section 351.511

Section 351.511 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 discussed above in connection with the provisions of goods or services, the Department does not have any experience in applying an adequate remuneration standard. In addition, while government procurement was potentially a countervailable subsidy prior to the URAA, allegations of procurement subsidies were extremely rare. Thus, we do not even 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 in general, and the adequate remuneration standard in particular, we are not issuing regulations concerning the government purchase of goods. Instead, we have designated Section 351.511 as ''[Reserved].''

In this regard, however, one commenter that suggested a regulation regarding government procurement stated that any such regulation should cover the government procurement of services. Although, for the reasons stated above, we are not promulgating a regulation on government procurement at this time, we should note that under section 771(5)(D)(iv) of the Act and Article 1.1(a)(1)(iii) of the SCM Agreement, only government procurement of goods is identified as a financial contribution.

Section 351.512

Section 351.512 deals with worker-related subsidies. Under paragraph (a), which is based on § 355.44(j) of the 1989 Proposed Regulations, the Department will continue to identify and measure the benefit of government-provided assistance to workers based on the extent to which such assistance relieves a firm of an obligation it otherwise normally would incur.

One commenter argued that the Department should clarify that worker assistance is countervailable only when the assistance relieves a firm of an existing *contractual or statutory* obligation. Such a clarification would prevent what this commenter considered to be an erroneous determination in *Certain Steel Products from Germany,* 58 FR 38318 (1993); *GIA* at 37256–57. In that case, the Department countervailed the Member State-funded portion of Article 56(2)(b) early retirement aid based on its conclusion that the government's contribution was likely to have an effect on the outcome of labor negotiations between steel producers and their workers. A different commenter, however, endorsed the Department's determination and the method used by the Department to measure the amount of the subsidy.

The Department disagrees with the proposal of the first commenter, because, in certain circumstances, the relief from an obligation that is not ''binding'' in a contractual or statutory sense nonetheless may provide a benefit to a firm that is readily identifiable and measurable. On the other hand, the Department is not prepared to codify the particular approach used in *Certain Steel Products from Germany.* Given the limited alternatives available in that case, we consider the approach used therein to be reasonable. At the same time, we acknowledged in the determination that the approach used was somewhat speculative, and we stated that we would consider further refinements in the future, particularly as part of any administrative review requested. However, because no such review was requested, we have not had the benefit of private sector comments, other than the two comments described above. Moreover, the determination remains the subject of litigation.

Nevertheless, we may deal with this issue in more detail in the final regulations. Therefore, we invite public comment on this issue in particular.

Paragraph (b) deals with the timing of worker-related subsidies. Most subsidies of this type are provided in the form of cash payments (grants), and paragraph (b) provides that the Secretary will consider the subsidy to have been received by the firm as of the date on which the payment is made that relieves the firm of the obligation it normally would incur. Paragraph (c) deals with the allocation of worker-related subsidies to a particular time period, and essentially treats these types of subsidies as recurring grants to be allocated (expensed) to the year of receipt.

Section 351.513

Section 351.513 contains a 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, § 351.513 expands the definition of an export subsidy.

In particular, § 351.513 would overturn the practice described in *Extruded Rubber Thread from Malaysia,* 57 FR 38472 (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 had to agree to export commitments. In analyzing this program, the Department examined the number of 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, the Department did not consider the award of pioneer status to constitute an export subsidy. However, under the new standard contained in § 351.513, if exportation or anticipated exportation was either the sole or one of several criteria for granting pioneer status to a firm, we would consider any benefits provided under the program to the firm to be export subsidies.

This expanded definition of export subsidy is not intended to include situations where exportation or anticipated exportation is one of many criteria for awarding benefits under a program, but the firm in question has qualified to receive the benefits under non-export-related criteria. In these circumstances, the Department would not treat the subsidy to that firm as an export subsidy.

Section 351.514

Section 351.514 corresponds to paragraph (c) of the Illustrative List, and deals with preferential internal transport and freight charges on export shipments. 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 as of 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 allocate (expense) the benefit to the year in which the benefit is received.

Section 351.515

Section 351.515 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, § 351.515 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. Furthermore, it has been suggested that commercially available prices in world markets may include dumped or subsidized prices and we invite comment on this issue. Paragraphs (b) and (c) contain rules regarding the timing of benefit receipt and the allocation of the benefit to a particular time period, respectively.

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. The example cited was the European Community (''EC'') 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) applied 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 *Iron Construction Castings from India,* 55 FR 50747, 50748 (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. The Department 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). Therefore, based on the above judicial precedent, we must 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.

Section 351.516

Section 351.516 deals with the remission or rebate upon export of indirect taxes. (''Indirect tax'' is defined in § 351.102.) Section 351.516 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. Paragraph (g) deals with indirect taxes, 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 $5 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 $5. However, a corollary of paragraph (g) is that the exemption or non-excessive 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 rebate of indirect taxes is deemed to be received on the date of exportation. Paragraph (c) provides that the Secretary will expense these types of subsidies to the year of receipt.

Section 351.517

While § 351.516 deals with the exemption or remission of indirect taxes in general, § 351.517 deals with the exemption, remission, or deferral of prior-stage cumulative indirect taxes. (''Prior-stage indirect tax'' and ''cumulative indirect tax'' are defined in § 351.102.) Section 351.517 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 351.517 is intended to be consistent with paragraph (h) and the *Guidelines on Consumption of Inputs in the Production Process* (Annex II to the SCM Agreement).

Section 351.17 is drafted to address separately exemptions, remissions and deferrals of prior stage cumulative indirect taxes. 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, making normal allowance for waste. (''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. However, paragraph (a)(2) further directs, based on Annex II to the SCM Agreement, that the Secretary may consider the entire amount of a remission of prior-stage cumulative taxes to be a benefit if the Secretary determines that the foreign government has not examined the actual 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 and paid 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).

Paragraph (a)(3) deals with the amount of the benefit attributable to a deferral of prior-stage cumulative indirect taxes. Consistent with footnote 59 to the SCM Agreement, the first sentence of paragraph (a)(3) provides that a deferral does not give rise to a benefit if the government charges appropriate interest on the taxes deferred. Otherwise, the second sentence of paragraph (a)(3) provides that the Secretary will determine the amount of benefit by treating the tax deferral as if it were a government-provided loan in the amount of the taxes deferred. Normally, deferrals of one year or less will be treated as short-term loans, while multi-year deferrals will be treated as short-term loans rolled over on the anniversary date(s) of the deferral.

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 as of the date on which the tax otherwise would have been due. 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, stating that the Secretary will normally treat the benefit as having been received when the tax would otherwise be due, for a deferral of one year or less, or on the anniversary date(s) of the deferral for multi-year deferrals. Paragraph (c) deals with the allocation of the benefit to a particular time period, and provides that the Secretary will allocate (expense) the benefit from an exemption, remission, or deferral of prior-stage cumulative indirect taxes to the year of receipt.

Section 351.518

Section 351.518 deals with the remission or drawback of import charges. Section 351.518 generally is 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 351.518 is intended to be consistent with 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 levied on imported inputs when the finished product is exported. However, if the amount remitted or drawnback exceeds the amount of import charges levied, a benefit exists.

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 drawnback 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 attributable to an excessive remission or drawback of import charges. Paragraph (a)(3)(i) sets forth the general rule that the amount of the benefit equals the difference between the amount remitted or drawnback and the amount of import charges levied initially on the imported inputs for which the remission or drawback is claimed. For example, assume that a firm imports widgets to produce gizmos, and pays $2 in import duties per widget. If, when the firm exports finished gizmos, the firm receives $5 in drawback, the benefit equals $3 ($5 − $2=$3).

However, paragraph (a)(3)(ii) provides that in certain circumstances, the Secretary may consider the amount of the benefit to equal the amount of the remission or drawback. Paragraph (a)(3)(ii) provides for a ''linkage'' test, and is essentially identical to § 351.517(a)(2)(ii). See discussion of § 351.517(a)(2)(ii), above.

Paragraph (b) provides that the Secretary normally will consider the benefit to have been received as of the date of exportation. Paragraph (c) provides that the Secretary normally will allocate this benefit to the year in which it is received.

Section 351.519

Section 351.519 deals with export insurance. 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) 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 earlier 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 the Israeli Exchange 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, 36214 (1984). Therefore, we did not find a countervailable subsidy despite losses in the early years of the program. However, after observing losses for five years, we concluded that the premiums charges were inadequate, and we determined that the scheme conferred a countervailable benefit.

Finally, § 355.44(d)(1) stated that the Department would take into account income from other insurance programs operated by the entity in question. 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.

Section 351.520

Section 351.520 continues and codifies the Department's practice with respect to certain types of government export promotion activities. As the Department has observed in the past, most countries, including the United States, 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, for example, such activities promoted a specific product or provided financial assistance to a firm, a benefit could exist under one of the other provisions of subpart E.

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. 412, 103rd Cong., 2d Sess. 93 (1994). Under the new law, import substitution subsidies are automatically considered to be specific.

Two domestic parties commented that the Department should state in its regulations that import substitution subsidies include subsidies that are contingent ''in law or in fact'' upon the use of domestic over imported goods. The quoted language is included in the export subsidy definition in section 771(5A)(B) of the Act, but does not appear in the import substitution subsidy definition in section 771(5A)(C) of the Act. One of the parties argued that similar language should be included in a regulatory definition of import substitution subsidy to avoid a ''potential loophole'' for *de facto* import substitution subsidies.

We agree with these commenters that the statute does not expressly state that import substitution subsidies include those that are contingent ''in law or in fact'' upon the use of domestic over imported goods. On the other hand, however, the plain language of section 771(5A)(C) does not limit the definition of import substitution subsidies to only those subsidies that are contingent ''in law'' upon the use of domestic goods.

Because of the Department's lack of experience in dealing with this new category of subsidies, we are not issuing a regulation at this time on this particular point. Instead, we intend to develop our practice regarding import substitution subsidies on a case-by-case basis. However, the omission at this time of explicit ''in law or in fact'' language from these regulations should not be construed as an indication that the Department believes that section 771(5A)(C) applies only to *de jure* import substitution measures.

Section 351.522

Certain Agricultural Subsidies

Section 771(5B)(F) of the Act implements provisions of the WTO Agreement on Agriculture regarding the noncountervailable status of certain ''domestic support measures.'' Under Annex 2 of the Agreement on Agriculture, domestic support measures that meet the policy-specific criteria and conditions of Annex 2 are exempt from Member countries' commitments to reduce subsidies. In addition, Article 13(a) of the Agreement on Agriculture directs that these subsidies, commonly referred to as ''green box'' subsidies, will be noncountervailable during the nine-year implementation period described in Article 1(f) of the Agreement on Agriculture.

In accordance with section 13(a) of the Agreement, section 771(5B)(F) of the Act provides that the Secretary will treat as noncountervailable domestic support measures that (1) are provided with respect to products listed in Annex 1 of the Agreement on Agriculture, and (2) that the Secretary ''determines conform fully to the provisions of Annex 2'' of that Agreement. To implement section 771(5B)(F), § 351.522 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 regulations should require the Secretary 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 noncountervailable 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. A second commenter disputed the suggestion that the regulations should include a list of agricultural programs that the Secretary automatically would consider as noncountervailable. 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.

The Department believes 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 to receive green box status, and § 351.522 reflects the plain language of these criteria. Consistent with section 771(5B)(F) of the Act and the Agreement on Agriculture, paragraph (a) of § 351.522 provides that the Secretary will treat as noncountervailable 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 and the relevant policy-specific criteria and conditions set out in paragraphs 2 through 13 of that Annex.

In this regard, 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 67–69. 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 exercises 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 on this particular point. The Department understands the due restraint requirement to entail a commitment to refrain from self-initiating CVD investigations, and the Department will administer the statute accordingly.

Green Light Subsidies in General

Under section 771(5B), which implements Article 8 of the SCM Agreement, certain domestic subsidies and domestic subsidy programs are treated as noncountervailable, notwithstanding the fact that they are specific under section 771(5A)(D) of the Act. 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). Although at this time we are not promulgating regulations regarding Green Light subsidies, we received many comments concerning this category of subsidies, and we address those comments here.

The noncountervailable 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) 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 benefiting from the subsidy or subsidy program.

The second method for obtaining Green Light status involves situations where a 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 noncountervailable 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). However, the Secretary must determine that the subsidy satisfies *all* of the relevant criteria before a given subsidy will be treated as noncountervailable. *See* section 771(5B)(A) of the Act; SAA at 266. 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 266. 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 accordance with the Administration's commitment in the SAA, the Department intends to strictly construe 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 265. 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 267.

Under the transition rules set forth in section 291 of the URAA, the new law applies to investigations and administrative reviews initiated on the basis of post-January 1, 1995 requests. As with other issues that arise in such investigations and reviews, the Department will consider claims for Green Light treatment as parties present such claims to the Department. A Department determination that a particular subsidy received by a firm is a Green Light subsidy would not necessarily mean that the Department would find 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. We do not believe this is necessary. As discussed above, our general approach to the drafting of these regulations has been to avoid simply repeating the language of the statute and/or the SAA.

Investigation of Notified Subsidies

One commenter, noting the text of section 771(5B)(E), 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.

In replying to these comments, we note 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, Commerce 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, 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 that has been notified under Article 8.3, the Department will include the subsidy in a CVD investigation or review in order to resolve the identity of the subsidy in question. If a party claiming Green Light status demonstrated that the alleged subsidy had been notified, that would be the end of the analysis, and the Department would not inquire further as to the subsidy's conformance with the applicable Green Light criteria. If the party failed to establish that the alleged subsidy program had been notified, then the Department would analyze the subsidy's eligibility for Green Light status in the same manner as for any other non-notified subsidy.

Nevertheless, the Department is not promulgating a regulation concerning this issue at this time. While the manner in which the Department would proceed in the situation described appears fairly straightforward, our lack of experience in administering the new Green Light provisions leaves open the possibility that questions of interpretation will arise that cannot be foreseen at this time.

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). 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 266.

While we do not disagree with the policy espoused, we do not believe that this policy must be codified in the regulations. As discussed above, the statute and the SAA are 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 Light status has the burden of presenting evidence demonstrating that a particular subsidy meets all of the relevant criteria for noncountervailable status.

Alleged Green Light Subsidies not Used During the Period of Investigation or Review

Although this issue was not raised by any of the commenters, the Department believes that, in an investigation or a review of a CVD order or suspended investigation, the Department should 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 should be considered only in an investigation or review of a time period where the subject merchandise did receive a benefit from the subsidy. However, the Department does not believe that a regulation is needed to clarify this issue.

Research Subsidies

Prior to the enactment of the URAA, the Department treated assistance provided by a government to finance research and development (''R&D'') as noncountervailable 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 Commerce in § 355.44(l) of the 1989 Proposed Regulations. One commenter argued that the Department should reaffirm the public availability test.

The Department has not retained the public availability test in these regulations. We believe that the objectives served by the public availability test are better met by applying the criteria listed in section 771(5B)(B) of the Act and Article 8.2(a) of the SCM Agreement.

Another commenter argued that, in determining whether a given research subsidy falls within the 75 and 50 percent maximum allowed under section 771(5B)(B), 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 was exceeded during the year under 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 maxima 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 266.

The Department agrees 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 75 or 50 percent maximum, 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. The Department agrees, however, that if, over the duration of a project, the subsidy exceeds the 75 or 50 percent threshold, the entire amount of the subsidy is countervailable, not merely the excess. Also, if it is indisputable at the outset of the project that the relevant threshold will be exceeded, the entire amount of the subsidy is countervailable.

Subsidies to Disadvantaged Regions

One commenter suggested 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 category, the Department 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 264. For example, if the Department were to investigate a product from Luxembourg, the term ''country'' would refer to the EC as a whole if the subsidy being investigated was received under an EC 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. Although the Department is not promulgating a regulation on this point, the Department intends to adopt this approach as a matter of practice.

Subsidies for Adaptation of Existing Facilities to New Environmental Requirements

One commenter 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 noncountervailable those subsidies given to upgrade existing facilities to environmental standards that are higher than the minimum standards imposed by law or regulation. According to this commenter, ''[g]overnments should be allowed the flexibility to encourage higher environmental standards than the minimum required by law when government shares the additional costs of achieving the higher environmental standards.''

Several commenters dispute this suggestion, claiming that section 771(5B)(D)(i) 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.

Although we acknowledge that governments should have the flexibility to encourage higher environmental standards, the Department agrees with the latter commenters. As noted above, section 771(5B)(D)(i) provides that noncountervailable 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 267. Given the clear language of the statute and the SAA, the Department believes that subsidies given to upgrade existing facilities to environmental standards in excess of legal requirements are countervailable.

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. However, we have made one change that reflects a change in practice regarding the identification and measurement of the competitive benefit bestowed by an upstream subsidy. Before turning to that change, we note that we have adopted certain new terminology in § 351.523(a). Specifically, we have replaced ''control'' with ''cross ownership.'' *See* § 351.524(b)(6) for an explanation of ''cross ownership.''

Regarding ''competitive benefit'' and upstream subsidies, § 351.523 sets forth the standard for determining whether a competitive benefit exists. In this regard, section 771A(b)(1) of the Act provides that a competitive benefit exists 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, the Department preferred to base its comparisons upon the price charged for unsubsidized inputs produced by other producers in the same country as the producer of the subject merchandise. If the Department had determined in a prior CVD proceeding that a countervailable subsidy had been bestowed in the subject country on the comparison input, the Department's next preferred alternative was to adjust the price of the input product to reflect the subsidy. As a final alternative, the Department could select a ''world market price for the input product.'' The Department 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, the Department 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; Final Determination,* 57 FR 42964, 42967–68 (1992).

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. 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.

If actual prices or offers for unsubsidized inputs are not available, we have concluded that it is preferable to rely upon 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). Only if there are no prices for unsubsidized inputs available from any source will we adjust the price of the comparison input product to reflect a 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), the Department would use an average price for the input product from different countries adjusted to reflect the subsidy or some other adjusted surrogate price. Only 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), would we rely upon the price of a subsidized input. *See* paragraph (c)(1)(v).

We believe that the approach described in the preceding paragraph 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 that the Department should make adjustments for subsidies only 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 the Department's earlier practice. *See, e.g., Agricultural Tillage Tools from Brazil,* 50 FR 24270, 24273 (1985).

In the hierarchy described above for selecting the price that the producer otherwise would pay for the input, we intend to use subsidized prices only when unsubsidized prices are not available. 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).

One other clarification in paragraph (c) is that in determining whether there is a competitive benefit, the Department will adjust prices upward to account for delivery charges (*i.e.*, c.i.f.). 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 Non-Alloy Steel Pipe from Venezuela*, 57 FR at 42967 (1992).

Several outside parties commented on the upstream subsidies provision. One commenter argued that when using a world market price as a benchmark, the Department should rely upon an average of all publicly available export prices, including U.S. export prices. In response, several domestic parties argued that the world market price should equal the weighted-average landed price of the input product within the country under investigation. These commenters added that the price should also include all delivery expenses. Finally, other domestic parties suggested a hierarchy that would apparently not include any averaged prices from the world market, but instead would be limited to (1) actual prices paid by the producer of the subject merchandise to domestic or third-country suppliers, or (2) information regarding prices from such suppliers. We believe the above explanation adequately addresses the concerns raised by these comments.

Section 351.524

Section 351.524 deals with the calculation of the *ad valorem* subsidy rate and the attribution of a subsidy to a particular product. While § 351.524 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 is $100 and the firm's total sales were $1,000, the ad valorem subsidy rate would be 10 percent ($100 ÷ $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 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*, the Department announced that it would begin using sales values as recorded in a firm's financial statements. The Department did so in the belief that this approach would be more accurate, would reduce the burden on the firms involved, and would allow the Department 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, the Department 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 wound up using its traditional F.O.B. (port) methodology.

Because the Department's 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 ''shipping'' component of a transaction is subsidized, the Department 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 ''shipping'' 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, we would wind up with an extremely lengthy set of rules that might prove to be 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 so that parties can predict with a reasonable degree of certainty how the Department will attribute subsidies to particular products in a given factual scenario. In this regard, the Department's intent is to apply these rules in an harmonious manner.

With respect to the attribution rules themselves, they are consistent with the concept of ''benefit'' described in § 351.501, *i.e.*, that a benefit 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 should be attributed, to the extent possible, to those products for which costs are reduced (or revenues increased). *See, e.g.*, H.R. Rep. No. 317, 96th Cong., 1st Sess. 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. * * *.'').

This principle of attributing a subsidy to an affected cost (or revenue) center 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, the Department attributes a subsidy to 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 all products produced by a firm.

Paragraphs (b)(2) through (b)(7) set forth rules that the Department 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, tied to the exportation, paragraph (b)(2) provides that the Secretary will attribute an export subsidy only to products exported by a firm.

As noted above, the Department intends to apply paragraphs (b)(2) through (b)(7) consistently with each other. 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 products exported by 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 a firm's exports of widgets to Country X.

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.

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 that product. Paragraph (b)(5)(ii) provides an exception to this general rule, which is also consistent with our past practice. Under this exception, if an input product is produced within the same corporation, subsidies tied to the input product will be attributed to sales of both the input and the downstream products. It is important to note that the Department intends to limit this exception to situations where production of the input and downstream product occur within the same corporation. If they are produced by companies that are separately incorporated—even if there is ''cross ownership'' between those separately incorporated companies (as discussed further below)—the Department will follow the general tying rule in paragraph (b)(5)(i). Consequently, petitioners alleging that subsidies to a separately incorporated input producer also benefit the downstream product should file their allegation in accordance with § 351.523(a) (upstream subsidies).

Paragraph (b)(6) deals with situations where cross ownership exists between corporations. 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 controlling ownership interest (*i.e.*, majority voting ownership) between two corporations or through common ownership of two (or more) corporations. In certain circumstances, a large minority voting interest (for example, 40 percent) may also result in cross ownership. Specifically, if the remaining shares are widely held, then a large minority voting interest interest would be sufficient to find cross ownership. (Situations where cross ownership exists by virtue of common government ownership are addressed further below.)

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. ''Affiliation'' describes a wide range of business relationships, while cross ownership describes a much narrower range of relationships. In limiting our attribution rules to situations where there is cross ownership, we are not reading ''affiliated'' out of the CVD law. Indeed, 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 believe that affiliation alone provides a sufficient basis for attributing subsidies received by one corporation to products produced and sold by another affiliated corporation. Instead, we have chosen to focus on cross ownership, as described above, because where cross ownership exists one corporation can use or direct the individual assets of the other corporation in essentially the same ways it can use its own assets. Where the interests of the two parties have merged to this degree, we believe it is reasonable to presume that subsidies to one corporation may also benefit another corporation. Paragraph (b)(6) reflects this. However, where cross ownership does not exist, we will not make this presumption. Nor do we intend to investigate subsidies to affiliated parties unless cross ownership exists or other information indicates that such subsidies may indeed benefit the merchandise being produced by the corporation being investigated.

Paragraph (b)(6) begins by stating a general rule, which is followed by three exceptions to that rule deriving from the presumption 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 production of corporation A.

However, under paragraph (b)(6)(ii), if two (or more) corporations with cross ownership produce the same 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 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 are attributed to sales of another corporation with cross ownership. This is where the subsidy is received by a holding company. Under paragraph (b)(6)(iii), such subsidies will normally be attributed to the consolidated sales of the holding company. However, if the Department determines that the holding company is merely serving as a conduit for government-provided funds to one (or more) of the holding company's subsidiaries, then the subsidy will be attributed to the production of that subsidiary. Analogous to this situation 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 Certain Steel from Belgium*, 58 FR 37273, 37282 (1993).

Finally, paragraph (b)(6)(iv) addresses situations where a corporation producing another product receives subsidies. In this instance, the Department will determine whether the corporation receiving the subsidy transfers it to the corporation producing the subject merchandise. For example, subsidies may be transferred between corporations with cross ownership through loans or other financial transactions. However, as discussed above, where the subsidies are allegedly transferred through the purchase of inputs from an input supplier with cross ownership, that situation will be addressed under § 351.523 (upstream subsidies).

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. Nothing in paragraph (b)(6)(iv) is meant to require the Department to determine that the government-owned utility is receiving subsidies which it then transfers to the producer of the product under investigation. The situations where we would normally expect to treat common government ownership as cross ownership are: (1) Upstream subsidy allegations (*see* § 351.523(a)(1)(ii)(A)); (2) government-owned corporations producing the same product (*see* § 351.524(b)(6)(ii)); and (3) government-owned corporations producing different products (*see* § 351.524(b)(6)(iv)) where the corporations are under the control of the same ministry or within a corporate group containing producers of similar products.

Although the rules described in paragraphs (b)(2)–(b)(7) of § 351.524 deal with tying, § 351.524 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 (1982), the Department 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, 54 FR at 23374, the Department 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 the Department has encountered in the past, and is likely to encounter in the future, we are reluctant to promulgate 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. Therefore, for the present time, we intend to apply the term ''tied'' on a case-by-case basis. We would, however, welcome comments regarding what factors are relevant to the Department's determination of whether benefits are tied.

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, we do not believe that the fungibility principle is useful for purposes of attributing subsidies. For example, according to the fungibility principle, there should be no distinction between export and domestic subsidies. Yet, this agency's consistent and non-controversial practice over the past 16 years has been to attribute export subsidies to exported products and domestic subsidies to all products sold. Over time, we also have adopted the practices of attributing: (1) Subsidies that can be tied to particular markets to products sold to those markets; (2) subsidies that can be tied to particular products to those products; (3) subsidies to companies with multinational production to production occurring in the jurisdiction of the subsidizing government; and (4) subsidies to corporate entities to the specific entities that receive the subsidies, absent a showing that the subsidies are transferred elsewhere within the corporate family. While we have characterized these as exceptions to the principle of the fungibility of money, the exceptions have become more prevalent than the rule insofar as attribution of subsidies is concerned. Therefore, while we do not reject fungibility, we do not believe that it should guide our attribution decisions.

This having been said, we would note that the rules we have proposed are entirely consistent with the court ruling most often cited in connection with the fungibility principle, *British Steel Corp.* v. *U.S.*, 605 F. Supp. 286, 293–96 (Ct. Int'l Trade 1985) (''*British Steel*''). In *British Steel*, the issue being addressed by the court was whether funds provided by the government to cover redundancy and closure costs of British Steel Corporation conferred a benefit on the company's ongoing production:

> In plaintiffs' view, funds provided to shut down excess capacity and eliminate unnecessary jobs are for purposes that are the very antithesis of ''manufacture, production or export,'' and thus are not countervailable under any circumstances.

Id. Commerce had taken a position contrary to this view, stating that the government's payments made ''the recipient more efficient and relieve[d] it of significant financial burdens.''

Presented with the same facts and arguments today, we would take the same position. The fact that the funds were given for the purpose of closing down facilities would not render the funds non-countervailable. This is because the costs that are affected when the government provides funds to close down facilities are the input costs of the ongoing operation, the operation that would bear those costs in the absence of the government payments. Hence, consistent with the attribution principles described above, those subsidies would properly be attributed to the ongoing production and sales of the recipient and not to the activities that had been closed down.

The court also addressed the Department's practice of attributing the benefit of untied subsidies (*i.e.*, the same redundancy and closure payments) to all merchandise produced by the recipient. Plaintiffs had characterized this practice as being based on the fungibility principle, and argued that application of the fungibility principle did not yield an accurate measure of the subsidy conferred on the subject merchandise. The court upheld Commerce's practice that untied subsidies benefit all products on a *pro rata* basis. This same practice is reflected in § 351.524(b)(3) of these regulations.

Therefore, we see the attribution rules we have proposed as being consistent with past practice, even where fungibility has been at issue. Moreover, we believe that these rules provide the best measure of the level of countervailable subsidies being conferred on the subject merchandise, because they match the subsidy with the activity or cost center experiencing the cost saving (or revenue increase).

Regarding the attribution of capital infusions received by companies with multinational production, certain commenters urged the Department to return to its pre-1993 policy of treating such subsidies as benefitting all of the recipient's sales. Other commenters sought codification of the 1993 policy, which established a rebuttable presumption that domestic subsidies are tied to domestic production.

Section 351.524(b)(7) reflects 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, § 351.524(b)(7) states that we normally will attribute subsidies to merchandise produced within the jurisdiction of the granting authority. However, where a respondent can demonstrate that the subsidy is tied to foreign production, the subsidy will be attributed to merchandise produced by the foreign facility.

Although the proposed rule is similar to the practice the Department adopted in 1993, there are some differences. First, the rule is not stated as a rebuttable presumption. Instead of showing that subsidies are not tied to domestic production, respondents will instead have to demonstrate that the subsidies are tied to foreign production. We believe that this 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. Second, where a respondent can demonstrate that a subsidy is tied to foreign-produced merchandise, the subsidy will not be countervailable. *See* § 351.526 (transnational subsidies). This result is similar to the result under the practice adopted in 1993; *i.e.*, subsidies that were found not tied to domestic production were attributed to worldwide sales. By using worldwide sales, the CVD rate was reduced just as it will be reduced when subsidies are tied to foreign production and foreign production is not included in the denominator used to calculate the *ad valorem* CVD rate.

Finally, we note that nothing in paragraph (b)(7) is intended to imply that the Department is considering calculating regional subsidy rates; *i.e.*, different CVD rates for imports originating in different subnational jurisdictions.

Section 351.525

Section 351.525 deals with program-wide changes, and is almost identical to § 355.50 of the 1989 Proposed Regulations.

Section 351.526

Section 351.526 is based on § 355.44(o) of the 1989 Proposed Regulations, and provides that so-called "transnational subsidies" are not countervailable. Subsidies of this type include situations where (1) The government of one country provides foreign aid that ultimately is received by a firm located in the donee country, or (2) funds are provided by an international lending or development institution, such as the World Bank.

Section 355.44(o) contained a paragraph (o)(2) which 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, § 351.526 merely references, but does not repeat, section 701(d).

Section 351.527

Section 351.527 is based on § 355.46(b) of the 1989 Proposed Regulations, and provides that the Secretary will ignore the secondary tax consequences of a subsidy. For example, the Secretary would not reduce the benefit of a countervailable grant because the grant is treated as revenue for income tax purposes.

Classification

E.O. 12866

This proposed 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 proposed rule, if promulgated as final, would 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 Uruguay Round Agreements Act, the Department believes that these regulations benefit both petitioners and respondents without favoring either, and, therefore, would not have a significant economic effects. 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 proposed 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 countervailing duty 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 (see **ADDRESSES**) or to OMB Desk Officer, New Executive Office Building, Washington, DC. 20503.

E.O. 12612

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

List of Subjects in 19 CFR Part 351

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

Dated: February 18, 1997.

Robert S. LaRussa

Acting Assistant Secretary for Import Administration.

For the reasons stated, it is proposed that the proposed rule published at 61 FR 7308 on February 27, 1996, adding a new 19 CFR part 351, is further amended as follows:

PART 351—COUNTERVAILING AND ANTIDUMPING DUTIES

1. The authority citation for part 351 is proposed to continue to read as follows:

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

§ 351.102 [Amended]

2. Section 351.102 (Definitions) is amended by adding the following definitions in alphabetical order to read as follows:

* * * * *

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'' means any individual, partnership, corporation, association, organization, or other entity, and is used to refer to the recipient of an alleged countervailable subsidy.

Government-provided. ''Government-provided'' is used as a shorthand expression to refer to 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.

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) *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).

(b) *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.

(c) *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 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 will consider a benefit as having been received as of the date on which the firm received the grant.

(c) *Allocation of benefit to a particular time period.*—(1) *Recurring grants.* The Secretary will allocate (expense) a recurring grant to the year in which the subsidy is received (*see* paragraph (b) of this section).

(2) *Non-recurring grants.*—(i) *In general.* The Secretary will allocate a non-recurring grant over the number of years corresponding to a firm's AUL (*see* paragraph (c)(4) of this section).

(ii) *Exception.* The Secretary will normally allocate (expense) non-recurring grants received under a particular subsidy program to the year in which the subsidies are received if the total amount of such grants is less than 0.50 percent of all sales of the firm in question during the same year, or, in the case of an export subsidy program, 0.50 percent of the export sales of the firm in question during the same year.

(3) *''Recurring'' versus ''non-recurring.''* The Secretary will consider a grant as ''non-recurring'' if the grant is exceptional in the sense that the recipient of the grant cannot expect to receive additional grants under the same subsidy program on an ongoing basis from year to year; or the government must approve the provision of the grant each year. If a grant does not satisfy the standard for a non-recurring grant under the preceding sentence, the Secretary will consider the grant as ''recurring.'

(4) *Process for allocating non-recurring grants over time.*—(i) *In general.* For purposes of allocating a non-recurring grant over time and determining the annual subsidy 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 grant (*see* paragraph (a) of this section,

n=the AUL (*see* paragraph (c)(4)(ii) of this section),

d=the discount rate (*see* paragraph (c)(4)(iii) of this section, and

k=the year of allocation, where the year of receipt=1 and $1 < k < n$.

(ii) *AUL.* The term ''AUL'' means the average useful life of a firm's productive assets. Normally, the Secretary will calculate a firm's AUL by dividing the average gross book value of the firm's depreciable productive fixed assets (for a period considered appropriate by the Secretary) by the firm's average annual charge to accumulated depreciation. In calculating a firm's AUL, the Secretary will attempt to exclude fixed assets that are not depreciable (*e.g.,* land or construction in progress) and assets that have been fully depreciated and are no longer in service. In addition, the Secretary may make a normalizing adjustment to account for such factors as an extraordinary write-down in the value of fixed assets or hyperinflation.

(iii) *Selection of a discount rate.*—(A) *In general.* The Secretary will select a discount rate based upon data for the year in which the government and the firm agreed on the terms for receiving the grant. The Secretary will use as a discount rate the following, in order of preference:

(1) 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;

(2) The average cost of long-term, fixed-rate loans in the country in question; or

(3) A rate that the Secretary considers to be most appropriate.

(B) *Exception for uncreditworthy firms.* In the case of a firm considered by the Secretary to be uncreditworthy (*see* § 351.504(a)(4)), the Secretary will use as a discount rate the interest rate described in § 351.504(a)(3)(iii).

§ 351.504 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 structures 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.

(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 at the direction of the government or with funds provided by the government. However, the Secretary normally will not consider a loan provided under a government program to be a commercial loan for purposes of selecting a loan to compare to 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 period of investigation or review. 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 otherwise obtain on the market,'' the Secretary normally will rely on the actual experience of the firm in question in obtaining comparable commercial 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 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:

$i_b=[(1+i_f)/0.957]-1$

Where

i_b=the benchmark interest rate for uncreditworthy companies;

i_f=the long-term interest rate that would be paid by creditworthy companies.

(4) *Uncreditworthiness defined.*—(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 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 long-term commercial loans, unaccompanied by a government-provided guarantee, will 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 being considered in connection with the allocation of non-recurring grants (or benefits treated as non-recurring grants (*e.g.*, equity)), the Secretary will rely on information available in the year in which the government agrees to provide the grant.

(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, the Secretary may modify the method described in that paragraph.

(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 commercial bank absent a specific allegation that is supported by information establishing a reasonable basis to believe or suspect that:

(A) The government-owned bank provided the loan at the direction of the government or with funds provided by the government; 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 as of the date on which the firm is due to make a payment on the government-provided 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.

(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 in which the loan was received, 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 § 351.503(c)(4)(i) (grants) 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 of receipt=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.* In the case of a long-term, interest-free loan, the obligation for repayment of which is contingent upon subsequent events, 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)(4), (b), and (c)(1) of this section.

§ 351.505 Loan guarantees.

(a) *Benefit.*—(1) *In general.* In the case of a loan guarantee, a benefit exists to the extent that the amount a firm pays on the loan with the government-provided guarantee is less than the amount the firm would pay on a comparable commercial loan absent the government-provided guarantee, after adjusting for 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 § 351.504(a) (loans).

(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 Secretary finds that it is a 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 as of the date on which the firm is due to make a payment on the loan subject to the government-provided loan guarantee.

(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 § 351.504(c) regarding loans.

§ 351.506 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. In determining whether an investment decision is inconsistent with usual investment practice, the Secretary normally will compare the price paid by the government for the equity it purchased to the price that a private investor in the country would pay for the same (or similar) form of equity.

(2) *Private investor prices available.* (i) *In general.* 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 equity is greater than, in order of preference:

(A) The price paid by private investors for the same (or similar) form of newly-issued equity; or

(B) The publicly-traded market price for previously issued equity of the same (or similar) form as the newly-issued equity.

(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 equity made at such time as, in the Secretary's judgment, permits a reasonable comparison to the newly-issued equity 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 equity, or private investor trading in previously issued equity, is not significant.

(iv) *Adjustments for ''similar'' form of equity.* Where the Secretary uses private investor prices for a form of equity that is similar to the newly-issued equity 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 equity.

(3) *Private investor prices unavailable.* If private investor prices are not available under paragraph (a)(2) of this section, the Secretary will determine whether the firm that received 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, if any, 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. In making this determination, the Secretary may examine the following factors, among others:

(A) Current and past indicators of the firm's financial health calculated from the firm's statements and accounts, adjusted, if appropriate, to conform to generally accepted accounting principles;

(B) Future financial prospects of the firm, including market studies, economic forecasts, and project or loan appraisals prepared at the time of, or prior to, the government-provided equity infusion in question;

(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 prior subsidies.* In determining whether a firm was equityworthy, the Secretary will ignore current and prior subsidies received by the firm.

(5) *Benefit to equityworthy firm.* If the Secretary determines that a firm was equityworthy, the Secretary will examine the details of the particular equity infusion in question to determine whether the investment was inconsistent with usual investment practice of private investors. If the Secretary determines that the investment was inconsistent with usual investment practice, the Secretary will determine the amount of the benefit conferred on a case-by-case basis.

(6) *Benefit to unequityworthy firm.*—(i) *Constructed private investor price.* If the Secretary determines that a firm was unequityworthy, the Secretary normally will measure the benefit conferred by a government-provided equity infusion by estimating, based on information and analysis available at the time of the equity infusion, the price that a reasonable private investor would have paid for the equity purchased by the government. If the price paid by the government for newly-issued equity was greater than this price, the benefit will be based on the difference between the two prices.

(ii) *Constructed private investor price unavailable.* If the Secretary determines that information is not available, or does not provide an appropriate basis, for calculating the price that a reasonable private investor would have paid (*see* paragraph (a)(6)(i) of this section), the Secretary will measure the benefit conferred by an equity infusion in an unequityworthy firm by adjusting the amount of the infusion allocated to a particular year under paragraph (c)(3) of this section by the amount of subsequent after-tax returns achieved in that year.

(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) 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 as of the date on which the firm received the equity infusion.

(c) *Allocation of benefit to a particular time period.*—(1) *In general.* The benefit conferred by an equity infusion shall be allocated over the same time period as a non-recurring grant. *See* § 351.503(c)(2).

(2) *Allocation where private investor prices used.* Where the Secretary determines the amount of the benefit conferred by an equity infusion by using private investor prices (*see* paragraph (a)(2) of this section) or the price that a reasonable private investor would have paid (*see* paragraph (a)(6)(i) of this section), the Secretary will allocate the benefit as if it were a non-recurring grant (*see* § 351.503(c)(2)).

(3) *Allocation where private investor prices not used.* Where the Secretary is unable to use private investor prices (*see* paragraph (a)(2) of this section) or the price that a reasonable private investor would have paid (*see* paragraph (a)(6)(i) of this section), the Secretary will allocate the full amount of the equity infusion as if it were a non-recurring grant (*see* § 351.503(c)(2)). The amount so allocated to a particular year will be subject to adjustment under paragraph (a)(6)(ii) of this section.

§ 351.507 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 eliminating or reducing the firm's debt obligation, the Secretary will determine the existence of a benefit under § 351.506 (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.*—(i) *In general.* The Secretary will treat the benefit determined under paragraph (a) of this section as a non-recurring grant, and will allocate the benefit to a particular year in accordance with § 351.503(c)(2)(grants).

(ii) *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 § 351.504(c)(loans).

§ 351.508 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 § 351.504.

(b) *Time of receipt of benefit.* 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 as of the date on which the recipient firm became capable of calculating the amount of the benefit. Normally, this date will be the date on which the firm filed its tax return. In the case of a tax deferral of one year or less, the Secretary normally will consider the benefit as having been received as of 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.

§ 351.509 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 § 351.504.

(b) *Time of receipt of benefit.* 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. 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 as of the date 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.

§ 351.510 Provision of goods or services.

(a) *Benefit.* [Reserved]

(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 allocate (expense) the benefit to the year in which the benefit is considered to have been received under paragraph (b) of this section.

§ 351.511 Purchase of goods. [Reserved]

§ 351.512 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 as of 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.

§ 351.513 Export subsidies.

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 actual or anticipated exportation or export earnings. In applying this section, the Secretary will consider a subsidy to be contingent upon actual or anticipated exportation or export earnings if receipt of the subsidy is, in law or in fact, tied to actual or anticipated export performance, alone or as one of two or more factors.

§ 351.514 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 as of 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.

§ 351.515 Price preferences for inputs used in the production of goods for export.

(a) *Benefit.* (1) *In general.* In the case of the provision by governments or their agencies, either directly or indirectly through government-mandated schemes, of imported or domestic products 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 are provided are more favorable than the terms or conditions applicable to the provision of like or directly competitive products for use in the production of goods for domestic consumption. The amount of the benefit will equal the difference between the amount that a firm paid for inputs used in the production of export products and the amount the firm would have paid for like or directly competitive products for use in the production of goods for domestic consumption.

(2) *Exception.* A benefit will not exist under paragraph (a)(1) of this section if the Secretary determines that the terms or conditions relating to the provision of products for use in the production of exported goods are not more favorable than those commercially available on world markets to exporters in the country in question. For purposes of the preceding sentence, the Secretary normally will compare the price charged for the domestically sourced input to the delivered price of the imported input in order to determine whether the domestically sourced input is being provided on more favorable terms or conditions than those available on world markets.

(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.

§ 351.516 Remission upon export of indirect taxes.

(a) *Benefit.* In the case of the remission upon export of indirect taxes, a benefit exists to the extent that the Secretary determines that the amount remitted 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 remission upon export of an indirect tax, the Secretary 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 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.

§ 351.517 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. 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.

(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. Notwithstanding the preceding sentence, the Secretary will consider the entire amount of the remittance 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, where the system or procedure is not reasonable, or where 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.

(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 does not exist if the government charges appropriate interest on the taxes deferred. If the Secretary determines that a benefit exists, the Secretary normally will treat the deferral as if it were a government-provided loan in the amount of the tax deferred, according to the methodology described in § 351.504.

(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, as of the date on which the deferred tax was due; and

(4) In the case of a multi-year deferral, as of 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.

§ 351.518 Remission or drawback of import charges upon export.

(a) *Benefit.*—(1) *In general.* 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 consumed in the production of the exported product, making normal allowances for waste.

(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 drawnback exceeds the amount of the import charges levied initially on the imported inputs for which drawback is claimed.

(3) *Amount of the benefit from remission or drawback*—(i) *In general.* 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 drawnback and the amount levied initially on the imported inputs for which remission or drawback was claimed.

(ii) *Exception.* Notwithstanding paragraph (a)(3)(i) of this section, the Secretary will consider the entire amount of a remission or drawback to confer a benefit, unless the Secretary determines that:

(A) 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

(B) If the government in question does not have a system or procedure in place, where the system or procedure is not reasonable, or where 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.

(b) *Time of receipt of benefit.* In the case of the remission or drawback of import charges, 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.* The Secretary normally will allocate (expense) the benefit of the 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.

§ 351.519 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.

§ 351.520 General export promotion.

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.

§ 351.521 Import substitution subsidies. [Reserved]

§ 351.522 Certain agricultural subsidies.

The Secretary will treat as noncountervailable 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:

(a) Is provided through a publicly-funded government program (including government revenue foregone) not involving transfers from consumers;

(b) Does not have the effect of providing price support to producers; and

(c) Meets the relevant policy-specific criteria and conditions set out in paragraphs 2 through 13 of Annex 2.

§ 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 exist:

(A) There is cross ownership between the supplier of the input product and the producer of the subject merchandise;

(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.

(2) *Use of delivered prices.* The Secretary will use a delivered (*e.g.,* c.i.f.) price whenever the Secretary uses the price of an imported 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 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 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 *ad valorem* subsidy rate to account for such subsidies.

(b) *Attribution of a subsidy to a product*—(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 and import substitution subsidies.* The Secretary will attribute a domestic subsidy or an import substitution 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 the production or sale of an input product produced within the same corporation that produces the downstream product, then a subsidy which is tied to the input product will be attributed to the input and downstream products produced by that 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 same product, the Secretary will attribute the subsidies received by either or both corporations to the products produced by both corporations.

(iii) *Holding companies.* If the firm that received a subsidy is a holding company, the Secretary will attribute the subsidy to the consolidated sales of the holding company. 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) *Transfer of subsidy between corporations with cross ownership producing different products.* 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.

(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 jurisdiction of the government that granted the subsidy. However, if the subsidy is tied to production by a facility outside of that jurisdiction, the Secretary will attribute the subsidy to products produced by that facility.

§ 351.525 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 results 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 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.

§ 351.526 Transnational subsidies.

Except as otherwise provided in section 701(d) of the Act (subsidies provided to international consortia), a subsidy does not exist if the Secretary determines that the funding for the subsidy is provided:

(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.

§ 351.527 Tax consequences of benefits.

In calculating the amount of a benefit, the Secretary will not consider the secondary tax consequences of the benefit.

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