

**DEPARTMENT OF COMMERCE****International Trade Administration****19 CFR Part 351**

[Docket No. 200626–0170]

RIN 0625–AB10

**Regulations To Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws**

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

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

**SUMMARY:** Pursuant to its authority under Title VII of the Tariff Act of 1930, as amended (the Act), the Department of Commerce (Commerce) proposes to modify its regulations under Part 351 of Title 19 to improve administration and enforcement of the antidumping duty (AD) and countervailing duty (CVD) laws. Specifically, Commerce proposes to modify its regulation concerning the time for submission of comments pertaining to industry support in AD and CVD proceedings; to modify its regulation regarding new shipper reviews; to modify its regulation concerning scope matters in AD and CVD proceedings; to promulgate a new regulation concerning circumvention of AD and CVD orders; to promulgate a new regulation concerning covered merchandise referrals received from U.S. Customs and Border Protection (CBP); to promulgate a new regulation pertaining to Commerce requests for certifications from interested parties to establish whether merchandise is subject to an AD or CVD order; and to modify its regulation regarding importer reimbursement certifications filed with CBP. Finally, Commerce proposes to modify its regulations regarding letters of appearance in AD and CVD proceedings and importer filing requirements for access to business proprietary information. Commerce is seeking public comments on this proposed rule.

**DATES:** To be assured of consideration, written comments must be received no later than September 14, 2020.

**ADDRESSES:** Submit comments through the Federal eRulemaking Portal at <http://www.Regulations.gov>, Docket No. ITA–2020–0001. Comments may also be submitted by mail or hand delivery/courier, addressed to Jeffrey I. Kessler, Assistant Secretary for Enforcement and Compliance, Room 1870, Department of

Commerce, 1401 Constitution Ave. NW, Washington, DC 20230.

Commerce will consider all comments received before the close of the comment period. All comments responding to this document will be a matter of public record and will generally be available on the Federal eRulemaking Portal at <http://www.Regulations.gov>. Commerce will not accept comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. Therefore, do not submit confidential business information or otherwise sensitive or protected information.

Any questions concerning the process for submitting comments should be submitted to Enforcement & Compliance (E&C) Communications office at (202) 482–0063 or [ECCOMMS@trade.gov](mailto:ECCOMMS@trade.gov).

**FOR FURTHER INFORMATION CONTACT:** Scott McBride at (202) 482–6292; David Mason at (202) 482–5051; or Jessica Link at (202) 482–1411.

**SUPPLEMENTARY INFORMATION:****General Background**

Title VII of the Act vests Commerce with authority to administer the AD/CVD laws, known as trade remedies. In particular, section 731 of the Act directs Commerce to impose an AD order on merchandise entering the United States when it determines that a producer or exporter is selling a class or kind of foreign merchandise into the United States at less than fair value (*i.e.*, dumping), and material injury or threat of material injury to that industry in the United States is found by the International Trade Commission (ITC). Section 701 of the Act directs Commerce to impose a CVD order when it determines that a government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise that is imported into the United States, and material injury or threat of material injury to that industry in the United States is found by the ITC.<sup>1</sup>

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

The purpose of the regulatory changes proposed in this rulemaking is to strengthen the administration and enforcement of AD/CVD laws, make such administration and enforcement more efficient, and create new enforcement tools for Commerce to address circumvention and evasion of trade remedies. If adopted, these changes would equip Commerce to better fulfill the Congressional intent behind the AD/CVD laws—namely, to protect U.S. companies, workers, farmers, and ranchers from the injurious effects of unfairly traded imports. In addition, if adopted, these changes would promote the Administration’s objective to enforce the AD/CVD laws rigorously, and to aggressively pursue parties that seek to skirt them. Moreover, the proposed regulations facilitate a stronger and more efficient administration of the AD and CVD laws in the context of Commerce’s proceedings. The proposed changes are summarized briefly here, and discussed further below:

- Modify section 351.203 to provide for the establishment of a deadline by which parties may file comments on industry support. At present, comments on industry support may be filed up to and including the scheduled date of an initiation determination, leaving Commerce little or no time to consider fully such comments for purposes of determining whether the petition has sufficient industry support. Therefore, such modifications are necessary to enhance Commerce’s ability to consider and act upon such comments in a timely manner.

- Revise numerous provisions to section 351.214 concerning new shipper reviews to address abuse of those procedures and ensure that the sales to be reviewed are, in fact, *bona fide* sales. These changes are necessary to conform the regulation to recent statutory changes<sup>2</sup> and to ensure Commerce expends its limited resources on new shipper reviews only where warranted.

- Revise numerous provisions to section 351.225 concerning scope inquiries by adopting new procedures to preserve resources, expedite deadlines, and remove unnecessary and burdensome notice and service requirements. These revisions also clarify and codify the substantive basis for Commerce’s scope rulings pertaining to country of origin, scope language interpretation, and “mixed-media”

a subsidy must be specific within the meaning of section 771(5A) of the Act.

<sup>2</sup> Trade Facilitation and Trade Enforcement Act of 2015, Public Law 114–125, 130 Stat. 122, 155 (2016).

products, which incorporate subject merchandise in some form, in light of past practice and various court decisions. These revisions also ensure that AD/CVD duties are appropriately applied to products determined to be subject to the scope of the order.

- Adopt new section 351.226 concerning circumvention inquiries, which largely mirrors the proposed scope procedures. These provisions also clarify Commerce's authority to self-initiate circumvention inquiries and apply circumvention determinations on a "country-wide" basis.

- Adopt new section 351.227 concerning "covered merchandise referrals" from CBP under section 517 of the Act, which largely mirror the proposed scope and circumvention procedures and allow Commerce maximum flexibility to further develop its procedures and practice as it gains more experience in this new area of the law.

- Adopt new section 351.228, which is specifically targeted at improving enforcement of AD and CVD orders and ensuring the effectiveness of those orders. Under new section 351.228, Commerce may determine to impose a certification requirement on an importer or another interested party to further ensure that entries of merchandise subject to an AD/CVD order are appropriately classified as subject merchandise.

- Modify section 351.402 regarding importer certifications for the payment or reimbursement of AD/CVD duties on entries subject to AD orders to account for updated procedures.

- Adopt necessary changes, consistent with certain substantive proposed rules discussed above, to two procedural provisions: Section 351.103(d)(1) pertaining to letters of appearance and public service lists, and section 351.305(d) pertaining to importer filing requirements for access to business proprietary information in Commerce's proceedings.

### Explanation of the Proposed Rules

#### *Comment Period on Industry Support Prior to Initiation Determination—Section 351.203*

Once an AD petition under section 732(b) of the Act or a CVD petition under section 702(b) is filed, the statute provides Commerce with 20 days in which to determine whether the elements necessary for initiation of an investigation have been satisfied, including the requirement to demonstrate industry support. In exceptional circumstances, Commerce may extend the 20-day period to a

maximum of 40 days solely for purposes of determining industry support. At present, comments on industry support may be filed up to and including the scheduled date of an initiation determination, leaving Commerce little or no time to consider fully such comments for purposes of determining whether the petition has sufficient industry support. To address this, Commerce proposes to modify section 351.203 to provide for the establishment of a deadline for comments no later than five business days before the scheduled date of initiation; and rebuttal comments no later than two days thereafter.

#### *New Shipper Reviews—Section 351.214*

Commerce proposes to modify its regulation pertaining to new shipper reviews under section 751(a)(2)(B) of the Act and section 351.214. Section 751(a)(2)(B) of the Act provides a procedure by which exporters or producers who did not export the product during the original AD or CVD investigation can obtain their own individual dumping margin or countervailing duty rate on an accelerated basis (referred to as a "new shipper review"). This provision was enacted in the Uruguay Round Agreements Act (URAA) in 1994,<sup>3</sup> and Commerce promulgated its accompanying new shipper review regulation, section 351.214, in 1997.<sup>4</sup> This regulation provides the rules regarding requests for new shipper reviews and procedures for conducting such reviews, and is largely unchanged since 1997. Under this provision, Commerce conducts a new shipper review to establish an individual weighted-average dumping margin or countervailable subsidy rate if it receives a properly documented request for review.

In 2016, the Trade Facilitation and Trade Enforcement Act of 2015 was signed into law, which contains Title IV—Prevention of Evasion of Antidumping and Countervailing Duty Orders (short title "Enforce and Protect

Act of 2015" or "EAPA").<sup>5</sup> Section 433 of EAPA (entitled "Addressing Circumvention by New Shippers") made two important revisions to the new shipper review procedures under section 751(a)(2)(B) of the Act.

First, in legislative history explaining these amendments, Congress expressed concern regarding the abuse of new shipper review procedures to avoid AD/CVD duties.<sup>6</sup> One area of abuse in particular involved the ability of an importer of a new shipper's merchandise to post a bond or security in lieu of cash deposits for entries of that merchandise for the duration of the new shipper review.<sup>7</sup> Therefore, to prevent such abuse of these procedures, section 433 of EAPA removed the ability for importers to post AD/CVD-specific bonds or security in lieu of AD/CVD cash deposits by striking this provision from section 751(a)(2)(B) of the Act.<sup>8</sup>

Second, section 433 added a provision that the individual dumping margin or countervailing duty rate determined for a new shipper must be based on *bona fide* sales in the United States, and codified the factors that Commerce has historically used to determine whether a sale is *bona fide*.<sup>9</sup> In explaining this proposed change, Congress identified abuse of new shipper review procedures where a new shipper "enter{s} into a scheme to structure a few sales to show little or no dumping or subsidization when those sales are reviewed . . . resulting in a low or zero antidumping or countervailing duty rate for that

<sup>5</sup> Public Law 114–125, 130 Stat. 122, 155 (2016).

<sup>6</sup> See H.R. Rep. No. 114–114, at 89 (2015) ("The Committee is concerned that the ability of new exporters and producers to obtain their own individual weighted average dumping margins or individual countervailing duty rates from the Department of Commerce on an expedited basis (known as 'new shipper reviews') has been abused to avoid antidumping and countervailing duties.")

<sup>7</sup> *Id.* ("One area of abuse is taking advantage of the option to post a bond or security, rather than the normally required cash deposit, while the Department of Commerce conducts a new shipper review. This allows an importer to bring in large quantities of dumped or subsidized merchandise from the exporter or producer under review without having to provide in cash the full amount of estimated duties that could be owed on those imports. Having to put up less capital makes it easier for unscrupulous importers to enter into schemes to bring in dumped and subsidized merchandise with the intent of disappearing or otherwise not being available to pay the antidumping and countervailing duties owed on the imports. This loophole would be closed by requiring importers of merchandise from a producer or exporter in a new shipper review to provide a cash deposit of estimated duties.")

<sup>8</sup> See § 433, 130 Stat. at 171; see also H.R. Rep. No. 114–376, at 192 (2015) (Conf. Rep.).

<sup>9</sup> See § 433, 130 Stat. at 171; see also H.R. Rep. No. 114–376 at 192–193.

<sup>3</sup> See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 816 (1994) (SAA) ("Article 9.5 {of the Anti-Dumping Agreement} establishes special procedures for imposing antidumping duties on exporters or producers who did not export the product to the importing country during the original period of investigation (so-called 'new shippers').")

<sup>4</sup> See *Antidumping Duties; Countervailing Duties, Proposed Rule*, 61 FR 7308, 7317–18 (Feb. 27, 1996) (1996 Proposed Rule) (discussing the proposed new shipper review regulation); *Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27318–19 (May 19, 1997) (1997 Final Rule) (discussing the finalized new shipper review regulation).

producer or exporter.”<sup>10</sup> As a result of such scheme: “An importer could then bring in that producer or exporter’s merchandise at highly dumped or subsidized prices but with little or no cash deposit. The problem is further exacerbated if the importer disappears or otherwise becomes unavailable to pay the duties owed and U.S. Customs and Border Protection (CBP) has little or no cash deposit against which to recover the owed duties.”<sup>11</sup> Accordingly, to protect against such schemes,<sup>12</sup> section 433 added section 751(a)(2)(B)(iv) to the Act, providing that, in determining whether the sales in the United States of a new shipper made during the period covered by the review is *bona fide*, Commerce shall consider with respect to such sales: Pricing, commercial quantities, timing, expenses, resale at profit, and arm’s-length basis. Additionally, under section 751(a)(2)(B)(iv), Commerce may consider any other factor which it determines to be relevant as to whether such sales are, or are not, likely to be typical of those the new shipper will make after completion of the review.

As a result of the above, Commerce is making conforming amendments to section 351.214 discussed below. The modifications to section 351.214 would clarify the circumstances under which Commerce will expend the resources required to reach a determination in a review conducted under section 751(a)(2)(B) of the Act, among other issues.

Revised paragraph (a) would update the introduction to section 351.214 by including reference to current section 751(a)(2)(B) of the Act and the statutory requirement for *bona fide* sales in a new shipper review. Consistent with the revised statutory language in section 751(a)(2)(B)(iv) of the Act, proposed revisions to paragraph (b)(1), pertaining to requests for new shipper reviews, provide that, in requesting a new shipper review, an exporter or producer must not only satisfy the export or sale requirement but must also demonstrate the existence of a *bona fide* sale. With regard to existing section 351.214(b), Commerce explained in the *1996 Proposed Rule* that it was requiring certain certifications from the requestor “demonstrating that the party is a *bona*

*fide* new shipper.”<sup>13</sup> In doing so, Commerce explained:

The purpose of these certifications is to ensure that new shipper status is not achieved through mere restructuring of corporate organizations or channels of distribution. In accordance with the SAA, at 875, this provision also makes clear that parties will not be granted new shipper status merely because they were not individually examined during the investigation.<sup>14</sup>

In responding to comments in the *1997 Final Rule*, Commerce noted that it had received one request that Commerce “clarify that a person can request a new shipper review as long as there is a bona fide sale of subject merchandise to the United States, even if that merchandise has not yet been shipped to or entered the United States.”<sup>15</sup> Although Commerce did not address the “*bona fide*” nature of such sale, Commerce explained:

The initiation of new shipper reviews and the issuance of questionnaires requires an expenditure of administrative resources by the Department that is not inconsiderable when cumulated across all AD/CVD proceedings. In our view, the Department should not expend these resources unless there is a reasonable likelihood that there ultimately will be a transaction for the Department to review; namely, as discussed below, an entry and sale to an unaffiliated purchaser.<sup>16</sup>

Consistent with this earlier discussion, and in light of the concerns related to circumvention and abuse of new shipper review procedures expressed by Congress in enacting section 751(a)(2)(B)(iv) of the Act, Commerce proposes to expend its resources in conducting a new shipper review only where there is a reasonable likelihood that there ultimately will be a *bona fide* sale for Commerce to review. Thus, proposed revisions to paragraph (b)(1) provide that a producer or exporter may request a new shipper review if it can demonstrate the existence of a *bona fide* sale. Commerce expects that a producer or exporter could make such a demonstration by complying with the proposed requirements in proposed paragraph (b)(2)(iv), and proposed revisions to paragraph (b)(2)(v).

Under proposed paragraph (b)(2)(iv), a request for a new shipper review must contain (1) a certification from the unaffiliated customer in the United States that it did not purchase the subject merchandise from the producer or exporter during the period of investigation, and (2) a certification

from the unaffiliated customer in the United States that it will provide necessary information requested by Commerce regarding its purchase of subject merchandise. With respect to (1), this language was previously discussed in the *1997 Final Rule*, among a number of other suggestions which were aimed at discouraging meritless requests for new shipper reviews.<sup>17</sup> At the time, Commerce was beginning to develop its practice with respect to new shipper reviews, which was a new procedure adopted in the URAA in 1994.<sup>18</sup> In light of this limited experience, Commerce declined to adopt a proposal to require additional documentation from an exporter claiming to be a new shipper, or to require certifications from the purchaser, explaining that “{w}hile the Department has no interest in dealing with meritless claims for new shipper reviews, by the same token, we do not want to discourage meritorious claims.”<sup>19</sup> However, in light of Commerce’s past 20 years of practice in this area, and the circumvention and abuse of procedures concerns expressed by Congress in adopting the 2016 amendments to the new shipper review statute, we believe that the additional requirements above are needed to discourage meritless claims, and to preserve Commerce’s resources in conducting new shipper reviews where there is a reasonable likelihood that the unaffiliated customer will participate in the review.

Consistent with these same considerations, proposed paragraph (b)(2)(v) (currently paragraph (b)(2)(iv)) requires specific documentation which would allow Commerce to conduct a *bona fides* analysis under section 751(a)(2)(B)(iv) of the Act. This includes information pertaining to whether shipments were made in commercial quantities, the date of any subsequent sales, circumstances surrounding the sale, such as price, expenses, resale for profit, and the arm’s-length basis of the sale. Additionally, documentation establishing the business activities of the producer or exporter would also be required under this proposed paragraph (*i.e.*, the producer’s or exporter’s offers to sell merchandise in the United States, identification of the complete circumstances surrounding the exporter’s or producers’ sales to the United States, home market or any third country markets (if applicable), an explanation of any non-producing exporter’s relationship with its

<sup>10</sup> H.R. Rep. No. 114–114 at 89.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (“This provision would prevent such arrangements by requiring that the U.S. sales in a new shipper review be bona fide sales and setting out criteria for identifying bona fide sales, reflecting the Department of Commerce’s current regulations and practices in this area.”)

<sup>13</sup> See *1996 Proposed Rule*, 61 FR at 7317–18.

<sup>14</sup> See *1997 Final Rule*, 62 FR at 27318–19.

<sup>15</sup> *Id.*, 62 FR at 27319.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, 62 FR at 27319.

<sup>18</sup> See *1996 Proposed Rule*, 61 FR at 7317.

<sup>19</sup> See *1997 Final Rule*, 62 FR at 27319.

producer/supplier, and identification of the producer's or exporter's relationship to the first unrelated U.S. customer).

Proposed revisions to paragraph (c) provide a conforming amendment to reflect the change in numbering in paragraph (b)(2).

Proposed paragraph (d) would be entitled "Initiation of new shipper review." Paragraph (d)(1) would clarify that Commerce will initiate a new shipper review if the requirements for a request for new shipper review under paragraph (b) are satisfied. Paragraphs (d)(1)–(3), discussing time limits for the initiation of a new shipper review, would remain unchanged (with the exception of a minor grammatical edit in paragraph (d)(2)). These provisions would require Commerce to initiate a new shipper review in the calendar month immediately following the anniversary month, or semi-annual anniversary month of the order, as applicable. This is consistent with the statement in the SAA that new exporters or producers may request an accelerated new shipper review at any time.<sup>20</sup> Paragraph (d)(4) would provide that if Commerce determines that the requirements for a request for new shipper review under paragraph (b) have not been satisfied, the Secretary will reject the request and provide a written explanation of the reasons for the rejection.

Proposed revisions to paragraph (e) would eliminate language that requires Commerce to allow, at the option of the importer, the posting of an AD/CVD-specific bond or security in lieu of an AD/CVD cash deposit for each entry of the subject merchandise. This proposed modification implements the same amendment to section 751(a)(2)(B) of the Act under section 433 of the EAPA as discussed above, which eliminated the option of posting an AD/CVD bond or security in new shipper reviews.<sup>21</sup> Proposed paragraph (e) would also clarify that, when a new shipper review is initiated, Commerce will direct CBP to suspend or continue to suspend liquidation of any relevant unliquidated entry of subject merchandise at the applicable cash deposit rate.

Proposed revisions to paragraph (f) would expand on Commerce's ability to rescind new shipper reviews, in whole or in part, where a producer or exporter timely withdraws its request for a new shipper review, or where Commerce determines there is an absence of entry or sale to an unaffiliated customer. Proposed new paragraph (f)(3) would

provide that Commerce likewise may rescind a new shipper review, in whole or in part, where (1) information that Commerce considers necessary to conduct a *bona fide* sales analysis is not on the record, or (2) the producer or exporter at issue has failed to demonstrate, to the satisfaction of Commerce, the existence of a *bona fide* sale to an unaffiliated customer. This new provision would be consistent with Commerce's existing practice in both new shipper reviews and administrative reviews, that Commerce cannot conduct a review where there is no *bona fide* sale.<sup>22</sup> This would also clarify that Commerce has the option to rescind where the information required for its analysis is missing. However, nothing in this provision is intended to preclude Commerce from completing the new shipper review by applying the provision governing facts available in section 776 of the Act where necessary.

Commerce proposes no changes to paragraphs (g)–(j), and current paragraphs (k) and (l) would be re-lettered to (l) and (m), respectively. Further, re-lettered paragraph (l) contains minor formatting amendments and also removes reference to the posting of an AD/CVD-specific bond or security in lieu of an AD/CVD cash deposit pursuant to the changes in paragraph (e) discussed above.

Lastly, proposed paragraph (k) would clarify the factors Commerce will consider in making a *bona fide* sale determination. This paragraph would explain that Commerce shall consider the enumerated factors in section 751(a)(2)(B)(iv) and identifies, for purposes of section 751(a)(2)(B)(iv)(VII) of the Act, the additional factors that Commerce shall consider in determining whether the examined sale is typical, or not, of any future sales by the new shipper. These additional factors include whether the parties in the transaction were established for purposes of the sale(s) in question after the imposition of the order, whether the parties have other lines of business unrelated to the subject merchandise, whether there is an established history of duty evasion with respect to new shipper reviews under the order or circumvention in the same or similar industry, the quantity of sales, and any other factor which Commerce determines to be relevant with respect to the future selling behavior of the producer or exporter, including any other indicia that the sale was not commercially viable. These additional

factors would aid Commerce in developing a consistent practice of evaluating typical behavior of the new shipper. Additionally, we believe this proposal reflects Commerce's past twenty years of practice in this area, and would address the concerns regarding circumvention, duty evasion, and abuse of procedures expressed by Congress in adopting the 2016 amendments to the new shipper review statute.

#### Scope—Section 351.225

Upon issuance of an AD or CVD order, the Act requires Commerce to provide a description of the class or kind of merchandise subject to the order at issue (*i.e.*, subject merchandise).<sup>23</sup> That description is known as the scope of the AD/CVD order. Because the statute "does not require Commerce to define the class or kind of foreign merchandise in any particular manner{,} Commerce has the authority to fill that gap and define the scope of an order consistent with the countervailing duty and antidumping duty laws."<sup>24</sup> Further, "under the statutory scheme, Commerce owes deference to the intent of the proposed scope of an antidumping investigation as expressed in an antidumping petition."<sup>25</sup> Thus, Commerce retains considerable discretion to define the scope of the order to ensure that all imports causing injury have been addressed, and, additionally, may take into account potential circumvention and duty evasion concerns in crafting the scope language.<sup>26</sup>

After issuance of an AD/CVD order, Commerce directs CBP to "suspend liquidation" and collect cash deposits, or estimated amounts of duties, on appropriate entries subject to the scope of the order corresponding to the margins of dumping established under an AD order and the countervailable duty rates established under a CVD order.<sup>27</sup> On a yearly basis, interested parties may request that Commerce conduct an administrative review to determine the appropriate dumping margin or CVD rate for entries subject to

<sup>23</sup> See section 706(a)(2) of the Act; section 736(a)(2) of the Act; section 771(25) of the Act.

<sup>24</sup> See *Canadian Solar, Inc. v. United States*, 918 F.3d 909, 917 (Fed. Cir. 2019) (internal citations and punctuation omitted) (*Canadian Solar*).

<sup>25</sup> *Ad Hoc Shrimp Trade Action Committee v. United States*, 637 F. Supp. 2d 1166, 1174 (CIT 2009).

<sup>26</sup> See *Canadian Solar*, 918 F.3d at 921–22 ("It is unnecessary for Commerce to engage in a game of whack-a-mole when it may reasonably define the class or kind of merchandise in a single set of orders, and within the context of a single set of investigations, to include all imports causing injury.")

<sup>27</sup> See generally section 706 of the Act; section 736 of the Act. See also 19 CFR 351.211.

<sup>20</sup> See SAA at 816.

<sup>21</sup> See § 433, 130 Stat. at 171; see also H.R. Rep. No. 114–376 at 192–193.

<sup>22</sup> See, e.g., *Haixing Jingmei Chem. Prods. Sales Co. v. United States*, 357 F. Supp. 3d 1337, 1351 (Ct. Int'l Trade 2018).

the order during the previous review year.<sup>28</sup> Commerce directs CBP to “lift suspension of liquidation” and assess final duties according to Commerce’s administrative review procedures.<sup>29</sup> Under this dual statutory framework, Commerce is the agency charged with establishing and interpreting the scope of AD/CVD orders,<sup>30</sup> and CBP is the agency charged with applying and enforcing the AD/CVD orders by—upon instruction from Commerce—collecting appropriate cash deposits and assessing final duties on appropriate entries of merchandise into the United States covered by the scope of an order.<sup>31</sup> As part of its statutory responsibility “to fix the amount of duty owed on imported goods{,}” CBP “is both empowered and obligated to determine in the first instance whether goods are subject to existing {AD/CVD orders}.”<sup>32</sup> Pursuant to 19 U.S.C. 1514(b) (section 514 of the Act), this “determination is then ‘final and conclusive’ unless an interested party seeks a scope ruling from Commerce (which ruling would then be reviewable pursuant to {19 U.S.C. 1516a}).”<sup>33</sup>

<sup>28</sup> See section 751(a)(1) of the Act.

<sup>29</sup> See 19 CFR 351.212–213.

<sup>30</sup> See *Xerox Corp. v. United States*, 289 F.3d 792, 795 (Fed. Cir. 2002) (“Commerce should in the first instance decide whether an antidumping order covers particular products, because the order’s meaning and scope are issues particularly within the expertise of that agency.”) (internal citations and punctuation omitted).

<sup>31</sup> See *Sunprime Inc. v. United States*, 892 F.3d 1186, 1188 (Fed. Cir. 2018) (*Sunprime I*). In *Sunprime I*, the CAFC held that a party cannot invoke the CIT’s jurisdiction under 28 U.S.C. 1581(i) to challenge CBP’s decision to apply an AD/CVD order to the party’s merchandise where the party had an available remedy by seeking a scope ruling from Commerce, which subsequently could have been challenged under 28 U.S.C. 1581(c). *Id.* at 1192–94. In *Sunprime Inc. v. United States*, 924 F.3d 1198 (Fed. Cir. 2019) (*Sunprime II*), the CAFC upheld Commerce’s affirmative scope ruling, however, a divided panel found that CBP had exceeded its authority when it suspended liquidation based on its interpretation of ambiguous scope language prior to Commerce’s scope ruling, and, therefore, Commerce could not lawfully order the continuation of suspension of liquidation prior to the initiation of Commerce’s scope inquiry. See 924 F.3d at 1212–15. In *Sunprime Inc. v. United States*, 946 F.3d 1300 (Fed. Cir. 2020) (*Sunprime III*), the CAFC vacated *Sunprime II* in part and held that “it is within Customs’{ } authority to preliminarily suspend liquidation of goods based on an ambiguous {AD or CVD} order, such that the suspension may be continued following a scope inquiry by Commerce.” 946 F.3d at 1303.

<sup>32</sup> See *Sunprime III*, 946 F.3d at 1317 (citing 19 U.S.C. 1500(c); Section 500(c) of the Act).

<sup>33</sup> See *TR International Trading Co. v. United States*, Ct. No. 19–00022, Slip Op. 20–34 at \*7 (CIT Mar. 16, 2020) (citing *Sunprime III*, 946 F.3d at 1318) (*TR International*) (appeal pending) (referencing section 516 of the Act); see also *Fujitsu Ten Corp. v. United States*, 957 F. Supp. 245, 248 (CIT 1997) (“The statute recognizes Customs makes the initial determination that an existing antidumping order applies to a specific entry of

Furthermore, each agency has its own authority to ensure the effectiveness of the trade remedy laws in accordance with its statutory mandate. Congress, and the courts, have long recognized that Commerce has the vested authority to administer the trade remedy laws in accordance with their intent, and has the discretion to take appropriate enforcement measures to ensure the effectiveness of its AD/CVD orders by preventing duty evasion and circumvention.<sup>34</sup> As discussed below, Commerce has several existing mechanisms to ensure effective enforcement of its AD/CVD orders, while CBP has its own authority to conduct civil administrative investigations of duty evasion of AD/CVD orders, including as provided for in section 517 of the Act.<sup>35</sup> In exercising their separate authorities, Commerce and CBP frequently work together to ensure the effectiveness of the trade remedy laws. In this proposed rule, Commerce has taken additional steps to ensure that it continues to exercise its authority to administer the AD/CVD laws, in cooperation with CBP, and in accordance with its mandate to prevent duty evasion and circumvention.

Because the scope of an AD/CVD order is written in general terms, questions may arise as to whether a certain product is within the scope, and therefore covered by the order. In such cases, Commerce’s existing regulation, section 351.225, describes the applicable procedures and standards concerning “scope rulings” that Commerce will issue upon application of an interested party, or by initiating a “scope inquiry.” Additionally, section 351.225 provides procedures concerning circumvention proceedings conducted pursuant to section 781 of the Act. Under these provisions, Commerce may

merchandise. The statute states that such a decision is ‘final and conclusive’ unless it is appealed by petition to Commerce.” (citations omitted).

<sup>34</sup> See generally section 781 of the Act; SAA at 892–95; *Tung Mung Development Co., Ltd. v. United States*, 219 F. Supp. 2d 1333, 1343 (CIT 2002) (*Tung Mung*) (“Commerce has a duty to avoid the evasion of antidumping duties. {Commerce} ‘has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, {Commerce} has a certain amount of discretion {to act} . . . with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law.’”) (quoting *Mitsubishi Elec. Corp. v. United States*, 700 F. Supp. 538, 555 (CIT 1988) (*Mitsubishi I*), *aff’d* 898 F.2d 1577, 1583 (Fed. Cir. 1990) (*Mitsubishi II*)). See also *Torrington Co. v. United States*, 745 F. Supp. 718, 721 (CIT 1990), *aff’d* 938 F.2d 1276 (Fed. Cir. 1991).

<sup>35</sup> Additionally, Homeland Security Investigations (HSI), at the Department of Homeland Security, has the authority to investigate criminal violations related to illegal evasion of payment of required duties, including payment of AD/CV duties. See, e.g., 18 U.S.C. 542.

determine that certain products are circumventing existing AD/CVD orders, and thus lawfully may be considered within the scope of the order(s), even when the products do not fall within the literal scope language.<sup>36</sup> Commerce proposes to revise section 351.225 in its entirety to clarify and improve Commerce’s procedures and standards related to scope matters which have evolved since Commerce’s current scope regulations were issued in 1997.<sup>37</sup> As discussed further below, Commerce proposes to adopt new section 351.226 to address circumvention matters.

We propose revising paragraph (a) to set forth the general purpose and rules which govern scope proceedings. This is distinguished from the current paragraph (a), which governs both scope proceedings and circumvention proceedings. Commerce is now proposing that circumvention proceedings under section 781 of the Act be covered by a new regulation, proposed section 351.226. An additional significant change in this proposed rule, which would be codified in proposed paragraph (a) and throughout revised section 351.225, eliminates the distinction between a simpler, or informal, scope ruling procedure (*i.e.*, a ruling based upon the application) and a formal scope inquiry. This is discussed in further detail below. Proposed paragraph (a) also explains that, unless otherwise specified in revised section 351.225, Commerce’s existing procedures contained in subpart C (*i.e.*, relating to factual information (sections 351.102(b)(21) and 351.301) and the extension of time limits (section 351.302)) apply to scope inquiries.

Additionally, regarding the term “clarify” in current paragraph (a), the courts have used this term to try to draw

<sup>36</sup> See *Target Corp. v. United States*, 609 F.3d 1352, 1355 (Fed. Cir. 2010).

<sup>37</sup> See 1996 Proposed Rule, 61 FR at 7321–22; 1997 Final Rule, 62 FR at 27327–30. Section 351.225 in its current form adopted many of the existing procedures from the preceding regulations, sections 353.29 and 355.29, which were issued in 1990. See 1996 Proposed Rule, 61 FR at 7321 (“With a few exceptions, section 351.225 is substantively unchanged from existing §§ 353.29 and 355.29{ }”); see also *Antidumping and Countervailing Duties, Interim Final Rule*, 55 FR 9046 (March 9, 1990) (*1990 Interim Final Rule*) (“To implement section 781 of the Act (as added by section 1321 of {the Omnibus Trade and Competitiveness Act of 1988}), new §§ 353.29 and 355.29 establish procedures for the Secretary to conduct inquiries to determine whether merchandise is included within the scope of an existing antidumping or countervailing duty finding or order. The procedures apply to all scope determinations, including those under section 781 of the Act. In applying these procedures to scope determinations other than those under section 781, {Commerce} is codifying existing practice.”).

a distinction between scope language which is “unambiguous” and therefore does not require “clarification” under the section 351.225 procedures, and scope language which is “ambiguous” and does require such “clarification.” In practice, the procedures under section 351.225 are intended to cover a wide variety of scope questions and are not intended to be restrictive to only those scenarios in which certain language in the scope requires “clarification.” Therefore, we have removed the term “clarify” from proposed paragraph (a). Additionally, proposed paragraph (a) explains that a scope ruling that a product is within the scope of the order is a determination that the product has *always* been within the scope of the order. As explained further below in the discussion of proposed section 351.225(l), the fact that an importer did not declare merchandise as subject to an AD and/or CVD order for a period of time before Commerce issued a scope ruling finding that such merchandise was covered does not justify treating entries that preceded that scope ruling as non-subject merchandise. Accordingly, scope rulings will be applied to all unliquidated entries of subject merchandise, as discussed further below.

Furthermore, the procedures under section 351.225 are not intended to be the only means by which Commerce may address scope questions that arise in its proceedings. The language in paragraph (b) in the current version of section 351.225, which states that Commerce “will” initiate a scope inquiry if certain information is available, also has raised questions about the agency’s authority to address scope questions outside the section 351.225 procedures. For example, Commerce has the existing authority to address scope issues in the context of another segment of the proceeding under the AD and/or CVD order, such as an administrative review or circumvention inquiry. Over time, there have been questions about Commerce’s discretion to self-initiate a scope inquiry under the current regulation when an interested party raises the possibility that its product is not covered by an order during the course of an administrative review under section 751(a) of the Act. Commerce has always argued that it has such authority under current laws and regulations. This issue would be addressed by revised paragraphs (b) and (i). In particular, revised paragraph (b) would clarify that Commerce “may” self-initiate a scope inquiry, if it believes such initiation is warranted; revised paragraph (i)(1)

would allow Commerce to address scope questions in another segment of the proceeding, such as an administrative review under section 351.213, a circumvention inquiry under new section 351.226, or a covered merchandise referral under new section 351.227, without separately having to initiate a scope inquiry under section 351.225. To be clear, Commerce would retain discretion to determine if self-initiation is warranted under section 351.225(b) or to address scope questions outside the context of a scope inquiry. Moreover, the onus would remain on parties who wish to raise scope questions in another segment of a proceeding, such as an administrative review under section 351.213, to provide Commerce with the relevant information needed to address such matters (*i.e.*, by submitting a scope application and supporting information as provided in paragraph (c)).

Paragraph (c) addresses the information needed for interested parties<sup>38</sup> to file a scope ruling application. Domestic industries, foreign exporters, foreign producers, importers, and those considering exporting or importing merchandise to the United States all have different interests in Commerce making scope rulings on particular merchandise. This paragraph proposes certain amendments to address specific concerns which Commerce has identified with the current scope inquiry process. One concern is that scope ruling requests do not always include the requisite sufficient description and supporting information necessary for Commerce to complete an analysis. This has resulted in Commerce issuing numerous requests for further clarification and supporting evidence, which have further delayed its proceedings. Commerce has determined that one way to make this less pervasive is to require parties to fill out and file a standardized scope ruling

<sup>38</sup> The term “interested party” is defined in section 771(9) of the Act, and pertains, for example, to “foreign manufacturers,” “producers,” “exporters,” or “United States importers” “of subject merchandise.” However, the nature of a scope ruling is to determine whether the merchandise produced, imported by, or exported by a party is “subject” to an AD or CVD order. Thus, in many cases, the question of whether a party is an “interested party” is tied to the question of whether the merchandise at issue is determined to be subject merchandise or not. Accordingly, for purposes of these scope regulations, reference to the term “interested party” includes a party that potentially meets the definition of “interested party” under section 771(9) of the Act, depending upon the outcome of the scope inquiry. This clarification of the term “interested party” for purposes of this regulation is in no way intended to negate the requirement that the product is, or has been, in actual production as of the filing of the scope ruling application, as discussed below.

application which would be available to parties on Commerce’s website. Revised paragraph (c)(2) would list the information required which should be contained in the scope ruling application. It is understood that interested parties requesting a scope ruling may not have access to all of the information that would be requested. For example, a domestic interested party seeking a scope ruling on a product will not be likely to provide the narrative history of the production of the product at issue, including a history of earlier versions of the product, if this is not the first model of the product. For this reason, the regulation would require that the requested information in the scope ruling application be provided to the extent reasonably available to the requestor. The applicant would have to explain the reason it does not have certain requested information when filling out the scope ruling application, and Commerce would retain the ability to both ask supplemental questions about those explanations if necessary, as well as reject a scope ruling application if the information and explanations provided are insufficient.

The use of the term “particular product” in the current text of paragraphs (a) and (c) of section 351.225 has also generated questions over time. In practice, Commerce issues scope rulings, which generally apply to a particular interested party’s product, relying on the description provided by the interested party. Sometimes the description of the product does not lend itself to a broader ruling that applies to all similar products (for instance, the description of the product is specific to a party’s specific description, product number, contract, packaging, or manufacturing process, etc.). To address these concerns, proposed revisions to paragraph (c)(2)(ii) would require parties submitting scope ruling applications to provide a concise public description of the product at issue. It is Commerce’s intent that the description used throughout the scope inquiry and in the final scope ruling will reflect the “particular product” at issue—thereby enabling the public and CBP to more easily identify the product at issue.

Proposed revisions to paragraph (c)(2)(v) would also mandate that, in requesting a scope ruling on merchandise which has already been imported into the United States as of the filing of the scope ruling application, to the extent reasonably available, an applicant must provide a statement as to whether an entry of the product has been classified as subject to an AD/CVD order by the filer or reclassified as

subject to an AD/CVD order by CBP along with documentation, including print-outs of the CBP ACE entry summary information, identifying the product upon importation and other related commercial documents.

Additionally, proposed paragraph (c)(1) provides that the applicant must demonstrate that the product is or has been in actual production as of the filing of the scope ruling application.<sup>39</sup> It is Commerce's expectation that a party will be able to satisfy this requirement by providing the requisite information under proposed paragraphs (c)(2)(iii), concerning a narrative of the production history, and (c)(2)(iv), concerning the volume of annual production of the product for the most recently completed fiscal year.

Another procedural matter that has arisen is a party's reference to prior agency scope rulings and determinations in scope requests without the placement of those scope rulings, or the full source document, on the record of the segment of the administrative proceeding. Those determinations, along with any other relevant source document supporting the party's position, such as the petition or relevant documents from the underlying investigation, must be placed on the record for Commerce to be able to consider them as part of its analysis. Accordingly, paragraph (c)(2)(viii) would also require that full copies of relevant prior determinations by the Secretary (including scope rulings) and relevant excerpts of other documents identified in paragraph (k)(1) be placed on the administrative record if cited by an applicant for support of its arguments.

Additional changes under paragraphs (c), (d), and (e) deal with the distinction between an informal scope ruling procedure and a formal scope inquiry procedure. In the context of its scope ruling practice, there is a 45-day deadline for Commerce to either (A) issue a scope ruling based upon the scope ruling application and descriptions of the merchandise listed under paragraph (k)(1) pursuant to current paragraphs (c)(2) and (d), or (B) initiate a formal inquiry pursuant to current paragraph (e), which Commerce

adopted in the 1997 rulemaking.<sup>40</sup> This was initially intended to streamline the process and expedite review of certain, less complex scope issues, but in Commerce's experience this has not been the case. Instead, it has led to unnecessary delay and questions on the part of outside parties. For example, in this 45-day window, Commerce often solicits and receives new factual information and comments from numerous parties, leaving little time to consider the evidence and argument, and reach a well-reasoned decision within the time allotted. Frequently, Commerce must extend this deadline at least once before ultimately determining to formally initiate a scope inquiry (at which point, a new round of comments is triggered pursuant to paragraph (f), further delaying Commerce's decision). This has also led to questions from parties as to whether a decision to formally initiate a scope inquiry is a reflection of the difficulty of the issue, thus warranting analysis of the additional factors under paragraph (k)(2). Instead, a decision to formally initiate is often the result of the limited window in which Commerce has to consider the evidence and comments and reach a well-reasoned decision, even where the issue itself is neither complex nor controversial.

Thus, one change in these proposed regulations is that there would no longer be a distinction between an informal scope ruling procedure and a formal scope inquiry procedure, as the distinction between those two procedures sometimes causes confusion and adds unnecessary delay to the proceedings. Proposed paragraph (d), once a scope ruling application has been filed and appropriately served on all necessary parties, would allow Commerce 30 days to determine whether to accept or reject the scope ruling application. If Commerce determines that the scope ruling application is deficient or otherwise unacceptable, Commerce could reject it with an explanation. The applicant may correct the problems and refile the scope ruling application, restarting the regulatory deadlines. On the other hand, if Commerce does not reject the scope ruling application, then after 31 days, a scope inquiry would be deemed initiated. At that point, Commerce cannot reject the scope ruling application for deficiencies, but could

demand supplemental information if necessary.

On a related matter, revised section 351.225 would provide that all scope rulings be issued pursuant to a scope inquiry consistent with this regulatory provision, with certain exceptions. For example, Commerce recognizes that there may be instances in which Commerce has already expressly considered the product at issue, and thus a new scope inquiry is not necessary to address the issue. In such instances, new paragraph (m)(1) discussed below would allow for Commerce to notify parties that it is applying a prior scope ruling to products with the identical physical description from the same country of origin. It is Commerce's intent that this notification would serve in place of a final scope ruling under new paragraph (h), but the requirements of paragraph (h) would still apply. As another example, as noted above and discussed further below, under proposed paragraph (i), Commerce would be able to address scope questions in the context of another segment of the proceeding, as a means of preserving departmental resources. Additionally, under revised paragraph (f)(6) discussed below, Commerce would be able to rescind a scope inquiry under appropriate circumstances.

Proposed revisions to paragraph (e) would provide new deadlines for scope inquiries. The current provision indicates that informal scope rulings based upon the application under the current version of § 351.225(d) would be completed within 45 days of receipt of a scope ruling application. But years of experience have shown Commerce that this is a difficult and frequently unworkable deadline, for the reasons discussed above. Accordingly, the proposed deadlines are timed off the initiation of the scope inquiry, with most scope inquiries being completed within 120 days (which is consistent with current paragraph (f)(5) of § 351.225). If good cause exists, however, such as the need for further information on the record, or the issuance of a preliminary scope ruling, Commerce would have the authority under proposed paragraph (e)(2) to extend the deadline an additional 180 days, up to 300 days—similar to the deadlines allowed for circumvention inquiries under section 781(f) of the Act.

Proposed revisions to paragraph (f) would clarify certain procedures for scope inquiries. As an initial matter, as noted above, proposed paragraph (a) explains that, unless otherwise specified in proposed section 351.225, Commerce's existing procedures

<sup>39</sup> See *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures*, 73 FR 3634, 3639 (January 22, 2008) (“{Commerce’s} practice is to issue a scope ruling or conduct a scope inquiry when the party requesting the ruling can show that the specific product in question is actually in production. The product need not be imported into the United States so long as the requestor can show evidence that the product is in production. {Commerce} will not issue a scope ruling or conduct a scope inquiry on a purely hypothetical product.”).

<sup>40</sup> See *1996 Proposed Rule*, 61 FR at 7321–22; *1997 Final Rule*, 62 FR at 27327–30. These procedures clarified Commerce's existing practice as codified in sections 353.29 and 355.29, adopted in the 1990 rulemaking. See *1990 Interim Final Rule*, 55 FR at 9046.

contained in subpart C apply to scope inquiries. Proposed paragraph (f) therefore identifies procedures which otherwise deviate from subpart C, including the deadlines for parties to comment and submit new factual information regarding Commerce's self-initiation of a scope inquiry under paragraph (b) and a scope ruling application. These deadlines would generally maintain the deadlines of current paragraph (f) (*i.e.*, 20/10 day comment/rebuttal periods). Additionally, proposed paragraph (f) would maintain Commerce's ability to issue questionnaires and conduct verifications, as appropriate, as well as its discretion to limit the number of respondents in a scope inquiry, if warranted. However, proposed paragraph (f)(4) would also establish deadlines regarding comments and rebuttal comments after a preliminary scope ruling under proposed paragraph (g) if the preliminary scope ruling is not issued concurrently with the initiation of the scope inquiry. These deadlines would be reduced from 20 to 10 days and 10 to 5 days, respectively.

Proposed paragraph (f)(5) would provide Commerce with the ability to establish alternative procedures if the preliminary scope ruling issued under proposed paragraph (g) is issued concurrently with the initiation of the scope inquiry.<sup>41</sup> Additionally, proposed paragraph (f)(6) would allow Commerce to maintain the discretion to rescind a scope inquiry, as appropriate. Commerce intends to exercise this discretion as a means of preserving departmental resources, for example, in instances in which a scope matter may be better addressed in another segment of a proceeding (*see* revised paragraph (i)(1)) or instances in which a new scope inquiry or scope ruling is unnecessary because of a related or prior scope ruling (*see* revised paragraph (m)). In addition, Commerce may rescind a scope inquiry, for example, if an interested party has failed to provide information necessary for Commerce to issue a scope ruling.<sup>42</sup> Finally, proposed paragraph (f)(7) would continue to provide Commerce with the discretion to consider extension requests and alter the comment deadlines during the scope inquiry, as appropriate.

Proposed revisions to paragraph (g) address the potential issuance of a

preliminary scope ruling and mostly tracks paragraph (f)(3) of the current regulation, with some exceptions. Under current paragraph (f)(3), whenever Commerce determines that a scope inquiry presents an issue of significant difficulty, Commerce will issue a preliminary scope ruling, based upon the available information at the time, as to whether there is a reasonable basis to believe or suspect that the product is covered by the scope. Under proposed paragraph (g), Commerce would, pursuant to the same "reasonable basis to believe or suspect" standard, maintain the discretion to issue a preliminary scope ruling, but Commerce need not consider whether the inquiry presents an issue of significant difficulty. Similar to existing paragraph (g), proposed paragraph (g) would allow Commerce to issue a preliminary scope ruling, based on available information at the time, as to whether there is a reasonable basis to believe or suspect that the product is covered by the scope of the order. Further, proposed paragraph (g) would maintain Commerce's discretion to issue a preliminary scope ruling at the same time Commerce initiates a scope inquiry. This could be done, for example, if the scope question before Commerce previously has been addressed by Commerce, or Commerce finds the issue to be relatively straightforward. In determining whether to issue a preliminary scope ruling, Commerce may consider the complexity of the issues and the arguments raised by parties.

It is worth noting that, in accordance with proposed paragraph (n)(4), if Commerce issues a preliminary scope ruling, it would no longer be required to notify all parties on the scope service list of that preliminary ruling. Instead, only parties who are on the segment-specific public service list or the APO service list (*see* § 351.103(d)), as applicable, would receive notice of the preliminary scope ruling, as with any other document that is placed on the record by the agency, through Commerce's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) system.

Proposed revisions to paragraph (h) largely follow paragraph (f)(4) of the current regulation concerning the issuance of final scope rulings, with a few exceptions. Significantly, proposed paragraph (h) provides that Commerce would "convey" the final scope ruling in accordance with the requirements of section 516A(a)(2)(A)(ii) of the Act, which states that judicial review of "class or kind" determinations under

section 516A(a)(2)(B)(vi) of the Act, such as scope rulings, are based off of the date of mailing of such determination. Section 516A(a)(2)(A)(ii) of the Act further provides that only "an interested party who is a party to the proceeding" may commence judicial review procedures. Therefore, Commerce proposes to convey the final scope ruling in the manner prescribed by section 516A(a)(2)(A)(ii) of the Act to interested parties who are parties to the proceeding (*see* § 351.102(b)(36)), because these are the only parties that have legal standing to appeal the final scope ruling under section 516A(a)(2)(A)(ii) of the Act. However, as noted above, as with any other document that is placed on the record by the agency, all parties on the segment-specific service lists will be notified of the final scope ruling through Commerce's electronic ACCESS system.

Additionally, paragraph (h) states that Commerce will "promptly" convey the scope ruling to all parties to the proceeding. The use of this term is consistent with the use of the same term in new §§ 351.226 and 227. It is Commerce's expectation that prompt conveyance of the scope ruling normally would occur no more than 5 business days from the issuance of the final scope ruling. Consistent with sections 516A(a)(2)(A)(ii) and (B)(vi) of the Act, judicial review procedures would be commenced based on the date of conveyance, as opposed to the date of receipt, of a scope ruling.

As noted above, proposed paragraph (i) would clarify the interaction between scope inquiries and other segments of the proceeding and would replace paragraphs (f)(6) and (l)(4). These revisions acknowledge Commerce's discretion to determine after reviewing all of the information on the record, on a case-by-case basis, the most efficient means of addressing a scope question in an effort to preserve departmental resources. For example, Commerce would be able to address scope questions in another segment of a proceeding, such as an administrative review under § 351.213, a circumvention inquiry under new § 351.226, or a covered merchandise inquiry under new § 351.227, without invoking the § 351.225 procedures; conduct a scope inquiry under § 351.225 in addition to another segment of the proceeding; or align the deadlines, maintaining them as separate segments of the proceeding. Further, under revised paragraph (i)(3), during the pendency of a scope inquiry or upon issuance of a final scope ruling, Commerce could consider the products

<sup>41</sup> To be clear, Commerce already has the authority under existing regulations to issue a preliminary scope ruling concurrently with initiation.

<sup>42</sup> Commerce also maintains the discretion to apply facts available pursuant to section 776 of the Act, as appropriate, rather than rescind a scope inquiry.



subject to the scope inquiry in an ongoing administrative review, as appropriate (*i.e.*, if sufficient time remains in the administrative review to collect and analyze such information), although it would not be required to do so.

Proposed revisions to paragraphs (j) and (k) address the substance of Commerce's scope ruling determinations. Aside from the description of the merchandise subject to the scope of an order, an essential element in determining whether a product is covered by an order is the country of origin of the product at issue. Therefore, proposed paragraph (j) would codify Commerce's longstanding "substantial transformation" test or analysis, which is used to determine the country of origin of a product or products.<sup>43</sup> In particular, Commerce generally uses a substantial transformation analysis to determine whether a product's country of origin has changed as a result of processing that occurs in third countries before a product is imported into the United States. The courts have upheld Commerce's substantial transformation analysis,<sup>44</sup> which has, in different iterations, looked at factors such as whether the processed downstream product is a different class or kind of merchandise than the upstream product; the technical, physical, and chemical characteristics of the product and its parts; the intended end-use of the product; the cost of production and value added to the product as a result of further processing in third countries; the nature and sophistication of processing in third countries; the level of investment in third countries; and where the essential component of the product is produced or where the essential characteristics of the product are imparted. In addition, Commerce has considered other relevant case-specific factors in applying its substantial transformation analysis when necessary.

Additionally, Commerce continues to recognize that, in addressing country of origin issues in the context of

Commerce proceedings, Commerce is not bound by the country of origin determinations of other agencies, such as CBP.<sup>45</sup> While such determinations may be informative, when determining the scope of AD/CVD orders, Commerce's country of origin analysis is ultimately made independently and is based upon the information on the record of the proceeding.

Furthermore, if for some reason the substantial transformation test is not appropriate for purposes of determining the country of origin of a particular product, Commerce would continue to retain the ability to apply another reasonable test to determine the country of origin of a specific product. This would particularly be the case where "rote application" of the substantial transformation test would be inadequate to remedy the unfair pricing decisions and/or unfair subsidization because it would exclude the very imports found to injure the domestic industry."<sup>46</sup>

Paragraph (k) of current § 351.225 describes the substantive basis for Commerce's scope rulings, and, as a result, has been the source of much litigation over the life of the regulation. Although the U.S. Court of International Trade (CIT) and the U.S. Court of Appeals for the Federal Circuit (CAFC) have generally recognized that Commerce has "substantial freedom to interpret and clarify" the scope of AD/CVD orders through scope rulings,<sup>47</sup> the Courts have held that Commerce's scope rulings must still be issued in accordance with the requirements of its scope ruling regulations, and in particular, the sequence of factors to consider set forth in paragraph (k). In light of Commerce's years of experience drafting scope rulings, and numerous holdings of the CIT and CAFC addressing Commerce's scope determinations, Commerce is proposing that certain modifications be made to paragraph (k). As an initial matter, current paragraph (k) makes no specific reference to the scope language as the starting point for any scope analysis. However, the CAFC has added this initial step, sometimes referred to as a "k(0)" analysis.<sup>48</sup> Recently, the CAFC

clarified the legal framework required of a scope ruling determination:

First, the plain language of an antidumping order is paramount in determining whether particular products are included within its scope. If the scope is unambiguous, it governs. In reviewing the plain language of a duty order, Commerce must consider the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission. Second, if the above sources do not dispositively answer the question, Commerce may consider the (k)(2) factors.<sup>49</sup>

Accordingly, proposed paragraph (k) would codify this judicially created and affirmed framework, explaining that the primary analysis in any scope inquiry is the language of the scope itself. Revised paragraph (k) also explains that Commerce may issue its scope ruling on this basis alone if the language of the scope, including the descriptions of merchandise expressly excluded from the scope, and the language of the scope as a whole, is dispositive. Furthermore, in light of our experience and prior court holdings, proposed paragraph (k)(1) indicates that, in considering the plain language of the scope, Commerce, at its discretion, could also consider the underlying petition, Commerce's investigation, prior Commerce determinations (including but not limited to prior scope rulings,<sup>50</sup> memoranda, or clarifications),<sup>51</sup> and

scope of antidumping or countervailing orders. Commerce has filled the statutory gap with a regulation that sets forth a two-step test for answering scope questions, 19 CFR 351.225(k), and our case law has added another layer to the inquiry."<sup>52</sup> (internal citations and punctuation omitted).

<sup>49</sup> *Meridian Prods., LLC v. United States*, 890 F.3d 1272, 1277–78 (Fed. Cir. 2018) (*Meridian*) (internal citations and punctuation omitted).

<sup>50</sup> This is not limited to Commerce's scope rulings within the same order, and Commerce may consider its analysis of the same or similar scope language used in other orders.

<sup>51</sup> Scope clarifications are not defined in the statute or regulation. Scope clarifications are sometimes issued during an ongoing investigation if arguments or information pertaining to the scope of an investigation comes to Commerce's attention following the issuance of a scope memorandum and Commerce determines that it is necessary to place a clarification on the administrative record to address those scope claims. Scope clarifications also may be issued after an AD/CVD order has been in place for a period of time and Commerce has found that multiple parties have requested scope rulings over and over covering the same or similar scope language. In that situation, Commerce may issue a scope clarification addressing that particular scope language, and then further memorialize that clarification in the form of an interpretive footnote to the scope of the order. Following the issuance of a scope clarification in that context, the interpretive footnote will normally accompany the text of the scope itself when it is published in Commerce's administrative determinations and instructions to CBP. The procedures and timetables set forth in these regulations covering scope

<sup>43</sup> See *Bell Supply Company, LLC v. United States*, 888 F.3d 1222, 1228–29 (Fed. Cir. 2018) ("A substantial transformation occurs where, 'as a result of manufacturing or processing steps . . . {,} the {product} loses its identity and is transformed into a new product having a new name, character and use.'" (internal citations omitted).

<sup>44</sup> See *E.I. DuPont de Nemours & Co. v. United States*, 8 F. Supp. 2d 854, 858 (CIT 1998) ("The 'substantial transformation' rule provides a yardstick for determining whether the processes performed on merchandise in a country are of such significance as to require the resulting merchandise to be considered the product of the country in which the transformation occurred.").

<sup>45</sup> While the "Department may consider the decisions of Customs, it is not obligated to follow, nor is it bound by, the classification determinations of Customs. . . ." *Wirth Ltd. v. United States*, 5 F. Supp. 2d 968, 973 (CIT 1998) ("Commerce, not Customs, has authority to clarify the scope of AD/CVD orders and findings.").

<sup>46</sup> See *Canadian Solar*, 918 F.3d at 919.

<sup>47</sup> *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002) (quotation marks and citations omitted).

<sup>48</sup> See *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017) ("No specific statutory provision governs the interpretation of the

determinations of the ITC. In addition to the (k)(1) sources, Commerce could also consider traditional interpretive tools, such as a dictionary and industry usage of a particular word or phrase, or other record evidence, to provide context and understanding in considering the plain language of the scope. However, in the event of a conflict between these interpretive tools or other record evidence and the sources identified in paragraph (k)(1), Commerce would adopt the interpretation supported by the (k)(1) sources.<sup>52</sup>

Proposed revisions to paragraph (k)(2) would maintain that if, based on the scope language and the factors enumerated above, Commerce is unable to determine whether a product is covered by a scope, then Commerce would consider the listed five additional factors.<sup>53</sup> These factors are largely consistent with current paragraph (k)(2), with some minor clarifications. It is Commerce's intent that the first factor—the characteristics of the product, including the technical, physical, or chemical characteristics of the product—may be given greater weight than the other individual factors. Nonetheless, Commerce should consider each of the factors in making its determination under paragraph (k)(2).

Finally, proposed paragraph (k)(3) would codify and clarify Commerce's analysis for certain products, colloquially referred to as “mixed media” products (*i.e.*, subject merchandise assembled or packaged with non-subject merchandise), which has been recognized by the courts.<sup>54</sup> In some instances, the scope language of an order may clearly address these types of products.<sup>55</sup> In such cases, a “mixed-

media” analysis may not be necessary. However, because scope language is written in general terms, the language itself may not contemplate assembled or packaged items that contain subject merchandise as a component. Therefore, in conducting a scope inquiry, Commerce may need to conduct a “mixed-media” analysis to determine whether a combination of products or a component thereof constitutes subject merchandise. Under such situations, in accordance with Commerce's practice and proposed paragraph (k)(3), Commerce could first determine whether the component product, if separated from the other component products, would be considered covered by the scope. If the determination is that the product would be covered by the scope, then Commerce would conduct a further analysis and determine if the product is nonetheless excluded from the scope through its inclusion in the combined product. To determine if the product is covered or excluded from the scope of the order, Commerce would consider the practicability of separating the in-scope component for repackaging or resale, the measurable value of the in-scope component as compared to the measurable value of the merchandise as a whole, and the ultimate use or function of the in-scope component relative to the ultimate use or function of the merchandise as a whole. If Commerce determines that the component product at issue is covered by the scope of an order, but the other components of the larger merchandise are not covered by the scope of an order, the value of the in-scope subject component should be reported to CBP for AD/CVD purposes in accordance with CBP's reporting requirements.

Paragraph (l) of the current regulation, governing the suspension of liquidation and requirement of cash deposits for entries affected by Commerce's scope rulings, also has been the source of varying interpretations and litigation and requires revision.

As an initial matter, as discussed above, AD and CVD orders provide the legal basis for the suspension of liquidation of importations of subject merchandise that enter for consumption on or after the date of publication of that order, throughout the life of the order,

scope does not include the non-aluminum extrusion components of subassemblies or subject kits.”); *Narrow Woven Ribbons With Woven Selvedge From Taiwan and the People's Republic of China: Amended Antidumping Duty Orders*, 75 FR 56982, 56983 (September 17, 2010) (“Narrow woven ribbons subject to the orders may. . . be included within a kit or set such as when packaged with other products, including but not limited to gift bags, gift boxes and/or other types of ribbon.”).

and until the order is revoked.<sup>56</sup> Further, the publication in the **Federal Register** of Commerce's preliminary and final investigation determinations, as well as the publication of the resulting orders, serve as notice to producers, exporters, and importers that their merchandise might be covered by those investigations and/or orders, and, therefore, it is incumbent upon the importing parties to (1) declare the status of their merchandise truthfully to CBP upon entry, or (2) seek a scope ruling from Commerce if there is a question as to whether the merchandise is covered by an AD and/or CVD order. As discussed above for proposed paragraph (a), a scope ruling that a product is within the scope of the order is a determination that the product has *always* been within the scope of the order, and Commerce's scope regulations must reflect that determination. Put another way, if a party has imported merchandise and declared that merchandise as not covered by the scope of an order, and then Commerce issues a scope ruling finding that such merchandise is subject to an order, under these proposed regulations Commerce's scope ruling would apply to all unliquidated entries of the merchandise, as discussed below. Importing parties are already notified through the publication in the **Federal Register** of Commerce's determinations and/or order, and, therefore, cannot claim ignorance or reliance on another agency's determinations or actions to avoid the application of Commerce's scope ruling to their merchandise. Commerce proposes to amend paragraph (l) as necessary in light of these considerations.

Additionally, current paragraph (l) reflects the distinction between a formal scope inquiry as provided under current paragraphs (b), (e), and (f) and a final scope ruling based on the application under current paragraph (d) (also referred to as an informal scope inquiry). Although current paragraph (l) expressly addresses suspension of liquidation and requirement of cash deposits under the first procedure, it is largely silent with respect to scope rulings based on the application—and this silence has been the source of some confusion and litigation. As discussed above, we are proposing to eliminate the distinction between these two procedures, and, with these proposed changes, we are proposing to adapt the current structure of paragraph (l)

inquiries and scope rulings do not apply to scope clarifications, nor do they inhibit Commerce's ability or discretion to issue such scope clarifications.

<sup>52</sup> See *Meridian*, 890 F.3d at 1280–81 (overruling a CIT decision that adopted the common and commercial meaning and dictionary definition of a scope term over Commerce's interpretation in prior scope rulings).

<sup>53</sup> These factors are sometimes referred to as the Diversified Products factors because they were first articulated in *Diversified Prods. Corp. v. United States*, 572 F. Supp. 883 (CIT 1983). See *Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1355 & n.2 (Fed. Cir. 2010) (*Walgreen*).

<sup>54</sup> See *Mid Continent Nail Corporation v. United States*, 725 F.3d 1295, 1302–04 (Fed. Cir. 2013) (*Mid Continent Nail*) (referencing the “mixed-media” analysis); *Walgreen*, 620 F.3d at 1355–57 (same).

<sup>55</sup> See, e.g., *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 FR 30650, 30651 (May 26, 2011) (“The scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise unless imported as part of the finished goods ‘kit’ defined further below. The

<sup>56</sup> See *Ugine & ALZ Belgium v. United States*, 551 F.3d 1339, 1340–43 (Fed. Cir. 2009); *Am. Power Pull Corp. v. United States*, 121 F. Supp. 3d 1296, 1300–02 (CIT 2015).

accordingly to reflect a single scope inquiry procedure. That is, all scope rulings would be subject to the same procedures under revised paragraph (l), and there will no longer be any distinction between formal and informal scope inquiries (as discussed above).

Revised paragraph (l)(1) provides that when Commerce initiates a scope inquiry under proposed paragraphs (b) or (d), it will notify CBP of the initiation and direct CBP to continue the suspension of liquidation of all unliquidated entries of products subject to the scope inquiry that are already subject to the suspension of liquidation,<sup>57</sup> until appropriate liquidation instructions are issued.<sup>58</sup> Further, Commerce will direct CBP to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order. These revisions are consistent with current paragraph (l)(1) to the extent that both call for the suspension of liquidation and application of cash deposits for already-

<sup>57</sup> Entries may be already subject to the suspension of liquidation under a variety of scenarios. As recently affirmed by the CAFC and as discussed in more detail above, CBP has independent authority to suspend liquidation of entries that CBP determines are within the scope of an AD or CVD order; such determinations are “final and conclusive” unless appealed to Commerce through a request for a scope ruling. See *Sunpreme III*, 946 F.3d at 1317–18. Additionally, section 517 of the Act (concerning CBP’s civil administrative investigations of duty evasion of AD/CVD orders) authorizes CBP to suspend liquidation of entries for which it has reasonable suspicion, or, in the case of final determination, substantial evidence, that covered merchandise is entered into the United States through evasion under section 517(e) and (d) of the Act.

<sup>58</sup> At the time Commerce initiates a scope inquiry, there may be entries of products subject to the scope inquiry that CBP has liquidated but for which liquidation is not yet final (e.g., entries under protest pursuant to 19 U.S.C. 1514). Consistent with current practice and in accordance with CBP’s statutory and regulatory authorities, Commerce expects that CBP may stay its action on these entries pending the outcome of the scope inquiry. This is consistent with the CAFC’s decision in *Thyssenkrupp Steel North America, Inc. v. United States*, 886 F.3d 1215 (Fed. Cir. 2018). In *Thyssenkrupp*, the CAFC recognized that instructions revoking an antidumping duty order superseded previously issued liquidation instructions, as of the effective date of the revocation, and applied to entries under protest that entered the United States after the effective date of the revocation. *Id.* at 1223–27. The CAFC explained that this “serves the purpose of the protest mechanism—to allow agency consideration of issues after an initial liquidation determination—and respects the longstanding principle . . . that newly governing law, if retroactive to particular events, is to be applied to those events in ordinary, timely initiated direct-review proceedings.” *Id.* at 1224. A similar point was recognized in *TR International*, Slip Op. 20–34 at \*11, currently on appeal, concerning CBP’s potential application of a Commerce scope ruling to entries under protest.

suspended entries to continue after initiation of a formal scope inquiry.

However, this also deviates from current paragraphs (l)(1) and (2), which provide that when Commerce issues a preliminary scope ruling finding the product is not covered by the scope of the AD and/or CVD order (i.e., a “negative” scope ruling), it will instruct CBP to terminate suspension of liquidation and refund all cash deposits for already-suspended entries.

Notably, revised paragraph (l)(2) (pertaining to preliminary scope rulings) does not require Commerce to notify CBP of a negative preliminary scope ruling. In such instances, suspension of liquidation and application of cash deposits for already suspended entries (if any) under revised paragraph (l)(1) will remain in effect pending Commerce’s subsequent issuance of a final scope ruling and appropriate instructions as described in revised paragraphs (l)(3) or (4). Thus, any suspension of liquidation prior to the negative preliminary scope ruling will remain in effect until the conclusion of the scope inquiry to ensure appropriate application of AD/CVD duties in the event of a final scope ruling finding the product is covered by the scope of the AD and/or CVD order (i.e., an “affirmative” scope ruling). Further, under revised paragraph (l)(4), if Commerce issues a negative final scope ruling that the product is not covered by an order, and the product is not otherwise subject to suspension as a result of another segment of a proceeding, such as a circumvention inquiry under § 351.226 or a covered merchandise inquiry under § 351.227, for merchandise that was suspended and for which cash deposit rates were paid, Commerce would instruct CBP to terminate suspension of liquidation and refund cash deposits (if any) on entries of this non-subject merchandise.

Paragraphs (l)(2) and (3) also have been revised to address the considerations highlighted above, specifically, to ensure that the results of affirmative scope rulings are appropriately applied to all entries of subject merchandise, which should be covered by those rulings. Therefore, under revised paragraphs (l)(2) and (3), at the time of the first affirmative scope ruling (preliminary or final), Commerce will direct CBP to suspend liquidation of all unliquidated entries of products subject to the scope inquiry that are not already subject to the suspension of liquidation (and continue suspension of liquidation for any entries already suspended as provided under revised paragraph (l)(1)). This action would apply to all such entries dating back to

the earliest suspension date under the order, which is normally the preliminary determination in the underlying investigation. Further, Commerce will direct CBP to apply the applicable cash deposit rate to all such entries. As provided under revised paragraphs (l)(2) and (3), these instructions will remain in place until appropriate liquidation instructions are issued pursuant to §§ 351.212 and 351.213.<sup>59</sup>

This deviates from current paragraph (l) in certain respects. As stated above, current paragraph (l) expressly addresses suspension of liquidation and requirement of cash deposits for entries in a formal scope inquiry, but is less clear when Commerce issues a final scope ruling based upon the application in an informal scope inquiry. For instance, current paragraphs (l)(2) and (3) provide that if Commerce issues an affirmative preliminary or final scope ruling pursuant to a formal scope inquiry, then “any suspension of liquidation” will continue. Where there has been no previous suspension of liquidation, Commerce will direct CBP (in the event of an affirmative preliminary or final scope ruling) to suspend liquidation of unliquidated entries dating back to the date of initiation of the scope inquiry.

Current paragraph (l)(3) also provides that if Commerce issues an affirmative final scope ruling based on the application, then “any suspension of liquidation” will continue. However, paragraph (l) does not expressly address instances in which Commerce issues an affirmative final scope ruling based upon the application (and thus, there has been no initiation of the scope inquiry) and entries have not already been suspended. Therefore, in such instances Commerce may direct CBP to suspend liquidation of all unliquidated entries subject to the scope inquiry not already subject to the suspension of liquidation (and continue suspension of liquidation for any entries already suspended), and apply the applicable cash deposit rates to such entries. This action applies to all such entries dating back to the earliest suspension date

<sup>59</sup> As discussed above, consistent with current practice and in accordance with CBP’s statutory and regulatory authorities, CBP may stay its action on entries of products that CBP has liquidated but for which liquidation is not yet final pending the outcome of a scope inquiry. Additionally, any instructions issued by Commerce directing CBP to “lift suspension of liquidation” and assess duties at the applicable AD/CVD rate would not limit CBP’s ability to (1) suspend liquidation/assess duties/take any other measures pursuant to CBP’s EAPA investigation authority under section 517 of the Act specifically, or (2) take any other action within CBP’s or HSI’s authority with respect to AD/CVD entries.

under the order, which is normally the preliminary determination in the underlying investigation.

In short, under the current regulatory framework, Commerce has employed two distinct approaches for suspension of liquidation and application of cash deposits reflecting the different procedures for informal and formal scope inquiries. As Commerce proposes to eliminate the distinction between these different procedures, and, in light of the considerations highlighted above, revised paragraph (l) largely mirrors the approach for informal scope inquiries discussed above. Specifically, as stated above, the proposed action under paragraphs (l)(2) and (3) would apply to all unliquidated entries dating back to the earliest suspension date under the order, which is normally the preliminary determination in the underlying investigation, as opposed to the date of initiation of the scope inquiry (*i.e.*, the approach currently taken in formal scope inquiries).

The reason that Commerce is proposing to take this approach to suspension of liquidation and application of cash deposits is to prevent a situation which, in the terms of the CAFC, “would encourage gamesmanship by importers” and “permit importers to potentially avoid paying duties. . . .”<sup>60</sup> Under the proposed approach, importers have an incentive to seek a determination as soon as possible whether a particular product is subject to the scope of an existing AD/CVD order. If they fail to do so, then they may be liable for AD/CVD duties if Commerce eventually determines that the products are covered by the scope of an existing AD/CVD order. By contrast, the alternative approach (*i.e.*, the approach currently taken in rulings based on a formal scope inquiry) would encourage gamesmanship, delay, and indeed, duty evasion. Foreign producers and exporters, as well as U.S. importers, would understand that all entries not already suspended prior to the date on which Commerce initiates a scope inquiry are essentially excused from AD/CVD duties, even if Commerce finds through the scope inquiry that such duties should have applied. In turn, this would lead parties to import as much as possible before any request for a scope

inquiry is filed, and then eliminate AD/CVD duty liability for such imports by requesting a scope inquiry. Such manipulation of AD/CVD duty liability would undermine the effectiveness and remedial purpose of the AD/CVD laws. Accordingly, Commerce proposes to adopt the procedures discussed above.

We recognize that the CAFC recently held that Commerce’s current regulations did not allow for “retroactively suspending liquidation to the issuance date” of the antidumping order in that litigation, where Commerce issued a final scope ruling based on the application in an informal scope inquiry.<sup>61</sup> However, the CAFC relied on the existing regulatory framework that delineates between an informal and formal scope inquiry described above, and that Commerce is now proposing to change in this proposed rule.<sup>62</sup> Therefore, notwithstanding the CAFC’s holding in *Fasteners*, Commerce is not precluded from amending its regulations through notice and comment procedures to adopt the procedures discussed herein.

Additionally, to the extent the CAFC relied on concerns in the *1997 Final Rule* regarding potential retroactive suspension of liquidation,<sup>63</sup> those concerns pertained to the inconvenience to importers and exporters if domestic industries filed a scope request based “on nothing more” than a mere “allegation” and Commerce began suspension of liquidation on entries not already subject to suspension of liquidation.<sup>64</sup> This was in response to a suggestion that, at the time Commerce initiates a formal scope inquiry based on a scope request, Commerce should instruct CBP to suspend liquidation of any unliquidated entries.<sup>65</sup> However, Commerce’s proposed regulation does not adopt such a position. Rather, Commerce proposes that only upon issuance of an affirmative preliminary or final scope ruling will Commerce direct that any unliquidated entries under the order (dating back to the earliest suspension date under the order) be suspended. This proposal is consistent with the *1997 Final Rule* statement that “the Department will not order the suspension of liquidation until it makes either a preliminary or final affirmative scope ruling, whichever occurs first.”<sup>66</sup> The difference is that the *1997 Final Rule* as promulgated in

the current regulation imposes a “cut-off” of the initiation date of the scope inquiry—the proposed regulation removes this limitation so that any unliquidated entries found within the scope of the order appropriately will be subject to duties, not just those that entered after the initiation date.<sup>67</sup>

This exercise of Commerce’s discretion is reasonable and balanced. As explained above, Congress, and the courts, have long recognized that Commerce has the vested authority to administer the trade remedy laws in accordance with their intent, and has the discretion to take appropriate enforcement measures to ensure the effectiveness of its AD/CVD orders by preventing duty evasion and circumvention.<sup>68</sup> Further, over the last twenty years, the United States has faced various complications in fully collecting AD and CVD duties from the obligated parties.<sup>69</sup> Although Commerce is cognizant of the concerns raised in the *1997 Final Rule* regarding the risk of potential unfairness to certain importers who genuinely may not be aware that their products are within the scope of an order until Commerce issues a ruling, Commerce cannot distinguish between importers with a genuine misunderstanding from those who (1) have failed to do their due diligence by reviewing Commerce scope descriptions or past scope rulings, or (2) are aware of their potential (or actual) AD/CVD liability and have opted not to seek a scope ruling or enter their merchandise as subject to an AD/CVD order, so as to avoid the likely application of AD/CVD duties. On balance, Commerce has determined that the very real risk and concerns of duty evasion, circumvention, and duty collection should guide its updated regulations.

Commerce also has considered the practical effect this change in policy may have on importers’ liability. Significantly, the statute generally directs CBP to liquidate entries which have not been declared as subject to an AD/CVD order within one year of entry.<sup>70</sup> Therefore, practically speaking, it is unlikely that once Commerce issues

<sup>60</sup> *Sunprime III*, 946 F.3d at 1317 and 1321. In *United Steel and Fasteners, Inc. v. United States*, 947 F.3d 794 (Fed. Cir. 2020) (*Fasteners*), discussed further below, the CAFC did not disagree with Commerce’s concerns of potential “gamesmanship and delay” if importers did not report their merchandise to CBP as subject merchandise. See *Fasteners*, 947 F.3d at 803 (finding narrowly that “we do not find that such gamesmanship occurred in this case.”)

<sup>61</sup> See *Fasteners*, 947 F.3d at 800–03.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 802 (citing *1997 Final Rule*, 62 FR at 27327–38).

<sup>64</sup> See *1997 Final Rule*, 62 FR at 27328.

<sup>65</sup> *Id.*, 62 FR at 27327–28.

<sup>66</sup> *Id.*, 62 FR at 27328.

<sup>67</sup> As discussed above, consistent with current practice and in accordance with CBP’s statutory and regulatory authorities, CBP may stay its action on entries of products that CBP has liquidated but for which liquidation is not yet final pending the outcome of a scope inquiry.

<sup>68</sup> See generally section 781 of the Act; SAA at 892–95; *Tung Mung*, 219 F. Supp. 2d at 1343.

<sup>69</sup> See, e.g., U.S. Gov’t Accountability Office, Report to the Chairman, Committee on Finance, U.S. Senate, GAO 16–542, Antidumping and Countervailing Duties: CBP Action Needed to Reduce Duty Processing Errors and Mitigate Nonpayment Risk, at 13 (July 2016).

<sup>70</sup> 19 U.S.C. 1504(a); Section 504 of the Act.

a preliminary or final scope ruling finding a product covered by an AD/CVD order that there will be any unliquidated entries, other than those already suspended, more than a year old. In light of this, Commerce believes that it has settled on a policy which will effectuate its authority under the AD/CVD laws, while mitigating the harm to importers who may be acting in good faith by importing without paying duties. Moreover, should this change in policy be adopted in any final rule, the effective date of the policy change would be 30 days after publication of the final rule. Therefore, scope inquiries initiated prior to this effective date would maintain the initiation date of the inquiry as the furthest potential “retroactive” date for unliquidated entries not already suspended. That said, given that this proposal involves complex and technical issues, and given that important trade enforcement objectives are implicated, Commerce invites public comment on revised § 351.225(l). We will carefully consider all public comments before issuing a final rule that revises the existing regulation.

Proposed revisions to paragraph (m) address the application of scope rulings under two different scenarios. Paragraph (m)(1) would clarify that if a scope ruling application requests a scope ruling on a product, which is physically identical to that of another product for which a scope ruling has already been issued under the same order, Commerce could apply the previous scope ruling directly to the requested product without conducting a new scope inquiry. In that situation, for example, Commerce may issue a letter to the applicant and attach the scope ruling upon which it has relied, making its determination without the need of a larger, more detailed scope ruling. In such instances, the requirements for issuing a final scope ruling under paragraph (h) would apply.

Proposed paragraphs (m) and (n) together address a problem that arises when a scope ruling would apply equally to companion AD and CVD orders, which cover the same merchandise from the same country. In that scenario, an interested party submitting a scope ruling application pertaining to both orders pursuant to paragraph (c) must file its scope ruling application on the record of the AD proceeding only, and serve its scope ruling application to all parties on the annual inquiry service list for both the AD and CVD orders. The annual inquiry service list and related procedures are discussed in paragraph (n). Once Commerce initiates the scope inquiry,

Commerce would initiate and conduct that inquiry pertaining to both orders only on the record of the AD proceeding.<sup>71</sup> This is because Commerce has noticed over the years that, in certain inquiries, interested parties have inadvertently placed relevant information, for example, on the AD proceeding record, but not on the CVD proceeding record, or vice-versa. Once Commerce issues a final scope ruling on the record of the AD proceeding, Commerce would include a copy of that scope ruling on the record of the CVD proceeding. By limiting the scope inquiry only to the record of one proceeding, the chances of incomplete records, or confusing records being filed with courts on appeal, should be lessened.

Proposed revisions to paragraph (n) addresses service requirements. The current regulations require that any party that has ever participated in proceedings under an order must be served with a scope request based on the scope service list maintained on Commerce’s website. However, because some orders are decades old and the scope service list contains dozens of parties who have participated over the years, the proposed regulations would require that parties (other than the petitioner) who wish to be served with new scope ruling applications, under paragraph (c), or be notified of Commerce’s self-initiation of a scope inquiry, under paragraph (b), would have to take the affirmative step of filing a request for inclusion on the annual inquiry service list. Requests for inclusion on the annual inquiry service list must be filed with Commerce during the anniversary month of the AD or CVD order at issue, and Commerce would update the list on an annual basis at that time.

In addition, under proposed paragraph (n), once a scope ruling application is accepted by Commerce in accordance with paragraph (d), and after Commerce has notified parties on the annual inquiry service list of its self-initiation of a scope inquiry under paragraph (b), a segment-specific service list would be established, under § 351.103(d)(1), and the requirements of § 351.303(f) would apply. To be clear, once the segment-specific service list is established, parties on the annual inquiry service list for all orders that may be affected by the scope ruling would no longer be served with filings made pursuant to the scope inquiry, unless they had followed the procedures of § 351.103(d)(1) by filing an entry of

<sup>71</sup> Commerce will follow the procedures of paragraph (l) for both orders.

appearance in the relevant scope segment. However, as discussed further below, Commerce proposes to amend § 351.103(d)(1) to reflect that an interested party that submits a scope ruling application need not file an entry of appearance under § 351.103(d)(1), as that interested party would be placed on the segment-specific service list by Commerce.

Finally, proposed revisions to paragraphs (o) and (p) provide that Commerce would publish in the **Federal Register** on a quarterly basis a list of all of the final scope rulings issued within the previous three months and that scope rulings may, as appropriate, apply to suspension agreements as well, in accordance with § 351.208.

#### *Circumvention—Section 351.226*

When the current scope regulations were drafted, there was a belief that there were similarities between scope inquiries and circumvention inquiries sufficient to place them both in the same general regulatory provision. Circumvention inquiries (sometimes called anti-circumvention inquiries) are conducted pursuant to section 781 of the Act, while scope inquiries are referenced only in sections 516a(a)(2)(A)(ii) and 516a(a)(2)(B)(vi) of the Act. As the two latter provisions pertain to determinations by Commerce as to “whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order,” it is clear that Commerce derives its authority to conduct a scope ruling from multiple sources, including, for example, sections 771(25) (defining subject merchandise as a “class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, (or) an order”), 701(a) (directing Commerce to impose duties on a class or kind of merchandise being subsidized), and 731(a) of the Act (directing Commerce to impose duties on a class or kind of merchandise being dumped).

Because there is unique authority for these different inquiries and corresponding determinations, and we conduct the two proceedings differently, we have determined that it is appropriate to establish separate regulations for each type of proceeding. With respect to circumvention inquiries in particular, paragraphs (h), (i), (j), and (k) of proposed new § 351.226 are derived directly from section 781 of the Act and current regulation §§ 351.225(g), (h), (i), and (j).

Proposed paragraph (a) introduces new § 351.226 and briefly addresses

section 781 of the Act. Congress enacted section 781 of the Act to combat certain forms of circumvention of AD and CVD orders. When Congress passed the Omnibus Trade and Competitiveness Act in 1988, it explained that “[a]n order on an article presumptively includes articles altered in minor respects in form or appearance . . . .” The legislative history explains that the purpose of the circumvention statute “is to authorize the Commerce Department to apply AD and {CVD} orders in such a way as to prevent circumvention and diversion of U.S. law.”<sup>72</sup> Further, it indicates that Congress was concerned with the existence of “loopholes,” *i.e.*, foreign companies evading orders by making slight changes in their method of production, because such scenarios “seriously undermine the effectiveness of the remedies provided by the antidumping and countervailing duty proceedings, and frustrated the purposes for which these laws were enacted.”<sup>73</sup> Congress also recognized that “aggressive implementation of {the circumvention statute} by the Commerce Department can foreclose these practices.”<sup>74</sup> When implementing the Uruguay Round Agreements Act of 1994, the Administration expressed similar concerns about scenarios limiting the effectiveness of the AD duty law (*i.e.*, completion or assembly in a country other than the subject country).<sup>75</sup> Accordingly, Commerce “has been vested with authority to administer the antidumping laws in accordance with the legislative intent” and, thus, “has a certain amount of discretion {to act} . . . with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law.”<sup>76</sup> Proposed paragraph (a), as well as additional paragraphs discussed below, would codify these principles. Additionally, proposed § 351.226(a) tracks proposed § 351.225(a), and explains that, unless otherwise specified in proposed new § 351.226, Commerce’s existing procedures contained in subpart C (*i.e.*, relating to factual information (§§ 351.102(b)(21) and 351.301) and the extension of time limits (§ 351.302)) apply to circumvention inquiries.

Under proposed paragraph (b), Commerce could self-initiate a circumvention inquiry based on

information available to it, while under proposed paragraph (c), Commerce could initiate a circumvention inquiry based on the filing of an inquiry request by an interested party.<sup>77</sup> If Commerce self-initiates, it would publish a notice of initiation in the **Federal Register**. If a circumvention inquiry request is filed with Commerce, the filing party would have to notify all parties on the annual inquiry service list, set forth in proposed §§ 351.225(n) and 351.226(n). Proposed paragraph (c)(2) would also set forth the information to be included in a circumvention inquiry request. Commerce expects that such a request would include not only a detailed description of the merchandise allegedly circumventing the order, but also public identification of any producers, exporters, or importers of the merchandise.<sup>78</sup> As with respect to the revised scope ruling application described in proposed § 351.225(c), it is understood that not all of the information listed will be available to all interested parties requesting a circumvention inquiry. For example, the domestic industry may know certain details about a company’s “further manufacturing” of a product, but it may not be able to supply “a description of parts, materials, and the production process employed in the production of the product.” For this reason, proposed paragraph (c)(2) would require that the described information in the circumvention inquiry request be

<sup>77</sup> To be clear, Commerce already has the authority to self-initiate anti-circumvention inquiries under the current regulations. See 19 CFR 351.225(b). As noted above with respect to the proposed changes to the scope regulations, the term “interested party” is defined in section 771(9) of the Act, and pertains, for example, to “foreign manufacturers,” “producers,” “exporters,” or “United States importers” “of subject merchandise.” However, the nature of a circumvention proceeding is to determine whether the merchandise produced, imported by, or exported by a party is circumventing an AD or CVD order. Thus, in many cases, the question of whether a party is an “interested party” is tied to the question of whether the merchandise at issue is determined to be subject merchandise, or not. Accordingly, for purposes of these circumvention regulations, the term “interested party” includes a party that potentially meets the definition of “interested party” under section 771(9) of the Act, depending upon the outcome of the circumvention inquiry.

<sup>78</sup> Commerce recognizes that the identity of the producers, exporters and or importers alleged to be participants to circumvention may not be public, but that such information can be very important to the conduct of a circumvention inquiry. Accordingly, although the regulation requests public names be provided, if available, it also stresses that this provision is not intended to restrict the inclusion of the business proprietary names of those entities in the application if the requester has access to that data.

provided to the extent reasonably available to the requestor.

Proposed paragraph (d) would provide the deadlines for initiation of a circumvention inquiry. The deadline for initiation would be shortened from the current 45 days to 20 days, with a possible extension of up to a total of 35 days. However, initiation would only occur if Commerce concludes that the request properly alleges that the elements necessary for a circumvention determination under section 781 of the Act exist and is accompanied by information reasonably available to the interested party supporting these allegations. If the circumvention request is incomplete or otherwise unacceptable, the Secretary may reject the request and will reconsider it if it is resubmitted with sufficient documentation. Additionally, Commerce could defer its initiation of a circumvention inquiry if it determines that a scope question should first be addressed in a new or ongoing segment of a proceeding, such as a scope inquiry under the proposed revisions to § 351.225.

Paragraph (d)(2) refers to proposed § 351.225(i)(1), which expressly allows Commerce to address scope issues in the context of a circumvention inquiry, rather than conduct a separate scope inquiry under § 351.225. In certain circumstances, a party may submit a request for a circumvention inquiry, which requires Commerce to consider, in the first instance, whether the product at issue is already covered by the scope of the order at issue in its scope ruling procedures under § 351.225. If a product is already subject to the scope of the order, a circumvention inquiry may not be necessary. To consolidate its resources and avoid unnecessary duplication of effort, proposed §§ 351.226(d)(2) and 351.225(i)(1) would allow Commerce to address scope and circumvention issues more efficiently, by allowing scope issues to be addressed within the context of a circumvention inquiry.

Proposed paragraph (e) would provide the deadlines for Commerce to conduct circumvention inquiries, consistent with section 781(f) of the Act, which sets a deadline for circumvention determinations within 300 days from the date of publication of the initiation notice, to the maximum extent practicable. Proposed paragraph (e)(1) would establish a new deadline for preliminary determinations of 150 days from the date of publication of the initiation notice. Proposed paragraph (e)(2) restates the statutory deadline, and also sets forth that Commerce would only be able to extend the 300-

<sup>72</sup> Omnibus Trade Act of 1987, Report of the Senate Finance Committee, S. Rep. No. 100-71, at 101 (1987).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See SAA at 892-95.

<sup>76</sup> *Tung Mung*, 219 F. Supp. 2d at 1343 (quoting *Mitsubishi I*, 700 F. Supp. at 555, *aff’d* 898 F.2d at 1583).

day statutory deadline by no more than 65 days if it determined that an inquiry was extraordinarily complicated. It is Commerce's understanding that for an inquiry to be extraordinarily complicated there would exist, for example, novel facts or issues (such as facilities being ravaged by natural disasters or unusual or complicated government or business practices), or a large number of firms involved in the inquiry.

Proposed paragraph (f) would provide the procedures for circumvention inquiries, and largely tracks the proposed new scope inquiry procedures provided under proposed § 351.225(f), as well as the requirements provided under current § 351.225(f)(7) concerning notification to the ITC. This provision also explains that Commerce could limit the issuance of questionnaires to a reasonable number of respondents. In practice, Commerce could do this through a respondent selection process.

Proposed paragraph (f)(4) would also establish deadlines regarding comments and rebuttal comments after a preliminary circumvention determination under proposed paragraph (g) if the preliminary circumvention determination is not issued concurrently with the initiation of the circumvention inquiry. Proposed paragraph (f)(5) would provide Commerce with the ability to establish alternative procedures if the preliminary circumvention determination issued under proposed paragraph (g) is issued concurrently with the initiation of the circumvention inquiry.<sup>79</sup> Additionally, proposed paragraph (f)(6) would allow Commerce to forego or rescind a circumvention inquiry, in whole or in part, if a circumvention request is withdrawn or if Commerce issues a final determination in another segment of the proceeding under an AD and/or CVD order that the merchandise at issue in the circumvention inquiry is covered by that order (or orders). Commerce could also rescind if the basis for the initiation of the circumvention inquiry included multiple provisions under section 781 of the Act, and Commerce need only reach a final determination with respect to one of those provisions. This most frequently happens if a circumvention inquiry examines whether merchandise is altered in minor respects or later-developed merchandise, and Commerce need only address one of those provisions to reach an affirmative determination. Proposed paragraph

(f)(7) would allow Commerce to alter deadlines under this paragraph, as appropriate, including to align the deadlines of the circumvention inquiry with another segment of the proceeding, such as a scope inquiry, under proposed new § 351.225.

Finally, proposed paragraph (f)(8) would also maintain provisions regarding notification to the ITC under current § 351.225(f)(7). Unless otherwise specified, Commerce's current procedural regulations concerning factual information (19 CFR 351.102(b)(21) and 19 CFR 351.301), including the extension of time limits (19 CFR 351.302), apply to circumvention procedures and would continue to apply under the proposed revisions.

Proposed paragraph (g) follows proposed §§ 351.225(g) and (h) with respect to preliminary and final circumvention determinations. However, unlike preliminary and final scope rulings, preliminary and final circumvention determinations will both be published in the **Federal Register**. Similar to proposed § 351.225(g), proposed paragraph (g)(1) would allow Commerce to issue a preliminary circumvention determination, based on available information at the time, as to whether there is a reasonable basis to believe or suspect that the elements necessary for a circumvention determination under section 781 of the Act exist. Proposed paragraph (g)(2) largely tracks the similar provision under proposed § 351.225(h) concerning the issuance of final scope rulings. Thus, proposed paragraph (g)(2) provides that Commerce would "convey" the final circumvention determination in accordance with the requirements of section 516A(a)(2)(A)(ii) of the Act, which states that judicial review of "class or kind" determinations under section 516A(a)(2)(B)(vi) of the Act, such as scope rulings and circumvention determinations, are based off of the date of mailing of such determination. Section 516A(a)(2)(A)(ii) of the Act further provides that only "an interested party who is a party to the proceeding" may commence judicial review procedures. Therefore, aside from its obligation to publish notice of the final circumvention determination in the **Federal Register**, Commerce proposes to convey a copy of the final circumvention determination in the manner prescribed by section 516A(a)(2)(A)(ii) of the Act (*i.e.*, mailing) to interested parties who are parties to the proceeding (*see* § 351.102(b)(36)), because these are the only parties that have legal standing to

appeal the final circumvention determination under section 516A(a)(2)(A)(ii) of the Act.

Furthermore, paragraph (g)(2) states that Commerce will "promptly" convey a copy of the final circumvention determination after publication in the **Federal Register**. The use of the term "promptly" is consistent with the use of the same term in revised section 225 and new section 227. It is Commerce's expectation that prompt conveyance of a copy of the final circumvention determination normally would occur no more than 5 business days from the publication of the determination in the **Federal Register**. Consistent with sections 516A(a)(2)(A)(ii) and (B)(vi) of the Act, judicial review procedures would be commenced based on the date of conveyance, as opposed to the date of receipt, of a final circumvention determination. Additionally, as with any other document that is placed on the record by the agency, all interested parties on the segment-specific service lists will be notified of the final circumvention determination through Commerce's electronic ACCESS system.

Proposed paragraphs (h) and (i) relate to the current regulatory provisions for products completed or assembled in the United States or other foreign countries found in current §§ 351.225(g) and (h), respectively, with two important proposed revisions. First, we have removed statements that no one single factor under sections 781(a)(2) and 781(b)(2) of the Act will be controlling. We recognize that this language adopts similar language from the SAA.<sup>80</sup> However, this statement alone, without additional context, has raised questions. In particular, the SAA states: "Commerce will evaluate each of {the factors under sections 781(a)(2) and 781(b)(2) of the Act} as they exist either in the United States or a third country, depending on the particular circumvention scenario. No single factor will be controlling." The SAA also provides that these provisions "do not establish rigid numerical standards for determining the significance of the assembly (or completion) activities in the United States or for determining the significance of the value of the imported parts or components."<sup>81</sup> Therefore, although no one single factor should control Commerce's analysis, this statement in the SAA should be considered in light of the evidence before Commerce in a given case and is not intended to limit Commerce's discretion to evaluate the particularities of the circumvention scenario.

<sup>79</sup>To be clear, Commerce already has the authority under existing regulations to issue a preliminary circumvention determination concurrently with initiation.

<sup>80</sup> See SAA at 893.

<sup>81</sup> *Id.* at 894.

Accordingly, we are proposing to remove the statement from paragraphs (h) and (i).

Second, we propose removing specific reference to the major input rule under section 773(f)(3) of the Act in paragraphs (h) and (i). Under current §§ 351.225(g) and (h), in determining the value of parts or components purchased from an affiliated person under sections 781(a)(1)(D) and 781(b)(1)(D) of the Act, or of processing performed by an affiliated person under sections 781(a)(2)(E) and 781(b)(2)(E) of the Act, the value of the part or component may be based on the cost of producing the part or component under section 773(f)(3) of the Act. The 1996 *Proposed Rule* added this reference to the “transactions disregarded” and “major input” rules applicable to affiliated transactions set forth in 773(f)(3) of the Act in response to comments raised before Commerce at the time.<sup>82</sup> Additionally, the 1997 *Final Rule* further explained that the SAA clearly contemplates the use of the major input rule in appropriate circumstances, and, in response to comments, also explained that cost of production may be used as the basis of the value for inputs from affiliated persons.<sup>83</sup> Based on our more recent experience, we believe it would be beneficial to codify that determinations of the value of parts or components on the basis of the cost of producing the part or component may be conducted under the various applicable provisions of section 773—in this case, section 773(e) (constructed value) and 773(c) (factors of production under the nonmarket economy methodology) of the Act. The major input rule under section 773(f)(3) will still apply, as appropriate, in accordance with this applicable statutory framework.

Proposed paragraph (j) would incorporate the current regulatory provision, § 351.225(i), pertaining to minor alteration of merchandise under section 781(c) of the Act, with some additions. Although the statute is silent regarding what factors to consider in determining whether alterations are properly considered “minor,” the legislative history of this provision indicates there are certain criteria that should be considered before reaching a

circumvention determination.<sup>84</sup> Previous circumvention cases conducted by Commerce have relied on those enumerated criteria.<sup>85</sup> These would now be incorporated into paragraph (j). Additionally, in conducting a minor alteration circumvention inquiry, under section 781(c) of the Act, we have analyzed other factors, as appropriate on a case-by-case basis, including the circumstances under which the products enter the United States, the timing of the entries during the circumvention review period, and the quantity of merchandise entered during the circumvention review period.<sup>86</sup> We would incorporate these additional factors, which is a non-exhaustive list, in paragraph (j).

Proposed paragraph (k) would incorporate the current regulatory provision, § 351.225(j), pertaining to later-developed merchandise, under section 781(d) of the Act, with some additions. In conducting a later-developed merchandise circumvention inquiry, under section 781(d)(1) of the Act, and in determining whether the merchandise is “later-developed,” Commerce first examines whether the merchandise at issue was commercially available at the time of the initiation of the AD and CVD investigation.<sup>87</sup> We

<sup>84</sup> See Omnibus Trade Act of 1987, Report of the Senate Finance Committee, S. Rep. No. 100–71, at 100 (1987) (stating that Commerce “should apply practical measurements regarding minor alterations, so that circumvention can be dealt with effectively, even where such alterations to an article technically transform it into a differently designated article{,}” and providing a list of criteria to be considered).

<sup>85</sup> See, e.g., *Final Results of Anti-Circumvention Review of Antidumping Order: Corrosion-Resistant Carbon Steel Flat Products From Japan*, 68 FR 33676, 33677 (June 5, 2003).

<sup>86</sup> See *Preliminary Determination of Circumvention of Antidumping Order; Cut to Length Carbon Steel Plate from Canada*, 65 FR 64926, 64929–31 (October 31, 2000), unchanged in *Final Determination of Circumvention of Antidumping Order; Cut to Length Carbon Steel Plate from Canada*, 66 FR 7617 (January 24, 2001).

<sup>87</sup> See *Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order*, 71 FR 32033, 32037–40 (June 2, 2006), unchanged in *Later-Developed Merchandise Anticircumvention Inquiry of the Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 71 FR 59075 (October 6, 2006); *Candles Anticircumvention Final*, 71 FR at 59077 and accompanying Issues and Decision Memorandum at Comment 4, amended by Redetermination Pursuant to Court Remand Order in *Target Corporation v. United States*, 578 F. Supp. 2d 1369 (CIT 2008) (November 7, 2008), affirmed by *Target Corp. v. United States*, 626 F. Supp. 2d 1285 (CIT 2009), and *Target Corp.*, 609 F.3d at 1358–60 (holding that Commerce’s interpretation of later-developed, as turning on whether the

would incorporate the commercial availability standard into paragraph (k), as this is judicially-affirmed and well-established in our practice. Commerce intends to consider whether a product is “commercially available” on a case-by-case basis in light of the record of the proceeding. If Commerce determines that such merchandise was not commercially available at the time of the investigation, and is, thus, later-developed, Commerce would consider whether the later-developed merchandise is covered by the orders pursuant to the statutory factors identified in section 781(d)(1) of the Act.

Proposed paragraph (l) of § 351.226 would alter the suspension of liquidation requirements found in current § 351.225(l) (which apply to circumvention inquiries) and mirror the proposals to § 351.225(l) pertaining to scope, which have already been described above.

Thus, proposed paragraph (l)(1) of § 351.226 provides that when Commerce initiates a circumvention inquiry under proposed paragraphs (b) or (d), it will notify CBP of the initiation and direct CBP to continue the suspension of liquidation of all unliquidated entries of products subject to the circumvention inquiry that are currently suspended by CBP<sup>88</sup> at the applicable cash deposit rate that would apply if the product were determined to be circumventing the order.

Further, proposed paragraph (l)(2) of § 351.226 provides that if Commerce issues a preliminary circumvention determination under proposed paragraph (g)(1) that the product at issue is circumventing an AD and/or CVD order, Commerce will direct CBP to: (1) Continue suspension of liquidation of already suspended entries; (2) suspend

merchandise was commercially available at the time of the investigation, is reasonable). See also *Erasable Programmable Read Only Memories from Japan; Final Scope Ruling*, 57 FR 11599 (April 6, 1992); *Electrolytic Manganese Dioxide from Japan; Final Scope Ruling*, 57 FR 395 (January 6, 1992); *Portable Electronic Typewriters from Japan*, 55 FR 47358 (November 13, 1990).

<sup>88</sup> As discussed above, entries may be “currently suspended by CBP” under a variety of scenarios. See *Sunprime III*, 946 F.3d at 1317–18 (discussing CBP’s authority to suspend liquidation of entries that CBP determines are within the scope of an AD/CVD order unless appealed to Commerce); section 517 of the Act (authorizing CBP to suspend liquidation of entries for which it has reasonable suspicion, or, in the case of final determination, substantial evidence, that covered merchandise is entered into the United States through evasion under section 517(e) and (d) of the Act). Additionally, as discussed above, consistent with current practice and in accordance with CBP’s statutory and regulatory authorities, CBP may stay its action on entries of products that CBP has liquidated but for which liquidation is not yet final pending the outcome of a circumvention inquiry.

<sup>82</sup> See 1996 *Proposed Rule*, 61 FR at 7322. Clarifying edits to this language were made in the 1997 *Final Rule*. See 1997 *Final Rule*, 62 FR at 27328 (clarifying that application of the major input rule is discretionary for purposes of both U.S. and third country assembly).

<sup>83</sup> See 1997 *Final Rule*, 62 FR at 27328 (citing SAA at 894).



liquidation of all other products at issue that are unliquidated; and (3) apply the applicable cash deposit rate under the order to unliquidated entries.

Proposed paragraph (l)(4) provides that if Commerce issues a negative final determination under paragraph (g)(2), and the product is not otherwise subject to suspension as a result of another segment of a proceeding, such as a covered merchandise inquiry under § 351.227, for merchandise that was suspended and for which cash deposit rates were paid, Commerce would instruct CBP to terminate suspension of liquidation and refund cash deposits (if any) on entries of this non-subject merchandise.

On the other hand, if Commerce concludes in a final determination under proposed paragraph (g)(2) that circumvention has occurred, then under proposed paragraph (l)(3) Commerce would direct CBP to: (1) Continue suspension of liquidation of already suspended entries, including those entries subject to suspension of liquidation as a result of another segment of a proceeding, such as an administrative review under § 351.213; (2) suspend liquidation of all products at issue which are unliquidated; and (3) apply the applicable cash deposit rate under the order to unliquidated entries, until appropriate liquidation instructions are issued pursuant to §§ 351.212 and 351.213.<sup>89</sup>

As described in further detail above in the discussion of proposed paragraph (l) of § 351.225, these procedures deviate from the current § 351.225 framework in two key respects. First, upon an affirmative preliminary or final circumvention determination, Commerce will instruct CBP to suspend liquidation of any unliquidated entries, not only those that entered on or after the date of initiation of the circumvention inquiry. Second, the proposed regulation does not require Commerce to notify CBP of a negative preliminary circumvention determination, and, therefore, suspension of liquidation for already suspended entries (if any) will remain

in effect pending Commerce's issuance of a final circumvention determination.

These suspension of liquidation procedures and cash deposit requirements will result in a more effective application of circumvention determinations. As discussed above, Congress enacted section 781 of the Act to combat certain forms of circumvention of AD and CVD orders, however, neither section 781 of the Act nor any other provision of the Act contains specific guidance regarding when merchandise found to be circumventing an AD and/or CVD order should be subject to suspension of liquidation and cash deposit requirements. When Congress passed the Omnibus and Trade Competitiveness Act of 1988, it explained that the purpose of the circumvention statute "is to authorize the Commerce Department to apply antidumping and countervailing duty orders in such a way as to prevent circumvention and diversion of U.S. law."<sup>90</sup> Congress also recognized that "aggressive implementation of {the circumvention statute} by the Commerce Department can foreclose these practices."<sup>91</sup> Consistent with Congress's intent when enacting the circumvention statute, these proposals for paragraph (l) of § 351.226 will help prevent companies from eluding the payment of duties if Commerce ultimately concludes that the merchandise is circumventing an AD and/or CVD order.

Proposed paragraph (m) would address the effect and application of circumvention determinations. In its experience, Commerce has witnessed scenarios in which the circumvention determined to exist was unique to the interested party under review. In that situation, a company-specific circumvention determination is warranted. However, Commerce has also found circumvention to exist in other cases in which the circumvention warranted a country-wide determination. Accordingly, the regulation would recognize that section 781 of the Act provides Commerce with the discretion to apply a circumvention decision on a country-wide basis, and therefore allows for Commerce to consider whether a country-wide application is warranted on a case-by-case basis in circumvention inquiries. One of the factors Commerce may consider in making such a determination is the possibility of

subsequent circumvention by other producers, exporters, or importers following the issuance of an affirmative company-specific circumvention determination.

Proposed paragraph (m) would also address the potential overlap between a circumvention inquiry and other segments of the proceeding and would allow Commerce to take appropriate action in such other proceedings. For example, Commerce could request information concerning the product that is the subject of the circumvention inquiry for purpose of an administrative review under § 351.213.

Proposed paragraphs (m) and (n) would together address a problem that arises when a circumvention determination would apply equally to companion AD and CVD orders, which cover the same merchandise from the same country, and largely mirror the same paragraphs under the proposed revisions to § 351.225. In that scenario, an interested party requesting a circumvention inquiry pertaining to both orders pursuant to paragraph (c) must file its request on the record of the AD duty proceeding only, and serve its circumvention inquiry request to all parties on the annual inquiry service list for both the AD and CVD orders. The annual inquiry service list and related procedures are discussed in proposed § 351.225(n). Once Commerce initiates the circumvention inquiry, Commerce would initiate and conduct that inquiry pertaining to both orders only on the record of the AD duty proceeding.<sup>92</sup> Once Commerce issues a final circumvention determination on the record of the AD proceeding, Commerce would include a copy of that determination on the record of the CVD proceeding and notify CBP in accordance with paragraph (l). As noted above, by limiting the circumvention inquiry only to the record of one proceeding, the chances of incomplete records, or confusing records being filed with courts on appeal, should be lessened.

Proposed paragraph (n) would address service requirements and largely tracks the same provision under proposed § 351.225(n), *i.e.*, interested parties filing a circumvention inquiry request must serve all parties on the annual inquiry service list for that order and any companion order. Under proposed paragraph (n), once a circumvention inquiry is initiated under paragraph (b) or (d), a segment-specific service list would be established, under § 351.103(d)(1), and the requirements of

<sup>89</sup> As discussed above, consistent with current practice and in accordance with CBP's statutory and regulatory authorities, CBP may stay its action on entries of products that CBP has liquidated but for which liquidation is not yet final pending the outcome of a circumvention inquiry. Additionally, any instructions issued by Commerce directing CBP to "lift suspension of liquidation" and assess duties at the applicable AD/CVD rate are not intended to impugn CBP's ability to (1) suspend liquidation/ assess duties/take any other measures pursuant to CBP's EAPA investigation authority under section 517 of the Act specifically, or (2) take any other action within CBP's or HST's authority with respect to AD/CVD entries.

<sup>90</sup> Omnibus Trade Act of 1987, Report of the Senate Finance Committee, S. Rep. No. 100-71, at 101 (1987).

<sup>91</sup> *Id.*

<sup>92</sup> Under that scenario, Commerce would follow the procedures of paragraph (l) for both orders.

§ 351.303(f) would apply. Once the segment-specific service list is established, parties on the annual inquiry service list would no longer be served with filings made pursuant to the circumvention inquiry, unless they follow the procedures of § 351.103(d)(1) by filing an entry of appearance in the relevant circumvention segment. However, as discussed further below, Commerce proposes to amend § 351.103(d)(1) to reflect that an interested party that submits a request for circumvention inquiry need not file an entry of appearance under § 351.103(d)(1), as that party will be placed on the segment-specific service list by Commerce. Additionally, as discussed further below, Commerce proposes to amend § 351.305(d) to adopt special filing requirements for importers seeking access to business proprietary information in circumvention inquiries.

Finally, proposed paragraph (o) would allow for the circumvention inquiry procedures of § 351.226, discussed above, to apply to suspended investigations and suspension agreements.

#### *Covered Merchandise Referrals— Section 351.227*

As discussed above, Commerce and CBP work together to ensure the effectiveness of AD/CVD orders, and both agencies have their own independent authority to examine potential circumvention and duty evasion of existing orders.<sup>93</sup> Pursuant to section 421 of the Enforce and Protect Act of 2015,<sup>94</sup> effective August 22, 2016, section 517 was added to the Act, which establishes a formal process for CBP to conduct civil administrative investigations of potential duty evasion of AD and CVD orders on the basis of an allegation by an interested party or upon referral by another Federal agency (referred to herein as an “EAPA investigation”).<sup>95</sup> Pursuant to section 517(b)(4)(A) of the Act, if CBP is conducting an EAPA investigation based on an allegation from an interested party, and is unable to determine whether the merchandise at issue is “covered merchandise” within the meaning of section 517(a)(3) of the Act, it shall refer the matter to Commerce to make a covered merchandise determination (referred to

herein as a “covered merchandise referral”).<sup>96</sup>

Section 421 of the EAPA requires that the Secretary of the Treasury prescribe regulations as necessary to implement the amendments.<sup>97</sup> Although the EAPA does not mandate that Commerce promulgate regulations, in order to provide clarity and consistency to the public, Commerce proposes to adopt § 351.227, a new regulation to address procedures and standards specific to Commerce’s consideration of covered merchandise referrals. In particular, this new regulation would govern Commerce’s receipt of a covered merchandise referral, Commerce’s initiation and conduct of a covered merchandise inquiry, and Commerce’s covered merchandise determination, pursuant to section 517(b)(4) of the Act. The proposed rulemaking is intended to provide for efficient notice and service requirements, expedited deadlines, and streamlined opportunities to solicit information and comment from interested parties. These proposed changes are procedural in nature and pertain to the agency’s internal process in conducting its covered merchandise inquiry. In addition, these changes would not alter the current statutory or regulatory framework under which Commerce may already request participation of interested parties and issue a substantive determination that certain merchandise is within the scope of an AD/CVD order, as detailed above.

In promulgating the proposed procedures, Commerce is mindful of three aspects of the EAPA. First, as discussed above, section 517(b)(4) of the Act requires CBP to make a covered merchandise referral to Commerce if it is unable to determine whether the merchandise at issue is covered merchandise within the meaning of section 517(a)(3) of the Act. To date, Commerce has received only a few covered merchandise referrals,<sup>98</sup> and,

<sup>96</sup> See H.R. Rep. No. 114–376, at 190 (2015) (EAPA Conf. Rep.) (“If the Commissioner is unable to determine whether the merchandise at issue is covered merchandise, the Commissioner shall refer the matter to the Department of Commerce to determine whether the merchandise is covered merchandise. The Department of Commerce is to make this determination pursuant to its applicable statutory and regulatory authority, and the determination shall be subject to judicial review under 19 U.S.C. 1516a(a)(2). The Conferees intend that such determinations include whether the merchandise at issue is subject merchandise under 19 U.S.C. 1677j.”) (referencing sections 516 and 781 of the Act).

<sup>97</sup> See also *Investigation of Claims of Evasion of Antidumping and Countervailing Duties, Interim Regulations*, 81 FR 56477 (August 22, 2016) (setting forth CBP’s interim regulations under section 517 of the Act).

<sup>98</sup> See *Wooden Bedroom Furniture From the People’s Republic of China: Notice of Covered*

thus, we are still familiarizing ourselves with the facts and circumstances that would lead CBP to choose to make such a referral, as well as the facts and circumstances that would be appropriate for Commerce to consider in reaching its covered merchandise determination. For instance, there may be a need for Commerce to seek further information to establish a more detailed description of the merchandise at issue, or engage in a complex analysis, before determining whether the merchandise is covered merchandise. Commerce, therefore, needs to maintain flexibility in both its opportunities to request information and the issues that it considers in its analysis, before reaching a covered merchandise determination.

Second, the EAPA does not prescribe timing requirements for Commerce to reach its covered merchandise determination. Nevertheless, section 517(b)(4)(B) of the Act instructs Commerce to promptly transmit its determination to CBP. In addition, the EAPA (section 517(b)(4)(C) of the Act) provides that CBP’s own deadlines to complete its EAPA investigation will be stayed pending completion of Commerce’s covered merchandise determination. In drafting the proposed regulations, Commerce is taking timeliness into account, which we believe is consistent with the intent of Congress in drafting the EAPA.

Third, section 517(b)(4)(D) of the Act provides that the statutory scheme for judicial review under section 516A(a)(2) of the Act applies to Commerce’s covered merchandise determinations.<sup>99</sup> Under the applicable standard of review, Commerce’s determinations must be supported by substantial evidence and in accordance with law (see section 516A(b)(1)(B) of the Act). Thus, to ensure that its covered merchandise determinations meet this standard, Commerce intends to ensure that parties are afforded opportunities to submit evidence and argument for Commerce’s consideration in reaching its determination. Further, Commerce intends to allow sufficient time for it to consider such evidence and arguments for purposes of drafting a well-reasoned determination that may be subject to judicial review.

In short, in proposing new § 351.227, we have taken into account considerations relating to: (1) Flexibility

*Merchandise Referral*, 83 FR 9272 (March 5, 2018); *Hydrofluorocarbon Blends From the People’s Republic of China: Notice of Covered Merchandise Referral*, 83 FR 9277 (March 5, 2018); and *Diamond Sawblades and Parts Thereof From the People’s Republic of China: Notice of Covered Merchandise Referral*, 83 FR 9280 (March 5, 2018).

<sup>99</sup> See EAPA Conf. Rep. at 190.

<sup>93</sup> Additionally, HSI has the authority to investigate criminal violations related to illegal evasion of payment of required duties, including payment of AD/CV duties. See, e.g., 18 U.S.C. 542.

<sup>94</sup> Public Law 114–125, 130 Stat. 122, 155 (2016).

<sup>95</sup> *Id.*, sections 421(a)-(d), 130 Stat. at 161–169.

in Commerce's ability to request information necessary for its analysis in reaching a covered merchandise determination; (2) timeliness; and (3) scheduling that allows Commerce sufficient time to analyze the issues and the record evidence and issue a determination that may be subject to judicial review. However, although we are setting forth these proposed regulations, as noted above, covered merchandise inquiries constitute a new type of segment of a proceeding at Commerce and, therefore, Commerce will continue to develop its practice and procedures in this area. Further, as detailed below, Commerce recognizes the potential significant overlap between a covered merchandise inquiry, scope inquiry and circumvention inquiry procedures discussed above under §§ 351.225 and 351.226, and possibly any other segment of a proceeding that may address scope issues.<sup>100</sup> Therefore, in crafting these regulations, Commerce has allowed for the flexibility to address CBP's covered merchandise referrals in the context of another segment of the proceeding, or to otherwise rely on the standards under section 351.225 and 226, in issuing a covered merchandise determination.

Proposed section 351.227(a) would introduce the new section and briefly describes the framework of CBP's EAPA investigations and covered merchandise referrals under section 517 of the Act. Additionally, paragraph (a) tracks the similar provision in proposed sections 351.225 (scope inquiries) and 351.226 (circumvention inquiries), explaining that, unless otherwise specified in new section 351.227, Commerce's existing procedures contained in subpart C (*i.e.*, relating to factual information (sections 351.102(b)(21) and 351.301) and the extension of time limits (section 351.302)), apply to covered merchandise inquiries.

Proposed paragraph (b) would provide that, within 15 days after receiving a covered merchandise referral that Commerce determines to be sufficient, Commerce will take one of three actions. First, under paragraph (b)(1), Commerce may initiate a covered merchandise inquiry and will publish notice of its initiation in the **Federal Register**. Second, under paragraph (b)(2), Commerce may self-initiate a circumvention inquiry in accordance

with proposed section 351.226(b) and publish notice of its initiation in the **Federal Register**. Third, under paragraph (b)(3), if Commerce determines that the covered merchandise referral can be addressed in an ongoing segment of a proceeding, such as a scope inquiry, under the proposed revisions to section 351.225, or circumvention inquiry, under proposed section 351.226, Commerce will publish a notice in the **Federal Register** that it intends to address the referral in the context of such other segment.

In determining whether a covered merchandise referral is sufficient, Commerce may consider, among other things, whether the referral has provided the name and contact information of the parties to CBP's EAPA investigation, including the name and contact information of any known representative acting on behalf of such parties; an adequate description of the alleged covered merchandise; identification of the applicable AD or CVD orders; and any necessary information reasonably available to CBP regarding whether the merchandise at issue is covered merchandise. Additionally, Commerce will review the covered merchandise referral and any accompanying documentation to ensure any business proprietary information is properly redacted in accordance with Commerce's statutory and regulatory requirements. Regardless of which of the three actions Commerce takes with respect to the covered merchandise referral, Commerce will place the documents on the record of the segment of the proceeding under which Commerce intends to address the referral.

Proposed paragraph (c) would provide the deadline for Commerce to conduct covered merchandise inquiries and would also set forth that Commerce could only extend the deadline if it determines that the inquiry is extraordinarily complicated. This tracks similar language under new section 351.226 (circumvention inquiries).

Proposed paragraph (d) would provide the procedures for covered merchandise inquiries, and largely tracks the new procedures provided under proposed sections 351.225(f) (scope inquiries) and 351.226(f) (circumvention inquiries), with some exceptions. For example, paragraph (d)(5) would allow Commerce to forego or rescind a covered merchandise inquiry, in whole or in part, for one of three reasons: First, if CBP withdraws its covered merchandise referral; second, if the Secretary issues a final determination in another segment of a

proceeding, which can provide the basis for the Secretary's covered merchandise determination, thus negating the need for a separate covered merchandise inquiry; and, third, where Commerce otherwise determines that it is not necessary to initiate or conduct a covered merchandise inquiry in response to a covered merchandise referral because the matter at issue may be addressed by other means. With respect to this third category, this could happen where Commerce believes a prior scope ruling or circumvention determination can provide the basis for Commerce's covered merchandise determination. In such instances, Commerce will issue a final covered merchandise determination in accordance with the requirements of paragraph (e)(2) of this section.

Proposed paragraph (e) would incorporate preliminary and final covered merchandise determinations, which will both be published in the **Federal Register**, and largely tracks the requirements under proposed section 351.226 pertaining to circumvention inquiries. Similar to proposed section 351.226(g)(1), proposed paragraph (e)(1) would allow Commerce to issue a preliminary covered merchandise determination, based on available information at the time, as to whether there is a reasonable basis to believe or suspect that the product that is the subject of the covered merchandise inquiry is covered by the scope of the order. Proposed paragraph (e)(2), which tracks proposed section 351.226(g)(2), would provide that, promptly after publication of the final covered merchandise determination, Commerce would convey a copy of the final determination, in the manner prescribed by section 516A(a)(2)(A)(ii) of the Act, to all parties to the proceeding, and transmit a copy of the final determination to CBP, thus fulfilling its obligation under section 517(b)(4)(B) of the Act. The use of the term "promptly" is not defined in section 517(b)(4)(B) of the Act. Consistent with the use of the same term in revised section 351.225 and new section 351.226, it is Commerce's expectation that prompt conveyance and transmittal of a copy of the final covered merchandise determination normally would occur no more than 5 business days from the publication of the determination in the **Federal Register**. Consistent with sections 516A(a)(2)(A)(ii) and (B)(vi) of the Act, judicial review procedures would be commenced based on the date of conveyance, as opposed to the date of receipt, of a final covered merchandise determination.

<sup>100</sup> *Id.* ("The Department of Commerce is to make this determination pursuant to its applicable statutory and regulatory authority, and the determination shall be subject to judicial review under 19 U.S.C. 1516a(a)(2). The Conferees intend that such determinations include whether the merchandise at issue is subject merchandise under 19 U.S.C. 1677j.").

Paragraph (e)(3) would also clarify that if Commerce addresses the covered merchandise referral in the context of another segment of the proceeding, or issues a scope ruling, under section 351.225, or a circumvention determination, under section 351.226, which provides the basis for the covered merchandise determination, Commerce would promptly transmit a copy of the final action in that segment to CBP in accordance with section 517(b)(4)(B) of the Act.

Proposed paragraph (f) would explain that, if Commerce issues a covered merchandise determination after conducting a covered merchandise inquiry, Commerce may rely on the standards provided under proposed sections 351.225(j) (country of origin) or (k) (scope rulings). Commerce also could rely on the provisions of section 781 of the Act regarding the four forms of circumvention (proposed sections 351.226(h), (i), (j), or (k)). We believe this is consistent with the legislative history, which specifically identifies that Commerce may follow its existing statutory and regulatory authority in issuing a covered merchandise determination.<sup>101</sup>

To maintain consistency with proposed sections 351.225 and 351.226, proposed paragraphs (g)–(k) would be reserved. Additionally, the following paragraphs would largely mirror the same provisions in proposed sections 351.225 and 351.226, which have been discussed in detail above: Paragraph (l) concerning suspension of liquidation; paragraph (m) concerning applicability of covered merchandise determinations; other segments of the proceeding, and companion AD and CVD orders; paragraph (n) concerning service; and paragraph (o) concerning suspended investigations and suspension agreements. Additionally, with respect to proposed paragraph (l), as discussed above, any instructions issued by Commerce directing CBP to “lift suspension of liquidation” and assess duties at the applicable AD/CVD rate are not intended to impugn CBP’s ability to (1) suspend liquidation/assess duties/take any other measures pursuant to CBP’s EAPA investigation authority under section 517 of the Act specifically, or (2) take any other action within CBP’s or HSI’s authority with respect to AD/CVD entries.

#### *Certifications—Section 351.228*

At various points throughout its history of administering the AD and CVD laws, Commerce has determined that the establishment of a certification

scheme is necessary to ensure the enforcement of the AD/CVD orders or suspension agreements. For example, to carry out the terms of certain suspension agreements, Commerce has required importers, producers, and exporters to certify to certain requirements with respect to the entries and sales of merchandise subject to the agreement.<sup>102</sup> Commerce has also required certifications for various AD and CVD orders.<sup>103</sup> Additionally, Commerce has established a certification scheme in the context of its circumvention inquiries to ensure that parties claiming merchandise is not subject to an AD/CVD order, as a result of a circumvention determination, must certify and maintain documentation to that effect.<sup>104</sup>

Proposed section 351.228 would codify and enhance Commerce’s existing authority and practice to require certifications by importers and other interested parties as to whether merchandise is subject to an AD/CVD order. Under proposed section 351.228(b), where that party fails to comply with the certification requirements by failing to provide the certification upon request, or providing a certification that contains materially false, fictitious, or fraudulent statements or representations, or material omissions, to Commerce or CBP, as appropriate, Commerce would have the authority to instruct CBP to collect from the importer cash deposits for the AD or CVD at the applicable rate. Commerce recognizes that CBP has its own independent authority to address import documentation related to negligence, gross negligence, or fraud.<sup>105</sup> This provision is not intended to supplant CBP’s authority, nor is a formal finding by CBP required for Commerce to determine, within its own authority, that the certification is deficient and unreliable for the reasons discussed above. Whether a certification contains “material” or “fraudulent” information is a determination that would be made by Commerce pursuant to its own

<sup>102</sup> See, e.g., *Sugar From Mexico: Suspension of Countervailing Duty Investigation*, 79 FR 78044 (December 29, 2014).

<sup>103</sup> See, e.g., *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Low Enriched Uranium From France*, 67 FR 6680 (February 13, 2002) (requiring certifications of the importer and end user).

<sup>104</sup> See, e.g., *Glycine From the People’s Republic of China: Final Partial Affirmative Determination of Circumvention of the Antidumping Duty Order*, 77 FR 73426 (December 10, 2012).

<sup>105</sup> Additionally, HSI has the authority to investigate criminal violations related to illegal evasion of payment of required duties, including payment of AD/CV duties. See, e.g., 18 U.S.C. 542.

authority and consideration of the normal meaning of those terms.<sup>106</sup>

#### *Importer Reimbursement Certification—Section 351.402(f)(2)*

Section 351.402(f)(1)(i) of Commerce’s regulations provide that in calculating the export price, or constructed export price in determining an AD margin, Commerce will deduct any AD or CVD duties that the exporter or producer paid on behalf of the importer or reimbursed to the importer. Section 351.402(f)(1)(ii) provides an exception that in calculating export price or constructed export price, Commerce will not deduct AD or CVD duties if an exporter or producer granted to the importer before initiation of the AD investigation in question a warranty of nonapplicability of AD/CVD duties with respect to subject merchandise (1) sold before the date of publication of the notice of first suspension of liquidation, and (2) exported before the date of publication of the final AD determination.

Section 351.402(f)(2) currently requires importers of AD entries to file prior to liquidation a certificate with CBP that identifies whether the importer has or has not entered into an agreement for the payment or reimbursement of AD or CVD duties. This certificate is required for each entry (or a group of entries) subject to AD duties, and must identify the relevant merchandise to which it relates. Consistent with section 351.402(f)(1)(i), if an importer certifies that it has entered into an agreement for the payment or reimbursement of AD or CVD duties, Commerce will deduct any AD or CVD duties that the exporter or producer paid on behalf of the importer or reimbursed to the importer. However, consistent with section 351.402(f)(2)(ii), Commerce will not deduct AD or CVD duties paid or reimbursed with respect to subject merchandise (1) sold before the date of publication of the notice of first suspension of liquidation, and (2) exported before the date of publication of the final AD determination where, before the initiation of the AD investigation in question, the exporter or producer granted a warranty of nonapplicability of AD or CVD duties with respect to the merchandise.

Additionally, under section 351.402(f)(3), if the importer does not provide the certificate prior to liquidation, Commerce presumes that the exporter or producer paid or reimbursed such duties and will deduct

<sup>106</sup> Commerce does not intend to be restricted by the interpretations or policies set forth by other agencies in interpreting those terms in applying other areas of law.

<sup>101</sup> See *id.* at 190.

the applicable AD or CVD duties that the exporter or producer is presumed to have paid on behalf of the importer or reimbursed to the importer. The current regulation, which is largely unchanged as it existed 40 years ago,<sup>107</sup> is otherwise silent regarding the specific filing requirements for the certificate.

Section 405 of the Security and Accountability for Every (SAFE) Port Act of 2006, Public Law 109–347, established the International Data Trade System (ITDS), the purpose of which “is to eliminate redundant information requirements, to efficiently regulate the flow of commerce, and to effectively enforce laws and regulations relating to international trade, by establishing a single portal system, operated by CBP, for the collection and distribution of standard electronic import and export data required by all participating Federal agencies.” Flowing from this, one goal of the ITDS is to encourage and facilitate the transition of paper filing requirements for certain import documentation to electronic format.

Accordingly, Commerce proposes to modify section 351.402(f)(2) to clarify that for all entries subject to AD duties, the importer must file a reimbursement certification in either electronic or paper form in accordance with CBP’s requirements, as applicable. Additionally, Commerce proposes to remove the requirement for specific certification language, and instead allow importers to certify to the substance of the certification. Moreover, for ease of administration, Commerce proposes to clarify that a certification is required for each entry of merchandise subject to AD duties imported on or after the date of the first suspension of liquidation.<sup>108</sup> Furthermore, although such certification is required prior to liquidation, Commerce proposes to clarify that CBP may also accept the reimbursement certification in accordance with its protest procedures under 19 U.S.C. 1514. Commerce is also proposing non-substantive restructuring of the regulation.

#### *Other Procedural Amendments—Sections 351.103(d)(1) and 305(d)*

Consistent with the substantive proposed rules discussed above, Commerce proposes to adopt necessary changes to two procedural regulations, section 351.103(d)(1) pertaining to letters of appearance and public service lists, and section 351.305(d) pertaining to importer filing requirements for access to business proprietary information in Commerce’s proceedings. As discussed above, under revised section 351.225, pertaining to scope inquiries, Commerce proposes to amend section 351.103(d)(1) to reflect that an interested party that submits a scope ruling application need not file an entry of appearance, under section 351.103(d)(1), as that interested party will be placed on the segment-specific service list for that scope inquiry by Commerce. Similarly, as discussed above, under revised section 351.226, pertaining to circumvention inquiries, Commerce proposes to amend section 351.103(d)(1) to reflect that an interested party that submits a request for a circumvention inquiry need not file an entry of appearance under section 351.103(d)(1) to be placed on the segment-specific service list for that circumvention inquiry. We have also made minor amendments to section 351.103(d)(1) to reflect the filing of an “entry of appearance,” rather than a “letter of appearance,” to more accurately describe Commerce’s electronic filing process.

Further, current section 351.305(d) would provide special filing requirements for importers seeking access to business proprietary information in Commerce’s proceedings, and would mandate that for scope segments of a proceeding, under existing section 351.225, an applicant seeking access to business proprietary information on behalf of an importer must demonstrate that the party is an importer, or has taken steps to import, the merchandise subject to the scope inquiry. This language would be unchanged with respect to importers in scope inquiries, but we have added similar language for importers in circumvention inquiries, under proposed section 351.226.

Lastly, with respect to covered merchandise inquiries under proposed section 351.227, we propose changes to both sections 351.103(d)(1) and 305(d). Specifically, under revised section 351.103(d)(1), any publicly identified parties in a covered merchandise referral from CBP, under section 517 of the Act, need not file an entry of appearance in the covered merchandise

inquiry to be added to the segment-specific service list for that segment of the proceeding. Additionally, under revised section 351.305(d), an applicant for access to business proprietary information on behalf of a party that has been publicly identified by CBP as the importer in a covered merchandise referral is exempt from the requirements of demonstrating that the party is an importer for purposes of a covered merchandise inquiry.

#### **Classifications**

##### *Executive Order 12866*

OMB has determined that this proposed rule is significant for purposes of Executive Order 12866.

##### *Executive Order 13771*

This rule is not subject to the requirements of E.O. 13771 because this rule results in no more than *de minimis* costs.

##### *Paperwork Reduction Act*

This proposed rule contains no collection of information subject to the Paperwork Reduction Act, 44 U.S.C. chapter 35.

##### *Executive Order 13132*

This proposed rule does not contain policies with federalism implications as that term is defined in section 1(a) of Executive Order 13132, dated August 4, 1999 (64 FR 43255 (August 10, 1999)).

##### *Regulatory Flexibility Act*

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

The entities upon which this rulemaking could have an impact include foreign governments, foreign exporters and producers, some of whom are affiliated with U.S. companies, and U.S. importers. Enforcement & Compliance currently does not have information on the number of entities that would be considered small under the Small Business Administration’s size standards for small businesses in the relevant industries. However, some of these entities may be considered small entities under the appropriate industry size standards. Although this proposed rule may indirectly impact small entities that are parties to individual AD and CVD proceedings, it

<sup>107</sup> See 19 CFR 153.49 (“Reimbursement of dumping duties”) (1979).

<sup>108</sup> Sections 351.402(f)(1)(i) and (ii) are unchanged in this proposed rule. Therefore, Commerce will not deduct AD or CVD duties paid or reimbursed with respect to subject merchandise (1) sold before the date of publication of the notice of first suspension of liquidation, and (2) exported before the date of publication of the final AD determination where, before the initiation of the AD investigation in question, the exporter or producer granted a warranty of nonapplicability of AD or CVD duties with respect to the merchandise.

will not have a significant economic impact on any such entities because the proposed rule applies to administrative enforcement actions, only clarifying and establishing streamlined procedures; it does not impose any significant costs on regulated entities. Therefore, the proposed rule would not have a significant economic impact on a substantial number of small business entities. For this reason, an Initial Regulatory Flexibility Analysis is not required and one has not been prepared.

#### List of Subjects in 19 CFR Part 351

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

Dated: July 7, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

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

#### PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

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

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

■ 2. Revise paragraph (d)(1) of § 351.103 to read as follows:

##### § 351.103 Central Records Unit and Administrative Protective Order and Dockets Unit.

\* \* \* \* \*

(d) \* \* \*

(1) With the exception of a petitioner filing a petition in an investigation pursuant to § 351.202, an interested party filing a scope ruling application pursuant to § 351.225(c), an interested party filing a request for a circumvention inquiry pursuant to § 351.226(c), and those relevant parties identified by the Customs Service in a covered merchandise referral pursuant to § 351.226, all persons wishing to participate in a segment of a proceeding must file an entry of appearance. The entry of appearance must identify the name of the interested party, how that party qualifies as an interested party under § 351.102(b)(29) and section 771(9) of the Act, and the name of the firm, if any, representing the interested party in that particular segment of the proceeding. All persons who file an

entry of appearance and qualify as an interested party will be included in the public service list for the segment of the proceeding in which the entry of appearance is submitted. The entry of appearance may be filed as a cover letter to an application for APO access. If the representative of the interested party is not requesting access to business proprietary information under APO, the entry of appearance must be filed separately from any other document filed with the Department. If the interested party is a coalition or association as defined in subparagraph (A), (E), (F) or (G) of section 771(9) of the Act, the entry of appearance must identify all of the members of the coalition or association.

\* \* \* \* \*

■ 3. Add paragraph (g) to § 351.203 to read as follows:

##### § 351.203 Determination of sufficiency of petition.

\* \* \* \* \*

(g) *Time limits for filing interested party comments on industry support.*

For purposes of sections 702(c)(4)(E) and 732(c)(4)(E) of the Act, the Secretary will consider comments or information on the issue of industry support submitted no later than 5 business days before the date referenced in paragraph (b)(1) of this section by any interested party under section 771(9) of the Act. The Secretary will consider rebuttal comments or information to rebut, clarify, or correct such information on industry support submitted by any interested party no later than two calendar days from the time limit for filing comments.

■ 4. Revise § 351.214 to read as follows:

##### § 351.214 New shipper reviews under section 751(a)(2)(B) of the Act.

(a) *Introduction.* Section 751(a)(2)(B) of the Act provides a procedure by which so-called “new shippers” can obtain their own individual dumping margin or countervailable subsidy rate on an expedited basis. In general, a new shipper is an exporter or producer that did not export, and is not affiliated with an exporter or producer that did export, to the United States during the period of investigation. Furthermore, section 751(a)(2)(B)(iv) requires that the Secretary make a determination of whether the sales under review are bona fide. This section contains rules regarding requests for new shipper reviews and procedures for conducting such reviews, as well as requirements for determining whether sales are bona fide under section 751(a)(2)(B)(iv) of the Act. In addition, this section contains rules regarding requests for expedited

reviews by non-investigated exporters in certain countervailing duty proceedings and procedures for conducting such reviews.

(b) *Request for new shipper review—*  
(1) *Requirement of sale or export.*

Subject to the requirements of section 751(a)(2)(B) of the Act and this section, an exporter or producer may request a new shipper review if it has exported, or sold for export, subject merchandise to the United States and can demonstrate the existence of a bona fide sale.

(2) *Contents of request.* A request for a new shipper review must contain the following:

(i) If the person requesting the review is both the exporter and producer of the merchandise, a certification that the person requesting the review did not export subject merchandise to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation;

(ii) If the person requesting the review is the exporter, but not the producer, of the subject merchandise:

(A) The certification described in paragraph (b)(2)(i) of this section; and  
(B) A certification from the person that produced or supplied the subject merchandise to the person requesting the review that that producer or supplier did not export the subject merchandise to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation;

(iii)(A) A certification that, since the investigation was initiated, such exporter or producer has never been affiliated with any exporter or producer who exported the subject merchandise to the United States (or in the case of a regional industry, who exported the subject merchandise for sale in the region concerned) during the period of investigation, including those not individually examined during the investigation; and

(B) In an antidumping proceeding involving imports from a nonmarket economy country, a certification that the export activities of such exporter or producer are not controlled by the central government;

(iv)(A) A certification from the unaffiliated customer in the United States that it did not purchase the subject merchandise from the producer or exporter during the period of investigation; and

(B) A certification from the unaffiliated customer in the United States that it will provide necessary

information requested by the Secretary regarding its purchase of subject merchandise.

(v) Documentation establishing:

(A) The date on which subject merchandise of the exporter or producer making the request was first entered, or withdrawn from warehouse, for consumption, or, if the exporter or producer cannot establish the date of first entry, the date on which the exporter or producer first shipped the subject merchandise for export to the United States;

(B) The volume of that and subsequent shipments, including whether such shipments were made in commercial quantities;

(C) The date of the first sale, and any subsequent sales, to an unaffiliated customer in the United States; and

(D) The circumstances surrounding such sale(s), including but not limited to:

(1) The price of such sales;

(2) Any expenses arising from such sales;

(3) Whether the subject merchandise involved in such sales was resold in the United States at a profit;

(4) Whether such sales were made on an arms-length basis;

(E) Additional documentation regarding the business activities of the producer or exporter, including but not limited to:

(1) The producer or exporter's offers to sell merchandise in the United States;

(2) An identification of the complete circumstance surrounding the producer or exporter's sales to the United States, as well as any home market or third country sales;

(3) In the case of a non-producing exporter, an explanation of the exporter's relationship with its producer/supplier; and

(4) An identification of the producer's or exporter's relationship to the first unrelated U.S. purchaser;

(vi) In the case of a review of a countervailing duty order, a certification that the exporter or producer has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire.

(c) *Deadline for requesting review.* An exporter or producer may request a new shipper review within one year of the date referred to in paragraph (b)(2)(v)(A) of this section.

(d) *Initiation of new shipper review—*  
(1) *In general.* If the requirements for a request for new shipper review under paragraph (b) of this section are satisfied, the Secretary will initiate a new shipper review under this section

in the calendar month immediately following the anniversary month or the semiannual anniversary month if the request for the review is made during the 6-month period ending with the end of the anniversary month or the semiannual anniversary month (whichever is applicable).

(2) *Semiannual anniversary month.* The semiannual anniversary month is the calendar month that is 6 months after the anniversary month.

(3) *Example.* An order is published in January. The anniversary month would be January, and the semiannual anniversary month would be July. If the Secretary received a request for a new shipper review at any time during the period February–July, the Secretary would initiate a new shipper review in August. If the Secretary received a request for a new shipper review at any time during the period August–January, the Secretary would initiate a new shipper review in February.

(4) *Exception.* If the Secretary determines that the requirements for a request for new shipper review under paragraph (b) of this section have not been satisfied, the Secretary will reject the request and provide a written explanation of the reasons for the rejection.

(e) *Suspension of liquidation.* When the Secretary initiates a new shipper review under this section, the Secretary will direct the Customs Service to suspend or continue to suspend liquidation of any unliquidated entries of the subject merchandise from the relevant exporter or producer at the applicable cash deposit rate.

(f) *Rescission of new shipper review—*  
(1) *Withdrawal of request for review.* The Secretary may rescind a new shipper review under this section, in whole or in part, if a producer or exporter that requested a review withdraws its request not later than 60 days after the date of publication of notice of initiation of the requested review.

(2) *Absence of entry and sale to an unaffiliated customer.* The Secretary may rescind a new shipper review, in whole or in part, if the Secretary concludes that:

(i) As of the end of the normal period of review referred to in paragraph (g) of this section, there has not been an entry and sale to an unaffiliated customer in the United States of subject merchandise; and

(ii) An expansion of the normal period of review to include an entry and sale to an unaffiliated customer in the United States of subject merchandise would be likely to prevent the completion of the review within the

time limits set forth in paragraph (i) of this section;

(3) *Absence of bona fide sale to an unaffiliated customer.* The Secretary may rescind a new shipper review, in whole or in part, if the Secretary concludes that:

(i) Information that the Secretary considers necessary to conduct a bona fide sale analysis is not on the record; or

(ii) The producer or exporter seeking a new shipper review has failed to demonstrate to the satisfaction of the Secretary the existence of a bona fide sale to an unaffiliated customer.

(4) *Notice of Rescission.* If the Secretary rescinds a new shipper review (in whole or in part), the Secretary will publish in the **Federal Register** notice of “Rescission of Antidumping (Countervailing Duty) New Shipper Review” or, if appropriate, “Partial Rescission of Antidumping (Countervailing Duty) New Shipper Review.”

(g) *Period of review—*(1) *Antidumping proceeding—*(i) *In general.* Except as provided in paragraph (g)(1)(ii) of this section, in an antidumping proceeding, a new shipper review under this section normally will cover, as appropriate, entries, exports, or sales during the following time periods:

(A) If the new shipper review was initiated in the month immediately following the anniversary month, the twelve-month period immediately preceding the anniversary month; or

(B) If the new shipper review was initiated in the month immediately following the semiannual anniversary month, the period of review will be the six-month period immediately preceding the semiannual anniversary month.

(ii) *Exceptions.* (A) If the Secretary initiates a new shipper review under this section in the month immediately following the first anniversary month, the review normally will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part to the end of the month immediately preceding the first anniversary month.

(B) If the Secretary initiates a new shipper review under this section in the month immediately following the first semiannual anniversary month, the review normally will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part to the end of the month immediately preceding the first semiannual anniversary month.

(2) *Countervailing duty proceeding.* In a countervailing duty proceeding, the period of review for a new shipper review under this section will be the same period as that specified in § 351.213(e)(2) for an administrative review.

(h) *Procedures.* The Secretary will conduct a new shipper review under this section in accordance with § 351.221.

(i) *Time limits*—(1) *In general.* Unless the time limit is waived under paragraph (j)(3) of this section, the Secretary will issue preliminary results of review (see § 351.221(b)(4)) within 180 days after the date on which the new shipper review was initiated, and final results of review (see § 351.221(b)(5)) within 90 days after the date on which the preliminary results were issued.

(2) *Exception.* If the Secretary concludes that a new shipper review is extraordinarily complicated, the Secretary may extend the 180-day period to 300 days, and may extend the 90-day period to 150 days.

(j) *Multiple reviews.* Notwithstanding any other provision of this subpart, if a review (or a request for a review) under § 351.213 (administrative review), § 351.214 (new shipper review), § 351.215 (expedited antidumping review), or § 351.216 (changed circumstances review) covers merchandise of an exporter or producer subject to a review (or to a request for a review) under this section, the Secretary may, after consulting with the exporter or producer:

(1) Rescind, in whole or in part, a review in progress under this subpart;

(2) Decline to initiate, in whole or in part, a review under this subpart; or

(3) Where the requesting producer or exporter agrees in writing to waive the time limits of paragraph (i) of this section, conduct concurrent reviews, in which case all other provisions of this section will continue to apply with respect to the exporter or producer.

(k) *Determinations based on bona fide sales.* In determining whether the U.S. sales of an exporter or producer made during the period covered by the review are bona fide, the Secretary shall consider the factors identified at section 752(a)(2)(B)(iv) of the Act. In accordance with section 751(a)(2)(B)(iv)(VII) of the Act, the Secretary shall consider the following factors:

(1) Whether the producer, exporter, or customer was established for purposes of the sale(s) in question after the imposition of the relevant antidumping or countervailing duty order;

(2) Whether the producer, exporter, or customer has lines of business unrelated to the subject merchandise;

(3) Whether there is an established history of duty evasion with respect to new shipper reviews or circumvention under the relevant antidumping or countervailing duty order;

(4) Whether there is an established history of duty evasion with respect to new shipper reviews or circumvention under any antidumping or countervailing duty orders in the same or similar industry;

(5) The quantity of sales; and

(6) Any other factor that the Secretary determines to be relevant with respect to the future selling behavior of the producer or exporter, including any other indicia that the sale was not commercially viable.

(l) *Expedited reviews in countervailing duty proceedings for noninvestigated exporters*—(1) *Request for review.* If, in a countervailing duty investigation, the Secretary limited the number of exporters or producers to be individually examined under section 777A(e)(2)(A) of the Act, an exporter that the Secretary did not select for individual examination or that the Secretary did not accept as a voluntary respondent (see § 351.204(d)) may request a review under this paragraph (l). An exporter must submit a request for review within 30 days of the date of publication in the **Federal Register** of the countervailing duty order. A request must be accompanied by a certification that:

(i) The requester exported the subject merchandise to the United States during the period of investigation;

(ii) The requester is not affiliated with an exporter or producer that the Secretary individually examined in the investigation; and

(iii) The requester has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire.

(2) *Initiation of review*—(i) *In general.* The Secretary will initiate a review in the month following the month in which a request for review is due under paragraph (l)(1) of this section.

(ii) *Example.* The Secretary publishes a countervailing duty order on January 15. An exporter would have to submit a request for a review by February 14. The Secretary would initiate a review in March.

(3) *Conduct of review.* The Secretary will conduct a review under this paragraph (l) in accordance with the provisions of this section applicable to new shipper reviews, subject to the following exceptions:

(i) The period of review will be the period of investigation used by the Secretary in the investigation that resulted in the publication of the countervailing duty order (see § 351.204(b)(2));

(ii) The final results of a review under this paragraph (l) will not be the basis for the assessment of countervailing duties; and

(iii) The Secretary may exclude from the countervailing duty order in question any exporter for which the Secretary determines an individual net countervailable subsidy rate of zero or de minimis (see § 351.204(e)(1)), provided that the Secretary has verified the information on which the exclusion is based.

(m) *Exception from assessment in regional industry cases.* For procedures relating to a request for the exception from the assessment of antidumping or countervailing duties in a regional industry case, see § 351.212(f).

■ 5. Revise § 351.225 to read as follows:

**§ 351.225 Scope rulings.**

(a) *Introduction.* Questions sometimes arise as to whether a particular product is covered by the scope of an antidumping or countervailing duty order. Such questions may arise for a variety of reasons given that the description of the merchandise subject to the scope is written in general terms. The Secretary will initiate and conduct a scope inquiry and issue a scope ruling to determine whether or not a product is covered by the scope of an order at the request of an interested party or on the Secretary's initiative. A scope ruling that a product is within the scope of the order is a determination that the product has always been within the scope of the order. This section contains rules and procedures regarding scope rulings, including scope ruling applications, scope inquiries, and standards used in determining whether a product is covered by the scope of an order. Unless otherwise specified, the procedures as described in subpart C of this part (§§ 351.301 through 351.308 and §§ 351.312 through 351.313) apply to this section.

(b) *Self-initiation of a scope inquiry.* If the Secretary determines from available information that an inquiry is warranted to determine whether a product is covered by the scope of an order, the Secretary may initiate a scope inquiry and notify, electronically or otherwise, all parties on the annual inquiry service list (see paragraph (n) of this section).

(c) *Scope ruling application*—(1) *Contents.* An interested party may submit a scope ruling application



requesting that the Secretary conduct a scope inquiry to determine whether a product, which is or has been in actual production by the time of the filing of the application, is covered by the scope of an order. The Secretary will make available a scope ruling application, which the applicant must fully complete and serve in accordance with the requirements of paragraph (n) of this section. To the extent reasonably available to the applicant, the scope ruling application must include the requested information under paragraph (c)(2) of this section and relevant supporting documentation.

(2) *Requested information.* (i) A detailed physical description of the product, including:

(A) The characteristics (including technical, physical, chemical or otherwise) of the product;

(B) The uses of the product;

(C) The product's tariff classification under the Harmonized Tariff Schedule of the United States;

(D) Clear and legible photographs, schematic drawings, specifications, standards, marketing materials, and any other exemplars providing a visual depiction of the product; and

(E) A description of parts, materials, and the production process employed in the production of the product.

(ii) A concise public description of the product and public identification of the name and address of the producer, exporter, and importer of the product, if reasonably available to the applicant.

(iii) A narrative history of the production of the product at issue, including a history of earlier versions of the product if this is not the first model of the product.

(iv) The volume of annual production of the product for the most recently completed fiscal year.

(v) If the product has been imported into the United States as of the date of the filing of the scope ruling application:

(A) An explanation as to whether an entry of the product has been classified as subject to an order; and

(B) Relevant documentation, including dated copies of the Customs and Border Protection entry summary forms (or electronic entry processing system documentation) identifying the product upon importation and other related commercial documents, including, but not limited to, invoices and contracts, which reflect the details surrounding the sale and purchase of that imported product.

(vi) A statement as to whether the product undergoes any additional processing in the United States after importation, or in a third country before

importation, and a statement as to the relevance of this processing to the scope of the order.

(vii) The applicant's statement as to whether the product is covered by the scope of the order, including:

(A) An explanation with specific reference to paragraph (j) and (k) of this section, as appropriate;

(B) Citations to any applicable legal authority; and

(C) Whether there are companion orders as described in paragraph (m)(2) of this section.

(viii) Factual information supporting the applicant's position, including full copies of prior scope determinations and relevant excerpts of other documents identified in paragraph (k)(1) of this section.

(d) *Initiation of a scope inquiry based on a scope ruling application.* (1) Within 30 days after the filing of a scope ruling application, the Secretary will determine whether to accept or reject the scope ruling application. If the Secretary determines that a scope ruling application is incomplete or otherwise unacceptable, the Secretary may reject the scope ruling application and will provide a written explanation of the reasons for the rejection. If the scope ruling application is rejected, the applicant may resubmit the full application at any time, with all identified deficiencies corrected.

(2) If the Secretary does not reject the scope ruling application, it will be deemed accepted 31 days after filing and the scope inquiry will be deemed initiated.

(e) *Time limits*—(1) *In general.* The Secretary shall issue a final scope ruling within 120 days after the date on which the scope inquiry was initiated under paragraph (b) or (d) of this section. (2) *Extension.* The Secretary may extend the deadline in paragraph (e)(1) of this section by no more than 180 days if the Secretary determines that good cause exists to warrant an extension. Situations in which good cause has been demonstrated may include, but are not limited to, the following:

(i) If the Secretary has issued questionnaires to the applicant or other interested parties; received responses to those questionnaires; and determined that an extension is warranted to request further information or consider and address the parties' responses on the record adequately; or

(ii) The Secretary has issued a preliminary scope ruling (*see* paragraph (g) of this section).

(f) *Scope inquiry procedures.* (1) Within 20 days of the Secretary's self-initiation of a scope inquiry under paragraph (b) of this section, interested

parties are permitted one opportunity to submit comment and factual information addressing the self-initiation. Within 10 days of the filing of such comments, any interested party is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information submitted by the other interested parties.

(2) Within 20 days of the initiation of a scope inquiry under paragraph (d)(2) of this section, an interested party other than the applicant is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information contained in the scope ruling application. Within 10 days of the filing of such rebuttal, clarification, or correction, the applicant is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification or correction.

(3) Following initiation of a scope inquiry under paragraph (b) or (d) of this section, the Secretary may issue questionnaires and verify submissions received, where appropriate. The Secretary may limit issuance of questionnaires to a reasonable number of respondents. Questionnaire responses are due on the date specified by the Secretary. Within 10 days after a questionnaire response has been filed with the Secretary, an interested party other than the original submitter is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information contained in the questionnaire response. Within five days of the filing of such rebuttal, clarification, or correction, the original submitter is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification or correction.

(4) If the Secretary issues a preliminary scope ruling under paragraph (g) of this section, which is not issued concurrently with the initiation of the scope inquiry, the Secretary will establish a schedule for the filing of scope comments and rebuttal comments. Unless otherwise specified, any interested party may submit scope comments within 10 days after the issuance of the preliminary scope ruling, and any interested party may submit rebuttal comments within 5 days thereafter. Unless otherwise specified, no factual information will be accepted in the scope or rebuttal comments.

(5) If the Secretary issues a preliminary scope ruling concurrently with the initiation of a scope inquiry under paragraph (g) of this section, paragraphs (f)(1) through (4) of this section will not apply. In such a situation, the Secretary will establish appropriate procedures on a case-specific basis.

(6) If the Secretary determines it is appropriate to do so, the Secretary may rescind a scope inquiry under this section.

(7) The Secretary may alter any deadlines under this paragraph or establish a separate schedule for the filing of comments and/or factual information during the scope inquiry, as appropriate.

(g) *Preliminary scope ruling.* The Secretary may issue a preliminary scope ruling, based upon the available information at the time, as to whether there is a reasonable basis to believe or suspect that the product subject to a scope inquiry is covered by the scope of the order. In determining whether to issue a preliminary scope ruling, the Secretary may consider the complexity of the issues and arguments raised in the scope inquiry. The Secretary may issue a preliminary scope ruling concurrently with the initiation of a scope inquiry under paragraph (b) or (d) of this section.

(h) *Final scope ruling.* The Secretary will issue a final scope ruling as to whether the product that is the subject of the scope inquiry is covered by the scope of the order, including an explanation of the factual and legal conclusions on which the final scope ruling is based. The Secretary will promptly convey a copy of the final scope ruling in the manner prescribed by section 516A(a)(2)(A)(ii) of the Act to all parties to the proceeding (*see* § 351.102(b)(36)).

(i) *Other segments of the proceeding.*

(1) Notwithstanding any other provision of this section, the Secretary may, but is not required to, address scope issues in another segment of the proceeding, such as an administrative review under § 351.213, a circumvention inquiry under § 351.226, or a covered merchandise inquiry under § 351.227, without initiating or conducting a scope inquiry under this section. For example, the Secretary may forego or rescind a scope inquiry under this section and determine whether the product at issue is covered by the scope of the order in another segment of the proceeding (including another scope inquiry, *see* paragraph (m)(1) of this section).

(2) Notwithstanding any other provision of this section, the Secretary may modify the deadlines of the scope

inquiry to align with the deadlines of another segment of the proceeding or make no changes to its scope inquiry deadlines.

(3) During the pendency of a scope inquiry or upon issuance of a final scope ruling under paragraph (h) of this section, the Secretary may take any further action, as appropriate, with respect to another segment of the proceeding. For example, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the scope inquiry for purpose of an administrative review under § 351.213.

(j) *Country of origin determinations.* In considering whether a product is covered by the scope of the order at issue, the Secretary may need to determine the country of origin of the product. To make such a determination, the Secretary may use any reasonable method and is not bound by the determinations of any other agency, including tariff classification and country of origin marking rulings issued by the Customs Service. In determining the country of origin, the Secretary may conduct a substantial transformation analysis that considers relevant factors that arise on a case-by-case basis, including:

(1) Whether the processed downstream product is a different class or kind of merchandise than the upstream product;

(2) The characteristics (including technical, physical, chemical or otherwise) and intended end-use of the product;

(3) The cost of production/value added of further processing in the third country or countries;

(4) The nature and sophistication of processing in the third country or countries; and

(5) The level of investment in the third country or countries.

In conducting a country of origin determination, the Secretary also may consider where the essential component of the product is produced or where the essential characteristics of the product are imparted.

(k) *Scope rulings.* In determining whether a product is covered by the scope of the order at issue, the Secretary will consider the language of the scope and may make its determination on this basis alone if the language of the scope, including the descriptions of merchandise expressly excluded from the scope, is dispositive.

(1) In considering the language of the scope, at the Secretary's discretion, the following may also be considered:

(i) The descriptions of the merchandise contained in the petition;

(ii) The descriptions of the merchandise contained in the initial investigation;

(iii) Determinations of the Secretary, including, but not limited to, prior scope rulings, memoranda, or clarifications; and

(iv) Determinations of the Commission, including reports issued pursuant to the Commission's initial investigation.

(2) If the Secretary determines that the above sources are not dispositive, the Secretary will then further consider:

(i) The characteristics (including technical, physical, chemical or otherwise) of the product;

(ii) The expectations of the ultimate purchasers;

(iii) The ultimate use of the product;

(iv) The channels of trade in which the product is sold; and

(v) The manner in which the product is advertised and displayed.

(3) If merchandise contains two or more components and the product at issue in the scope inquiry is a component of that merchandise, the Secretary will first analyze the scope language and the criteria above to determine if the product, standing alone, would be covered by an order. If the Secretary determines that a component product would otherwise be covered by the scope of an order, the Secretary next will examine the same criteria to determine if the component product's inclusion in the larger merchandise is directly addressed by the scope of the order for purposes of inclusion or exclusion from the coverage of the scope. Finally, if the scope language and the criteria above do not address that situation, then the Secretary will consider, as appropriate, relevant factors that may arise on a product-specific basis to determine whether the component product's inclusion in the larger merchandise results in its exclusion from the scope of the order, or leaves it within the coverage of the scope. Such relevant factors include:

(i) The practicability of separating the in-scope component for repackaging or resale;

(ii) The measurable value of the in-scope component as compared to the measurable value of the merchandise as a whole; and

(iii) The ultimate use or function of the in-scope component relative to the ultimate use or function of the merchandise as a whole.

(l) *Suspension of liquidation.* (1) When the Secretary initiates a scope inquiry under paragraph (b) or (d) of

this section, the Secretary will notify the Customs Service of the initiation and direct the Customs Service to continue the suspension of liquidation of entries of products subject to the scope inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order, until appropriate liquidation instructions are issued.

(2) If the Secretary issues a preliminary scope ruling under paragraph (g) of this section that the product at issue is covered by the scope of the order, the Secretary will direct the Customs Service as follows:

(i) To continue the suspension of liquidation of previously suspended entries of the product at issue as directed under paragraph (l)(1) of this section; and

(ii) To suspend liquidation of all other unliquidated entries of the product at issue, and apply the applicable cash deposit rate under the order to those entries.

(3) If the Secretary issues a final scope ruling under paragraph (h) of this section that the product at issue is covered by the scope of the order, the Secretary will direct the Customs Service as follows:

(i) To continue the suspension of liquidation of entries suspended as directed under paragraph (l)(1) and/or (l)(2) of this section (including entries of the product at issue that are subject to suspension of liquidation as a result of another segment of a proceeding, such as an administrative review under § 351.213 or a circumvention inquiry under § 351.226) and apply the applicable cash deposit rate under the order until appropriate liquidation instructions are issued pursuant to §§ 351.212 and 351.213; and

(ii) To suspend liquidation of all other unliquidated entries of the product at issue that are not otherwise subject to suspension of liquidation, and apply the applicable cash deposit rate under the order until appropriate liquidation instructions are issued pursuant to §§ 351.212 and 351.213.

(4) If the Secretary issues a final scope ruling under paragraph (h) of this section that the product is not covered by the scope of the order, and entries of the product at issue are not otherwise subject to suspension of liquidation as a result of another segment of a proceeding, such as a circumvention inquiry under § 351.226 or a covered merchandise inquiry under § 351.227, the Secretary will direct the Customs Service to terminate the suspension of

liquidation and refund any cash deposits for such entries.

(m) *Applicability of scope rulings; companion orders*—(1) *In general.* To the extent practicable, the Secretary normally will initiate and conduct a single scope inquiry and issue a single scope ruling for an order under this section with respect to all products with the identical physical description from the same country of origin as the particular product at issue, regardless of producer, exporter, or importer. If the Secretary has previously issued a scope ruling for an order with respect to a particular product, the Secretary may apply that scope ruling to all products with the identical physical description from the same country of origin as the particular product at issue, regardless of producer, exporter, or importer, without initiating or conducting a new scope inquiry under this section. In such instances, the requirements of paragraph (h) of this section will apply.

(2) *Companion antidumping and countervailing duty orders.* If there are companion antidumping and countervailing duty orders covering the same merchandise from the same country of origin, the requesting interested party under paragraph (c) of this section must file the scope ruling application pertaining to both orders only on the record of the antidumping duty proceeding. Should the Secretary determine to initiate a scope inquiry under paragraph (b) or (d) of this section, the Secretary will initiate and conduct a single inquiry with respect to the merchandise at issue for both orders only on the record of the antidumping proceeding. Once the Secretary issues a final scope ruling on the record of the antidumping duty proceeding, the Secretary will include a copy of that scope ruling on the record of the countervailing duty proceeding.

(n) *Service of scope ruling application; annual inquiry service list; entry of appearance.* (1) The requirements of § 351.303(f) apply to this section, except that an interested party that submits a scope ruling application under paragraph (c) of this section must serve a copy of the application on all persons on the annual inquiry service list for that order, as well as the companion order, if any, as described in paragraph (m)(2) of this section. If a scope ruling application is rejected and resubmitted pursuant to paragraph (d)(1) of this section, service of the resubmitted application is not required under this paragraph, unless otherwise specified.

(2) For purposes of this section, the “annual inquiry service list” will include the petitioner(s) and those

parties that file a request for inclusion on the annual inquiry service list for a proceeding, in accordance with the Secretary’s established procedures. (3) A new “annual inquiry service list” will be established on a yearly basis. Parties filing a request for inclusion on that list must file a request during the anniversary month of the publication of the antidumping or countervailing duty order. Only the petitioner will be automatically placed on the new annual inquiry service list once the previous year’s list has been replaced.

(4) Once a scope ruling application is accepted by the Secretary, a segment-specific service list will be established and the requirements of § 351.303(f) will apply. Parties other than the scope ruling applicant that wish to participate in the scope inquiry must file an entry of appearance in accordance with § 351.103(d)(1).

(o) *Publication of list of final scope rulings.* On a quarterly basis, the Secretary will publish in the **Federal Register** a list of final scope rulings issued within the previous three months. This list will include the case name, and a brief description of the ruling. The Secretary also may include complete public versions of its scope rulings on its website, should the Secretary determine such placement is warranted.

(p) *Suspended investigations; suspension agreements.* The Secretary may, as appropriate, apply the procedures set forth in this section in determining the scope of a suspended investigation or a suspension agreement (see § 351.208).

■ 6. Add § 351.226 as follows:

**§ 351.226 Circumvention inquiries.**

(a) *Introduction.* Section 781 of the Act addresses the circumvention of antidumping and countervailing duty orders. This provision recognizes that circumvention seriously undermines the effectiveness of the remedies provided by the antidumping and countervailing duty proceedings, and frustrates the purposes for which these laws were enacted. Section 781 of the Act allows the Secretary to apply antidumping and countervailing duty orders in such a way as to prevent circumvention by including within the scope of the order four distinct categories of merchandise. The Secretary will initiate and conduct a circumvention inquiry at the request of an interested party or on the Secretary’s initiative, and issue a circumvention determination as provided for under section 781 of the Act and the rules and procedures in this section. Unless otherwise specified, the procedures as described in subpart C of

this part (§§ 351.301 through 351.308 and §§ 351.312 through 351.313) apply to this section.

(b) *Self-initiation of circumvention inquiry.* If the Secretary determines from available information that an inquiry is warranted into the question of whether the elements necessary for a circumvention determination under section 781 of the Act exist, the Secretary may initiate a circumvention inquiry and publish a notice of initiation in the **Federal Register**.

(c) *Circumvention inquiry request—(1) In general.* An interested party may submit a request for a circumvention inquiry that alleges that the elements necessary for a circumvention determination under section 781 of the Act exist and that is accompanied by information reasonably available to the interested party supporting these allegations. The circumvention inquiry request must be served in accordance with the requirements of paragraph (n) of this section.

(2) *Contents of request.* To the extent reasonably available to the requestor, a circumvention inquiry request must include the requested information under paragraph (c)(1) of this section and the following:

(i) A detailed physical description of the merchandise allegedly circumventing the antidumping or countervailing duty order, including:

(A) The characteristics (including technical, physical, chemical or otherwise) of the product;

(B) The uses of the product;

(C) The product's tariff classification under the Harmonized Tariff Schedule of the United States;

(D) Clear and legible photographs, schematic drawings, specifications, standards, marketing materials, and any other exemplars providing a visual depiction of the product; and

(E) A description of parts, materials, and the production process employed in the production of the product.

(ii) A concise public description of the product and public identification of the name and address of any producer, exporter, and importer of the product allegedly circumventing the antidumping or countervailing duty order if reasonably available to the requesting interested party. If the full universe of parties allegedly circumventing the order(s) is unknown, then examples are sufficient. Furthermore, this provision is not intended to restrict the inclusion of business proprietary information in the request where appropriate.

(iii) A statement of the requestor's position as to the nature of the alleged circumvention under section 781 of the

Act, such as a description of the procedures, channels of trade, and foreign countries involved (including a description of the processes occurring in each country), as appropriate.

(iv) A statement of the requestor's position as to whether the circumvention inquiry, if initiated, should be conducted on a country-wide basis.

(iv) Factual information supporting this position, including import and export data relevant to the merchandise allegedly circumventing the antidumping or countervailing duty order.

(d) *Initiation of a circumvention inquiry based on a request.* Within 20 days after the filing of a request for a circumvention inquiry, the Secretary will determine whether to accept or reject the request. If it is not practicable to determine whether to accept or reject a request within 20 days, the Secretary may extend that deadline by an additional 15 days.

(1) If the Secretary determines that the request is incomplete or otherwise unacceptable, the Secretary may reject the request, and will provide a written explanation of the reasons for the rejection. If the request is rejected, the requestor may resubmit the full request at any time, with all identified deficiencies corrected.

(2) If the Secretary determines upon review of a request for a circumvention inquiry that a scope ruling is warranted before the Secretary can conduct a circumvention analysis, the Secretary may either, in accord with § 351.225(i)(1), initiate the circumvention inquiry and address scope issues in the context of the circumvention inquiry, or defer initiation of the circumvention inquiry pending the completion of any ongoing or new segment of the proceeding addressing the scope issue. When initiation is deferred pending another segment of the proceeding, if the result of that other segment is that the product at issue is not covered by the scope of the antidumping and/or countervailing duty order(s) at issue, the Secretary may immediately initiate the circumvention inquiry upon the issuance of the final decision in that other segment.

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

(e) *Time limits—(1) Preliminary Determination.* The Secretary will issue a preliminary determination under

paragraph (g)(1) of this section no later than 150 days from the date of publication of the notice of initiation of a circumvention inquiry under paragraph (b) or (d) of this section.

(2) *Final Determination.* In accordance with section 781(f) of the Act, the Secretary shall, to the maximum extent practicable, issue a final determination under paragraph (g)(2) of this section no later than 300 days from the date of publication of the notice of initiation of a circumvention inquiry under paragraph (b) or (d) of this section. If the Secretary concludes that the inquiry is extraordinarily complicated and additional time is necessary to issue a final circumvention determination, then the Secretary may extend the 300-day deadline by no more than 65 days.

(f) *Circumvention inquiry procedures.* (1) Within 20 days of the publication of the Secretary's self-initiation of a circumvention inquiry under paragraph (b) of this section, interested parties are permitted one opportunity to submit comment and factual information addressing the self-initiation. Within 10 days of the filing of such comments, any interested party is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information submitted by the other interested parties.

(2) Within 20 days of the publication of the initiation of a circumvention inquiry under paragraph (d) of this section, an interested party other than the requestor is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information contained in the request. Within 10 days of the filing of such rebuttal, clarification, or correction, the requestor is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information contained in the interested party's rebuttal, clarification or correction.

(3) Following initiation of a circumvention inquiry under paragraph (b) or (d) of this section, the Secretary may issue questionnaires and verify submissions received, where appropriate. The Secretary may limit issuance of questionnaires to a reasonable number of respondents. Questionnaire responses are due on the date specified by the Secretary. Within 10 days after a questionnaire response has been filed with the Secretary, an interested party other than the original submitter is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information contained in the questionnaire response. Within 5 days

of the filing of such rebuttal, clarification, or correction, the original submitter is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information contained in the interested party's rebuttal, clarification or correction.

(4) If the Secretary issues a preliminary circumvention determination under paragraph (g)(1) of this section, which is not issued concurrently with the initiation of the circumvention inquiry, the Secretary will establish a schedule for the filing of comments and rebuttal comments.

Unless otherwise specified, any interested party may submit comments within 10 days after the issuance of the preliminary circumvention determination, and any interested party may submit rebuttal comments within 5 days thereafter. Unless otherwise specified, no factual information will be accepted in the comments or rebuttal comments.

(5) If the Secretary issues a preliminary circumvention determination concurrently with the initiation of the circumvention inquiry under paragraph (g)(1) of this section, paragraphs (g)(1) through (4) will not apply. In such a situation, the Secretary will establish appropriate procedures on a case-specific basis.

(6) Notwithstanding any other provision of this section, the Secretary may forego or rescind a circumvention inquiry, in whole or in part, under this section for the following reasons:

(i) The requestor timely withdraws its request for a circumvention inquiry under paragraph (c) of this section;

(ii) The Secretary issues a final determination in another segment of a proceeding, and has determined that the merchandise at issue in the circumvention inquiry is covered by the scope of the antidumping or countervailing duty order;

(iii) Where the Secretary has initiated a circumvention inquiry under paragraph (b) or (d) of this section to examine circumvention under two or more provisions under paragraphs (h), (i), (j), or (k) of this section, and determines that it is not necessary to issue a final circumvention determination with respect to one of those paragraphs. For example, if the Secretary initiates a circumvention inquiry to examine whether merchandise is altered in minor respects under paragraph (j) of this section or later-developed merchandise under paragraph (k) of this section, the Secretary may rescind the inquiry in part to address only one of those provisions.

(7) The Secretary may alter any deadlines under this paragraph or establish a separate schedule for the filing of comments and/or factual information during the circumvention inquiry, as appropriate. Notwithstanding any other provision of this section, the Secretary may modify the deadlines of the circumvention inquiry to align with the deadlines of another segment of the proceeding or make no changes to its inquiry deadlines.

(8)(i) The Secretary will notify the Commission in writing of the proposed inclusion of products in an order prior to issuing a final determination under paragraph (g)(2) of this section based on a determination under:

(A) Section 781(a) of the Act (paragraph (h) of this section) with respect to merchandise completed or assembled in the United States (other than minor completion or assembly);

(B) Section 781(b) of the Act (paragraph (i) of this section) with respect to merchandise completed or assembled in other foreign countries; or

(C) Section 781(d) of the Act (paragraph (k) of this section) with respect to later-developed products that incorporate a significant technological advance or significant alteration of an earlier product.

(ii) If the Secretary notifies the Commission under paragraph (f)(7)(i) of this section, upon the written request of the Commission, the Secretary will consult with the Commission regarding the proposed inclusion, and any such consultation will be completed within 15 days after the date of such request. If, after consultation, the Commission believes that a significant injury issue is presented by the proposed inclusion of a product within an order, the Commission may provide written advice to the Secretary as to whether the inclusion would be inconsistent with the affirmative injury determination of the Commission on which the order is based.

(g) *Circumvention determinations*—  
(1) *Preliminary determination.* The Secretary will issue a preliminary determination, based upon the available information at the time, as to whether there is a reasonable basis to believe or suspect that the elements necessary for a circumvention determination under section 781 of the Act exist. The preliminary determination will be published in the **Federal Register**. The Secretary may publish notice of a preliminary determination concurrently with the notice of initiation of a circumvention inquiry under paragraph (b) or (d) of this section.

(2) *Final determination.* The Secretary will issue a final determination as to whether the elements necessary for a circumvention determination under section 781 of the Act exist, in which case the merchandise at issue will be included within the scope of the order. As part of its determination, the Secretary will include an explanation of the factual and legal conclusions on which the final determination is based. The final determination will be published in the **Federal Register**. Promptly after publication, the Secretary will convey a copy of the final determination in the manner prescribed by section 516A(a)(2)(A)(ii) of the Act to all parties to the proceeding (see § 351.102(b)(36)).

(h) *Products completed or assembled in the United States.* Under section 781(a) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order imported parts or components referred to in section 781(a)(1)(B) of the Act that are used in the completion or assembly of the merchandise in the United States at any time such order is in effect. In determining the value of parts or components (including such purchases from another person) under section 781(a)(1)(D) of the Act, or of processing performed (including by another person) under section 781(a)(2)(E) of the Act, the Secretary may determine the value of the part or component on the basis of the cost of producing the part or component under section 773(e) of the Act—or, in the case of nonmarket economies, on the basis of section 773(c) of the Act.

(i) *Products completed or assembled in other foreign countries.* Under section 781(b) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order, at any time such order is in effect, imported merchandise completed or assembled in a foreign country other than the country to which the order applies. In determining the value of parts or components (including such purchases from another person) under section 781(b)(1)(D) of the Act, or of processing performed (including by another person) under section 781(b)(2)(E) of the Act, the Secretary may determine the value of the part or component on the basis of the cost of producing the part or component under section 773(e) of the Act—or, in the case of nonmarket economies, on the basis of section 773(c) of the Act.

(j) *Minor alterations of merchandise.* Under section 781(c) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order articles altered in form or

appearance in minor respects. The Secretary may consider such criteria including, but not limited to, the overall physical characteristics of the merchandise, the expectations of the ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported products. The Secretary also may consider the circumstances under which the products enter the United States, including but not limited to the timing of the entries and the quantity of merchandise entered during the circumvention review period.

(k) *Later-developed merchandise.* In determining whether later-developed merchandise is within the scope of an antidumping or countervailing duty order, the Secretary will apply section 781(d) of the Act. In determining whether merchandise is “later-developed” the Secretary will examine whether the merchandise at issue was commercially available at the time of the initiation of the underlying antidumping or countervailing duty investigation.

(l) *Suspension of liquidation.* (1) When the Secretary publishes a notice of initiation of a circumvention inquiry under paragraph (b) or (d) of this section, the Secretary will notify the Customs Service of the initiation and direct the Customs Service to continue the suspension of liquidation of entries of products subject to the circumvention inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order, until appropriate liquidation instructions are issued.

(2) If the Secretary issues an affirmative preliminary determination under paragraph (g)(1) of this section, the Secretary will direct the Customs Service as follows:

(i) To continue the suspension of liquidation of previously suspended entries of the product at issue as directed under paragraph (l)(1) of this section; and

(ii) To suspend liquidation of all other unliquidated entries of the product at issue, and apply the applicable cash deposit rate under the order to those entries.

(3) If the Secretary issues an affirmative final determination under paragraph (g)(2) of this section, the Secretary will direct the Customs Service as follows:

(i) To continue the suspension of liquidation of entries suspended as directed under paragraph (l)(1) and/or (l)(2) of this section (including entries of

the product at issue that are subject to suspension of liquidation as a result of another segment of a proceeding, such as an administrative review under § 351.213) and apply the applicable cash deposit rate under the order until appropriate liquidation instructions are issued pursuant to §§ 351.212 and 351.213; and

(ii) To suspend liquidation of all other unliquidated entries of the product at issue that are not otherwise subject to suspension of liquidation, and apply the applicable cash deposit rate under the order until appropriate liquidation instructions are issued pursuant to §§ 351.212 and 351.213.

(4) If the Secretary issues a negative final determination under paragraph (g)(2) of this section, and entries of the product are not otherwise subject to suspension of liquidation as a result of another segment of a proceeding, such as a covered merchandise inquiry under § 351.227, the Secretary will order the Customs Service to terminate the suspension of liquidation and refund any cash deposits for such entries.

(m) *Applicability of circumvention determination; other segments of the proceeding; companion orders—(1) Applicability of circumvention determination.* In conducting a circumvention inquiry under this section, the Secretary shall consider, based on the available record evidence, whether the circumvention determination should be applied on a country-wide basis.

(2) *Other segments of the proceeding.* During the pendency of a circumvention inquiry or upon issuance of a final circumvention determination under paragraph (g)(2) of this section, the Secretary may take any further action, as appropriate, with respect to another segment of the proceeding. For example, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the circumvention inquiry for purpose of an administrative review under § 351.213.

(3) *Companion antidumping and countervailing duty orders.* If there are companion antidumping and countervailing duty orders covering the same merchandise from the same country of origin, the requesting interested party under paragraph (c) of this section must file the request pertaining to both orders only on the record of the antidumping duty proceeding. Should the Secretary determine to initiate a circumvention inquiry under paragraph (b) or (d) of this section, the Secretary will initiate and conduct a single inquiry with respect to the merchandise at issue for

both orders only on the record of the antidumping proceeding. Once the Secretary issues a final circumvention determination on the record of the antidumping duty proceeding, the Secretary will include a copy of that determination on the record of the countervailing duty proceeding.

(n) *Service of circumvention inquiry request; annual inquiry service list; entry of appearance.* (1) The requirements of § 351.303(f) apply to this section, except that an interested party that submits a circumvention inquiry request under paragraph (c) of this section must serve a copy of that inquiry request on all persons on the annual inquiry service list for that order, as well as the companion order, if any, as described in paragraph (m)(3) of this section. The procedures and description pertaining to the “annual inquiry service list” are set forth in § 351.225(n)(1)–(3).

(2) Once a circumvention inquiry request is accepted by the Secretary, a segment-specific service list will be established and the requirements of § 351.303(f) will apply. Parties other than the interested party requesting a circumvention inquiry that wish to participate in the circumvention inquiry must file an entry of appearance in accordance with § 351.103(d)(1).

(o) *Suspended investigations; suspension agreements.* The Secretary may, in accordance with section 781 of the Act, apply the procedures set forth in this section in determining whether the elements necessary for a circumvention determination under section 781 of the Act exist with respect to a suspended investigation or a suspension agreement (see § 351.208). ■ 7. Add § 351.227 to read as follows:

**§ 351.227 Covered merchandise referrals.**

(a) *Introduction.* The Trade Facilitation and Trade Enforcement Act of 2015 contains Title IV—Prevention of Evasion of Antidumping and Countervailing Duty Orders (short title “Enforce and Protect Act of 2015” or “EAPA”) (Pub. L. 114–125, sections 401, 421, 130 Stat. 122, 155, 161 (2016)). The Enforce and Protect Act of 2015 added section 517 to the Act, which established a new framework by which the Customs Service can conduct civil administrative investigations of potential duty evasion of an antidumping and/or countervailing duty order (referred to herein as an “EAPA investigation”). Section 517(b)(4)(A)(i) of the Act provides a procedure whereby if, during the course of an EAPA investigation, the Customs Service is unable to determine whether the merchandise at issue is covered

merchandise within the meaning of section 517(a)(3) of the Act, it shall refer the matter to the Secretary to make such a determination (referred to herein as a “covered merchandise referral”). Section 517(b)(4)(B) of the Act directs the Secretary to determine whether the merchandise is covered merchandise and promptly transmit the determination to the Customs Service. The Secretary shall consider a covered merchandise referral and issue a covered merchandise determination in accordance with the rules and procedures in this section. Unless otherwise specified, the procedures as described in subpart C of this part (§§ 351.301 through 351.308 and §§ 351.312 through 351.313) apply to this section.

(b) *Actions with respect to covered merchandise referral.* Within 15 days after receiving a covered merchandise referral from the Customs Service pursuant to section 517(b)(4)(A)(i) of the Act that the Secretary determines to be sufficient, the Secretary will take the following action.

(1) Initiate a covered merchandise inquiry (the Secretary will publish a notice of initiation in the **Federal Register**);

(2) Self-initiate a circumvention inquiry pursuant to § 351.226(b) to address the covered merchandise referral; or

(3) If the Secretary determines upon review of the covered merchandise referral that the question before the Secretary can be addressed in an ongoing segment of the proceeding, such as a scope inquiry under § 351.225 or a circumvention inquiry under § 351.226, the Secretary will publish a notice of its intent to address the covered merchandise referral in the context of such other segment in the **Federal Register**.

(c) *Time limits*—(1) *In general.* When the Secretary initiates a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary shall issue a final covered merchandise determination within 120 days from the date of publication of the notice of initiation.

(2) *Extension.* If the Secretary concludes that the inquiry is extraordinarily complicated and additional time is necessary to issue a final covered merchandise determination, then the Secretary may extend the deadline in paragraph (c)(1) by no more than 60 days.

(d) *Covered merchandise inquiry procedures.* (1) Within 20 days of the date of publication of the notice of a covered merchandise inquiry under paragraph (b)(1) of this section,

interested parties are permitted one opportunity to submit comment and factual information addressing the initiation. Within 10 days of the filing of such comments, any interested party is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information submitted by the other interested parties.

(2) Following initiation of a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary may issue questionnaires and verify submissions received, where appropriate. The Secretary may limit issuance of questionnaires to a reasonable number of respondents. Questionnaire responses are due on the date specified by the Secretary. Within 10 days after a questionnaire response has been filed with the Secretary, an interested party other than the original submitter is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information contained in the questionnaire response. Within five days of the filing of such rebuttal, clarification, or correction, the original submitter is permitted one opportunity to submit comment and factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification or correction.

(3) If the Secretary issues a preliminary covered merchandise determination under paragraph (e)(1) of this section, which is not issued concurrently with a covered merchandise inquiry, the Secretary will establish a schedule for the filing of comments and rebuttal comments. Unless otherwise specified, any interested party may submit comments within 10 days after the issuance of the preliminary covered merchandise determination, and any interested party may submit rebuttal comments within five days thereafter. Unless otherwise specified, no factual information will be accepted in the comments or rebuttal comments.

(4) If the Secretary issues a preliminary covered merchandise determination concurrently with the initiation of the covered merchandise inquiry under paragraph (e)(1) of this section, paragraphs (e)(1) through (3) will not apply. In such a situation, the Secretary will establish appropriate procedures on a case-specific basis.

(5) Notwithstanding any other provision of this section, the Secretary may forego or rescind a covered merchandise inquiry, in whole or in part, under this section for the following reasons:

(i) The Customs Service withdraws its request for a covered merchandise inquiry under paragraph (b) of this section;

(ii) The Secretary issues a final determination in another segment of a proceeding that can provide the basis for the Secretary's covered merchandise determination.

(iii) Where the Secretary otherwise determines that it is not necessary to initiate or conduct a covered merchandise inquiry to address the covered merchandise referral, in which case the requirements of paragraph (e)(2) of this section will apply.

(6) The Secretary may alter any deadlines under this paragraph or establish a separate schedule for the filing of comments and/or factual information during the covered merchandise inquiry, as appropriate. Notwithstanding any other provision of this section, the Secretary may modify the deadlines of the covered merchandise inquiry to align with the deadlines of another segment of the proceeding or make no changes to its inquiry deadlines.

(e) *Covered merchandise determinations*—(1) *Preliminary determination.* The Secretary may issue a preliminary determination, based upon the available information at the time, as to whether there is a reasonable basis to believe or suspect that the product that is the subject of the covered merchandise inquiry is covered by the scope of the order. In determining whether to issue a preliminary determination, the Secretary may consider the complexity of the issues and arguments raised in the context of the covered merchandise inquiry. The preliminary determination will be published in the **Federal Register**. The Secretary may publish notice of a preliminary determination concurrently with the notice of initiation of a covered merchandise inquiry under paragraph (b)(1) of this section.

(2) *Final determination.* The Secretary will issue a final determination as to whether the product that is the subject of the covered merchandise inquiry is covered by the scope of the order. As part of its determination, the Secretary will include an explanation of the factual and legal conclusions on which the final determination is based. The final determination will be published in the **Federal Register**. Promptly after publication, the Secretary will:

(i) Convey a copy of the final determination in the manner prescribed by section 516A(a)(2)(A)(ii) of the Act to all parties to the proceeding (see § 351.102(b)(36)); and

(ii) Transmit a copy of the final covered merchandise determination to the Customs Service in accordance with section 517(b)(4)(B) of the Act.

(3) *Covered merchandise determinations in other segments of the proceeding.* If the Secretary addresses the covered merchandise referral in the context of another segment of the proceeding as provided for under this section, or issues a scope ruling under § 351.225 or a circumvention determination under § 351.226 that can provide the basis for the Secretary's covered merchandise determination, the Secretary will promptly transmit a copy of the final action in that segment to the Customs Service in accordance with section 517(b)(4)(B) of the Act.

(f) *Basis for covered merchandise determination.* In issuing a determination under paragraph (e)(1) or (2) of this section, the Secretary may base its determination on paragraphs (j) and (k) of § 351.225 or any provision under section 781 of the Act (paragraphs (h), (i), (j), or (k) of § 351.226).

(g)–(k) [Reserved]

(l) *Suspension of liquidation.* (1) When the Secretary publishes a notice of initiation of a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary will notify the Customs Service of the initiation and direct the Customs Service to continue the suspension of liquidation of entries of products subject to the covered merchandise inquiry that were already subject to the suspension of liquidation, and to apply the cash deposit rate that would be applicable if the product were determined to be covered by the scope of the order until appropriate liquidation instructions are issued.

(2) If the Secretary issues an affirmative preliminary determination under paragraph (e)(1) of this section that the product at issue is covered by the scope of the Order, the Secretary will direct the Customs Service as follows:

(i) To continue the suspension of liquidation of previously suspended entries of the product at issue as described under paragraph (l)(1) of this section; and

(ii) To suspend liquidation of all other unliquidated entries of the product at issue, and apply the applicable cash deposit rate under the order to those entries.

(3) If the Secretary issues an affirmative final determination under paragraph (e)(2) of this section that the product at issue is covered by the scope of the order, the Secretary will direct the Customs Service as follows:

(i) To continue the suspension of liquidation of entries suspended as

directed under paragraph (l)(1) and/or (l)(2) of this section (including entries of the product at issue that are subject to suspension of liquidation as a result of another segment of a proceeding, such as an administrative review under § 351.213) and apply the applicable cash deposit rate under the order until appropriate liquidation instructions are issued pursuant to §§ 351.212 and 351.213; and

(ii) To suspend liquidation of all other unliquidated entries of the product at issue that are not otherwise subject to suspension of liquidation, and apply the applicable cash deposit rate under the order until appropriate liquidation instructions are issued pursuant to §§ 351.212 and 351.213.

(4) If the Secretary issues a negative final determination under paragraph (e)(2) of this section, and entries of the product are not otherwise subject to suspension of liquidation as a result of another segment of a proceeding, such as a circumvention inquiry under § 351.226, the Secretary will direct the Customs Service to terminate the suspension of liquidation and refund any cash deposits for such entries.

(m) *Applicability of covered merchandise determination; other segments of the proceeding; companion orders—(1) Applicability of covered merchandise determination.* In conducting a covered merchandise inquiry under this section, the Secretary shall consider, based on the available record evidence, whether the covered merchandise determination should be applied on a country-wide basis.

(2) *Other segments of the proceeding.* During the pendency of a covered merchandise inquiry or upon issuance of a final covered merchandise determination under paragraph (e)(2) of this section, the Secretary may take any further action, as appropriate, with respect to another segment of the proceeding. For example, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the covered merchandise inquiry for purpose of an administrative review under § 351.213.

(3) *Companion antidumping and countervailing duty orders.* If there are companion antidumping and countervailing duty orders covering the same merchandise from the same country of origin, and should the Secretary determine to initiate a covered merchandise inquiry under paragraph (b)(1) of this section, the Secretary will initiate and conduct a single inquiry with respect to the merchandise at issue only on the record of the antidumping duty proceeding. Once the Secretary

issues a final covered merchandise determination on the record of the antidumping duty proceeding, the Secretary will include a copy of that determination on the record of the countervailing duty proceeding, and notify the Customs Service in accordance with paragraph (l) of this section.

(n) *Service list.* Once the Secretary initiates a covered merchandise inquiry under paragraph (b)(1) of this section, a segment-specific service list will be established and the requirements of § 351.303(f) will apply. Parties other than those relevant parties identified by the Customs Service in the covered merchandise referral that wish to participate in the covered merchandise inquiry must file an entry of appearance in accordance with § 351.103(d)(1).

(o) *Suspended investigations; suspension agreements.* The Secretary may apply the procedures set forth in this section in determining whether the elements necessary for a circumvention determination under section 781 of the Act exist with respect to a suspended investigation or a suspension agreement (see § 351.208).

■ 8. Add § 351.228 to read as follows:

**§ 351.228 Certification by importer or other interested party.**

(a) *Certification Requirements.* The Secretary may determine in the context of an antidumping or countervailing duty proceeding that an importer or other interested party shall:

(1) Maintain a certification for entries of merchandise into the customs territory of the United States; or

(2) Provide a certification by electronic means at the time of entry or entry summary; or

(3) Otherwise demonstrate compliance with a certification requirement as determined by the Secretary, in consultation with the Customs Service. Where the certification is required to be maintained by the importer or other interested party, the Secretary and/or the Customs Service may require the importer or other interested party to provide such a certification to the requesting agency upon request.

(b) *Consequences For No Provision of a Certificate; Provision of a False Certificate.* The Secretary may instruct the Customs Service to suspend liquidation of an importer's or other interested party's entries and require the importer to post a cash deposit for the antidumping duty or countervailing duty at the applicable rate if:

(1) The importer or other interested party has not provided to the Secretary or the Customs Service, as appropriate,



the certification required under paragraph (a) of this section upon request; or

(2) The importer or other interested party provided a certification in accordance with paragraph (a) of this section, but the certification contained materially false, fictitious or fraudulent statements or representations, or contained material omissions. Under either of these scenarios, the Secretary may also instruct the Customs Service to assess an antidumping duty or countervailing duty at the applicable rate at the time of liquidation or reliquidation of the entry.

■ 9. Revise paragraph (d) of § 351.305 to read as follows:

**§ 351.305 Access to business proprietary information.**

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(d) *Additional filing requirements for importers.* If an applicant represents a party claiming to be an interested party by virtue of being an importer, then the applicant shall submit, along with the Form ITA-367, documentary evidence demonstrating that during the applicable period of investigation or period of review the interested party

imported subject merchandise. For a scope segment of a proceeding pursuant to § 351.225 or a circumvention segment of a proceeding pursuant to § 351.226, the applicant must present documentary evidence that the interested party imported subject merchandise, or that it has taken steps towards importing the merchandise subject to the scope or circumvention inquiry. For a covered merchandise referral segment of a proceeding pursuant to § 351.227, an applicant representing an interested party that has been identified by the Customs Service as the importer in a covered merchandise referral is exempt from the requirements of providing documentary evidence to demonstrate that it is an importer for purposes of that segment of a proceeding.

■ 10. Revise paragraph (f)(2) of § 351.402 to read as follows:

**§ 351.402 Calculation of export price and constructed export price; reimbursement of antidumping and countervailing duties.**

\* \* \* \* \*

(f) \* \* \*

(2) *Reimbursement Certification.* (i) The importer must certify with the Customs Service prior to liquidation whether the importer has or has not

been reimbursed or entered into any agreement or understanding for the payment or for the refunding to the importer by the manufacturer, producer, seller, or exporter for all or any part of the antidumping and countervailing duties, as appropriate. Such certifications should identify the commodity, the country, and the relevant entry number(s).

(ii) The reimbursement certification may be filed either electronically or in paper in accordance with the Customs Service's requirements, as applicable.

(iii) If an importer does not provide its reimbursement certification prior to liquidation, the Customs Service may accept the reimbursement certification in accordance with its protest procedures under 19 U.S.C. 1514.

(iv) Reimbursement certifications are applicable to entries for the relevant commodity that has been imported on or after the date of publication of the antidumping notice in the **Federal Register** that first suspended liquidation in that proceeding.

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