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**DEPARTMENT OF COMMERCE**

**International Trade Administration**

**19 CFR Part 351**

**Docket No. 200128-0035**

**RIN 0625-AB16**

**Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings**

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Commerce (Commerce) is modifying two regulations pertaining to the determination of benefit and specificity in countervailing duty proceedings. These modifications clarify how Commerce will determine the existence of a benefit when examining a subsidy resulting from currency undervaluation and clarify that companies in the traded goods sector of the economy can constitute a group of enterprises for purposes of determining whether a subsidy is specific.

**DATES:** *Effective date:* [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

*Applicability date:* This rule will apply to all segments of proceedings initiated on or after [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Gregory Campbell at (202) 482-2239 or

Matthew Walden at (202) 482-2963.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

On May 28, 2019, we published the *Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings; Proposed Rule and Request for Comments*.<sup>1</sup> In the proposed rule, we explained that neither the Tariff Act of 1930, as amended (the Act) nor Commerce's existing countervailing duty (CVD) regulations specify how to determine the existence of a benefit or specificity when Commerce is examining a potential subsidy resulting from the exchange of currency under a unified exchange rate system. We initiated this rulemaking process to fill that gap.

We received numerous comments on the proposed rule, and we address those comments below. The proposed rule, comments received, and this final rule can be accessed using the Federal eRulemaking portal at <http://www.regulations.gov> under Docket Number ITA-2019-0002. After analyzing and carefully considering all of the comments that Commerce received, we have adopted the modifications described below and amended Commerce's regulations accordingly.

### **Explanation of Regulatory Provisions and Final Modifications**

Commerce is modifying 19 CFR 351.502, which addresses specificity of domestic subsidies, and is adding new 19 CFR 351.528, to govern the determinations of undervaluation and benefit when examining potential subsidies resulting from the exchange of an undervalued currency. The modification to 19 CFR 351.502 adds new paragraph (c), which explains that enterprises that buy or sell goods internationally (*i.e.*, enterprises in the traded goods sector of an

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<sup>1</sup> 84 FR 24406 (proposed rule).

economy) can comprise a “group” of enterprises for specificity purposes. In essence, this modification fills a gap in section 771(5A)(D) of the Act, which states that a subsidy can be specific if provided to “a group” of enterprises or industries, but does not define the word “group.” Existing 19 CFR 351.502 makes clear that in determining whether there is a “group,” Commerce is not required to determine whether there are shared characteristics among the enterprises or industries that are eligible for, or actually receive, the subsidy. Moreover, Commerce’s Policy Bulletin 10.1, issued in 2010, clarifies that state-owned enterprises can constitute a “group” of enterprises within the meaning of section 771(5A)(D) of the Act.<sup>2</sup> The addition of 19 CFR 351.502(c) is intended to provide further clarification, this time for the traded goods sector, regarding the entities that may comprise a “group.”

New 19 CFR 351.528 provides guidance for Commerce’s determinations of undervaluation and benefit when examining a potential subsidy resulting from the exchange of an undervalued currency. Paragraph (a)(1) specifies that Commerce normally will consider whether a benefit is conferred from the exchange of U.S. dollars for the currency of the country under review or investigation only if that country’s currency is undervalued during the relevant period. In other words, a determination of undervaluation is a prerequisite to proceeding to an analysis of whether a benefit is conferred. To determine whether there is undervaluation, Commerce normally will consider the gap between the country’s real effective exchange rate (REER), on the one hand, and the REER that achieves an external balance over the medium term that reflects appropriate policies – otherwise known as the equilibrium REER – on the other

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<sup>2</sup> See Import Administration Policy Bulletin 10.1, “Specificity of Subsidies Provided to State-owned Enterprises,” 2010, *available at* <https://enforcement.trade.gov/policy/PB-10.1.pdf>. Commerce has also addressed the issue of the definition of “group” in certain CVD proceedings. For example, we found foreign-invested enterprises to comprise a “group” under the Act. *See, e.g., Citric Acid and Certain Citrate Salts From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 16836 (April 13, 2009), and accompanying Issues and Decision Memorandum at Comment 16.

hand. Paragraph (a)(2) specifies that Commerce normally will make an affirmative finding of currency undervaluation only if there has been government action on the exchange rate that contributes to an undervaluation of the currency. In assessing whether there has been such government action, Commerce will not normally include monetary and related credit policy of an independent central bank or monetary authority. In making its assessment of government action on the exchange rate, Commerce may consider the relevant government's degree of transparency regarding actions that could alter the exchange rate.

Paragraph (b) of § 351.528 states that once Commerce has made an affirmative finding of currency undervaluation, we normally will determine the existence of a benefit after examining the difference between (i) the nominal, bilateral U.S. dollar rate consistent with the equilibrium REER, and (ii) the actual nominal, bilateral dollar rate during the relevant time period, taking into account any information regarding the impact of government action on the exchange rate. If there is a difference between (i) and (ii), then the amount of the benefit normally will be determined by comparing the amount of the domestic currency<sup>3</sup> that the recipient received to the amount it would have received absent the difference between (i) and (ii). In short, under paragraph (b), the benefit normally will be equal to the extra amount of domestic currency received by a firm because of the undervaluation.

Information regarding the amount of domestic currency that the recipient actually received from an exchange of U.S. dollars normally will come from the recipient itself, through Commerce's normal questionnaire process. In this sense, a currency-related subsidy does not differ from the other types of subsidies that Commerce normally investigates. However, paragraph (c) of new 19 CFR 351.528 clarifies that in determining undervaluation (including

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<sup>3</sup> The term "domestic currency," as used throughout this notice, means the currency of the country under investigation or review.

government action) and the bilateral U.S. dollar rate gap, Commerce will request that the Department of the Treasury (Treasury) provide its evaluation and conclusion regarding these issues during a CVD proceeding.

### **Response to Comments on the Proposed Rule**

Commerce received 47 comments on the proposed rule. The majority of these comments expressed support for a regulation that addresses subsidies resulting from currency undervaluation.

As a result of the comments, we made changes (primarily additions) to the regulatory text, which are summarized in the “Changes from the Proposed Rule” section below. Many of these additions to the regulatory text – for example, the additions describing in greater detail the steps of the benefit determination and the additions regarding the role of government action on the exchange rate – are consistent with how we described the rule in the preamble to the proposed rule. In light of the comments received, we have decided to include greater detail in the regulatory text itself, rather than in the preamble alone. Other changes to the regulatory text – for example, the technical changes in 19 CFR 351.502 – respond to comments received.

Below is a summary of the comments, grouped by issue, followed by Commerce’s response.

#### *1. Whether the CVD Law is an Appropriate Tool to Remedy Subsidies from Currency Undervaluation*

While many of the comments Commerce received on the proposed rule were focused on technical or legal aspects of the methodologies described, several commenters also opined more generally on whether it is appropriate and effective, as a policy matter, for Commerce to involve itself in an area of analysis in which other U.S. government agencies and international institutions have historically been viewed as having primary jurisdiction and competence. These

commenters argued that the CVD law is not the appropriate vehicle for remedying the effects of currency undervaluation. Some of these commenters presumed that Commerce would impose a single, across-the-board duty that (i) assumes full exchange rate pass through, (ii) is applied to all exporters and all U.S. imports of the subject merchandise, and (iii) is totally divorced from “on-the-ground,” company-specific circumstances and experience.

*Response:* Congress gave Commerce the authority to remedy injurious subsidies, regardless of what form they take. The CVD law gives U.S. domestic producers the right to petition Commerce to investigate allegedly injurious foreign subsidies, and it requires Commerce to conduct such investigations (provided that the applicable requirements for initiation are met). This is true even with respect to issues in which other U.S. Government agencies or international bodies may have an overlapping interest. For example, if the domestic industry petitions Commerce alleging that a foreign agricultural product or a foreign energy resource is subsidized and injures a domestic industry, Commerce generally must investigate the allegations, even though other U.S. government agencies have expertise with respect to such products. Commerce routinely investigates programs involving, *e.g.*, export credits and equity infusions, which are potential forms of subsidization that may also be practices monitored by other governmental and international entities. So too with currency: if the domestic industry petitions Commerce alleging that a foreign currency is a mechanism for subsidizing an imported product, Commerce generally must investigate the allegations, despite the fact that other agencies have an interest in U.S. policy towards foreign currencies. This is true even before the adoption of the rule in this notice.

This interpretation of Commerce’s obligations is consistent with the intent behind the Trade Agreements Act of 1979, which transferred the authority for administering CVD

investigations from Treasury to Commerce. The House Ways and Means Committee explained that this shift: “will give these functions high priority within a Department whose principal mission is trade. In the past, agencies have arbitrarily set a course of administration of these statutes contrary to congressional intent.” Thus, Congress has already decided that because Commerce’s principal mission is trade, it is Commerce that should administer the CVD laws with respect to foreign imports and foreign subsidies of all types.

However, Commerce cannot administer the CVD law to counteract currency undervaluation *per se*. Contrary to some of the commenters, and as these regulatory modifications make clear, Commerce did not propose an across-the-board CVD in the amount of any currency undervaluation found to exist. The CVD law can only counteract countervailable subsidies – *i.e.*, financial contributions that confer a benefit and meet the specificity requirement of the Act – provided with respect to specifically defined categories of imported goods that injure or threaten injury to a U.S. industry.

To do this, Commerce will follow a two-step approach. First, we will conduct a REER-based analysis to determine if there is potentially actionable currency undervaluation. We will normally not find such currency undervaluation unless there has been government action on the exchange rate that contributes to the undervaluation. Such government action will not normally include monetary and related credit policy of an independent central bank or monetary authority. The second step will be an analysis of “on-the-ground,” firm-specific circumstances and experience to determine the extent of any countervailable benefit, after taking into account the U.S. dollar rate gap with respect to the undervalued currency. This approach will ensure that Commerce’s analysis of currency undervaluation adheres to the principles and conforms to the requirements of the U.S. CVD law, and that it fits squarely within the financial contribution-

benefit-specificity framework. Thus, the benefit calculation for any exchange or transfer involving an undervalued currency will follow the same principles as for any other countervailable subsidy. It will generally be based on the firm-specific value of the benefit, *i.e.*, the extra domestic currency units received as a result of the undervaluation, conferred on the firm.

Commerce recognizes that implementation will raise a variety of issues, but these should be addressed incrementally and over time, through Commerce's experience in individual cases – which are informed by arguments put forward by the interested parties as well as the underlying administrative record.

This approach is consistent both with Commerce's practice in other areas, as well as general principles of administrative law. In *SEC v. Chenery Corporation*, the Supreme Court recognized that rulemaking is often essential to an agency's processes, but then also explained, "the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule."<sup>4</sup> In such situations, "the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards."<sup>5</sup> The Supreme Court explained that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."<sup>6</sup>

Likewise, the Court of International Trade (CIT) has recognized that "[a]bsent statutory restraints, agencies are generally free to develop policy through either rulemaking or

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<sup>4</sup> *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

<sup>5</sup> *Id.* at 203.

<sup>6</sup> *Id.*

adjudication.”<sup>7</sup> In *Apex*, the CIT found that Commerce’s differential pricing methodology in antidumping duty proceedings was not required to be implemented through rulemaking.<sup>8</sup>

In fact, when Commerce promulgated its current CVD regulations in 1998, we repeatedly noted that it was not appropriate to set forth precise rules on every detail of CVD methodology for every type of subsidy.<sup>9</sup> Thus we stated that if Commerce at that time had little or no experience with a particular issue, we would not issue a regulation on that issue, but rather would resolve it on a case-by-case basis or further refine our treatment of it in the future.<sup>10</sup>

Therefore, these regulatory modifications do not resolve all potential complex issues that will arise. That these case issues can only be resolved over time is true not just for currency undervaluation, but for any new type of subsidy Commerce investigates. Commerce’s analytical approach, as structured in these regulatory modifications, will ensure that CVD actions against subsidies resulting from currency undervaluation remain measured, deliberate, and predictable.

## 2. *Statutory Authority to Promulgate this Rule*

One commenter asserted that Commerce has the statutory authority to evaluate currency undervaluation within the CVD law. On the other hand, two commenters argued that Commerce’s proposed rule is unlawful because Congress failed to approve legislation that would specifically deem currency undervaluation as a countervailable subsidy. Therefore, these commenters claimed that Commerce lacks the statutory authority to alter its approach without Congressional change to the Act. Further, one commenter argued that Commerce has consistently held that “an allegedly undervalued unified exchange rate does not constitute a countervailable subsidy,” citing to *Carbon Steel Wire Rod from Poland: Preliminary Negative*

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<sup>7</sup> *Apex Frozen Foods Private Ltd. v. United States*, 144 F. Supp. 2d 1308, 1319 (CIT 2016).

<sup>8</sup> *See id.* at 1319-22.

<sup>9</sup> *See Countervailing Duties; Final Rule*, 63 FR 65348 (November 25, 1998) (*1998 Final Rule*).

<sup>10</sup> *See, e.g., id.* at 65378, 65394, 65397.

*Countervailing Duty Determination*, 49 FR 6768, 6771 (February 23, 1984). This commenter argued that, in light of Commerce’s alleged practice and Congress’s subsequent amendments to the Act that failed to establish that Commerce can countervail currency undervaluation, Congress, in effect, ratified Commerce’s alleged practice. Accordingly, citing *GPX*,<sup>11</sup> this commenter argues that this Congressional acquiescence in Commerce’s longstanding practice precludes Commerce from unilaterally altering its approach.

*Response:* To the extent that a currency exchange involving an undervalued currency meets the statutory definition of a countervailable subsidy, Commerce has the authority to administer the CVD law, countervail such a program and write regulations to effectuate the statute.

First, contrary to the allegation of one commenter, Commerce does not have an established practice that it does not find currency undervaluation to be countervailable. Although this commenter points to the preliminary determination of *Carbon Steel Wire Rod from Poland* to indicate such a practice, Commerce’s finding in that 1984 investigation dealt with multiple currency exchange rates, not the type of unified exchange rate system at issue in this regulation. Therefore, Commerce’s statement that “an allegedly undervalued unified exchange rate does not constitute a countervailable subsidy” can be viewed as *dicta* given that a unified exchange rate was not the program at issue in that investigation. Moreover, in the final determination of *Carbon Steel Wire Rod from Poland*, Commerce ultimately determined that it cannot apply the CVD law to non-market economies (NMEs) such as Poland (at that time), rendering moot Commerce’s initial statements in the preliminary determination.<sup>12</sup>

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<sup>11</sup> *GPX Int’l Tire Corp. v. United States*, 666 F.3d 732, 740 (Fed. Cir. 2011).

<sup>12</sup> *Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination*, 29 FR 19374, 19375 (May 7, 1984).

Further, contrary to this commenter’s claims that this alleged “practice” was further upheld in subsequent determinations by Commerce not to initiate on currency undervaluation allegations, Commerce determined not to initiate on subsequent currency undervaluation subsidy allegations because we determined that the petitioners’ allegations in those particular proceedings were unsupported by reasonably available information regarding the statutory elements for imposition of a CVD.<sup>13</sup> Commerce’s determinations not to initiate were not based on any practice regarding currency-related subsidies.

Additionally, since the publication of *Carbon Steel Wire Rod from Poland* in 1984, Commerce’s CVD law has undergone substantial changes, most significantly in the Uruguay Round Agreements Act.<sup>14</sup> For example, the law underwent a significant change that replaced the term “bounty or grant” with the current statutory definition of a “subsidy” as being a financial contribution that confers a benefit.<sup>15</sup> Thus, given the substantial changes to the CVD law since 1984, Commerce’s statements regarding subsidy programs in 1984 are not binding on its current application of the law.

Moreover, even if Commerce’s alleged practice was binding — despite its consistent subsequent practice indicating otherwise — Commerce is always free to change its practice, provided that it explains its decision, which we have done here.

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<sup>13</sup> See, e.g., *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 75 Fed. Reg. 59213 (Sept. 27, 2010), and accompanying Issues and Decision Memorandum at cmts. 5-7; *Aluminum Extrusions From the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 75 FR 54302 (September 7, 2010) (unchanged in *Aluminum Extrusions From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 76 FR 18521 (April 4, 2011)); and *Notice of Initiation of Countervailing Duty Investigations: Coated Free Sheet Paper from the People’s Republic of China, Indonesia, and the Republic of Korea*, 71 FR 68546 (November 27, 2006).

<sup>14</sup> See, e.g., Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

<sup>15</sup> *Id.*

Contrary to one commenter's reliance on *GPX* to assert that Congressional acquiescence in Commerce's longstanding practice precludes us from unilaterally altering our approach, the *GPX* case is distinguishable.

In *GPX*, the Federal Circuit determined that because Commerce had previously interpreted the Act such that CVDs could not be assessed on imports from NMEs and, because Congress had subsequently amended the Act without disturbing Commerce's interpretation, Congress had, in effect, ratified the agency's interpretation of the statute.<sup>16</sup> In evaluating whether Commerce had interpreted the statute to determine CVDs could not be assessed on imports from NMEs, the court looked to prior agency briefs that defended its interpretation of the statute, Congressional rejection of provisions to amend the law to include subsidies in NMEs as countervailable, and Congressional testimony by Commerce asserting that CVDs cannot be assessed on NMEs.<sup>17</sup> Further, the court looked to a past Federal Circuit case<sup>18</sup> which upheld Commerce's interpretation of the Act that CVDs could not be assessed on imports from NMEs.<sup>19</sup>

Contrary to the situation in *GPX*, Commerce does not have a practice that subsidies related to currency undervaluation are not countervailable, and there certainly has been no Federal Circuit case affirming that alleged "practice," as there had been prior to the *GPX* decision. Rather, Commerce in the past did not initiate on currency undervaluation allegations because the petitioners' allegations in those particular proceedings were unsupported. Finally, contrary to these commenters' arguments, the Supreme Court has stated that "failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior

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<sup>16</sup> *GPX Int'l Tire Corp.*, 666 F.3d at 737-45.

<sup>17</sup> *Id.* at 737-740.

<sup>18</sup> *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

<sup>19</sup> *GPX*, 666 F.3d at 741-745.

statute.”<sup>20</sup> Therefore, we disagree that Commerce does not have statutory authority to promulgate this final rule.

### 3. *Financial Contribution*

Several commenters argued that currency undervaluation and exchanges of currency do not constitute financial contributions under either section 771(5)(D) of the Act or Article 1.1(a)(1) of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). They argued that an exchange of currency is neither a “direct transfer of funds,” as indicated in the proposed rule, nor any other type of listed financial contribution. One commenter argued that the conversion of one currency into another is a purchase and sale of items of equivalent value and also that the sale of something to the government – unless it is the sale of a “good,” which currency is not – is not a financial contribution. This commenter also noted that when an exporter earns foreign currency on an export sale, it might never convert that foreign currency into domestic currency. According to this commenter, even when the exporter does convert that foreign currency, it may be impossible to link the currency exchange back to the export sale.

Other commenters urged Commerce to take a broad view of the types of entities that can constitute “authorities” capable of providing financial contributions within the meaning of section 771(5)(B) of the Act. Some commenters also urged Commerce to take a broad view of the “entrustment or direction” standard in section 771(5)(B)(iii) of the Act during investigations of currency-related subsidies. They argued that there may be a large variety of government actions that amount to entrustment or direction when a government undervalues its currency and that an express government mandate that banks purchase foreign currency is not a prerequisite to a finding of entrustment or direction.

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<sup>20</sup> *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

*Response:* These regulatory modifications do not address financial contribution under section 771(5)(B) and section 771(5)(D) of the Act. In fact, none of Commerce’s existing CVD regulations directly address financial contribution. Accordingly, we do not consider it necessary to respond in detail to these comments, many of which are more appropriately made in the context of a particular CVD proceeding than in this rulemaking process.

As we stated in the proposed rule, “[t]he receipt of domestic currency from an authority (or an entity entrusted or directed by an authority) in exchange for U.S. dollars could constitute the financial contribution under section 771(5)(D) of the Act.”<sup>21</sup> We maintain this view, but of course any such finding will depend upon the facts on the record of the proceeding. We disagree that an exchange of currency can never be a “direct transfer of funds” within the meaning of section 771(5)(D)(i) of the Act. The word “transfer” suggests a conveyance, passing or exchange of something from one person to another. The word “funds” suggests money or some monetary resource. Further, contrary to one commenter, we disagree that the question of whether “equivalent value” was exchanged is relevant to a financial contribution analysis. If anything, this relates to the determination of benefit.

With respect to the commenters that raised issues regarding interpretations of the statutory terms “authority” and “entrusts or directs,” we find that these issues are more appropriately raised in the context of an actual CVD proceeding. The issue of whether a provider of a financial contribution is an authority arises frequently in our CVD proceedings, and our practice is well-developed and known by interested parties. With respect to the “entrusts or directs” language in section 771(5)(B)(iii) of the Act, we explained in the *1998 Final Rule* that “we do not believe it is appropriate to develop a precise definition of the phrase for purposes of

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<sup>21</sup> Proposed Rule, 84 FR at 24408.

these regulations” and that it was not necessary to provide an “illustrative list” of actions that could constitute entrustment or direction.<sup>22</sup> At the same time, we explained that we would examine entrustment or direction on a case-by-case basis, that we would “enforce this provision vigorously,” and that the statutory language could encompass a “broad range of meanings.”<sup>23</sup> We reiterate these points here.

#### *4. Determination of Undervaluation*

Several commenters claimed the proposed rule needs to have more objective and clear criteria. Some commenters were in support of the proposed rule but advocated for a more clear and concise decision-making process, including a predetermined set of objective criteria, for determining if a currency is manipulated to avoid uncertainty and charges of arbitrariness. Other commenters argued that since there is no one agreed-upon methodology for calculating currency undervaluation, any such estimate would unavoidably be subjective. One such comment claimed Commerce’s proposed methodology is too broad to be understood, properly applied and transparent, and is therefore arbitrary and unenforceable. According to the commenter, although Commerce claimed that “[i]n determining whether there has been government action on the exchange rate that undervalues the currency, [it does] not intend in the normal course to include monetary and related credit policy of an independent central bank or monetary authority...,” it did not define “the normal course.” This, the commenter claimed, opens the door to a wide range of actions and could lead to unpredictability. Similarly, the comment expressed concern that Commerce does not define “external balance” that an equilibrium REER would achieve or “the relevant time period” that Commerce would consider.

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<sup>22</sup> See 1998 Final Rule, 63 FR at 65349.

<sup>23</sup> See *id.*, 63 FR at 65349, 65351.

Another commenter argued that even if Commerce used the International Monetary Fund's (IMF)'s approach for estimating the equilibrium REER, since the IMF utilizes a wide range of methods to make its determinations, Commerce should not use the IMF's estimation of the equilibrium REER as a stand-alone determination but rather as one component of its overall assessment. This commenter also pointed out a discrepancy related to the second step of Commerce's methodology: estimating the nominal, bilateral U.S. dollar exchange rate consistent with the equilibrium REER that would have prevailed but for the undervaluation. The commenter contended that the equilibrium REER estimated does not provide any information on bilateral exchange rates.

Various commenters urged Commerce to consider methods for calculating the equilibrium REER other than those commonly used by the IMF and other third parties, claiming that these methodologies, unlike the one described by Commerce in the proposed rule, will produce a REER that causes a true zero-balance in the current account (*i.e.*, neither a trade surplus nor a trade deficit). Other commenters recommended that, in addition to considering the equilibrium REER as defined in its proposed methodology, when measuring the extent of undervaluation, Commerce should also consider the equilibrium REER as defined in either the IMF's macroeconomic balance approach (which has effectively been replaced with the External Balance Assessment approach - the IMF's preferred methodology) or the purchasing power parity approach. Alternatively, Commerce could focus not on the REER but on the fundamental equilibrium exchange rate (FEER) in accordance with the methodology proposed by the Peterson Institute for International Economics (PIIE). The commenters argued, among other points, that the right approach varies by country and that in some cases these alternatives may better capture

economic conditions and provide more accurate estimates of undervaluation for the currencies of certain countries.

*Response:* Commerce recognizes the challenges in countervailing subsidies resulting from exchanges of undervalued currencies and the variation in the analytical methods used and the REER gap estimates produced. However, these are measurement and valuation problems not unlike those that arise in many CVD proceedings, and Commerce will therefore follow standard procedure for CVD proceedings in the currency context. All information and evidence on the administrative record will be reviewed, and all estimates of REER gaps, U.S. dollar exchange rate gaps and the underlying methodologies and data will be assessed after receiving any input from Treasury and in light of interested party comments. Commerce's ultimate determination will be fully documented and supported by evidence on the administrative record, and the general analytical approach will be that described in the final rule.

Commerce agrees with the commenters that multiple valid methodologies may exist for calculating the equilibrium REER and that no single definition or formula necessarily fully captures a country's appropriate medium-term external balance. Section 358.528 of this final rule states that Commerce normally will examine the gap between the country's real effective exchange rate (REER) and the real effective exchange rate that achieves an external balance over the medium term that reflects appropriate policies (equilibrium REER) and will carry out its analyses based on the determinations and information from Treasury and other relevant record information. Specifically, an assessment of the appropriate level for countries' external balances and REERs that takes into account macroeconomic fundamentals, demographics, cyclical factors, and desired medium-term macroeconomic policies, and which generates multilaterally consistent estimates, would not necessarily indicate that a zero balance for the current account

would be “appropriate” for all countries. As such, if the facts on the record for a case indicate circumstances warranting the use of an alternative methodology to calculate the equilibrium REER, the rule preserves Commerce’s flexibility to do so in exceptional cases. However, in most cases, we intend to follow the normal rule set forth in new § 351.528.

In light of the comments received, and to provide more guidance to the public and interested parties in our CVD proceedings, these final modifications to our regulations specify in greater detail than did the proposed rule the process we will follow in examining an alleged subsidy relating to the exchange of an undervalued currency. We also note that many of the comments evinced a misunderstanding of the exact type of subsidy at issue, the benefit calculation proffered in the proposed rule, and the process for calculating a CVD rate more generally. Therefore, this final rule adds new § 351.528 to our regulations to specifically address the exchange of undervalued currencies. Paragraph (a) of § 351.528 provides the criteria Commerce will follow in determining whether a currency is undervalued. Paragraph (b) describes how Commerce will determine the existence and amount of any benefit resulting from the exchange of an undervalued currency. Given Commerce’s lack of experience with examining this type of subsidy, we disagree that more detail is warranted at this time. As we stated in the *1998 Final Rule* with respect to similar issues for which we had little experience, we intend to follow the general principles set forth in this final rule, and we may develop more detailed criteria as we gain experience.<sup>24</sup>

##### *5. Government Action on the Exchange Rate*

Several commenters urged greater clarity on how “government action on the exchange rate” would factor into the assessment of currency undervaluation. They argued that a foreign

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<sup>24</sup> See, e.g., *1998 Final Rule*, 63 FR at 65378.

government should be engaged in activity purposefully aimed at undervaluing its currency for Commerce to find undervaluation. In other words, Commerce should limit its application of the proposed new rule to currency undervaluation caused by official actions that target the exchange rate for competitive purposes and not to currency fluctuations caused by monetary and fiscal policies or any non-policy factors. Some commenters claimed that, due to strong economic growth and higher interest rates than other advanced economies, the U.S. dollar is arguably overvalued on a purchasing power parity (PPP) basis, but that this situation should not constitute grounds for imposing countervailing duties against our major trading partners.

*Response:* We have added language in a new § 351.528(a)(2) stating that Commerce normally will make an affirmative finding of currency undervaluation only if there has been government action on the exchange rate that contributes to an undervaluation of the currency. Such government action will not normally include monetary and related credit policy of an independent central bank or monetary authority. In making its assessment of government action on the exchange rate, Commerce may also consider the relevant government's degree of transparency regarding actions that could alter the exchange rate.

The scope of government action under this final rule will necessarily become more clear as Commerce considers a range of government actions over time and the institutional settings in which they are undertaken. This could potentially include whether and how meaningful distinctions can be made between government action and market action.

#### *6. Calculation of the Benefit*

One commenter argued that Commerce's benefit formula of "X percent duty for X percent undervaluation" will significantly over-penalize a producer because the notion that "X percent duty" counteracts "X percent undervaluation" is only true under certain circumstances.

This commenter provided several examples to illustrate its point. Furthermore, the commenter claimed that determining the tariff duty that accurately countervails the extent of undervaluation is a difficult and imprecise process that varies considerably from industry to industry and from firm to firm.

Some commenters stated that the proposed rule suggested that Commerce will only calculate a benefit from sales to the United States that occur in U.S. dollars; however, these commenters suggested that it is also possible that sales to third countries could be denominated in dollars and thus benefit from the same undervaluation when converted to the domestic currency. Moreover, a government's currency undervaluation practices may also impact goods traded in other international currencies. In order to capture the full benefit from currency undervaluation, these commenters argued that dollar-denominated sales to third countries should also be included in the benefit calculation.

Some commenters also argued that Commerce should countervail the benefit that exporters receive from converting all currencies into the domestic currency, instead of only countervailing the benefit received from converting U.S. dollars into the domestic currency. These commenters believed that doing so would capture the full benefit of the undervaluation, which is calculated on a REER-basis (*i.e.*, the domestic currency is undervalued relative to a basket of currencies, and not simply bilaterally undervalued relative to the dollar).

*Response:* The first comment misunderstands the benefit analysis set forth in the proposed rule and adopted in this final rule. Nowhere in the proposed rule did we suggest, and nowhere in this final rule do we suggest, that "X percent undervaluation" will lead to "X percent duty." A ten percent undervaluation will not automatically lead to a duty of ten percent. This is not the approach to benefit and duty calculation promulgated in this final rule.

Rather, this final rule makes clear that when Commerce determines under § 351.528 that a country's currency is undervalued, there may be a benefit to a particular firm when that firm exchanges U.S. dollars for domestic currency and receives more domestic currency than it otherwise would have absent the undervaluation. Commerce agrees with this commenter's argument that this calculation must be firm-specific.

With respect to the argument that we should account for dollar-denominated sales to third countries in our benefit calculation, § 351.528(b)(2) of the regulatory text in this final rule states that the amount of any benefit from a currency exchange normally will be based on the difference between the amount of domestic currency the firm received in exchange for U.S. dollars and the amount of domestic currency the firm would have received absent the difference between (i) the nominal, bilateral U.S. dollar rate consistent with the equilibrium REER and (ii) the actual nominal, bilateral U.S. dollar rate during the relevant time period, taking into account any information regarding the impact of government action on the exchange rate. We do not find it necessary, in this final rule, to specify or anticipate the manner in which the firm earned the U.S. dollars that it is converting. The relevant point is that there may be a benefit at the point of the conversion of those U.S. dollars into the undervalued domestic currency. There might be a variety of means by which the firm earned the U.S. dollars and, to the extent that is relevant, we will assess the facts on a case-by-case basis consistent with sections 701 and 771(5)(B) of the Act and the provisions of this final rule.

Regarding the comments that we should calculate the benefit after taking into account conversions of all currencies (not just the U.S. dollar) into the domestic currency, we have not adopted this position in this final rule. Although the determination of undervaluation, as outlined in § 351.528(a), is made with respect to a basket of currencies, § 351.528(b) specifies that

Commerce will determine the existence of a benefit after examining the difference between (i) the nominal, bilateral U.S. dollar rate consistent with the equilibrium REER and (ii) the actual nominal, bilateral U.S. dollar rate during the relevant time period, taking into account any information regarding the impact of government action on the exchange rate. In other words, this final rule only addresses conversions of U.S. dollars into domestic currency that might give rise to a countervailable subsidy. Given Commerce's lack of experience with determining the benefit from exchanges of currency, we find that conversions of U.S. dollars are the appropriate focus at this time. Once Commerce gains more experience in investigating and analyzing this type of subsidy, there may come a time to adopt the approach advocated by these commenters.

#### *7. Other Calculation Issues*

One commenter stated that if the benefit from an undervalued currency is limited to the excess domestic currency a firm receives in exchange for U.S. dollars, the sales denominator should also be limited to sales in U.S. dollars. To allocate the excess domestic currency over a firm's total sales revenue to determine the subsidy rate for the currency program would understate the benefit conferred by currency undervaluation.

A second commenter argued that the existence of a net benefit to an exporter from an undervalued exchange rate cannot be presumed due to the fact that an individual exporter may engage in a variety of transactions in a foreign currency. This commenter stated that the costs for imported goods such as materials and machinery that may be used by the exporter would increase with an undervalued exchange rate. As a result, the measurement of the net impact of an undervalued currency is necessarily a complex undertaking that requires a comprehensive analysis of the effect of the exchange rate not only on the exports of the finished product, but also on the cost of all inputs used by the producer and its upstream suppliers. In a similar vein, a

third commenter argued that the determination of the duty rate that accurately countervails any undervaluation is very difficult and will vary from industry to industry and from firm to firm. This commenter stated that firms with the same level of sales revenue will have different subsidy rates from the currency undervaluation based on their level of imported goods used in the production of its merchandise and provided three examples to demonstrate the argument.

*Response:* The essential concept, with which we agree, behind the argument of the first commenter is that the numerator and the denominator for our subsidy calculations must be on the same basis. This is the fundamental premise of our attribution regulation codified at 19 CFR 351.525. This regulation sets forth how we calculate the *ad valorem* subsidy rate and attribute a subsidy to the sales value of the product or products that benefit from the subsidy. In any future CVD proceeding involving a subsidy resulting from the exchange of an undervalued currency, the appropriate numerator and denominator will be based upon the facts on the record of that proceeding consistent with the application of the attribution rules in 19 CFR 351.525.

While the first commenter cited to our attribution regulation, the second and third commenters did not reference any statutory or regulatory support for their arguments with respect to the calculation of an alleged subsidy resulting from currency undervaluation. The second commenter has argued that an undervalued currency may increase certain costs to a firm, which supposedly would negate or offset any benefits received by that firm due to an undervalued exchange rate. The commenter argued that an undervalued exchange rate will increase the firm's costs for imported raw materials and equipment, which should be considered in determining whether the firm received a benefit from exchanges of the undervalued currency.

We disagree with this commenter that these modifications to our regulations should include this concept. We note that section 771(6) of the Act provides for only a limited number

of adjustments to the gross countervailable subsidy in order to calculate the net countervailable subsidy. These are: (a) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy; (b) any loss in value of the countervailable subsidy resulting from its deferred receipt, if the deferral is mandated by government order; and (c) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received. The adjustment proposed by this commenter is not included within the list in section 771(6) of the Act, and therefore we are not including it in this final rule.

Likewise, we disagree with the third commenter that the cost of imported inputs is relevant to the benefit calculation for a subsidy resulting from a firm's exchange of U.S. dollars for the undervalued domestic currency. In effect, this commenter is suggesting an offset to the benefit conferred through exchanges of undervalued currency. However, such an offset is not contemplated by section 771(6) of the Act. Nevertheless, we agree with this commenter that the subsidy rate calculation will be firm-specific. Except with respect to the calculation of the all-others rate under section 705(c)(5) of the Act, a country-wide rate under section 777A(e)(2)(B) of the Act or a "non-selected" respondent rate in an administrative review, all of our subsidy rates are firm-specific. The identical subsidy provided to three different firms could produce different subsidy rates given a number of factors such as sales revenue, whether the subsidy is untied or tied (and to which product or products it is tied), and the presence of cross-owned companies. In fact, it would be unusual to have identical subsidy rates for different firms.

#### *8. The Role of Treasury*

Comments fell across a wide spectrum with respect to the role Treasury should play in a determination that undervalued currency gives rise to a countervailable subsidy. Some

commenters argued that Treasury holds the primary expertise, reflecting its role historically as the lead U.S. government agency with responsibility for exchange rate policy, in assessing whether foreign government actions result in currency manipulation, and therefore Commerce should ultimately defer to Treasury's judgment in making the decision as to whether undervaluation exists in a given CVD proceeding. Other commenters recognized that Treasury has relevant experience that Commerce should take into account, but that Commerce should ultimately make any determination regarding undervaluation subsidies for CVD purposes.

Commenters also stated that Commerce should clarify the difference between "currency manipulation," as Treasury investigates in its semi-annual reports on exchange practices of U.S. trading partners, and "currency undervaluation" in Commerce's proposed rule. Still other commenters argued that Treasury should not be involved, or should only be involved to the extent that it is treated similarly to that of any objective, third party source of data and analysis, in making the relevant determination. The latter group tended to emphasize the point that Commerce should use a different standard from Treasury's manipulation standard. Treasury, they argued, has not utilized its own statutory authority to the fullest, as evidenced by the fact that it has not found any country to be a currency manipulator since the mid-1990s. Commenters argued that strong enforcement of the trade remedy laws will require relying on stronger, less-discretionary statutory authority than that which governs Treasury's findings.

Four commenters objected to the language in the preamble to the proposed rule that Commerce would "defer" to Treasury on the issue of undervaluation. Three commenters suggested that we replace the word "defer" in the preamble of the proposed rule with the phrase "confer with, and seek advice from," Treasury. Two commenters objected to the statement in the proposed rule that Commerce "will request that the Secretary of the Treasury provide Treasury's

evaluation and conclusion as to” undervaluation, and suggested that the rule simply state that Commerce “will determine” the issue of undervaluation. Another commenter argued that Commerce’s deference to Treasury in the proposed rule is an inappropriate delegation of Commerce’s statutory authority to determine CVDs under the Act. This commenter argued that federal courts have ruled that an agency with delegated authority from Congress may not sub-delegate that authority to another entity. Two commenters argued that Commerce did not provide sufficient explanation in the preamble to the proposed rule as to when it would depart from Treasury’s recommendation regarding undervaluation.

Other commenters raised concerns that Treasury’s involvement in Commerce’s investigatory process, which is governed by tight statutory timelines, could cause disruption to that process and potentially delay relief to the petitioning U.S. industry. These commenters request that, if Treasury is to be involved, Commerce should specify clear dates by which Treasury’s views and supporting information would be put on the record of a given proceeding, to ensure that all parties have sufficient time to submit rebuttal factual information and to comment. Other commenters suggested that any Treasury input should not go on the record until after Commerce issues a preliminary finding, given the very short statutory deadline (*e.g.*, 65 days from initiation) for issuing such preliminary decisions in a CVD investigation.

*Response:* Commerce recognizes that Treasury has considerable experience and data that are relevant to an analysis of currency undervaluation as envisioned in this regulation. That said, Commerce makes its determination regarding CVDs pursuant to a different legal authority from Treasury’s statutory currency determinations, and for a different statutory purpose. The purpose of the CVD remedy is to provide redress to particular domestic industries that are found by the U.S. International Trade Commission (ITC) to be injured (or threatened with injury) by imports

that Commerce determines to benefit from specific subsidies. Under the CVD law, the petitioning U.S. industries have a right to relief – because section 701 of the Act mandates that duties “shall be imposed” – where Commerce and the ITC make these requisite findings. A determination that the foreign subsidizing government is *intending* to provide its subsidized industries a competitive advantage vis-à-vis their U.S. and international competitors, or to otherwise manipulate the playing field, is not a required element of a CVD determination under U.S. law.

In contrast, pursuant to the Omnibus Trade and Competitiveness Act of 1988 and the Trade Facilitation and Trade Enforcement Act of 2015, Treasury is responsible for completing and releasing a semiannual Report to Congress on Macroeconomic and Foreign Exchange Policies of Major Trading Partners of the United States. In its analysis, Treasury assesses a range of developments in international economic and exchange rate policies of selected trading partners, including currency developments. The 1988 statute directs Treasury to determine whether countries manipulate the rate of exchange between their currency and the United States dollar *for purposes of* preventing effective balance of payments adjustments or gaining unfair competitive advantage in international trade. The 2015 statute requires Treasury to assess the macroeconomic and currency policies of major trading partners and conduct enhanced analysis of and engagement with those partners if they trigger certain objective criteria that provide insight into possibly unfair currency practices.<sup>25</sup>

We therefore agree with those commenters who argue that the statutory provisions pursuant to which Treasury conducts its analysis differ from the statutory provisions governing

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<sup>25</sup> Following the closing of the comment period for the proposed rule, Treasury designated a country (China) as a currency manipulator for the first time. *See* Press Release, Treasury Designates China as a Currency Manipulator (Aug. 5, 2019), <https://home.treasury.gov/news/press-releases/sm751>.

Commerce's CVD analysis. Accordingly, whereas the analysis in Treasury's semiannual reports examining possible currency manipulation may have relevance to Commerce's determination, Treasury's analysis in its semiannual reports is distinct from the analysis as to whether there is undervaluation for purposes of a CVD proceeding. In other words, Treasury conducts a different analysis, pursuant to a different statutory authority and subject to different statutory criteria, in its semiannual reports. Nonetheless, these statutes reflect Congress' recognition that Treasury has expertise in currency-related matters.

With respect to the comments arguing that Commerce cannot legally "defer" decision-making authority to Treasury under principles of administrative law, section 771(1) of the Act designates the Secretary of Commerce as the administering authority of the CVD law. This means that Congress has delegated to Commerce, and no other agency, the authority to determine the existence of countervailable subsidies, impose duties, and otherwise administer the CVD law. Commerce's authority under the CVD law is distinct and independent from Treasury's authority to consider whether countries manipulate their currency pursuant to 22 U.S.C § 5305 and 19 U.S.C. § 4421.

We agree with the commenters who argued that it is important for Commerce to retain ultimate authority on administering the CVD law, including determining whether exchanges of an undervalued currency constitute countervailable subsidies in a given case. We acknowledge that federal courts have found that when Congress delegates authority to an agency, that agency cannot redelegate that authority to a separate entity.<sup>26</sup> However, this final rule does not delegate

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<sup>26</sup> See *G.H. Daniels III & Associates v. Perez*, 626 Fed. Appx. 205, 210-12 (10<sup>th</sup> Cir. 2015) (holding that the Department of Homeland Security's subdelegation of its authorities under the H-2B visa program to an outside agency, the Department of Labor, was improper); see also *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) (prohibiting the FCC from delegating its decision-making authority to state commissions); *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 783-84 and n.6 (D.C. Cir. 1998) (forbidding the Control Board in the Department of Education from redelegating its delegated powers to a Board of Trustees); and

any decision-making authority from Commerce to Treasury, but rather provides that Commerce will request and expect to receive Treasury's evaluation and conclusion as to undervaluation, government action and the bilateral U.S. dollar rate gap during a CVD proceeding. In any such future CVD proceeding involving currency undervaluation, we intend to place Treasury's evaluation and conclusion on the record and allow the submission of factual information to rebut, clarify or correct Treasury's evaluation and conclusion, as required by 19 CFR 351.301(c)(4). In recognition of Treasury's experience in the area of evaluating currency undervaluation, Commerce will defer to Treasury's expertise, but we will not delegate to Treasury the ultimate determination of whether currency undervaluation involves a countervailable subsidy in a given case. It is lawful for one federal agency to turn to another for "advice and policy recommendations" in an area where that other agency might have particular expertise.<sup>27</sup> Accordingly, we intend to defer to Treasury's expertise with respect to currency undervaluation. Therefore, we disagree with the commenters that objected to the proposed rule on this basis. We further disagree with the commenters that suggested that we need to describe in detail when we will depart from Treasury's evaluation and conclusion regarding undervaluation. We expect that we will normally follow Treasury's evaluation and conclusion regarding undervaluation, and any departure from Treasury's evaluation and conclusion will be based on substantial evidence on the administrative record.

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*ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 511, 517 (1988) (holding that the Army was not permitted to redelegate to the Department of the Interior power to contract to remove water for industrial use that Congress delegated to the Army). *But see Louisiana Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 671-75 (3<sup>rd</sup> Cir. 2014) (determining that the Department of Homeland Security did not delegate its authority under the H-2B visa program to the Department of Labor).

<sup>27</sup> *See U.S. Telecom Ass'n v. Federal Comm'n's Commission*, 359 F.3d 554, 568 (D.D.C. 2017) ("[A] federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself"); *see also Bellion Spirits v. United States*, 393 F. Supp. 3d 5, 15-17 (D.D.C. 2019) (upholding the Alcohol and Tobacco Tax and Trade Bureau's reliance on the scientific fact-finding and analysis of the Food and Drug Administration because the Bureau retained ultimate decision-making authority).

Regarding the comments expressing concern about the impact of Treasury's role on the deadlines of CVD proceedings, § 351.528 states that Commerce will request from Treasury its evaluation and conclusion as to the issues of undervaluation, government action and the U.S. dollar rate gap. Commerce intends to do so well before the deadline for a preliminary determination on the alleged currency subsidy. We will place on the record any information timely received from Treasury and intend to follow all normal procedures in Commerce's regulations – such as those in 19 CFR 351.301 – with respect to that information. It is Commerce's intention that, normally, such information will be placed on the record prior to a preliminary determination regarding the alleged currency subsidy so that, where possible and appropriate, Commerce can take it into account in its preliminary findings. Regardless of when the information is placed on the record, however, and as with all record information in a CVD proceeding, interested parties will have adequate opportunity to rebut any information provided by Treasury with factual information of their own. All interested parties and U.S. government agencies also have the opportunity to submit case briefs and rebuttal briefs to Commerce, pursuant to 19 CFR 351.309, after Commerce issues its preliminary determination.

#### *9. Specificity*

Several commenters argued that the proposed addition of paragraph (c) to 19 CFR 351.502 would contravene U.S. law and WTO rules. They argued that the traded goods sector is too diverse of a sector to constitute a “group” of enterprises under the Act and SCM Agreement. One commenter, citing to prior CVD investigations of aluminum extrusions and coated paper suitable for high-quality print graphics using sheet-fed presses from the People's Republic of China, claimed that treating exporters as a “group” for purposes of specificity for domestic subsidies is contrary to Commerce's past practice. Other commenters, on the other hand,

generally supported the proposed modification. They argued that defining the traded goods sector as a “group” is a positive step toward addressing specificity for certain types of subsidies.

More broadly, some commenters went beyond the proposed regulatory text and argued that currency undervaluation and exchanges of currency are not “specific” under U.S. or international law. Specifically, these commenters claimed that such subsidies, which are all-encompassing and broadly available throughout the economy, cannot be deemed specific under the statute or satisfy the “known or particularized” requirement of specificity under Article 2.1 of the SCM Agreement. One commenter cited to Commerce’s past determinations in this regard, and subsequent affirmance by the CIT, as demonstrative of the agency’s historical understanding of the term “specific.” Because the provisions of the SCM Agreement mirror those of the Act, several commenters also claimed that the proposed rule would conflict with WTO rules.

Some commenters argued that Commerce should not limit its specificity analysis to that under the proposed rule alone (*i.e.*, a domestic subsidy), because currency-related subsidies could also be viewed as export subsidies. One commenter further urged Commerce to allow domestic industries to allege currency undervaluation as an export subsidy. In contrast, one commenter claimed that treating currency undervaluation as an export subsidy is never proper under WTO rules, because the mere fact that such subsidies are provided to enterprises that export is not, in itself, enough to be found to be specific.

Other commenters requested revisions to the proposed language regarding specificity. For purposes of defining the relevant “group” of enterprises, several commenters requested that Commerce elaborate on its interpretation of the term “primarily.” According to these commenters, that term (*i.e.*, primarily), if left undefined, would be restrictive, and even critical to effective implementation. As one possible solution, some of these commenters proposed that

Commerce replace the term with the phrase “actively engaged in,” thereby establishing a more discretionary basis for assessment. Separately, one commenter suggested that Commerce replace the phrase “may consider” with “will consider” for purposes of consistency with other CVD regulations.

*Response:* As described above, Commerce is modifying 19 CFR 351.502 to add new paragraph (c), which clarifies that in analyzing specificity, Commerce normally will consider enterprises that buy or sell goods internationally to comprise a “group” of enterprises within the meaning of section 771(5A)(D) of the Act. Therefore, under this regulation, if a subsidy is limited to enterprises that buy or sell goods internationally, or if enterprises that buy or sell goods internationally are the predominant users or receive disproportionately large amounts of a subsidy, then that subsidy may be specific. This regulatory modification is similar to prior interpretations of the statutory term “group.” For example, we have found state-owned enterprises and foreign-invested enterprises to comprise “groups” under the Act.<sup>28</sup>

We agree with the commenters who suggested removing the word “primarily” from the proposed rule, because the use of this word may raise problems with administrability due to its ambiguity. We also agree with the commenters who suggested changing the phrase “may consider.” New section 351.502(c) now states that Commerce “normally will consider enterprises that buy or sell goods internationally to comprise such a group.” This phrase (“normally will”) is more consistent with the terminology used in most of our CVD regulations.

We disagree that this regulatory modification runs afoul of U.S. law or WTO rules. Section 771(5A)(D) of the Act does not define the word “group.” Therefore, it is within

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<sup>28</sup> See Import Administration Policy Bulletin 10.1, *supra* note 2; *Citric Acid and Certain Citrate Salts From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, *supra* note 2.

Commerce's authority to adopt a permissible interpretation of that term.<sup>29</sup> The interpretation adopted by paragraph (c) is permissible, because enterprises that buy or sell goods internationally are certainly an identifiable set of enterprises, and they constitute a subset of all economic actors within a country. Moreover, as mentioned above, this type of interpretation of the term "group" is consistent with our practice. Regarding the argument that enterprises that buy or sell goods internationally could come from a variety of different industries, we do not disagree. But this is irrelevant under our existing regulations, because 19 CFR 351.502(b) states that there need not be shared characteristics among the enterprises that comprise a group.<sup>30</sup>

We further note that section 771(5A)(A) of the Act deems export subsidies and import-substitution subsidies to be specific *per se*, without regard to whether there is a narrow or diverse array of industries or companies reflected by the recipients of those two categories of subsidies, or whether there are any other common characteristics among those recipients. The SCM Agreement not only likewise deems these two categories of subsidies to be specific, but also prohibits them outright.<sup>31</sup> Specifically in the context of undervalued currency, moreover, we note that if an exchange rate is too low or undervalued, it underprices exports and overprices imports. This directly distorts international trade on a systemic basis with the same direct adverse impact on trade as the simultaneous provision of import-substitution and export subsidies. Accordingly, treating importers and exporters of goods as a group for specificity purposes is entirely consistent with the international trade focus and remedial purposes of the trade remedy laws.

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<sup>29</sup> See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>30</sup> In any event, enterprises that buy or sell goods internationally clearly do share a characteristic, namely, that they buy or sell goods internationally.

<sup>31</sup> See Article 3 of the SCM Agreement.

With respect to any statements Commerce may have made in prior investigations regarding issues that are squarely addressed and clarified in this final rule, it is a fundamental principle of administrative law that an agency is allowed to change its practice, provided the change is reasonable and explained.<sup>32</sup> Not only have we explained any such changes, but we are also adopting them through this notice-and-comment rulemaking.

Some of the commenters stepped beyond the text of the proposed regulatory provision to argue the specificity of currency-related subsidies *per se*. This regulatory modification to 19 CFR 351.502 only concerns the definition of the term “group,” and cannot possibly address the specificity of a particular type of subsidy *per se*. Rather, an affirmative or negative finding of specificity for a particular type of subsidy can only occur in a CVD proceeding. Nonetheless, we offer the following observations. Under section 771(5) of the Act, a countervailable subsidy must be one that is found specific under section 771(5A) of the Act. Section 771(5A)(D)(iii) of the Act, in turn, permits a finding of specificity as a matter of fact (*de facto*) where, *inter alia*, “(a)n enterprise or industry is a predominant user of a subsidy” or “receives a disproportionately large amount of the subsidy.” The Federal Circuit has held that determinations of “dominance” and “disproportionality” for the purposes of *de facto* specificity must be made on a fact-specific, case-by-case basis.<sup>33</sup> The CIT has further held that one enterprise or industry may in fact “predominantly” benefit from a subsidy even though that subsidy is nominally available to many different enterprises or industries.<sup>34</sup> Accordingly, there is no bright line rule at which an enterprise or industry or group of enterprises or industries would be deemed a predominant user or a disproportionate beneficiary. Indeed, in determining whether an enterprise or industry (or

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<sup>32</sup> See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); see also *Huvis Corp v. United States*, 570 F.3d 1347, 1354 (Fed. Cir. 2009).

<sup>33</sup> *AK Steel Corp. v. United States*, 192 F.3d 1367, 1382-1385 (Fed. Cir. 1999).

<sup>34</sup> *Royal Thai Gov't v. United States*, 441 F. Supp.2d 1350, 1364 (CIT 2006).

group thereof) is a disproportionate or predominant beneficiary of a subsidy, Commerce evaluates the relative share of the benefits received as opposed to the absolute share of the benefit. Thus, an inquiry into whether an alleged subsidy is all-encompassing or broadly available throughout an economy, requires case-by-case analysis, which Commerce intends to perform for currency undervaluation allegations, consistent with its statutory obligation. Moreover, because U.S. law is consistent with our international obligations, we disagree with commenters that the proposed rule conflicts with WTO rules, specifically the requirements of the SCM Agreement.

We also disagree with commenters that the proposed rule limits the domestic industries' ability to bring certain allegations (such as export subsidy allegations) regarding such subsidies, or that it limits Commerce's specificity analysis with respect to such allegations. This final rule only addresses the definition of the term "group" for domestic subsidy purposes; it does not address export subsidies. Indeed, Commerce, will continue to consider allegations concerning currency undervaluation and exchanges of currency – as well as all subsidy allegations – consistent with its statutory and regulatory obligations, including this final rule. And Commerce's evaluation of the facts of the proceeding, on a case-by-case basis, will serve to facilitate its analysis, and decisions on how to proceed with allegations concerning currency undervaluation and exchanges of currency. Because Commerce's evaluation of each allegation will be based on the facts of each case and consistent with U.S. law, there is no need to opine on the one commenter's statement that treating currency undervaluation as an export subsidy is never proper under international law.

#### *10. General Comments*

##### Commerce's Proposal Infringes on the IMF's Authority

We received comments from various parties arguing that our proposed rule infringes upon the jurisdiction of the IMF. One commenter stated that under Article XV of the GATT, the IMF is the appropriate venue to handle currency-related issues and that to countervail currency undervaluation could violate that GATT Article. Another commenter also argued that the IMF is the appropriate forum to deal with exchange rates and currency manipulation. This commenter argued that this is clear from the provisions of Article XV:2 of GATT 1994, which indicate that it is the IMF, and not the WTO, that has authority over problems concerning monetary reserves, balance of payments and foreign exchange arrangements. Another commenter argued that individual members of the IMF do not have the right to assess whether another member is involved in exchange rate manipulation or whether the member's exchange rate is undervalued. Finally, another commenter also argued that the proposed rule attempts to supersede the leading role played by the IMF on currency and exchange rate issues.

*Response:* We find the arguments made by these commenters to be without legal foundation. There is nothing under U.S. law or the IMF Articles of Agreement that prevents a sovereign member of the IMF from analyzing whether an exchange involving an undervalued currency constitutes a countervailable subsidy under a nation's CVD law. These commenters have cited to no provision under U.S. law or within the IMF Articles of Agreement that prohibits the remedies set forth under the CVD law to be applied against imports that benefit from countervailable subsidies resulting from an undervalued currency. In addition, the proposed rule does not infringe upon any rights or obligations set forth under the IMF Articles of Agreement. There is no language in the proposed rule that restricts in any manner the actions undertaken by the IMF, nor have the commenters referenced any language in the proposed rule that infringes on any actions of the IMF. Moreover, we note that the SCM Agreement explicitly includes certain

currency-related practices in item (b) of the “Illustrative List of Export Subsidies” in Annex I, and therefore it is incorrect to suggest that the IMF is the only international organization with jurisdiction over currency matters.

Moreover, under the section 771(1) of the Act, Commerce is designated as the administering authority of the CVD law. As such, under section 701 of the Act, we are legally mandated to determine whether any government or public entity 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 imported into the United States. Therefore, we are legally required to address, and – if the ITC finds injury – provide a remedy for, any action of a government or public entity that results in a subsidy that meets the definition of a countervailable subsidy defined under section 771(5) of the Act and is specific as defined under section 771(5A) of the Act. Indeed, Commerce has previously investigated exchange rate regimes.<sup>35</sup> Furthermore, at the time of the adoption of the SCM Agreement and the subsequent enactment of the Uruguay Round Agreements Act, there was only a narrow list of government actions that, notwithstanding the provisions of sections 771(5) and 771(5A) of the Act, would be treated as non-countervailable. This list was set forth under section 771(5B) of the Act. This list of exempted practices did not include exchange rate regimes, and, in addition, has long-since expired.

#### Possible Retaliation by U.S. Trading Partners

Some commenters argued against implementing the proposed regulation on the grounds that, should the United States begin to apply its CVD law against imports that allegedly benefit

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<sup>35</sup> See, e.g., *Final Negative Countervailing Duty Determination: Pork Rind Pellets from Mexico*, 48 FR 39105 (August 29, 1983); *Final Affirmative Countervailing Duty Determination: Certain Electrical Conductor Aluminum Redraw Rod from Venezuela*, 53 FR 24763 (June 30, 1988). These cases involved dual exchange rate regimes.

from undervalued currencies, this would result in disruption of international trade of goods and services, and could also lead U.S. trading partners to retaliate through the imposition of CVDs of their own, or through some other similar actions, especially in light of recent statements from the U.S. Administration about possible actions to lower the U.S. dollar value. This would have an adverse impact on U.S. exports of manufactured goods and agricultural products, and potentially reduce economic growth, especially if the WTO were to rule adversely against this practice. Similarly, one commenter notes that the IMF was originally created to avoid the risks of politicization of bilateral exchange rates disputes and a return to beggar-they-neighbor currency policies, which are risks that implementation of the proposed regulation may recreate.

*Response:* As noted elsewhere in this notice, under the CVD statute, the petitioning U.S. industries have a right to relief where Commerce determines that countervailable subsidies exist and the ITC determines that any such subsidies that benefit the imports in question cause, or threaten to cause, injury to those petitioning industries. Commerce must fully enforce the CVD law regardless of whether doing so may prompt trading partners to attempt to retaliate through the improper imposition of CVDs against U.S exports or through other means. Having previously received and addressed allegations that exchange rate regimes result in countervailable subsidies that injure U.S. industry, it is entirely consistent with the U.S. countervailing duty law that Commerce provide additional guidance on such matters through this rulemaking. When it comes to Commerce's attention that other countries are imposing retaliatory trade remedies or other trade barriers in a manner inconsistent with their international obligations, Commerce will work with the U.S. Trade Representative's office and other interagency partners to ensure that U.S. rights are fully protected.

Other Methods to Combat Currency Manipulation/Misalignment May Be More Effective

A few commenters argued that the proposed rule is not the most effective method to address currency manipulation because it would simply countervail imports from a specific industry (instead of all exports from the country under investigation or review) and because any duties would be contingent upon an affirmative injury ruling from the ITC. Others opined that the proposed rule is inappropriate because it fails to address the root cause of the currency misalignment (*i.e.*, the dollar's overvaluation due to years of excessive global demand for dollar-denominated assets and financial capital). Some of these commenters suggested potentially more effective alternatives that would better address the issue, such as countervailing currency intervention (CCI), Market Access Charge (MAC), and naming China a currency manipulator. However, all three of these commenters supported Commerce's proposed rule and believed that it was an important (albeit imperfect) first step towards fully addressing the issue. One commenter noted that Commerce should coordinate with Treasury to implement CCI, which would reduce bureaucratic problems that would likely occur under Commerce's proposed countervailing duty approach.

*Response:* While the alternatives proposed by commenters for combating currency misalignment and manipulation may or may not be more effective than the modifications proposed by Commerce, Commerce cannot implement any of them, because: (1) concerning the option to label China a currency manipulator, Treasury, and not Commerce, possesses the sole statutory authority to label a country a currency manipulator; and (2) both the other two proposed alternatives (CCI and MAC) also fall outside of Commerce's purview and have no connection to subsidies or CVDs.

Relationship to the Antidumping Law

Some commenters argued that Commerce should or could use the antidumping law to address currency undervaluation. For example, one commenter suggested that currency undervaluation could be one factor that leads to a finding of a particular market situation in an antidumping proceeding. This commenter argued that currency undervaluation can distort costs in the comparison market by distorting the costs of input products.

*Response:* This final rule addresses only CVD proceedings. Nothing in this final rule should be construed as affecting Commerce's antidumping duty regulations or practice in any way. The issue of what constitutes a particular market situation in an antidumping proceeding is a case-by-case determination, and interested parties are permitted to make a timely allegation of a particular market situation in antidumping proceedings.

#### *11. Economic Impact*

Some commenters noted that there is a large difference in the estimates produced by the two economic impact assessments included in the proposed rule, with the first estimating an economic impact of \$3.9 to \$16.6 million in duties collected annually and the second estimating a range of \$1.71 to \$3.14 billion in new duties collected annually on Chinese imports alone. These comments claimed that this suggests Commerce lacks a reliable or well-developed methodology for imposing CVDs for currency undervaluation.

Some comments predicted the impacts the duties would have. One commenter argued that linking the well-known undervaluation issue with the more obscure CVD law will increase public awareness of the latter and result in a greater number of CVD allegations from a variety of U.S. industries demanding that CVDs be enforced to remedy the amount of benefit provided to foreign producers. The commenter therefore contended that the proposed rule will likely increase its economic impact to a level well beyond Commerce's estimations. Another commenter claimed that there has been a significant cost to overall U.S. employment and GDP

as a result of the U.S. government not effectively addressing the trade effects of undervalued foreign currencies and that eliminating this cost could increase U.S. GDP by between \$288 billion and \$720 billion and create 2.3 to 5.8 million jobs.

Other commenters argued that imposing CVDs to offset the benefit of currency-related subsidies to imported goods would likely have relatively little impact overall to the U.S. economy, although it could provide much-needed relief to the industries and workers that have been specifically impacted by currency undervaluation. While some other commenters agreed that the overall impact was likely to be relatively small, they suggested that this was an argument against implementing this proposed regulation because the likely positive impact does not justify the significant risks involved. Still other commenters expressed concern that countervailing undervalued currencies would have a negative impact on the U.S. economy because it will force U.S. producers to switch to other foreign suppliers. They claimed the resulting shift in supply chains will have a widespread effect on U.S. prices of the relevant merchandise.

*Response:* The significant divergence in the estimates produced by the two alternative approaches reflects the nature of this exercise, which involves numerous variables and several simplifying assumptions that must be made for analytic tractability, as well as data constraints. Under the Alternative 1, “bottom-up” approach, Commerce estimated the total value of additional duties that would be collected on all imports of the relevant merchandise if currency-related subsidies were countervailed in future proceedings using standard benefit-to-the-recipient calculation methodologies. In contrast, under Alternative 2, Commerce followed a “top-down” approach to estimate total additional duties on the basis of market price effects. Thus, both approaches attempted to quantify the economic impact of the implementation of this regulation in terms of total additional duties, but necessarily involved different variables and assumptions

made, which in large part explains the divergent economic impact estimates. Since each estimate involves a margin of error, Commerce provided both assessments to give a sense of the dollar range of the possible economic impact of implementing this regulation.

Alternative 1 is based on Commerce's experience and practice, as well as with the requirements of the Act and Commerce's regulations. Under the law, CVDs are calculated and applied to offset benefits that accrue at the firm level. Although countervailing subsidies resulting from currency undervaluation may increase the number of allegations brought forth by petitioners and investigated by Commerce in a given case, any resulting CVDs would still be contingent on an affirmative injury finding by the ITC, thereby significantly limiting the economic impact of the proposed rule. No commenters argued specifically for the adoption of Alternative 2 over Alternative 1 as the appropriate economic impact analysis, although at least one commenter argued, without citing to any specific data for support and without specifying which alternative it was addressing, that the economic impact could be higher than the estimate in the proposed rule.

Commerce agrees with commenters who argue that currency undervaluation has adversely affected the U.S. economy. Although, as discussed above, it is not possible to determine the economic impact of implementing this rule with certainty, the collection of appropriate duties will have a significant positive impact on the specific U.S. industries harmed by undervalued currencies. Some commenters objected that Commerce's economic impact estimates fail to account for what they believe will be a vast number of currency allegations and additional CVD cases (and presumably orders) that will result from the proposed rule. While the number of allegations in future CVD proceedings is almost certain to increase by at least one, it is unlikely currency allegations would increase the total number of cases, since that would be

contingent upon an affirmative injury finding, which, as we discussed in the proposed rule at 24412, depends on a host of factors other than whether the currency is undervalued.

Furthermore, currency-related duties in terms of their magnitude and scope of application would reflect subsidy benefits calculated under the same benefit-to-the-recipient framework that governs all of Commerce's subsidy benefit calculations. Currency-related duties would apply to foreign exporters in a CVD proceeding that receive a benefit by converting U.S. dollars to their domestic currency. The duties would not be applied across the board to all imports of the subject merchandise in an equal amount, but rather would reflect on-the-ground company-level circumstances. With respect to the trade-diversion effects that some commenters argue currency-related duties could have, Commerce notes that currency-related duties in this regard would be no different than duties associated with other subsidies and (as explained above) are unlikely to increase the number of orders under which duties are collected. As Commerce noted in the proposed rule at 24411, at the time of drafting Commerce had 58 CVD orders on China, the most for any single country. Each CVD order typically involves multiple subsidy programs. Yet despite the increasing number of orders (starting with zero in 2006), U.S. imports from China have continued to rise significantly over the last several years to \$540 billion in 2018.

As we explained in the proposed rule,<sup>36</sup> Commerce's CVD determinations are made on a case-by-case basis, and each determination is based solely on the administrative record of that case, as well as on the Act and Commerce's regulations. Commerce's economic assessment of this final rule is not meant to serve as a predictor of the results of future CVD proceedings in which currency-related subsidies are alleged. Rather, our economic assessment is done solely to comply with Executive Order 12866.

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<sup>36</sup> See Proposed Rule, 84 FR at 24409.

## **Changes from the Proposed Rule**

As noted in the previous “Response to Comments on the Proposed Rule” section, in this final rule, and as a result of the comments on the proposed rule, we made changes (primarily additions) to the regulatory text. Many of these additions to the regulatory text – for example, the additions describing in greater detail the steps of the benefit determination and the additions regarding the role of government action on the exchange rate – are consistent with how we described the rule in the preamble to the proposed rule. In light of the comments received, we have decided to include greater detail in the regulatory text itself, rather than in the preamble alone. Other changes to the regulatory text – for example, the technical changes in 19 CFR 351.502 – respond to comments received.

In particular, Commerce has made certain modifications to the proposed rule’s regulatory text for 19 CFR 351.502(c) with respect to specificity. In particular, in response to comments, we removed the word “primarily” from the description of the enterprises that buy or sell goods internationally that may comprise a group of enterprises. We also changed the phrase “may consider” to “normally will consider,” in response to comments.

Additionally, we have created new 19 CFR 351.528 to contain the rules governing the determination of benefit for subsidies resulting from exchanges of undervalued currencies. We determined that it is more appropriate to put these rules in their own regulatory provision, rather than adding language in a paragraph of the general provisions of 19 CFR 351.503. Additionally, in response to comments received, we have provided additional detail on the various steps in the benefit determination. New § 351.528(a)(1) makes clear that a determination of undervaluation normally is a prerequisite to proceeding with the benefit determination. New § 351.528(a)(2) makes clear that a finding of government action on the exchange rate that contributed to the

undervaluation normally is a prerequisite to the finding of undervaluation in paragraph (a)(1). New § 351.528(b)(1) explains that Commerce normally will calculate the benefit after taking into account the U.S. dollar rate gap. New § 351.528(b)(2) explains that Commerce normally will determine the amount of the benefit by comparing the amount of domestic currency a firm received to the amount it would have received absent the U.S. dollar rate gap. New § 351.528(c) is similar to language in the proposed rule, in that it specifies that Commerce will seek an evaluation and conclusion from Treasury regarding the issues of undervaluation, government action, and the U.S. dollar rate gap.

### **Classifications**

#### *Executive Order 12866*

It has been determined that this rule is economically significant for purposes of Executive Order 12866.

#### *Executive Order 13771*

This rule constitutes regulatory action within the meaning of Executive Order 13771.

#### *Economic Impact*

In the proposed rule at 24409, Commerce presented two alternative approaches to estimating the economic impact of the adoption of this rule. Under Alternative 1, Commerce estimated an economic impact ranging from \$4 million to less than \$17 million. Under Alternative 2, Commerce estimated an impact in the range of between \$1.71 billion and \$3.14 billion. We received a small number of limited public comments on these estimates, which we have addressed above. None of the comments contained a detailed argument that one of the alternatives is more accurate than the other.

As we stated in the proposed rule, this economic impact analysis is done solely to conform with the requirements of Executive Order 12866 and is not meant to serve as a predictor of the facts in any potential future cases, nor to indicate the likelihood of any particular future determinations, should we receive currency-related subsidy allegations in the future. Commerce's CVD determinations are based solely on the administrative record of the proceeding at hand, consistent with the Act and Commerce's regulations.

#### *Paperwork Reduction Act*

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

#### *Congressional Review Act*

This rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801, *et seq.*) and will be transmitted to the Congress and to the Comptroller General for review in accordance with such provisions.

#### *Executive Order 13132*

This 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 for the Department of Commerce 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 this final rule would not have a significant economic impact on a substantial number of small business entities. The factual basis for this certification was published with the proposed rule and is not repeated here. No comments were received regarding the Regulatory Flexibility Act. As a result, the conclusion in the certification

memorandum for the proposed rule remains unchanged and a final 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: January 29, 2020.

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Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance

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

**PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES**

- 1. The authority citation for part 351 continues to read as follows:  
  
**Authority:** 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.*; and 19 U.S.C. 3538.
- 2. In § 351.502, redesignate paragraphs (c) through (f) as paragraphs (d) through (g), and add paragraph new (c) to read as follows:

**§ 351.502 Specificity of domestic subsidies.**

\* \* \* \* \*

(c) *Traded goods sector.* In determining whether a subsidy is being provided to a “group” of enterprises or industries within the meaning of section 771(5A)(D) of the Act, the Secretary

normally will consider enterprises that buy or sell goods internationally to comprise such a group.

\* \* \* \* \*

- 3. Add § 351.528 to subpart E to read as follows:

**§ 351.528 Exchanges of undervalued currencies.**

(a) *Currency undervaluation—(1) In general.* The Secretary normally will consider whether a benefit is conferred from the exchange of United States dollars for the currency of a country under review or investigation under a unified exchange rate system only if that country's currency is undervalued during the relevant period. In determining whether a country's currency is undervalued, the Secretary normally will take into account the gap between the country's real effective exchange rate (REER) and the real effective exchange rate that achieves an external balance over the medium term that reflects appropriate policies (equilibrium REER).

(2) *Government action.* The Secretary normally will make an affirmative finding under paragraph (a)(1) of this section only if there has been government action on the exchange rate that contributes to an undervaluation of the currency. In assessing whether there has been such government action, the Secretary will not normally include monetary and related credit policy of an independent central bank or monetary authority. The Secretary may also consider the government's degree of transparency regarding actions that could alter the exchange rate.

(b) *Benefit—(1) In general.* Where the Secretary has made an affirmative finding under paragraph (a)(1) of this section, the Secretary normally will determine the existence of a benefit after examining the difference between:

- (i) The nominal, bilateral United States dollar rate consistent with the equilibrium REER; and

(ii) The actual nominal, bilateral United States dollar rate during the relevant time period, taking into account any information regarding the impact of government action on the exchange rate.

(2) *Amount of benefit.* Where there is a difference under paragraph (b)(1) of this section, the amount of the benefit from a currency exchange normally will be based on the difference between the amount of currency the firm received in exchange for United States dollars and the amount of currency that firm would have received absent the difference referred to in paragraph (b)(1) of this section.

(c) *Information sources.* In applying this section, the Secretary will request that the Secretary of the Treasury provide its evaluation and conclusion as to the determinations under paragraphs (a) and (b)(1) of this section.

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