DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 110420253–1577–02]

RIN 0625–AA88

Modification of Regulations Regarding the Practice of Accepting Bonds During the Provisional Measures Period in Antidumping and Countervailing Duty Investigations

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce (the Department) is amending its regulations governing the effect of an affirmative preliminary determination in antidumping or countervailing duty proceedings to establish that the provisional measures will normally take the form of a cash deposit. Requiring that provisional measures will normally take the form of a cash deposit will help to strengthen the administration of the nation's antidumping (AD) and countervailing duty (CVD) laws by making importers directly responsible for the payment of AD and CVD duties.

DATES: This Final Rule is effective November 2, 2011. This rule will apply to all investigations initiated on the basis of petitions filed on or after this effective date.

FOR FURTHER INFORMATION CONTACT: Thomas Futtner at (202) 482–3814, Mark Ross at (202) 482–4794, or Joanna Theiss at (202) 482–5052.

SUPPLEMENTARY INFORMATION:

Background

On April 26, 2011, the Department published a proposed modification to its regulations regarding the practice of accepting bonds during the provisional measures period in AD and CVD investigations. *See Modification of Regulations Regarding the Practice of Accepting Bonds During the Provisional Measures Period in Antidumping and Countervailing Duty Investigations,* 76 FR 23225 (April 26, 2011) (Proposed Rule). The Proposed Rule explained the Department's proposal to modify its regulations to establish that the provisional measures during an AD or CVD investigation will normally take the form of a cash deposit. The Department received numerous comments on the Proposed Rule and has addressed these 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–2011–0005. After analyzing and carefully considering all of the comments that the Department received in response to the Proposed Rule, the Department has adopted the modification and amended its regulations to establish that the provisional measures during an AD or CVD investigation will normally take the form of a cash deposit.

Explanation of Regulatory Provision

Our regulations describe the preliminary determination in AD and CVD investigations as the first point at which the Department may provide a remedy if we preliminarily find that dumping or countervailable subsidization has occurred. The regulations at 19 CFR 351.205(a) stated that, ''[t]he remedy (sometimes referred to as 'provisional measures') usually takes the form of a bonding requirement to ensure payment if antidumping or countervailing duties ultimately are imposed.'' Section 351.205(d) of the Department's regulations states that, ''[i]f the preliminary determination is affirmative, the Secretary will take the actions described in section 703(d) or section 733(d) (whichever is applicable).''

The provisional measures period is the period between the publication of the Department's preliminary affirmative determination and the earlier of (1) The expiration of the applicable time period set forth in sections 703(d) and 733(d) of the Tariff Act of 1930, as amended (the Act), or (2) the publication of the International Trade Commission (Commission)'s final affirmative injury determination.[1] During this time the Department is instructed by the Act to order ''the posting of a cash deposit, bond, or other security, as the administering authority deems appropriate.'' *See* Sections 703(d)(1)(B) and 733(d)(1)(B) of the Act.

Requiring that provisional measures will normally take the form of a cash deposit will help to strengthen the administration of the nation's AD and CVD laws by making importers directly responsible for the payment of AD and CVD duties. This change will help to ensure that the U.S. Government collects the full amount of the duties owed should an investigation result in the imposition of an AD or CVD order and, further, it will reduce some of the burdens that U.S. Customs and Border Protection (CBP) faces when trying to collect AD and CVD duties. Certain parties commented on the explanation the Department provided for this change in the Proposed Rule, and the Department has addressed those comments in the section entitled ''Response to Comments on the Proposed Rule''.

Explanation of Final Modification to 19 CFR 351.205

Prior to this modification to the regulations, the second sentence of 19 CFR 351.205(a) stated that ''[t]he remedy (sometimes referred to as 'provisional measures') usually takes the form of a bonding requirement to ensure payment if antidumping or countervailing duties ultimately are imposed.'' The Department deleted most of the sentence to no longer permit under normal circumstances, U.S. importers to post bonds during the provisional measures period. However, the Department retained the phrase ''(sometimes referred to as 'provisional measures')'' but moved it to the first sentence of 19 CFR 351.205(a). We view this phrase as a useful link between this part of our regulations and the terminology under Article 7 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (''ADA'') and Article 17 of the Agreement on Subsidies and Countervailing Measures (''ASCM'').

Further, to clarify that provisional measures will take the form of cash deposits, the Department added a sentence to 19 CFR 351.205(d) that states, ''With respect to section 703(d)(1)(B) and 733(d)(1)(B) of the Act, the Secretary will normally order the posting of cash deposits to ensure payment if antidumping or countervailing duties ultimately are imposed.'' This change, in our view, places the requirement for cash deposits in the appropriate part of 19 CFR part 351 (*i.e.,* in the part that explains the effects of an affirmative preliminary determination). This amendment reflects the Department's change in practice to now normally require cash deposits rather than bonds during the provisional measures period. This modification is also in line with 19 CFR 351.205(d), which provides that ''if the preliminary determination is affirmative, the Secretary will take the actions described in section 703(d) or section 733(d) of the Act (whichever is applicable)'' because these sections of the Act provide that the Department

[1] Also, pursuant to sections 703(e)(2) and 733(e)(2) of the Act, if the Department makes an affirmative determination of critical circumstances, then provisional measures shall apply on or after the later of (A) The date which is 90 days before the date on which the suspension of liquidation was first ordered, or (B) the date on which notice of the determination to initiate the investigation is published in the **Federal Register**.

shall order the posting of cash deposits or bonds, as the Department deems appropriate.

Response to Comments on the Proposed Rule

The Department received numerous comments on its Proposed Rule. As indicated in the ''Background'' section, these comments can be accessed using the Federal eRulemaking Portal at *http://www.Regulations.gov* under Docket Number ITA–2011–0005. The Department has analyzed and carefully considered all of the comments received. Below is a summary of the comments, grouped by issue category, and followed by the Department's response.

Issue 1—U.S. Law, the WTO Agreements, and Cash Deposits During the Provisional Measures Period

Several commenters assert that section 703(d)(l)(B) and 733(d)(1)(B) of the Act provide the Department discretion to collect cash deposits as provisional measures. Some of the same parties also note that Article 7 of the ADA and Article 17 of the ASCM indicate that WTO members may require importers to post cash deposits as provisional measures. Another commenter asserts that Article 7 of the ADA and Article 17 of the ASCM indicate no hierarchy between cash and bond requirements for provisional measures, and that allowing the importer to choose the kind of guarantee that is suitable for them reduces the chance of default. Another commented that the ADA and ASCM clearly provide for the acceptance of bonds as one of the options for the purpose of covering provisional duties.

Response: It is within the Department's discretion to require that provisional measures will normally take the form of a cash deposit. The Act does not specify a preference for cash deposits or bonds, nor does it provide the importer with the option of selecting which method the importer prefers. For the provisional measures period in AD and CVD investigations, the Act provides for ''the posting of a cash deposit, bond, or other security, as the administering authority deems appropriate.'' *See* sections 703(d)(1)(B) and 733(d)(1)(B) of the Act.

The modification to our regulations is also consistent with the ADA and the ASCM. Article 7.2 of the ADA states that, ''[p]rovisional measures may take the form of a provisional duty or, preferably, a security *by cash deposit or bond* equal to the amount of the antidumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping.'' (emphasis added). Article 17.2 of the ASCM states that, ''[p]rovisional measures may take the form of provisional countervailing duties guaranteed *by cash deposits or bonds* equal to the amount of the provisionally calculated amount of subsidization.'' (emphasis added). U.S. law and the WTO Agreements provide that the Department may require either the posting of cash deposits or bonds, and do not prohibit the Department from normally requiring the posting of cash deposits only during the provisional measures period.

Issue 2—Use of Bonding by Other Countries

Several commenters assert that the practice of most, if not all, other WTO members is to require cash deposits during the provisional measures period, and that the proposed modification will bring the United States in line with the practices of other WTO members. Other commenters assert that the laws of certain WTO members provide for an option to post bonds or other security as provisional measures.

Response: The Department has considered the information the commenters provided on the practice of various countries of permitting or not permitting importers the option of posting bonds during the provisional measures period of AD and CVD investigations. As detailed in the above section entitled *''Issue 1—U.S. Law, the WTO Agreements, and Cash Deposits During the Provisional Measures Period,''* requiring cash deposits is permissible under the WTO Agreements and this also appears to be the practice of many WTO members. While certain WTO members may provide for an option to post bonds, sections 703(d)(1)(B) and 733(d)(1)(B) of the Act grant the Department the discretion to select the form of security that it deems appropriate as a provisional measure. After considering all the comments received, and for the reasons outlined in the Proposed Rule and this Final Rule, we have decided to proceed with the modifications to our regulations specified in the Proposed Rule. Accordingly, we are modifying our regulations to normally require cash deposits rather than bonds during the provisional measures period of AD and CVD duty investigations.

Issue 3—Effective Date of Rule Change

Several commenters urged the Department to make the change effective immediately. Two of these parties asked that we apply the change not only in future investigations, but to all pending AD or CVD proceedings for which a final determination has not yet been issued. One commenter asserted that implementation of this modification to the Department's regulations will involve minimal administrative burden in light of the very limited number of pending proceedings.

Response: As indicated in the **DATES** section above, this Final Rule will apply to all investigations initiated on the basis of petitions filed on or after November 2, 2011. The Department believes that this is a reasonable approach to the effective date issue for this particular rule change. Importantly, implementing the Final Rule in this manner will provide parties (*e.g.,* importers of merchandise that are subject to an AD or CVD investigation) time to prepare for the new requirement to normally post cash deposits upon the publication of an affirmative preliminary determination.

Issue 4—Financial Consequences of Cash Deposits

Several commenters assert that the change would have significant adverse consequences for importers. They argue that it would be burdensome for the importers, some of which are small businesses, because their cash flow would be negatively impacted. Certain supporters of the change assert that any burden placed on importers by the cash deposit requirement is mitigated by the fact that provisional measures are in place for a short period of time.

Response: The Department acknowledges that, in the past, certain importers may have benefited from the option of posting bonds during the provisional measures period and that upon implementation of this Final Rule that option will no longer be readily available to them. Nonetheless, the Act clearly provides the Department with discretion to require either cash deposits or bonds should a company choose to import merchandise that has been preliminarily determined to be dumped or subsidized and likely to be causing injury to an industry in the United States. The Department considers the security for provisional measures to be an important matter for the collection of duties. The requirement of a cash deposit will better ensure that importers bear full responsibility for any future AD and CVD duties they may owe, as the Department and CBP have learned from the agencies' extensive experience in the administration of the AD and CVD laws.

The provisional measures period lasts, at most, six months. The Department considers this to be a

relatively short period in the context of an AD or CVD proceeding. Further, importers will receive the cash deposit back in full if the imports at issue are not dumped (sold in the United States at less than the normal value of the merchandise) or not found to benefit from a countervailable subsidy (or the Commission issues a negative injury finding). If the margin calculated for the final determination ends up lower than the margin calculated at the preliminary determination, the statute requires that the difference be refunded to the importer. *See* Sections 707(a)(2) (CVD) and 737(a)(2) (AD) of the Act. However, if the margin calculated for the final determination is higher than the margin calculated at the preliminary determination, the difference is disregarded. *See* Sections 707(a)(1) (CVD) and 737(a)(1) (AD) of the Act. In other words, in no circumstance will an importer be required to post cash deposits which equal more than the margin determined at the preliminary determination, and in fact will be refunded its cash deposit to the extent the deposit is higher than the duty that is determined to be due.

Issue 5—Significance of Change to the Regulation

One commenter stated that the Department's reasoning as to why the change is not significant is ''subjective and without factual basis, especially since the Department ignores the market impact of preliminary determinations on small business industrial users/consumers.'' Certain supporters of the change argued that the percentage of U.S. imports subject to AD or CVD orders is extremely small.

Response: In determining whether this change to its regulations is significant, the Department first considered the fact that less than two percent of all entries of merchandise into the United States are subject to AD or CVD duties. Next, the Department examined the number of affirmative preliminary determinations which were issued in both AD and CVD investigations in 2007, 2008 and 2009. For instance, if an affirmative preliminary determination was published in June 2007, importers were required to post cash deposits or bonds generally beginning on the date of publication for a four to six month period. For each year, we also examined how many AD and CVD proceedings were ongoing, accounting for orders which had been revoked during a particular year. We then compared the number of affirmative preliminary determinations published in a given year to the number of ongoing proceedings in that year, to find the percentage of ongoing proceedings in each year where provisional measures were applied. We found that the average of the results of this comparison for 2007, 2008 and 2009 was less than ten percent. This analysis was used for the proposed regulatory change, and it demonstrates that the change is not significant because the change in the security requirement will impact less than ten percent of ongoing AD/CVD proceedings.

For the Final Rule, our analysis included data from 2010, which we did not include in our initial analysis. The 2010 data further supports our initial analysis: in 2010, there were 15 preliminary affirmative AD determinations and six preliminary affirmative CVD determinations, in comparison to 260 ongoing AD proceedings and 46 ongoing CVD proceedings. For 2010, approximately seven percent of all AD and CVD proceedings involved the application of provisional measures during the year. Also, the simple average of the results for each year from 2007 through 2010 is less than ten percent. Thus, we find that the market impact of altering the provisional measures security requirement is not significant for purposes of making a regulatory change. Finally, we disagree with the assertion that the Department is required to make an analysis of the significance of the change with regard to ''small business industrial users/consumers.'' The analytical requirements of 5 U.S.C. 605(b), requires that the Department consider the ''economic impact on a substantial number of small business entities,'' which requires the Department to analyze the economic impact on all small business entities, and is not limited to industrial users/consumers.

Issue 6—Requiring Cash Deposits Based on a Preliminary Determination

Several commenters argue that it is unfair to require cash deposits based on a preliminary determination, when a final order may not be issued. Some commenters assert that this change will serve as a trade barrier, and one party commented that the Department's true intention is to benefit petitioners in response to recent unfavorable WTO and court decisions. Several supporters of the change assert that importers are protected by the fact that provisional measures are not imposed without a preliminary determination of dumping (or countervailable subsidization) and injury. The parties also assert that the change will better ensure that the U.S. government can collect the full amount of duties owed, should the investigation result in the imposition of an AD or CVD order.

Response: We disagree with the assertion that it is unfair to require cash deposits based on a preliminary determination in an AD or CVD investigation. Before imposing provisional measures, the Department must make an affirmative preliminary determination of dumping or countervailable subsidization and the Commission must also make a preliminary determination as to whether dumping or subsidization are likely to be causing material injury. While a preliminary determination may occur without an order being issued, in such a circumstance any cash deposits are completely refunded to the importer(s). We also disagree with the assertion that the change would act as a trade barrier because AD and CVD measures, when applied consistent with WTO rules, remedy injury and harm caused by market-distorting unfair trade practices.

On August 26, 2010, in support of President Obama's National Export Initiative (NEI), the Department announced a number of proposals to strengthen the agency's administration of the nation's AD and CVD laws. One of those proposals is the modification of the regulations regarding the acceptance of bonds during the provisional measures period in AD and CVD investigations. Specifically, the Department indicated that it is ''[c]onsidering whether importers will be required to post cash deposits rather than bonds for imports that fall within the scope of an AD/CVD investigation starting with the issuance of the Department's preliminary determination (rather than following the imposition of an AD/CVD order).'' *See* ''NEI Trade Law Enforcement Package Fact Sheet'' at *http://ia.ita.doc.gov/tlei/fachsheet-tlei-20101108.pdf.* As indicated in the above section entitled ''*Explanation of Final Modification to 19 CR 351.205,''* the posting of cash deposits rather than bonds will make importers directly responsible for the payment of AD and CVD duties. It will also help to ensure that the U.S. Government collects the full amount of the duties owed should an investigation result in the imposition of an AD or CVD order. Further, the change will reduce some of the burdens that CBP faces when trying to collect AD and CVD duties.

Issue 7—Whether Bonds Will Be Accepted in Any Circumstance

One commenter argues that the Proposed Rule would still allow bonding as an option for provisional measures, and suggests that the

Department should set forth guidelines of circumstances in which bonding is permitted. Another argues that the Department should consider other options to address the issues it has experienced with the use of bonding during the provisional measures period (such as those used in new shipper reviews).

Response: The change to the regulation provides that ''the Secretary will normally order the posting of cash deposits to ensure payment if antidumping or countervailing duties ultimately are imposed.'' The Department considers that this change appropriately addresses the concerns identified with the use of bonding during the provisional measures period of AD and CVD investigations. The use of the term ''normally'' provides the Department flexibility to address those rare and unusual circumstances that the Department may find warrant the acceptance of bonds. The Department intends to make such exceptional determinations on a case-by-case basis (depending on the particular facts of each case) as warranted rather than attempting to articulate a rule that predicts what unusual circumstances may arise in the future. With regard to the comment about new shipper reviews, unlike in investigations, bonding in new shipper reviews is required by the Act.

Issue 8—Administrative Burdens of Permitting Bonding

One commenter asserts that the Department cites a subjective and unsubstantiated conclusion regarding the burden the bonding requirement imposes on CBP. Another commenter asserts that by requiring cash deposits, the administrative burdens and expenses, such as ensuring adequate bond coverage and handling claims for mitigation or relief from the bond requirement, will be minimized.

Response: In the Proposed Rule the Department stated that, ''[w]hile most of the duties on entries secured by a bond during the provisional measures period are ultimately collected, these collections can be very slow and involve burdensome administrative problems for (CBP).'' This conclusion was based on the U.S. Government Accountability Office's (GAO) Report to Congress on Antidumping and Countervailing Duties (GAO–08–391) (March 2008), in which the GAO stated that when an importer fails to pay supplemental AD or CVD duties, CBP frequently faces a lengthy process of trying to collect from bonding agents. Additionally, CBP reports bonding is more burdensome than collecting cash deposits because Single Transaction Bonds (STBs), which are required for the posting of bonds in AD and CVD investigations, must be reviewed for sufficiency and adequacy. Further, since bonds are legal documents, CBP must keep paper copies of STBs. CBP also has to manually enter an electronic note in its Automated Commercial System for STBs. Conversely, cash deposits are recorded electronically in ACS and are usually transmitted to CBP electronically and, thus, are recorded automatically.

Issue 9—The Use of Bonds in a Retrospective Duty Assessment System

One commenter asserted that bonds are a more appropriate form of provisional measures for the United States since it has a retrospective duty collection system, and requests that the Department not modify the current regulations and practice of accepting bonds during the provisional measures period.

Response: The Department disagrees with the assertion that bonds are a more appropriate form of provisional measures, and notes that no information or argument was provided to support this assertion. The ADA and ASCM permit the application of provisional measures in the form of cash or bond, regardless of whether the WTO member is operating a prospective or retrospective system. In either system, provisional measures serve the same function—to provide adequate security for the payment of AD or CVD duties pending the final determination of whether such duties are owed and in what amount.

Classification

Executive Order 12866

This rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

The Chief Counsel for Regulation has certified to the Chief Counsel for Advocacy of the Small Business Administration under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule, if promulgated, would not have a significant economic impact on a substantial number of small business entities. The factual basis for the certification was published in the Proposed Rule. The Department received a comment regarding the factual basis for this decision, which appears in *Issue 5—Significance of Change to the Regulation.* Based upon the Department's analysis, as discussed above, the factual basis used in the Proposed Rule to determine that the rule, if promulgated, would not have a significant economic impact on a substantial number of small business entities did not change. *See Issue 5—Significance of Change to the Regulation.* As a result, a Final Regulatory Flexibility analysis is not required and has not been prepared.

Paperwork Reduction Act

This rule does not contain a collection of information for purposes of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 *et seq.*).

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: September 15, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

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

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

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

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

§ 351.205 [Amended]

■ 2. In § 351.205, revise paragraphs (a) and (d) to read as follows:

(a) *Introduction.* A preliminary determination in an antidumping or countervailing duty investigation constitutes the first point at which the Secretary may provide a remedy (sometimes referred to as ''provisional measures'') if the Secretary preliminarily finds that dumping or countervailable subsidization has occurred. Whether the Secretary's preliminary determination is affirmative or negative, the investigation continues. This section contains rules regarding deadlines for preliminary determinations, postponement of preliminary determinations, notices of preliminary determinations, and the effects of affirmative preliminary determinations.

* * * * *

(d) *Effect of affirmative preliminary determination.* If the preliminary determination is affirmative, the Secretary will take the actions described in section 703(d) or section 733(d) of the Act (whichever is applicable). With

respect to section 703(d)(1)(B) and 733(d)(1)(B) of the Act, the Secretary will normally order the posting of cash deposits to ensure payment if antidumping or countervailing duties ultimately are imposed. In making information available to the Commission under section 703(d)(3) or section 733(d)(3) of the Act, the Secretary will make available to the Commission and to employees of the Commission directly involved in the proceeding the information upon which the Secretary based the preliminary determination and which the Commission may consider relevant to its injury determination.

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[FR Doc. 2011–24666 Filed 9–30–11; 8:45 am]

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DEPARTMENT OF THE TREASURY

31 CFR Part 31

RIN 1505–AC05

TARP Conflicts of Interest

AGENCY: Departmental Offices, Treasury.

ACTION: Final rule.

SUMMARY: On January 21, 2009, the Department issued an interim rule that provided guidance on conflicts of interest pursuant to Section 108 of the Emergency Economic Stabilization Act of 2008 (''EESA''), which was enacted on October 3, 2008. This final rule takes into account the public comments received and adopts revisions to the interim rule.

DATES: *Effective date:* November 2, 2011.

FOR FURTHER INFORMATION CONTACT: For further information regarding this final rule contact the Troubled Asset Relief Program Compliance Office, Office of Financial Stability, Department of the Treasury, 1500 Pennsylvania Avenue, Washington, DC, 20220, (202) 622–2000, or *TARP.COI@do.treas.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to Section 108 of EESA (Pub. L. 110–343; 122 Stat. 3765), which authorizes the Secretary of the Treasury to issue regulations or guidelines necessary to address and manage or to prohibit conflicts of interest that may arise in connection with the administration and execution of the EESA authorities, Treasury promulgated an interim final rule on conflicts of interest on January 21, 2009 (''Interim Rule'') (74 FR 3431). Treasury invited the public to submit comments on the Interim Rule and received requests from several commentators requesting that Treasury modify aspects of the Interim Rule. Treasury carefully considered all comments received and, in section II of this rule, discusses the comments received and sets out modifications in this final rule.

The January 21, 2009, interim rule's provisions are available at 74 FR 3431. The interim rule defines organizational and personal conflicts of interest. Further, the interim rule sets forth: (1) The requirements for retained entities to search for, disclose, certify to, and mitigate organizational or personal conflicts of interest, (2) general standards related to the handling of conflicts of interest, favors, gifts, Treasury property, and items of monetary value, (3) limits on retained entities' activities concurrently with providing services to Treasury, (4) limits on retained entities' communications with Treasury employees, (5) requirements with respect to the receipt and handling of nonpublic information, and (6) enforcement powers with respect to the interim rule.

II. Summary of Comments, Treasury's Resulting Changes, and Final Rule

Treasury is promulgating this rule to finalize the Interim Rule issued on January 21, 2009. Interested members of the public submitted several comments to the Interim Rule. The comments have been carefully considered. Comments are described below, as are the approaches that Treasury has taken in addressing them.

Commentators asked Treasury to eliminate the reference to ''management officials'' in 31 CFR 31.201 and 31 CFR 31.212. One commentator took issue with what they felt was the presumption, by defining management official, that such officials had knowledge related to the Treasury arrangement by virtue of status, rather than by virtue of having a substantive role in the arrangement. Treasury agrees, and decided to limit various obligations previously required of management officials to those key individuals who are personally and substantially involved in providing services under an arrangement with Treasury. Management officials performing a substantive role under an arrangement will be subsumed in the definition of key individual, rendering the definition of management official unnecessary.

Treasury received a comment that inquired whether Treasury considered the examples listed in the definitional provisions in 31 CFR 31.201 to *per se* constitute organizational conflict of interests. The illustrations set forth in the definitional provisions in section 31.201 are examples of situations that may give rise to a conflict of interest. They are not pronouncements that a particular set of facts will necessarily give rise to a conflict of interest, or that such conflict of interest cannot be mitigated. Treasury also received a comment suggesting the rule include specific mitigation plans for some of the conflicts examples. Treasury believes that including specific mitigation plans as part of the regulation would not be useful because the facts and circumstances of each potential or actual conflict determine whether a conflict of interest exists and dictate the appropriate mitigation controls. Treasury notes that it routinely interfaces directly with retained entities to formulate conflicts of interest mitigation plans that are dependent on the particular facts underlying the potential conflict.

Treasury also received comments questioning the relationship of the rule to contractors versus financial agents. To clarify, this final rule applies to both financial agency agreements and procurement contracts. Of course, procurement contracts are also subject to the Federal Acquisition Regulation (the ''FAR'') along with other regulatory requirements. Treasury also notes that the TARP Chief Compliance Officer lacks the direct or delegated authority to waive FAR rules related to organizational conflicts of interests. Thus, a waiver issued under 31 CFR part 31 does not itself ensure compliance with the applicable FAR requirements.

Treasury notes that pursuant to section 31.200(b), vendors hired under an arrangement to perform purely administrative services (*e.g.,* parking services for Treasury) are not subject to this rule because, in Treasury's estimation, the providers of such services are not likely to exercise the discretion core to Treasury's mission under the Troubled Asset Relief Program (''TARP'') which would likely create conflicts of interest and, therefore, the burden of subjecting such vendors to the rule is unnecessary.

Treasury added a specific reference to the appearance of a conflict of interest to sections 31.200, 31.211 and 31.212 to clarify that facts or situations that give rise to the appearance of a conflict of interest are also considered potential conflicts. This clarification is consistent with the overall approach of, and policy underlying, the regulation.

One commentator advocated the adoption of a rule that a retained entity which is an SEC-registered investment