

another will raise the question of whether the sale was at arm's length and for fair market value. Also, in the normal course of an investigation or review, the Department will usually issue a questionnaire that solicits basic information about the privatization as well as the broader market conditions. As much of the necessary information to analyze such an issue will be in the possession of the respondent company and/or government, that company or government will necessarily bear the "burden" of providing the necessary information, as would be the case with most factual questions the Department must consider in the course of a countervailing duty investigation. To some extent, therefore, the question of who must raise the issue for it to be considered is of only limited practical importance.

### 3. Process Analysis and the Cost to Government

Several commenters agree that an analysis of the privatization process is pertinent, if not central, to determining whether the sale was for fair market value. One commenter suggests that a price determined through a fair and open sales process is, by definition, the fair market value. Some commenters caution that merely because a fair and open process can result in fair market value, it does not necessarily follow that a process that is less than ideal cannot result in fair market value. In such less-than-ideal sales, all circumstances of the sale, including the objective analysis, must be considered.

Other commenters argue that an emphasis on the process through which the government sold the company would represent an illegal cost-to-government approach. The government's actions or motives in selling the company, they argue, are irrelevant to whether the purchaser received a benefit by paying less than fair market value (*i.e.*, on terms more favorable than those in the market). They continue that any such examination of government motives is illegal—neither the statute nor the Subsidies Agreement instructs the Department to examine a government's motives in determining a subsidy. Moreover, some commenters argue, discerning the government's motives would be prohibitively difficult in practice.

Likewise, the proposed "private seller" standard, several commenters contend, is illegal and impractical. One commenter argues that such a standard effectively and improperly collapses the financial contribution finding (*i.e.*, what the government provides) with the

benefit finding (*i.e.*, what the recipient receives). Other commenters, however, strongly support such a process-oriented approach, noting that the government, as seller, makes all of the critical decisions regarding the sale and, therefore, the Department's analysis must remain focused upon the government.

*Department's Position:* We disagree that our new methodology encompasses a cost-to-government standard, though we have revised the text to clarify any potential misunderstanding in this regard.

For this final modification, we have concluded that a useful and appropriate standard for determining whether a transaction was for fair market value is to assess its consistency with the normal sales practices of private, commercial sellers in that country. Preferably, in making a fair-market-value determination, we will compare the price paid for the company or its assets to a contemporaneous, benchmark price actually observed in the marketplace for a comparable company or assets. Where clear information on such a comparable, market-benchmark value is available, we will normally consider it to be highly probative in our fair-market-value analysis (though we may still consider other information regarding factors, where available and appropriate).<sup>11</sup> In our experience, however, such a clear market-benchmark price for a comparable sale rarely exists, and we will often have to resort to less conclusive benchmarks or alternative means for identifying a benefit.

One useful alternative approach is to examine the process through which the sale was made. As with the direct comparison with comparable market benchmarks, the purpose of examining the "process-oriented" factors is to determine whether the buyer ultimately paid less for the company or its assets than the buyer otherwise would have had to pay in the marketplace. In lieu of a more concrete and directly comparable benchmark price, we would have to evaluate what the buyer actually paid by examining whether the conditions and circumstances of the sale reflect those that the buyer would have faced if the buyer were purchasing the company or its assets from a private, commercial seller in the marketplace. If the conditions and circumstances of the sale reflect those the buyer would

otherwise have faced in the market, and absent more concrete evidence to the contrary, it is reasonable to determine that the price paid is what the buyer would otherwise have had to pay.

While it is true that, under this approach, there is an emphasis on the government's actions, this does not necessarily make it a cost-to-government standard. Rather, this emphasis merely reflects the reality that the seller is usually the party that determines the process and circumstances through which a company will be sold. In a privatization, the government happens to be the seller and, therefore, the one making those decisions.

We have, however, revised the wording of our final modification to de-emphasize the importance of government motives or intent. We continue to believe that, in some cases, statements from the government about what it was attempting to achieve by structuring a sale in a particular way may provide useful insight into what actions the government actually took, and what impact those actions had on the purchase price. However, we are clarifying that any determination regarding fair market value will normally not be based primarily on the government's motives or intent, as those are generally difficult to establish precisely and, in any case, are not necessarily indicative of whether the transaction price was less than fair market value.

We note that the approach we are taking in this new methodology is, in fact, similar in many fundamental respects to the Department's established equity infusion methodology. Consistent with the statute, we determine whether a benefit to the recipient has been conferred as the result of a government equity infusion by examining whether "the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made." Section 771(5)(E)(I). Under section 351.507(a) of the Department's regulations, we will generally determine whether an equity infusion confers a benefit by reference to market prices for comparable shares.

However, where such benchmark prices are not available, our equity benefit determination will depend on whether we find the infusion recipient to have been equityworthy. Equityworthiness will be determined with reference to "the perspective of a reasonable private investor examining the firm at the time the government-provided equity infusion was made." Section 351.507(a)(4). In other words,

<sup>11</sup> We would not necessarily or automatically consider the predicted or hypothetical values cited in independent or objective analyses (referenced in our non-exhaustive list of factors) to constitute such a comparable market benchmark without further scrutiny of such analyses.