

Department should not immediately determine that the price was not fair market value, but instead should inquire as to why the highest bid was rejected and whether those reasons were commercially sound. Several commenters contend that there are many situations where a private commercial seller may choose as the winning bid an offer with a lower cash component, but with a higher value of bonds or other securities. Another commenter suggests the use of the "best-value" approach, which looks not only at price but at the technical component of the transaction as well.

Other commenters, however, argue that whether the highest bid was selected is an appropriate consideration, and suggested additional scenarios (e.g., where the government finances the transaction) in which the payment may not be considered "cash equivalent."

Similarly, several commenters object to "profit maximization" as a necessary condition for determining that the government's actions were consistent with that of a private, commercial seller. One commenter believes that a focus on profit maximization is contrary to WTO obligations and United States law. Many argue that merely because a government "repackaged" the company's assets differently, thus resulting in a lower cash price, this does not mean that the purchaser paid less than fair market value for what it received.

Committed Investment: As to committed investment, several commenters state that the fair market value of the privatized company should be determined in light of the overall bundle of property, rights and obligations involved in the privatization. So long as any limitations or conditions are known prior to the sale, they argue, those conditions become part of the bargained-for exchange between the parties and are factored into the fair market value of the privatization transaction. Accordingly, these commenters state, the presence of such conditions or promises of future investments are not *per se* evidence that the sale was not for fair market value.

Several commenters note that even private sellers of companies may place conditions on a sale that go beyond a mere listing of assets to be sold. For example, these conditions may govern the timing or form of payment, or may involve pre-existing obligations to workers. Moreover, some commenters explained that in many cases, the government-imposed conditions or required investments do not even necessarily affect the sales price, particularly if the requirements are actions the purchaser would have taken

anyway. Furthermore, one commenter recalls, the purpose of the countervailing duty law is not to correct market distortions caused by previously bestowed subsidies but, simply, is to provide remedial relief to offset subsidies. Accordingly, these commenters urge the Department to eliminate this factor from the items to be examined in the determination of fair market value.

Another commenter urges the Department to retain the emphasis from its proposed modification on whether a benefit is actually conferred through committed investments. Specifically, unless there is both a required committed investment and a clearly demonstrable effect of that requirement on the price of the sale, the Department should find, *ceteris paribus*, the sale to be for fair market value.

In response, other commenters contend that where the agency is confronted with behavior such as the government's imposition of conditions on a sale, it should find such actions inconsistent with those of a commercial seller. Furthermore, they urge the Department to recognize that by seeking such commitments from the purchaser, the government is accepting less than full market value for the company. One commenter, although agreeing generally with the inclusion of this factor, suggests that it should not be necessary to identify explicit price discounts or other inducements in order to establish that the committed investment was not a normal commercial selling practice.

Additional Factors: Some commenters propose that the Department add to its fair-market-value analysis an examination, where appropriate, of the trends in stock prices of a company following its privatization. Specifically, the commenter suggests that a sudden run-up in post-sale prices due to "flipping" of the stock by the initial purchasers on or soon after the sales date strongly suggests that the sales price was less than fair market value. Other commenters disagree that such *post hoc* analysis of secondary prices is appropriate. Other commenters suggest additional criteria to consider, such as the original cost less depreciation of the assets, contemporaneous similar sales, and the presence of government industrial policies in that sector.

Department's Position: We have carefully considered the many comments we received on the proposed fair-market-value analysis, and have decided to retain the same basic approach articulated in our proposed modification. We agree with those commenters who argue that no hierarchy should be established among

the factors, and that the list of factors should not be considered exhaustive. We will generally not consider any one factor in itself to be dispositive, but will consider all the relevant facts and circumstances of a privatization to determine whether the sales price was a fair market value.¹³ For this reason, we disagree with other commenters' concern that the analysis is "too vague." Our fair-market-value analysis must be sufficiently flexible to address the diverse factual scenarios that may be encountered in the future.

With regard to barriers to entry, as we noted in the proposed modification, the fundamental consideration here is not necessarily the number of bidders, but rather whether the market is contestable, *i.e.*, anyone who wants to buy the company or its assets has a fair and open opportunity to do so. We therefore do not believe that it would be useful to adopt a rigid rule with regard to how large the pool of bidders must be, or what would necessarily constitute "overly burdensome" or "unreasonable" bidder qualifications. Obviously, such considerations are case-specific, and we will judge them in the broader context of the overall privatization process and the relevant market. That said, we take note of the particular types of restrictions that some commenters argue are strongly indicative of a less-than-fair-market-value sales process, and agree that many of these would constitute sufficient cause for a more probing study. For example, we intend to scrutinize particularly closely any privatization where there is only one final bidder (or a few), particularly in those industries or economies where a relatively large pool of bidders for such a privatization would normally be expected.

With regard to an objective or independent analysis, we disagree that a sales price at or above the value cited in such an analysis is necessarily a dispositive indicator that the sale was for fair market value, other aspects of the sales process notwithstanding. We do not believe that private, commercial sellers normally follow or adopt such analyses blindly without a fuller understanding of, *inter alia*, the assumptions and scope of the analyses and the broader context of other market indicators and industry studies.

However, we do believe that the absence of such an analysis, in circumstances where private, commercial sellers would normally

¹³ As explained below, we will normally consider the absence of an objective analysis to be highly probative in determining that the transaction was not a fair market value.