

require such information, would be a very important consideration in our examination of the sales process. Accordingly, when examining fair market value, we will normally require from the respondents the information and analysis upon which the government relied in determining how, and for what price, to sell the company or its assets. Such analysis must be objective, timely (*i.e.*, completed prior to agreement on the final transaction price), and complete (*i.e.*, contain the information typically considered by private, commercial sellers contemplating such a sale). The absence of such information and analysis would normally be highly probative (though not necessarily dispositive) in determining that the transaction was not for fair market value.

We wish to clarify, however, that though such objective analysis can serve as one useful benchmark for the sales price and can provide useful information about whether the process the government pursued was consistent with that of a private, commercial seller, we must exercise caution in how we use such an analysis given that it is often speculative and subjective in nature. The Department has experience in considering similar types of independent studies and objective analyses in the related context of government equity infusions, and we intend to follow a similar approach here, to the extent appropriate. We discussed this issue at length in the preamble to our equity infusion regulations, wherein we stated,

We will closely examine such studies. In order to be considered in our equityworthiness analysis, any study must have been prepared prior to the government's approval of the infusion and must be sufficiently objective and comprehensive. We intend to review such studies carefully to determine whether the government acted like a reasonable private investor, subjecting both the assumptions and the analysis to scrutiny. This will enable us to decide whether the decision to invest was commercially sound given the information at the disposal of the government.

Some independent studies commissioned to analyze the merits of a given investment may present an assessment of the company's expected returns and risks that is predicated on certain future actions by the company in question. For instance, a study might conclude that the investment in a company planning to close one outmoded plant and construct a new one in a different location is commercially viable so long as the company also reduces its workforce by half. In this case, the Department would take into consideration whether the downsizing will actually occur. If the company has known for a long time that a reduction in its workforce was a necessary condition for improved

financial performance, but has consistently shown itself unwilling or incapable of making that reduction, this may prove sufficient cause to believe that the projected return is unattainable.

Some commenters cautioned the Department about relying too heavily on independent studies given their inherently speculative and subjective nature. We are well aware of the potential difficulties in using independent analyses, not least of which is the fact that independent experts often fundamentally disagree about the prospects of a given investment. In other instances, the objectivity of some studies is called into question. However, private investors are likewise usually faced with a similar variety of competing views and must exercise their own judgement with respect to the objectivity of information before them. When considering the suitability of a submitted study, we will seek to ensure the study is accurate and reliable, and exercise our own judgement with respect to a study's objectivity. Specifically, we will take into consideration the extent to which the study's premises and conclusions differ from those of other independent studies, accepted financial analysis principles, or market sentiment in general (*e.g.*, industry-specific business publications or general industry market studies).

Preamble to the CVD Regulations, 63 FR 65348, 65372 (November 25, 1998).

With regard to the acceptance of the highest bid, we disagree that this is not an important factor when considering whether the sale was for fair market value. This factor goes hand-in-hand with our "primary consideration" of whether the government maximized its return on what it sold, and is an important consideration in whether the government acted like a private, commercial seller. We recognize that there may be situations where a private, commercial seller will accept something other than cash or close equivalent as payment in a sale, but we believe those circumstances are exceptional and not the norm. We will, however, examine any information a party presents in demonstrating that the government's acceptance of non-cash or close-equivalent payment is consistent with private, commercial selling practice in the relevant market (*e.g.*, that country and/or industry).

We clarify that the phrase "cash or close equivalent" is intended to include normal types of payment that may take the form of a variety of financial instruments other than cash (*e.g.*, other shares or bonds). To the extent that these or similar forms of payment are used in transactions between private, commercial parties, there is generally no problem. What we would primarily be concerned with are forms of payment to which the government ascribes a value that is different from the monetary value

that a private, commercial seller would ascribe to the payment. Examples of this might include illiquid forms of payment, or payments that have little or no tradeable value in the marketplace. As a general rule, we will carefully scrutinize any sale where the face or exchange value of a financial or other instrument given as payment differs from its market value.

We believe that the criterion of profit maximization is an appropriate consideration in our fair-market-value analysis. It is a basic principle of corporate finance and management that the primary function of a commercial enterprise is to maximize the financial return on its owners' investment.¹⁴ Moreover, such a "profit maximization" standard is supported by the Federal Circuit:

The government has different concerns from those of a private seller. Unlike a private seller who seeks the highest market price for its assets, the government may have other goals, such as employment, national defense, and political concerns, which may affect the terms of a privatization transaction. Thus a case involving privatization does not necessarily govern a private-to-private situation.

Delverde III, at 1369. Any of the government's actions in selling a company that do not maximize the financial return to the government on the sale are, therefore, legitimate and important areas of scrutiny under our fair-market-value analysis as they may indicate that the government has acted in a manner that is not consistent with the normal practices of private, commercial seller.

The profit-maximization standard is also fully consistent with the WTO findings. For example, the Panel noted that " * * * in a market-based economy, the value of a company depends on its ability to generate returns for its shareholders." *Panel Report* at para. 7.51. The Panel further noted that, "[f]ollowing privatization and consistent with commercial principles, the owners of the privatized company should be profit-maximizers, set on obtaining a market return on the entirety of their investment in the privatized company." *Panel Report* at para. 7.60. Although the Panel here was referring explicitly to the purchasers of the company (and not the seller), it is clear that in order for the sales price to be considered fair market value, both

¹⁴ To the extent that a commercial firm may have goals other than profit maximization, those non-commercial pursuits are generally reflected in the company's market value to the extent they enhance or detract from the company's ability to generate a profit.