



C-570-940; C-570-942; C-570-946
C-570-959; C-570-968; C-570-978
Section 129 Proceeding
DS437

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March 31, 2016

MEMORANDUM FOR: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

RE: Section 129 Proceedings: United States – Countervailing Duty
(CVD) Measures on Certain Products from the People’s Republic
of China (WTO DS437)

SUBJECT: Final Determination of Public Bodies and Input Specificity

I. SUMMARY

Section 129 of the Uruguay Round Agreements Act (URAA)¹ governs the actions of the Department of Commerce (the Department) following adverse World Trade Organization (WTO) dispute settlement reports. Consistent with Section 129, the Department is revising analyses in the following six CVD investigations: *Lawn Groomers*, *Kitchen Shelving*, *Wire Strand*, *Print Graphics*, *Aluminum Extrusions*, and *Steel Cylinders*² in accordance with the report adopted by the WTO Dispute Settlement Body (DSB) in WTO DS437.

Given the number of CVD investigations and the complexity of issues involved, the Department addressed the DSB’s findings through separate preliminary determination memoranda with respect to each of the issues addressed in DS437. On January 4, 2016, and February 25, 2016, we issued the *Input Specificity Memorandum* and *Input Specificity/Public Bodies Preliminary Determination* memoranda which are relevant to these Section 129 proceedings.³ Additionally, on March 11, 2016, we announced to interested parties the schedule for the submission of case and rebuttal briefs, which were due to the Department on March 25, 2016, and March 30, 2016,

¹ 19 USC 3538(b).

² See Attachment 1 for full case citations.

³ See Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, “Input Specificity: Preliminary Analysis of the Diversification of Economic Activities and Length of Time,” (December 31, 2015) (*Input Specificity Memorandum*); and Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, “Preliminary Determination of Public Bodies and Input Specificity,” (February 25, 2016) (*Input Specificity/Public Bodies Preliminary Determination*).



respectively.⁴ On March 25, 2016, the Government of the People’s Republic of China (GOC) submitted a case brief commenting on the Department’s *Input Specificity Memorandum* and *Input Specificity/Public Bodies Preliminary Determination*.⁵ On March 30, 2016, Petitioners in *Line Pipe from the PRC*, *OCTG from the PRC*, and *Solar Panels from the PRC* filed rebuttal briefs.⁶

As discussed below, we considered all the comments filed by the interested parties. After evaluating those comments, we have determined to make no change to the preliminary analyses with regard to the *Input Specificity/Public Bodies Preliminary Determination*. Therefore, for these six Section 129 proceedings, we are adopting the findings of the preliminary determinations for these final determinations. As explained in the *Input Specificity/Public Bodies Preliminary Determination*, there were no changes made to the net subsidy rates calculated in the original investigations of these six CVD cases as a result of these Section 129 proceedings.⁷

II. ISSUES ADDRESSED PURSUANT TO WTO DS437

A. Public Bodies

GOC Comments:

- The Department provided an insufficient and unreasonable amount of time for the GOC to prepare responses to the public bodies questionnaires.
- The Department deemed the information that the GOC provided not relevant to the preliminary public bodies determination, asserting that the preliminary determination is a copy of the Department’s public bodies determination in the *Section 129 Proceedings in US – Antidumping and Countervailing Duties (China)* (WT/DS379) (DS379).
- However, the Appellate Body has explained that “a determination of whether particular conduct is that of a public body ‘must be made by evaluating the core features of the entity and its relationship to government’ and ‘must focus on evidence relevant to the question of whether the entity is vested with or exercises governmental authority.’”⁸ Further, the

⁴ See Department Memorandum, regarding “Schedule for rebuttal factual information, written argument, and a hearing,” (March 11, 2016).

⁵ See Letter from the GOC, regarding “Comments of the Ministry of Commerce of the People’s Republic of China on the Department’s Preliminary Public Body and Input Specificity Determinations” (March 25, 2016) (GOC Case Brief).

⁶ See Letter from Petitioner, regarding “*Compliance Proceedings Pursuant to Section 129 of the Uruguay Round Agreements: United States - Countervailing Duty Measures on Circular Welded Carbon Quality Steel Line Pipe from the People’s Republic of China (WTO/DS437): Rebuttal Brief of Maverick Tube Corporation*” (March 30, 2016); Letter from Petitioner regarding “*Compliance Proceedings Pursuant to Section 129 of the Uruguay Round Agreements: United States - Countervailing Duty Measures on Certain Oil Country Tubular Goods from the People’s Republic of China (WTO/DS437): Rebuttal Brief of Maverick Tube Corporation*” (March 30, 2016); and Letter from Petitioner, regarding “*Compliance Proceedings Pursuant to Section 129 of the Uruguay Round Agreements: United States - Countervailing Duty Measures on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People’s Republic of China (WTO/DS437): Rebuttal Brief of SolarWorld Americas, Inc.*” (March 30, 2016) (collectively, Petitioners’ Rebuttal Briefs).

⁷ See *Input Specificity/Public Bodies Preliminary Determination* at 2. See also Department Memorandum, regarding “Net Subsidy Rates as a Result of Preliminary Analyses” (March 10, 2016).

⁸ GOC comment citing DS379, para. 345, and *US – Carbon Steel (India)* (WT/DS436) (DS436), para 4.52.

Appellate Body has made clear that the central inquiry in respect of whether a particular entity is a “public body” is whether that entity “is vested with authority to exercise governmental functions.”⁹

- The questions posed in the Department’s May 1, 2015, public bodies questionnaire were not calculated to elucidate whether input suppliers are “public bodies,” and were identical to the public bodies questionnaire issued in other CVD proceedings.
- Few, if any, of the Department’s questions have any connection to the issue of whether the particular conduct of providing inputs is a governmental function within the domestic legal order of the People’s Republic of China (PRC). Instead, the Department’s questions were focused on what the Appellate Body has referred to as “indicia of control.”
- In the absence of evidence that the provision of a particular input is a governmental function within the domestic legal order of the PRC, and that particular enterprises have been vested with the authority to perform that function, no amount of control-related evidence would be sufficient to support an affirmative public body determination in respect of any input supplier.
- Further, a determination made on the basis of “facts available,” under Article 12.7 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), must be based on positive evidence on the record. The Department, therefore, should have been precluded in these Section 129 proceedings from reaching an affirmative public body determination in respect of any input supplier in the absence of positive evidence in the record that the provision of particular inputs is a governmental function within the domestic legal order of the PRC, and that particular entities have been vested with authority to perform that function. There is no evidence on the record to this effect, because the provision of the inputs at issue is not, in fact, a governmental function in the PRC.

Petitioners’ Rebuttal Comments:

- The GOC implies that the Department’s public bodies determination must be based on an explicit legal authority designating the provision of an individual input as a function of government and assigning that function to the specific suppliers at issue. However, such argument, Petitioners assert, mischaracterizes the Appellate Body’s holdings.¹⁰
- Further, the GOC fails to address any of the record evidence which demonstrates that the input suppliers are public bodies according to the WTO’s legal standard. Petitioners assert that the evidence, consisting of both primary and Chinese sources and secondary expert analysis, reveals a clear, singular objective on the part of the GOC to exercise state authority over key enterprises in strategic and pillar industries and to control the development of those industries in accordance with the state’s industrial policy objectives.¹¹

⁹ See DS379, para. 318, and DS436, n. 515.

¹⁰ See *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/R (July 14, 2014) (DS437 Panel Report), para. 7.64 -7.74, and DS379, para. 317-318.

¹¹ See Department Memorandum, regarding “Public Bodies Memorandum” (October 28, 2015), which contains the Department Memorandum regarding “Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People’s Republic of China: An Analysis of Public Bodies in the People’s Republic of China in Accordance with the WTO Appellate Body’s Findings in WTO DS379” (May 18, 2012) (*Public Bodies Memorandum*) (Note: Appended to the Public Bodies Memorandum is the Department Memorandum regarding “The relevance of the Chinese Communist Party for the limited purpose of determining whether particular enterprises should be considered to be ‘public bodies’ within the context of a countervailing duty

Department’s Position: The Department provided the GOC with sufficient time to respond to its public bodies questionnaires. The time period the Department provided the GOC to respond to the May 1, 2015, questionnaire was more than reasonable, particularly given the backdrop of the very short Reasonable Period of Time (RPT) pressed for by the GOC in this dispute.¹² As discussed in detail below, the GOC had, in fact, 98 days, and had, effectively, nearly six months, to gather and provide to the Department the information requested in the public body questionnaire.

The GOC attempts to argue that it had only two weeks to respond to the public body questionnaires. In this regard, the GOC asserts that it “reasonably understood that the Department’s decision to grant only a one-week extension to be the Department’s final decision on this matter.”¹³ The Department disagrees. Although the Department provided the GOC with two weeks to respond to the questionnaires, it made clear that it would be willing to grant further extensions of time to the GOC. Specifically, the Department stated on May 20, 2015, in response to the GOC’s assertion that it needed more than two weeks to respond, that the Department would consider an additional extension on the public body questionnaires depending on the RPT agreed to by the GOC in this dispute.¹⁴ During the next month it became apparent that an agreed-to-RPT would not be reached in this dispute and, on June 26, 2015, the GOC requested a WTO arbitration to determine the RPT.¹⁵ As a result, the Department could no longer wait for the establishment of an RPT to establish a final deadline for the public body questionnaires. Accordingly, the Department notified the GOC that it was extending this deadline to August 7, 2015.¹⁶ Thus, the GOC had from May 1 to August 7, 2015 to respond to the public body questionnaires – a total of 98 days – which was more than a reasonable amount of time. Moreover, the content of the public body questionnaires was not a surprise to the GOC. The Department adopted a revised public body methodology in a Section 129 proceeding in WTO DS379¹⁷ which the Department has been following for the past few years. Indeed, the GOC admits in its comments that “{t}he Department’s public body questionnaire was identical to public body questionnaires that the Department has issued in countervailing duty proceedings

investigation” (May 18, 2012) (*CCP Memorandum*)).

¹² See, e.g., *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/16 (October 9, 2015), para. 3. 15, (*Award of the Arbitrator under Article 21.3(c) of the DSU*) (noting that China argued in a WTO arbitration that the RPT should not exceed ten months) (*Arbitration Award*).

¹³ See GOC Case Brief at n. 3.

¹⁴ See Department Letter to the GOC, regarding “Section 129 Proceeding: United States- Countervailing Duty Measures on Certain Products from the People’s Republic of China (WTO/DS437): Response of the Government of the People’s Republic of China to the Public Body Questionnaire/Input Specificity: C- 570-931; C-570-936; C-570-940; C-570-942; C-570-944; C-570-946; C-570-957; C-570-959; C-570-966; C-570-968; C-570-978; C-570-980” (May 20, 2015).

¹⁵ Arbitration Award at para. 1.2.

¹⁶ See Department Letter to the GOC regarding “Section 129 Proceeding: United States- Countervailing Duty Measures on Certain Products from the People’s Republic of China (WTO/DS437): Extension of Deadline for the Response of the Government of the People’s Republic of China to Certain Initial Questionnaires: C-570- 931; C-570-936; C-570-940; C-570-942; C-570-944; C-570-946; C-570-957; C-570-959; C-570-966; C-570-968; C-570-978; C-570-980” (July 24, 2015).

¹⁷ See, e.g., *Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube from the People’s Republic of China*, 77 FR 52683, 52684 (August 30, 2012).

over the past several years.”¹⁸ Thus, on February 13, 2015, the date on which the United States announced its intention to comply with the recommendations and rulings in this dispute¹⁹ the GOC knew, or should have known, that the GOC would need to provide the Department with the information contained in the public body questionnaire . Thus, the GOC effectively had almost six months to prepare responses to the Department’s public bodies questionnaire.

Second, we do not agree that the Department’s approach to the public body issue fails in some regard to address the inquiry laid out by the Appellate Body. As the GOC recognizes, the Department’s analysis addresses the extent that the government exercises meaningful control over the relevant entities. In the words of the Appellate Body, this may serve “as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.”²⁰ As such, the Department’s inquiries along these lines are directly related to the question of whether the entities possess, exercise, or are vested with governmental authority within the meaning of Article 1.1(a)(1) of the SCM Agreement.

Similarly, the *Public Bodies Memorandum* and accompanying *CCP Memorandum*²¹ set forth evidence concerning the extent to which certain categories of state-invested enterprises function as instruments of the GOC.²² The Department discusses and analyzes a significant amount of record evidence before coming to the conclusion that certain state-invested enterprises are used “as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector of the economy and upholding the socialist market economy.”²³ Of course, as noted above, the GOC has in some instances provided incomplete responses to these questionnaires, thus affecting the completeness of the information the Department had to analyze. However, as discussed in *Input Specificity /Public Bodies Preliminary Determination*, even where the GOC’s failure to respond resulted in the Department basing its analyses in part on the facts available, the Department’s public body determinations are supported by affirmative record evidence.²⁴ In any event, the GOC’s protestations that these facts available are somehow deficient are misplaced. The facts available in these public body determinations are explicitly premised on a lack of necessary information on the record.²⁵ Facts available are, by design, information used to fill these gaps in the record and will often be less ideal than the information requested. If the GOC wanted to ensure that the Department’s public body determinations were based on a better quality and quantity of data, it should have responded to the Department’s requests for information.²⁶

¹⁸ See GOC Case Brief at 3.

¹⁹ See *Notice of Commencement of Compliance Proceedings Pursuant to Section 129 of the Uruguay Round Agreements Act*, 80 FR 23254, 23254 (April 27, 2015).

²⁰ See DS379, para. 318.

²¹ See *Public Bodies Memorandum* and *CCP Memorandum*.

²² See, e.g., *Public Bodies Memorandum* at 2-3, and the resulting analysis.

²³ *Id.*, at 37.

²⁴ See, e.g., *Input Specificity/Public Bodies Preliminary Determination* at 13 referring to facts and analyses summarized at pp. 9-10 which are drawn from the *Public Bodies Memorandum* and the *CCP Memorandum*.

²⁵ See, e.g., *Input Specificity/Public Bodies Preliminary Determination* at 13.

²⁶ With respect to the GOC’s argument that the Department deemed the information it submitted irrelevant to the public body determinations, we disagree. As is clear from *Input Specificity/Public Bodies Preliminary Determination*, in cases where the GOC responded to requests for information, the Department considered the information submitted by the GOC and relied on that information to determine that the relevant entities were public bodies. See, e.g., *Input Specificity/Public Bodies Preliminary Determination* at pp. 14-15, n. 68 & n. 69 (citing to

In conclusion, we do not agree with the arguments presented in the GOC’s case brief and hereby adopt the preliminary determination with respect to public bodies described in *Input Specificity /Public Bodies Preliminary Determination* for this final determination. As a result, the Department continues to find that the relevant entities in these six investigations were public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement.

B. DS437 Panel Conclusion Regarding *Kitchen Shelving* “As Such” Measure

No parties submitted comments concerning the Department’s preliminary determination concerning this issue. We hereby adopt the preliminary determination that the Department no longer relies upon, and to the extent it constituted a policy has withdrawn, the “rebuttable presumption” analysis employed in *Kitchen Shelving*.²⁷

C. Input Specificity

GOC Comments:

- The Department preliminarily determined that the various input for LTAR programs have been in existence since at least 1957, because that is the latest date at which state-owned entities (SOEs) were producing and providing the inputs at issue.
- This conclusion assumes, however, that SOEs have consistently sold the relevant inputs, *i.e.*, that there has been that a “subsidy program” in place for the entire period of time. However, the GOC argues that the preliminary determination provides no evidence to support the assumption that subsidy programs have been in existence since at least 1957.

Petitioners’ Rebuttal Comments:

- The GOC’s argument conflates the WTO’s requirement that the Department consider the length of time in which the subsidy program has been in operation, with the issue of demonstrating the existence of a subsidy program. Petitioners state that the Appellate Body did not complete its analysis with regard to the latter issue and, thus, did not find that the Department erred in this respect with regard to the investigations at issue.
- Further, Petitioners assert that the record evidence cited by the Department that government suppliers have produced the inputs since the founding of the PRC adequately addresses the WTO’s concerns.

Department’s Position: The GOC’s comments provide no reason for the Department to modify its analysis from the preliminary determinations. As explained in the *Input Specificity Memorandum*, during the challenged investigations in which the provision of inputs for less than adequate remuneration was at issue, the Department requested three years of data regarding the industry providing the relevant input – information as to the year of receipt of the subsidy and the prior two years.²⁸ In addition, in these Section 129 proceedings, the Department also requested that the GOC provide information as to how long SOEs had been providing and selling

the GOC’s initial questionnaire responses and the Department Memorandum regarding “Input Producers and Input Purchases During the Investigations” (February 25, 2016) (*Inputs Memorandum*).

²⁷ See *Input Specificity/Public Bodies Preliminary Determination* at 18.

²⁸ See *Input Specificity Memorandum* at 6 and 7, n. 25.

each of the inputs at issue in the PRC; how long those inputs had been produced in the PRC; and how long those inputs had been consumed in the PRC.²⁹ Rather than provide the detailed information requested, the GOC elected in five of the proceedings to answer only that state-owned enterprises began producing and selling the inputs at some point during the period covered by the first Five-Year Plan (1953-1957) and possibly earlier, and for the other seven proceedings, the GOC did not respond, at all.³⁰ As a result, the Department based its determination on length of time on this statement, either as the fact provided by the GOC in five of the proceedings or, as facts available, for those seven proceedings where the GOC failed to respond.³¹

The Department can only make its determination based upon facts on the administrative record, and if the GOC had believed that it was important for the Department to have detailed information as to the existence of these programs three or more years prior to the periods of investigation for each of the challenged investigations, then it was incumbent upon the GOC to provide such information upon request. As it is, the Department made its determination based upon the information on the administrative record with respect to the provision of those inputs for less than adequate remuneration, both prior to and during the periods of investigation at issue.

The Appellate Body concluded that with respect to “the length of time during which the subsidy programme has been in operation,” “in order to establish” that an “unwritten subsidy programme” exists, “an investigating authority must have adequate evidence of the existence of a systematic series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises.”³² On the basis of case specific input purchase data, which was reported to the Department in the CVD investigations at issue and compiled in the Department’s Inputs Memorandum,³³ we found adequate evidence in each of the investigations that public bodies systematically provided hot-rolled steel, wire rod, caustic soda, primary aluminum, seamless tubes, and standard commodity steel billets and blooms for less than adequate remuneration to producers in the PRC.³⁴ The GOC has presented no arguments to warrant a reconsideration of the Department’s preliminary findings in this regard.

In conclusion, we do not agree with arguments presented in the GOC’s case brief and hereby adopt the preliminary determination with respect to economic diversification and length of time in the *Input Specificity Memorandum* and the *Input Specificity /Public Bodies Preliminary Determination* for this final determination. As a result, the Department has examined both economic diversification and the length of time the input for LTAR subsidy programs were in existence and we have determined that neither provide a reason for us to change the

²⁹ See *id.* at 6-9.

³⁰ See *id.*

³¹ *Id.*

³² See *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R (December 18, 2014) (*Appellate Body Report*) at paras. 4.143 and 4.149. In this regard, the Appellate Body also made clear that an investigating authority is *not* required to identify an “explicit subsidy programme implemented through law or regulation” when determining if a program is *de facto* specific, but instead the investigating authority must determine whether the subsidy program at issue “is used by a limited number of certain enterprises”). *Id.* at para. 4.146.

³³ See *Inputs Memorandum*.

³⁴ See *Input Specificity/Public Bodies Preliminary Determination* at 18-20.

Department's original findings that these input for LTAR programs in each of the six investigations to which this memorandum applies were *de facto* specific.

III. RECOMMENDATION

In light of the report adopted by the DSB in WTO DS437 and based on our analysis of the comments received, we recommend adopting the positions described above which will render our determinations for *Lawn Groomers*, *Kitchen Shelving*, *Wire Strand*, *Print Graphics*, *Aluminum Extrusions*, and *Steel Cylinders* not inconsistent with the recommendations and rulings of the DSB.

Agree Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

31 MARCH 2016

(Date)

ATTACHMENT 1: CVD Investigations

Case Number	Case Short Cite	Final Determination and Order
C-570-940	Lawn Groomers	<i>Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People’s Republic of China: Final Affirmative Countervailing Duty Determination</i> , 74 FR 29180 (June 19, 2009) (<i>Lawn Groomers</i>), and accompanying Decision Memorandum (<i>Lawn Groomers Decision Memorandum</i>). <i>Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People’s Republic of China: Countervailing Duty Order</i> , 74 FR 38399 (August 3, 2009).
C-570-942	Kitchen Shelving	<i>Certain Kitchen Shelving and Racks from the People’s Republic of China: Final Affirmative Countervailing Duty Determination</i> , 74 FR 37012 (July 27, 2009) (<i>Kitchen Shelving</i>), and accompanying Decision Memorandum (<i>Kitchen Shelving Decision Memorandum</i>). <i>Certain Kitchen Shelving and Racks from the People’s Republic of China: Countervailing Duty Order</i> , 74 FR 46973 (September 14, 2009).
C-570-946	Wire Strand	<i>Pre-Stressed Concrete Steel Wire Strand from the People’s Republic of China: Final Affirmative Countervailing Duty Determination</i> , 75 FR 28557 (May 21, 2010) (<i>Wire Strand</i>), and accompanying Decision Memorandum (<i>Wire Strand Decision Memorandum</i>). <i>Pre-Stressed Concrete Steel Wire Strand from the People’s Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order</i> , 75 FR 38977 (July 7, 2010).
C-570-959	Print Graphics	<i>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</i> , 75 FR 59212 (September 27, 2010) (<i>Print Graphics</i>), and accompanying Decision Memorandum (<i>Print Graphics Decision Memorandum</i>). <i>Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People’s Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order</i> , 75 FR 70201 (November 17, 2010).
C-570-968	Aluminum Extrusions	<i>Aluminum Extrusions from the People’s Republic of China: Final Affirmative Countervailing Duty Determination</i> , 76 FR 18521 (April 4, 2011) (<i>Aluminum Extrusions</i>), and accompanying Decision Memorandum (<i>Aluminum Extrusions Decision Memorandum</i>). <i>Aluminum Extrusions from the People’s Republic of China: Countervailing Duty Order</i> , 76 FR 30653 (May 26, 2011).
C-570-978	Steel Cylinders	<i>High Pressure Steel Cylinders from the People’s Republic of China: Final Affirmative Countervailing Duty Determination</i> , 77 FR 26738 (May 7, 2012) (<i>Steel Cylinders</i>), and accompanying Decision Memorandum (<i>Steel Cylinders Decision Memorandum</i>). <i>High Pressure Steel Cylinders from the People’s Republic of China: Countervailing Duty Order</i> , 77 FR 37384 (June 21, 2012).