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Investigation
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August 7, 2017

MEMORANDUM TO: Carole Showers
Executive Director, Office of Policy
performing the duties of
Deputy Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Senior Director
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Silicon Metal from Australia

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## I. SUMMARY

The Department of Commerce (Department) preliminarily determines that countervailable subsidies are being provided to a producer/exporter of silicon metal in Australia, as provided in section 703 of the Tariff Act of 1930, as amended (the Act).

## II. BACKGROUND

### A. Case History

On March 8, 2017, the Department received countervailing duty (CVD) petitions concerning imports of silicon metal from Australia, Brazil, and Kazakhstan, filed in proper form on behalf of Globe Specialty Metals, Inc. (the petitioner), accompanied by antidumping duty (AD) petitions from Australia, Brazil and Norway.[1] On March 28, 2017, the Department initiated a CVD investigation on silicon metal from Australia.[2]

Although the Department normally relies on the number of producers/exporters identified in the Petition and/or import data from U.S. Customs and Border Protection to determine whether to select a limited number of producers/exporters for individual examination in CVD investigations,

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[1] *See* "Silicon Metal from Australia, Brazil, Kazakhstan, and Norway; Antidumping and Countervailing Duty Petition," dated March 8, 2017 (petition).

[2] *See Silicon Metal from Australia, Brazil, and Kazakhstan: Initiation of Countervailing Duty Investigations*, 82 FR 16356 (April 4, 2017) (*Initiation Notice*). On the same date, we also published a notice of initiation for the AD investigation of silicon metal from Australia, Brazil, and Norway. *See Silicon Metal from Australia, Brazil and Norway: Initiation of Less-Than-Fair-Value Investigations*, 82 FR 16352 (April 4, 2017).

the petition identified only one company as a producer/exporter of silicon metal in Australia: Simcoa Operations Pty. Ltd. (Simcoa). We currently know of no additional producers/exporters of merchandise under consideration from Australia. Accordingly, the Department is examining Simcoa, the only known producer/exporter in Australia.

On March 30, 2017, the Department issued a CVD questionnaire to the Government of Australia (GOA) and instructed the GOA to forward the Initial Questionnaire to Simcoa.[3] We received an affiliation response from Simcoa on April 13, 2017.[4] We received responses to our Initial Questionnaire from the GOA (GOAQR) and Simcoa (QR1) on May 15, 2017.[5] We issued supplemental questionnaires to Simcoa and the GOA in June and July 2017, and received responses to these supplemental questionnaires in the same months.

On May 26, 2017, the petitioner alleged that Simcoa received an additional countervailable subsidy during the period of investigation (POI).[6] On June 9, 2017, the Department initiated an investigation into this newly alleged subsidy.[7] We issued supplemental questionnaires to Simcoa and the GOA in June and July 2017, and received responses to these supplemental questionnaires in the same months.

On July 10, 2017, the petitioner filed a request that the Department align the final determination of this CVD investigation with the companion AD investigations.[8]

### B. Postponement of Preliminary Determination

On May 2, 2017, the petitioner requested an extension of the preliminary determination. On May 16, 2017, the Department fully extended the preliminary determination pursuant to section 703(c)(1)(A) of the Act and 19 CFR 351.205(b)(2).[9]

### C. Period of Investigation

The POI is January 1, 2016, through December 31, 2016.

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[3] *See* Department letter re: Countervailing Duty Questionnaire, dated March 30, 2017 (Initial Questionnaire).
[4] *See* Simcoa's April 13, 2017, Affiliation Response (Simcoa AFFR).
[5] *See* Simcoa's May 15, 2017, Initial Questionnaire Response (QR1); and the GOA's May 15, 2017, Initial Questionnaire Response (GOAQR1).
[6] *See* the petitioner's letter, "Silicon Metal from Australia; Countervailing Duty Investigation; Allegation that Simcoa Received an Additional Countervailable Subsidy," dated May 26, 2017.
[7] *See* Memorandum re: New Subsidy Allegation, dated June 9, 2017.
[8] *See* letter from the petitioner, "Silicon Metal from Australia, Brazil, and Kazakhstan; Countervailing Duty Investigations; Request for Alignment of Final Determinations," dated July 10, 2017 (Alignment Request).
[9] *See Silicon Metal from Australia, Brazil and Kazakhstan: Notice of Postponement of Preliminary Determinations of Countervailing Duty Investigations*, 82 FR 22490 (May 16, 2017).

## III. SCOPE COMMENTS

In accordance with the preamble to the Department's regulations,[10] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage, *i.e.*, scope.[11] Certain interested parties commented on the scope of this investigation as it appeared in the *Initiation Notice*. For a summary of the product coverage comments and rebuttal responses submitted to the record for this preliminary determination, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.[12] We have evaluated the scope comments filed by the interested parties, and we are not preliminarily modifying the scope language as it appeared in the *Initiation Notice*.[13] In the Preliminary Scope Decision Memorandum, we set a separate briefing schedule on scope issues for interested parties and we will issue a final scope decision after considering any comments submitted in scope case and rebuttal briefs.

## IV. ALIGNMENT

In accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4), and based on the petitioner's request,[14] we are aligning the final CVD determination in this investigation with the final determinations in the companion AD investigations of silicon metal from Australia, Brazil, and Norway. Consequently, the final CVD determination will be issued on the same date as the final AD determinations, which are currently scheduled to be issued no later than December 18, 2017, unless postponed.

## V. INJURY TEST

Because Australia is a "Subsidies Agreement Country" within the meaning of section 701(b) of the Act, the U.S. International Trade Commission (ITC) is required to determine whether imports of the subject merchandise from Australia materially injure, or threaten material injury to, a U.S. industry. On April 27, 2017, the ITC preliminarily determined that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of silicon metal from Australia, Brazil, Kazakhstan, and Norway.[15]

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[10] *See Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27323 (May 19, 1997).
[11] *See Initiation Notice*, 82 FR at 16357.
[12] *See* Memorandum, "Silicon Metal from Australia, Brazil, Kazakhstan, and Norway: Scope Comments Decision Memorandum for the Preliminary Determinations," dated June 27, 2017 (Preliminary Scope Decision Memorandum).
[13] *Id*.
[14] *See* Alignment Request.
[15] *See* Silicon Metal from Australia, Brazil, Kazakhstan, and Norway: Investigation Nos. 701–TA–567-569 and 731–TA–1343–1345 (May 2017) (Preliminary); *Silicon Metal from Australia, Brazil, Kazakhstan, and Norway*, 82 FR 19383 (April 27, 2017).

## VI. SUBSIDIES VALUATION

### A. Allocation Period

The Department normally allocates the benefits from non-recurring subsidies over the average useful life (AUL) of renewable physical assets used in the production of subject merchandise.[16] The Department finds the AUL in this proceeding to be 14 years, pursuant to 19 CFR 351.524(d)(2) and the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System.[17] The Department notified the respondents of the 14-year AUL in the initial questionnaire and requested data accordingly.[18] No party in this proceeding disputed this allocation period.

Furthermore, for non-recurring subsidies, we have applied the "0.5 percent test," as described in 19 CFR 351.524(b)(2). Under this test, we divide the amount of subsidies approved under a given program in a particular year by the relevant sales value (*e.g.*, total sales or export sales) for the same year. If the amount of the subsidies is less than 0.5 percent of the relevant sales value, then the benefits are allocated to the year of receipt rather than across the AUL.

### B. Attribution of Subsidies

In accordance with 19 CFR 351.525(b)(6)(i), the Department normally attributes a subsidy to the products produced by the company that received the subsidy. However, 19 CFR 351.525(b)(6)(ii)-(v) provides additional rules for the attribution of subsidies received by respondents with cross-owned affiliates. Subsidies to the following types of cross-owned affiliates are covered in these additional attribution rules: (ii) producers of the subject merchandise; (iii) holding companies or parent companies; (iv) producers of an input that is primarily dedicated to the production of the downstream product; or (v) an affiliate producing non-subject merchandise that otherwise transfers a subsidy to a respondent. Further, 19 CFR 351.525(c) provides that benefits from subsidies provided to a trading company which exports subject merchandise shall be cumulated with benefits from subsidies provided to the firm producing the subject merchandise that is sold through the trading company, regardless of affiliation.

According to 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. This standard will normally be met where there is a majority voting interest between two corporations or through common ownership of two (or more) corporations.[19] The Court of International Trade (CIT) has upheld

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[16] *See* 19 CFR 351.524(b).

[17] *See* U.S. Internal Revenue Service Publication 946 (2008), "How to Depreciate Property," at Table B-2: Table of Class Lives and Recovery Periods.

[18] Although the POI is a recent period, we are investigating alleged subsidies received over a time period corresponding to the AUL. *See Final Results of Countervailing Duty Administrative Reviews: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 70 FR 40000 (July 12, 2005), and accompanying IDM at Comment 4.

[19] *See, e.g., Countervailing Duties*, 63 FR 65348, 65401 (November 25, 1998).

the Department's authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits.[20]

Simcoa responded to the Department's questionnaires on behalf of itself, Silicon Metal Company of Australia Pty Ltd. (SILMET); Microsilica Pty Ltd.; and Simcoa International Pty Ltd. Collectively referred to as the "Simcoa Group," these companies are wholly-owned subsidiaries of Shin-Etsu Chemical Company (Japan).[21] Silicon Metal Company of Australia Pty Ltd. is the holding company for Simcoa and certain other affiliated companies. It owns and controls 100 percent of Simcoa.[22] Microsilica Pty Ltd. markets and sells silica fume (also known as microsilica), which is a by-product of the silicon metal production process.[23] Simcoa International Pty Ltd. was established as a trading company for the sale of silicon metal. It has been inactive since 2005, and was officially de-registered on December 14, 2016, following years of inactivity and restructuring.[24] As such, we preliminarily determine that the companies are cross-owned within the meaning of 19 CFR 351.525(b)(6)(vi).

### C. Denominators

In accordance with 19 CFR 351.525(b)(1)-(5), the Department considers the basis for the respondent's receipt of benefits under each program when attributing subsidies, *e.g.,* to the respondent's total sales, in calculating the *ad valorem* subsidy rate. In the sections below, we describe the denominators we used to calculate the countervailable subsidy rates for the various subsidy programs. For a further discussion of the denominators used, see the Preliminary Calculation Memorandum.[25]

### D. Discount Rate

Simcoa stated that it does not have information related to specific, long-term, fixed-rate loans for itself or its cross-owned companies that were received in 1990, the year in which the GOA/Government of Western Australia (GOWA) approved the non-recurring subsidies under the State Agreement loan and grant program.[26] Therefore, consistent with 19 CFR 351.524(d)(3)(i)(B), we used as our discount rate, the national average cost of long-term lending in the country. Simcoa reported average 1990 interest rates from the Reserve Bank of Australia. The discount rate used in our preliminary calculations are provided in Simcoa's Preliminary Calculation Memorandum.

*See* the "Analysis of Programs" section below for a description of the program for which we required an interest rate benchmark.

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[20] *See Fabrique de Fer de Charleroi, SA v. United States*, 166 F. Supp. 2d 593, 600-604 (CIT 2001).
[21] *See* Simcoa AFFR.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *See* Memorandum, "Preliminary Results Calculations for Simcoa Operations Pty Ltd.," dated August 7, 2017 (Preliminary Calculation Memorandum).
[26] *See* Simcoa's July 24, 2017, Third Supplemental Questionnaire Response at 2.

## VII. ANALYSIS OF PROGRAMS

Based upon our analysis of the record and the responses to our questionnaires, we preliminarily determine the following:

### *A. Programs Preliminarily Determined To Be Countervailable*

#### 1. Payments Under the Demand Side Management Scheme

Simcoa reported receiving payments from its electricity providers, Synergy (Retail) (Synergy) and Kleenheat Pty. Ltd (Kleenheat), under a government program, Reserve Capacity Mechanism (RCM), administered by the GOWA pursuant to the Electricity Industry Act 2004, and Part 4 of the Wholesale Electricity Market (WEM) Rules.[27]

Synergy is a statutory corporation that is wholly-owned by the State of Western Australia and serves the South West Interconnected System (SWIS).[28] Synergy is principally governed by the Electricity Corporations Act of 2005 (ECA), which, among other provisions, provides that corporations governed by the Act are to have a board of directors and chief executive officer which are appointed by the Governor of Western Australia, and provides that the corporation will pay annual and interim dividends to the State.[29] Additionally, the GOWA regulates electricity prices offered by Synergy to certain non-contestable customers (*e.g.*, customers which consume up to 50 megawatt hours (MWh) of electricity per year), which are unable to choose their electricity retailer and must be supplied by Synergy.[30] Changes to regulated electricity prices are considered by the GOWA annually.[31] Kleenheat is a wholly private entity.[32]

According to the GOA and Simcoa, the purpose of this program is to ensure that the SWIS has enough electricity generation capacity each year to meet expected peak system requirements.[33] Under the RCM, electricity generators and providers of demand side management (DSM) are paid for the capacity they make available to the market.[34] The Australian Energy Market Operator (AEMO) (previously the Independent Market Operator (IMO))[35] specifies an individual share of reserve capacity requirements which is known as the Individual Reserve Capacity Requirement (IRCR) for electricity retailers.[36] The AEMO was established and operates the WEM in accordance with Western Australia's legislative framework. It is regulated by the Australian Securities and Investments Commission under the *Corporations Act 2001*.[37] The

[27] *See* QR1 at 23-30; *see also* GOAQR1 at 19, 34, and 93.
[28] *See* GOAQR1 at 7 and 9-10.
[29] *Id.,* at Exhibit GOA-20.
[30] *Id., a*t 13.
[31] *Id*.
[32] *Id.,* at 33.
[33] *See* QR1 at 23 and GOAQR1 at 34-35.
[34] *See* GOAQR1 at 33.
[35] The transfer of functions from the IMO to the AEMO took place on November 30, 2015. At this time, most of the IMO's operations (*e.g.*, forecasting and information services functions under the WEM Rules) were transferred to the AEMO. The remaining functions were transferred to another GOWA entity.
[36] *See* QR1 at 23 and GOAQR1 at 12.
[37] *See* GOAQR1 at 93.

AEMO's Board of Directors are appointed by the Minister for Energy and the Minister of Energy approves the Operational Plan and budget on an annual basis.[38]

If an entity with an IRCR fails to purchase sufficient capacity credits, the AEMO purchases the additional capacity requirement on that entity's behalf at the Reserve Capacity Price and charges the purchase amount to the entity.[39] Under this program, AEMO annually calculates a Benchmark Reserve Capacity Price (BRCP) that is used as an input to the calculation in the administered Reserve Capacity Price. This benchmark price is then used to establish the marginal cost of providing additional reserve capacity in each Capacity Year, and thus the administered, per MW Reserve Capacity Price paid by the AEMO for Capacity Credits to "Market Participants", such as Synergy and Kleenheat.[40] The Capacity Credit payments for the RCM do not vary and must be paid in accordance with the payment methodology prescribed under WEM Rules.[41]

Simcoa does not participate directly in the WEM and thus does not have specific capacity credit obligations. As such, Simcoa is not a registered DSM capacity provider under the program and cannot apply for Certified Reserve Capacity. However, Simcoa's energy providers, Synergy and Kleenheat, register Simcoa as an Ancillary Service Provider under the WEM Rules. Pursuant to these rules, Synergy and Kleenheat (1) register Simcoa's loads as DSM facilities, (2) obtain Certified Reserve Capacity, (3) acquire Capacity Credits from the AEMO, and (4) pay Simcoa a portion of those payments. These arrangements are administered pursuant to bilateral Curtailable Load Agreements (CLAs) with Synergy and Kleenheat.[42] As explained by the GOA, through the provision of DSM capacity, Simcoa assists Market Participants (Synergy and Kleenheat) to comply with their Reserve Capacity Obligations under the WEM Rules. The principal obligation under the RCM is to make capacity available if required and cede that capacity.[43] In turn, Synergy and Kleenheat pay a portion of the payments in the form of the Reserve Capacity Price they receive from AEMO to Simcoa pursuant to their respective, private CLAs.[44]

We preliminarily determine that the payments received by Simcoa pursuant to the WEM Rules constitute a financial contribution in the form of a direct transfer of funds from a public entity, AEMO, pursuant to sections 771(5)(B) and 771(5)(D)(i) of the Act. Although the capacity payments made by the AEMO pursuant to the administered Reserve Capacity Price are made through Simcoa's electricity providers, Synergy and Kleenheat, under their respective CLAs, these Market Participants are acting as conduits to convey a significant portion of the AEMO's payments under the DSM program and WEM Rules to Simcoa. We preliminarily determine that there is a "causal nexus" between the payments Synergy and Kleenheat received from the AEMO and those that were paid to Simcoa, as evidenced by their respective CLAs and the fact that the AEMO made those payments to Synergy and Kleenheat specifically for Simcoa's

[38] *See* GOAQR1 at Exhibit GOA-52.
[39] *See* GOAQR1 at 37.
[40] *See* GOAQR1 at 35-36.
[41] *Id.*, at 18.
[42] *See* Simcoa's June 20, 2017, Supplemental Questionnaire Response (QR2) at 7-8.
[43] *See* QR1 at 24.
[44] *Id.*; *see also* the GOA's June 26, 2017, Supplemental Questionnaire Response (GOAQR2) at 8; GOAQR1 at 33.

curtailable loads.[45] Further, we preliminarily determine that Simcoa received a benefit in the full amount of the payments from Synergy and Kleenheat during the POI for making its curtailable electricity loads available pursuant to section 771(5)(E) of the Act. We also note that the Department of Finance of the GOWA, the authority administering this program, issued a report concerning the RCM which recognized that there is excess reserve capacity in the SWIS. As a result, the report concludes that under the reserve capacity mechanism, the value of incremental capacity is "close to zero" because of the extremely low probability of a shortfall in energy supply.[46] According to the report, therefore, "electricity consumers and taxpayers would be paying for excess capacity for no material benefit," and "capacity providers are being paid to maintain capacity in the system or to invest in new capacity that has no value for consumers."[47] This further supports the Department's conclusion that the full amount of the capacity payments to Simcoa under WEM Rules are countervailable.

We preliminarily determine that this program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act, because record evidence demonstrates that the actual number of recipients is limited in number. There were 25 facilities allocated by the AEMO to provide DSM capacity during in the 2015-16 fiscal year, and twenty-seven entities for the 2016-17 fiscal year.[48] Although two or more different facilities may belong to the same entity, the total number of entities allocated to provide DSM capacity cannot be more than the number of facilities. Per the GOA, there are no restrictions as to which entities may contract with electricity retailers to provide DSM; however, the reserve capacity mechanism arrangements prescribed in the WEM Rules in effect limit the eligibility to contestable customers.[49] Contestable customers are those which use more than 160 MWh of electricity per year.[50] There are 25,787 contestable customers within the South West Interconnected System.[51] Therefore, we find that the 25-27 actual recipients of the benefit represent a limited number of enterprises out of the pool of at least 25,787 contestable customers eligible to provide DSM capacity.

To calculate the benefit, we divided the amount of the payments transferred to Simcoa through Synergy and Kleenheat under the demand side management program by Simcoa's total sales during the POI. On this basis, we preliminarily determine that Simcoa received a countervailable subsidy rate of 3.36 percent *ad valorem* under this program.

2. Payments Under the Ancillary Service (Spinning Reserve) Scheme

Simcoa reported receiving payments under this program during the POI. Under this program, Ancillary services (*i.e.*, contingency capacity) is provided by generators and large consumers of electricity with "suitable loads."[52] The purposes of this program are to: maintain power system

[45] *See Beijing Tianhai Indus. Co v. United States*, 52 F.Supp.3d 1351 (CIT 2015).
[46] See GOAQR2 at Exhibit GOAS-27, at 4.
[47] *Id*.
[48] *See* GOAQR1 at Attachment XGOA-IV.
[49] *See* GOAQR1 at Attachment GOA-46 at 20-121.
[50] *Id.,* at 6.
[51] *See* letter from the GOA "Investigation of Silicon Metal from Australia: Government of Australia Response to Second Supplemental Questionnaire" (GOAQR4), dated July 14, 2017 at 1.
[52] *See* QR1 at 46-47.

security and reliability, facilitate orderly trading in the wholesale electricity market, and ensure electricity supplies of good quality.[53] Contingency capacity provides network stability by enhancing the ability to react to real time disruptions such as a sudden loss of generation capacity and controlling loading of certain parts of the network.[54] Spinning Reserve is one category of "ancillary services" provided under the WEM Rules.[55] Under the market rules, the default provider of contingent capacity in the SWIS is Synergy; however, AEMO may enter into a contract with other providers in case of a less expensive alternative.[56] Simcoa has two interruptible load agreements (ILA) to provide Spinning Reserve contingency capacity: a short-term agreement and a long-term agreement.[57] As a result, Simcoa's facilities are registered with the AEMO, and AEMO pays Simcoa directly for the contingent capacity. AEMO recovers the costs for these payments from market participants.[58] The GOA reported that there are currently three Spinning Reserve contingent capacity providers: Synergy, Simcoa, and Bluewaters Power (an electricity generator).[59]

We preliminarily determine that the payments made under this program constitute a financial contribution in the form of a direct transfer of funds from the AEMO to Simcoa under section 771(5)(D)(i) of the Act. We also preliminarily determine that Simcoa benefited under section 771(5)(E) of the Act in the amount of payments received from the AEMO during the POI. As explained in the benefit discussion for the DSM program, above, we note that the Department of Finance of the GOWA issued a report which recognized that there is excess reserve capacity in the SWIS, and that the value of incremental capacity is "close to zero" because of the extremely low probability of a shortfall in energy supply.[60] This further supports the Department's conclusion that the full amount of the payments by the AEMO to Simcoa under this program are countervailable.

We preliminarily determine this program to be *de facto* specific under section 771(5A)(D)(iii)(I) of the Act because Simcoa, Synergy, and Bluewaters Power represent a limited number of actual recipients of the benefit out of the potential 25,787 contestable customers, 46 generators,[61] and other entities able to meet the technical criteria for providing Spinning Reserve contingent capacity.[62]

To calculate the benefit, we divided the amount of the payments made to Simcoa by the AEMO by Simcoa's total sales during the POI. On this basis, we preliminarily determine that Simcoa received a countervailable subsidy rate of 3.94 percent *ad valorem* under this program.

3. Renewable Energy Target (RET) Program

[53] *See* GOAQR1 at 90.
[54] *See* QR1 at 44-45.
[55] *See* GOAQR1 at 91.
[56] *Id*.
[57] *See* QR1 at 47; *see also* GOAQR1 at 91.
[58] *See* GOAQR1 at 92.
[59] *See* GOAQR4 at 9.
[60] *See* the GOA's June 26, 2017, Supplemental Questionnaire Response (GOAQR2) at Exhibit GOAS-27, p.4.
[61] *See* GOAQR1 at 22-23.
[62] *See* QR1 at Exhibit ADD-8, Rule 2.2.

Simcoa reported receiving credits on its electricity bills as an offset for pass-through renewable energy project cost liabilities (RET liabilities).[63] According to the GOA, this program is a legislated, market-based mechanism with the aim of providing financial incentives for various renewable energy projects.[64] Under this program, renewable energy certificates are created for corresponding electricity generated from renewable energy power stations, which can be traded with liable entities (primarily electricity retailers), which surrender the certificates to meet their annual renewable energy obligations.[65]

Both Synergy and Kleenheat incur liabilities to fund renewable energy projects. This liability consists of two components – small scale renewable energy target (SRES) and large scale renewable energy target (LRET).[66] If a liable entity does not meet its LRET or SRES obligations, it would incur a shortfall charge.[67] The GOA states that the aim of the scheme, including the shortfall charge, "is to provide an incentive to install new renewable energy systems . . . {--} not {} to raise revenue."[68] As liable entities, Synergy and Kleenheat fund these renewable energy systems, and pass through the resulting charges to the final consumers, including residential, commercial, and non-commercial entities.[69] Therefore, in effect, the costs for supporting the renewable energy goals under this program are imposed on non-exempt electricity consumers in Australia through increased electricity prices.

Exemptions under the RET are granted to eligible manufacturing activities that use large amounts of electricity, categorized as emissions-intensive trade-exposed (EITE) activities. The exemptions are used by electricity retailers – liable entities – in order not to impose additional RET costs on EITE entities to cover the costs of complying with the scheme. Entities that meet the EITE criteria are required to apply for exemption certificates on an annual basis. On the basis of an economy-wide assessment process in 2009, the production of silicon was found to meet the criteria for EITE activities and, as a result, was automatically eligible for an exemption certificate.[70]

Simcoa, as an eligible entity undertaking an EITE activity, applies each year to the Clean Energy Regulator (CER) for an exemption from renewable energy liabilities.[71] Fifty-three EITE industrial activities were exempt from RET liabilities during the POI.[72] The RET program and related EITE exemptions are legislated to operate for a limited time through the year of 2030.[73]

[63] *See* QR1 at 31-32.
[64] *See* GOAQR1 at 53.
[65] *Id.,* at 40 and 54.
[66] *See* QR1 at 31.
[67] *See* GOAQR1 at 41, 42, 53-55, and 57.
[68] *See* GOAQR2.
[69] *See* GOAQR1 at 40.
[70] *Id.,* at 48.
[71] *See* QR1 at 31.
[72] *See* GOAQR1 at 61.
[73] *Id.,* at 50.

Eligible EITE activities were selected based on emissions intensity and trade exposure.[74] A total of 89 companies were issued exemption certificates in 2016.[75]

Simcoa can only trade the certificates with its electricity providers, Synergy and Kleenheat,[76] and Simcoa's exemption was with respect to RET liabilities attached to the electricity supplied by Synergy and Kleenheat.[77] In other words, Synergy and Kleenheat receive the exemption certificates on behalf of Simcoa based on their share of power provided to Simcoa. In turn, Simcoa receives exemption credits from Synergy and Kleenheat for the value of the certificates on its electricity accounts.

We preliminarily find that Synergy, an "authority," as defined in section 771(5)(B) of the Act,[78] provided a financial contribution in the form of foregone revenue under section 771(5)(D)(ii) of the Act because Simcoa was exempted from RET liabilities owed to Synergy; in effect, Simcoa's share of costs to fund renewable energy projects was shifted to other electricity consumers. Although Simcoa was also exempted from RET liabilities owed to Kleenheat, we preliminarily determine that Kleenheat is not an "authority."[79] We also preliminarily find that Simcoa benefited from this program under section 771(5)(E) of the Act in the amount of credits received on its electricity bills from Synergy during the POI.

We also preliminarily find that this program is *de jure* specific under section 771(5A)(D)(i) of the Act because the benefit is expressly limited by law to enterprises conducting 53 industrial EITE activities.

To calculate the benefit, we divided the amount of the credits received by Simcoa by its total sales during the POI. On this basis, we preliminarily determine that Simcoa received a countervailable subsidy rate of 3.57 percent *ad valorem* under this program.

4. Provision of Quartz for LTAR

The production of silicon metal involves the mining of silica (quartz), an important input in the production process. In Australia, mineral resources are state-owned and each state government is responsible for ensuring that it receives a fair return in exchange for the extraction of the resources. Accordingly, state governments, including the GOWA, have implemented independent royalty systems to apply consistent values for mineral resources. In 1981, a three-tiered royalty system was introduced in Western Australia. One of three royalty rates is applied depending on the form in which the mineral is sold (*i.e.*, ore, concentrate, or final form), and the extent to which it is processed.

[74] *See* GOAQR1 at 62.
[75] *Id.,* at 66 and at Exhibit GOA-70.
[76] *See* GOAQR2 at 21.
[77] *See* GOAQR1 at 45.
[78] As described above in our analysis of the DSM scheme program, Synergy is a statutory corporation that is wholly-owned by the State of Western Australia and principally governed by the Electricity Corporations Act of 2005. Synergy's board of directors and chief executive officer are appointed by the Governor of Western Australia, and Synergy pays annual and interim dividends to the State.
[79] Information on the record indicates that Kleenheat is a private and publicly traded company. *See* QR1 at 10.

Mineral royalties levied under the *Mining Act of 1978* (*Mining Act*) and reflected in the *Mining Regulations 1981* (*Mining Regulations*), as well as under State Agreements, are calculated either as a specific rate per ton of production, or as an *ad valorem* amount (a percentage of the resource's value). Specific-rate royalties apply to basic raw materials, but also extend to some minerals. The rates are specified in the *Mining Regulations 1981* for each ton produced and are indexed every five financial years. *Ad valorem* royalties apply to metallic minerals and generally higher-value industrial minerals. There are three *ad valorem* rates, which reflect processing costs after the mineral is mined: 7.5 percent applies to bulk material, 5 percent for mineral concentrates, and 2.5 percent for minerals in metallic form or equivalent. During the POI, Simcoa paid royalties for the right to extract (silica) quartz from the Moora Mining Tenement, in accordance with the provisions of the Mining Act and Mining Regulations, at a royalty rate of Australian dollars (AUD) 1.17 per ton, which is the rate applicable to all silica producers in Western Australia.

The 2015 Mineral Royalty Rate Analysis (MRRA Report), issued by the GOWA,[80] considers silicon metal to be an anomaly in the royalty system, because a specific-rate royalty is not appropriate for a high-value product like silicon metal.[81] The MRRA Report states that there is an international market for silicon metal and the value of the product is high. At the time the MRRA Report was issued, the specific rate applicable to silicon metal was AUD1.00 per ton which provided a return to the community of approximately 0.25 percent of the sales value (based on a conservative price of AUD2,000 per ton).[82] According to the MRRA Report, this is well below the return to the community provided by other high-value commodities and is not considered a fair return to the community.[83] Based on the level of processing, the MRRA Report considers an *ad valorem* rate of 2.5 percent of the silicon metal value to provide a fairer return to the community and to be consistent with the return provided by other commodities. According to the GOWA, a rate of 2.5 percent would increase the royalties collected from silicon metal production by approximately AUD3.5 million per year. According to the MRRA Report, the processing of silica to silicon metal is similar in intensity to the production of commodities such as copper metal and titanium dioxide pigment. The MRRA Report recommends that the specific-rate royalty continues to apply to silica used for low-value applications.

We preliminarily determine that the GOWA, in granting Simcoa the right to extract silica pursuant to the Mining Act and Mining Regulations, confers a financial contribution in the form of the provision of a good – extracted (silica) quartz - within the meaning of section 771(5)(D)(iii) of the Act. Based on the analysis below, we also preliminarily determine that

[80] The final report and recommendations of the Mineral Royalty Rate Analysis were released by the GOWA on March 25, 2015. *See* the GOA's June 26, 2017, New Subsidy Allegation Supplemental Questionnaire (GOANSASQ).
[81] Previously, the 1986 Mineral Revenue Inquiry concluded that an *ad valorem* rate should apply to silicon and a specific rate to silica. *See* Paul G. Bradley, *Mineral Revenues Inquiry Final Report: The Study into Mineral (Including Petroleum) Revenues in Western Australia* (Western Australian Government, Volume 1, 1986) at 13.
[82] In October 2015, the Department of Mines and Petroleum of the GOWA issued a letter stating that two specific royalty rates were to be increased. One of the rates applied to silicon, with the rate increasing from AUD1.00 per ton to AUD1.17 per ton.
[83] See GOANSASQ at Exhibit GOAN-2, page 95.

there is a benefit to Simcoa in the form of the provision of a good for less than adequate remuneration (LTAR), and that this subsidy is specific.

Because Simcoa is the only silicon metal producer in Australia, it is the only recipient of the undervalued silica used in the production of silicon metal. Accordingly, because the number of recipients of the subsidy is limited, the provision of silica used in silicon metal production to Simcoa at an undervalued royalty rate is *de facto* specific in accordance with section 771(5A)(D)(iii)(I) of the Act.

With respect to benefit, we preliminarily determine, in accordance with 19 CFR 351.511(a)(2)(i) that there are no suitable market-determined benchmark prices for silica mining rights in Western Australia, *i.e.,* no "tier 1" in-country prices. The government is the sole provider of mining rights for (silica) quartz in Australia and thus there are no private, market-determined prices available for the good in question. We also preliminarily determine that there are no appropriate "tier 2" world market prices that would be available to Australian companies. Therefore, in accordance with 19 CFR 351.511(a)(2)(iii), we have conducted a "tier 3" analysis and examined whether the government price is consistent with market principles. The "Preamble" to the Department's regulations explains that this analysis may focus on factors including the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination.[84] As noted above, the GOWA's MRRA Report concludes that the current specific-rate royalty for (silica) quartz is "well below the return to the community provided by other high-value commodities and it not considered a fair return to the community."[85] On the basis of this conclusion, the MRRA Report recommends a higher *ad valorem* rate of 2.5 percent for silica, to be applied to the value of the finished good (in this case, silicon metal).[86] Therefore, we preliminarily determine that, based on the GOWA's own analysis reflected in the MRRA Report, the royalty rate that Simcoa paid during the POI does not reflect adequate remuneration in a manner consistent with section 771(5)(E)(iv) of the Act and 19 CFR 351.511(a). For the preliminary determination, we relied on the MRRA Report's recommended higher *ad valorem* rate as our basis to calculate the benefit for this program during the POI. We intend to seek additional information for the final determination and welcome comments from the parties regarding the appropriate benefit analysis for this program prior to the final determination.

In order to calculate the benefit for the preliminary determination, we compared the royalties paid to the GOWA during the POI, as reported by Simcoa, to the royalties that would have been paid using the royalty rate recommended in the MRRA Report, as this is the only information we have on the record. As for the royalty that would have been paid pursuant to the recommendation, we multiplied the total value of sales of subject merchandise by the recommended *ad valorem* rate of 2.5% as a benchmark. We then divided the difference between the royalties paid and the royalties that would have been paid by the FOB value of Simcoa's POI sales to derive a benefit conferred on Simcoa of 2.13 percent *ad valorem*.

[84] *See Countervailing Duties*, 63 FR 65348 at 65378 (November 25, 1998).
[85] See GOANSASQ at Exhibit GOAN-2, at 95.
[86] *Id*., at 96.

5. State Agreement Loan and Grant

Planning for Simcoa's silicon metal plant began in the early 1980s. The GOWA sought to assist in the establishment of the proposed silicon metal plant and entered into the Silicon (Picton) Agreement Act of 1987. Initially, the plant was to be located at Wundowie, but the site was deemed inappropriate and an alternate site was identified in Picton. However, in response to public concerns, the project was moved again to the current site at Kemerton. The State Agreement was designed to provide one-time assistance to Simcoa in recognition of its agreement to move its production plant site from the original planned location at Picton to the site at Kemerton, at a disadvantage to Simcoa. To facilitate the move and plant development, the GOWA advanced AUD8,000,000 to Simcoa through an interest-free loan. The loan terms provided for repayment in AUD400,000 installments for each year in which the plant manufactured more than 20,000 tons of silicon metal. Simcoa's production exceeded this threshold in 1990 and remained above it every year thereafter. The final payment was received and the loan fully discharged on July 1, 2009. In addition, the GOWA provided Simcoa a production grant of AUD400,000 for each fiscal year in which Simcoa manufactured more than 20,000 tons of silicon metal after June 30, 1990. The duration of the grant was 20 years, concomitant with the loan described above. The GOWA elected to apply the grant directly (no moneys were received by Simcoa) to repay the interest-free loan. Simcoa produced at least 20,000 tons after 1990; accordingly, it received AUD400,000 each year for the next 20 years. The final grant payment fully discharged the loan described above effective July 1, 2009.

We preliminarily determine that the grants provided by the GOWA within the AUL (*i.e.*, from 2003-2009) constitute financial contributions in the form of direct transfers of funds from the government bestowing a benefit in the amount of the grants within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act. We also preliminarily determine that a benefit exists under 19 CFR 351.504(a), equal to the amount of the grants. Finally, we preliminarily determine that the program is *de jure* specific, in accordance with section 771(5A)(D)(i) of the Act, because the GOWA authorized and provided the assistance only to Simcoa.

Because Simcoa did not receive these benefits on an on-going basis and the assistance was to be provided only up until July 1, 2009, we are treating these subsidies as non-recurring grants. Therefore, we conducted the "0.5 percent test" pursuant to 19 CFR 351.524(b)(2) and we found that the benefits were greater than 0.5 percent of Simcoa's total sales in the year the grants were approved. Thus, we allocated the total benefit over the AUL using the discount rate discussed above in the section "Discount Rates," to determine the amount attributable to the POI. We then divided the amount attributable to the POI by Simcoa's total sales during the POI. On this basis, we preliminarily determine that Simcoa received a net countervailable subsidy of 0.01 percent *ad valorem* under this program.

6. Research and Development (R&D) Tax Incentive

The R&D Tax Incentive program began on July 1, 2011, and is an economy-wide program which provides a tax incentive for companies to conduct R&D activities.[87] The criteria for R&D entities and R&D activities are defined in section 355 of the *Income Tax Assessment Act 1997*.

[87] *See* GOAQR at 70.

This tax program is available to all companies that are incorporated in Australia, as well as companies incorporated overseas that are liable for taxes in Australia.[88] Eligibility is automatic if the criteria are met, and the program operates on a self-assessment basis. According to the GOA, provided that activities fall within the established eligibility criteria, the expectation is that an applicant would always automatically receive assistance under the program. Applications do not cover multiple years – companies must submit an application each year in which a company seeks an R&D tax incentive. In order to receive the incentive for a particular year, an eligible company must conduct R&D in that year. The program is jointly administered by the Department of Industry, Innovation and Science (DIIS) and the Australian Taxation Office (ATO).[89] The DIIS is responsible for the eligibility of registered R&D activities and the ATO is responsible for the eligibility of entities applying under the program and for claimed R&D expenditures.

In the 2014-2015 financial year, 15,021 companies, across all 19 of the industry classification categories used in Australia, registered R&D activities with the DIIS, the authority that oversees the eligibility of R&D activities.[90] Additionally, a total of 9,945 companies from every sector of the Australian economy registered for the R&D Tax Incentive during the POI.[91]

R&D tax incentive guidelines stipulate that the Australian head company of an Australian group of companies is required to apply for registration of R&D activities on behalf of a subsidiary that is undertaking the R&D activities. Because Simcoa does not file a separate income tax return, Simcoa received benefits from this program during the POI in the form of a non-refundable tax offset included in SILMET's 2015 income tax return.[92] The parent company also applied for benefits in its 2016 income tax return but the tax incentive related to these activities will not be received until future years. This is due to the timing difference between the submission of the claim and the filing of the income tax return, and the fact that the R&D tax incentive is a non-refundable tax offset that can be carried forward into future years.

Income tax deductions provide a financial contribution under section 771(5)(D)(ii) of the Act in the form of foregone revenue that is otherwise due to a government. Pursuant to 19 CFR 351.509(a)(1), the benefit is the extent to which the taxes paid by the firms as a result of the program are less than the tax the firms would otherwise pay in the absence of the program.

The record demonstrates that the R&D Tax Incentive program is *de facto* specific because the actual recipients of the subsidy are limited in number (*i.e.*, less than 10,000 out of approximately 1,000,000). The SAA states that the specificity test should be applied "in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those subsidies which truly are broadly available and widely used throughout an economy."[93] We

[88] *See* QR1 at 52.
[89] *See* GOAQR at 71.
[90] *Id.,* at 70.
[91] *See* Simcoa's June 20, 2017, Supplemental Questionnaire Response at 12.
[92] As a corporation incorporated under Australian law, SILMET is an eligible entity with the meaning of section 355-35 of the *Income Tax Assessment Act 1997*. SILMET's subsidiary Simcoa conducted R&D activities within the meaning of sections 35-20, 35-25, and 355-35 of the *Income Tax Assessment Act 1997*.
[93] *See* Statement of Administrative Action (SAA) accompanying H.R. 5110, H.R. Doc. No. 316, 103d Cong., 2d

examined the number of companies that used this program and the number of corporations that filed tax returns.[94] This comparison indicates that less than one percent of companies filing corporate tax returns during the POI received benefits under this program. A tax program that is used by less than one percent of tax filers is not one that is widely used throughout an economy.[95] Therefore, we preliminarily determine that this program is *de facto* specific under section 775(5A)(D)(iii)(I) of the Act.

To calculate the benefit for the POI, we divided the R&D tax incentive that Simcoa reported it received by SILMET's consolidated sales, in accordance with 19 CFR 351.525(b)(6)(iii), to obtain a countervailable subsidy for Simcoa of 3.21 percent *ad valorem.*

*B. Programs for Which More Information is Required*

The Provision of Electricity for Less Than Adequate Remuneration

Simcoa states that it is one of the most significant electricity consumers in the SWIS, and that it purchased electricity during the POI from two electrical retailers – Synergy and Kleenheat. Although both Simcoa and the GOA cooperated in providing requested documentation regarding the provision of electricity, we are unable to make a determination on this LTAR allegation at this time, as we find that we still require a significant amount of additional information given the complexity of the program. Therefore, we intend to seek further information and to address this program in a post-preliminary analysis.

*C. Program Preliminarily Determined To Be Not Used*

We preliminarily determine that the following program was not used by Simcoa or its cross-owned affiliates during the POI:

- Jobs and Competitiveness Program

Sess. 911, 929 (1994).

[94] *See* the GOA's July 18, 2017, Third Supplemental Questionnaire Response.

[95] *See also Non-Oriented Electrical Steel from the Republic of Korea: Final Negative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 79 FR 61605 (October 14, 2014), and accompanying Issues and Decision Memorandum at 11 and 13.

## VIII. CONCLUSION

We recommend that you approve the preliminary findings described above.

| ☒ | ☐ |
| --- | --- |
| Agree | Disagree |

8/7/2017

X 

Signed by: CAROLE SHOWERS

Carole Showers
Executive Director, Office of Policy
performing the duties of
Deputy Assistant Secretary for Enforcement and Compliance