THE UNITED STATES – KOREA FREE TRADE AGREEMENT IMPLEMENTATION ACT

STATEMENT OF ADMINISTRATIVE ACTION

This Statement of Administrative Action ("Statement") is submitted to the Congress in compliance with section 2105(a)(1)(C)(ii) of the Bipartisan Trade Promotion Authority Act of 2002 ("TPA Act") and accompanies the implementing bill for the free trade agreement ("Agreement") that the United States has concluded with the Republic of Korea ("Korea"). The bill approves the Agreement, which the United States Trade Representative signed in Washington, D.C. on June 30, 2007, and makes statutory changes necessary or appropriate to implement the Agreement, including statutory changes to secure the benefits of an exchange of letters between the United States and Korea on February 10, 2011 related to the Agreement ("February 10, 2011 Exchange of Letters").

As is the case with Statements of Administrative Action submitted to the Congress in connection with earlier trade agreements, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Agreement, both for purposes of U.S. international obligations and domestic law. The Administration understands that it is the expectation of the Congress that future administrations will observe and apply the interpretations and commitments set out in this Statement. In addition, since this Statement will be approved by the Congress at the time it approves the implementing bill for this Agreement, the interpretation of the Agreement included in this Statement carries particular authority.

This Statement describes significant administrative actions proposed to implement U.S. obligations under the Agreement. The Statement also describes the pertinent provisions of the implementing bill, explaining how the bill changes or affects existing law, and stating why those provisions are necessary or appropriate to implement the Agreement.

In addition, incorporated into this Statement are two other statements required under section 2105(a) of the TPA Act: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Agreement. The Agreement does not change the provisions of any agreement the United States has previously negotiated with Korea.

For ease of reference, this Statement generally follows the organization of the Agreement, with the exception of grouping the general provisions of the Agreement (Chapters One and Twenty-One through Twenty-Four) at the beginning of the discussion.

For each chapter of the Agreement, the Statement describes the pertinent provisions of the implementing bill, explaining how the bill changes or affects existing law, and stating why those provisions are necessary or appropriate to implement the Agreement. The Statement then describes the administrative action proposed to implement the particular chapter of the

Agreement, explaining how the proposed action changes existing administrative practice or authorizes further action and stating why such actions are necessary or appropriate to implement the Agreement.

It should be noted that this Statement does not, for the most part, discuss those many instances in which U.S. law or administrative practice will remain unchanged under the Agreement. In many cases, U.S. laws and regulations are already in conformity with the obligations assumed under the Agreement.

Finally, references in this Statement to particular sections of U.S. statutes are based on those statutes in effect as of the date this Statement was submitted to the Congress.

Chapters:
One (Initial Provisions and Definitions)
Twenty-One (Transparency)
Twenty-Two (Institutional Provisions and Dispute Settlement)
Twenty-Three (Exceptions)
Twenty-Four (Final Provisions)

1. Implementing Bill

a. Congressional Approval

Section 101(a) of the implementing bill provides Congressional approval for the Agreement and this Statement, as required by sections 2103(b)(3) and 2105(a)(1) of the TPA Act.

b. Entry into Force

Article 24.5 of the Agreement requires the United States and Korea to exchange written notifications that their respective legal requirements for the entry into force of the Agreement have been fulfilled. The exchange of notifications is a necessary condition for the Agreement's entry into force. Section 101(b) of the implementing bill authorizes the President to exchange notes with Korea to provide for the Agreement to enter into force for the United States on or after January 1, 2012. The exchange of notes is conditioned on a determination by the President that Korea has taken measures necessary to comply with those of its obligations that are to take effect at the time the Agreement enters into force.

Certain provisions of the Agreement become effective after the Agreement enters into force. For example, Annex I of the Agreement provides Korea up to two years to comply with the general national treatment rule for investment as it applies to indirect foreign ownership of certain Korean public telecommunications suppliers. Certain specific commitments Korea has undertaken in Annex 13-B of the Agreement relating to financial services will apply within prescribed times after the Agreement enters into force. In addition, Annex II of the Agreement provides for Korea's obligations with respect to certain legal services to take effect at specified times after the Agreement enters into force.

c. Relationship to Federal Law

Section 102(a) of the bill establishes the relationship between the Agreement and U.S. law. The implementing bill, including the authority granted to federal agencies to promulgate implementing regulations, is intended to bring U.S. law fully into compliance with U.S. obligations under the Agreement, and to make other changes that are necessary or appropriate to implement the Agreement. The bill accomplishes those objectives with respect to federal legislation by amending existing federal statutes that would otherwise be inconsistent with the Agreement, amending existing federal laws that are necessary or appropriate to implement the Agreement, and, in certain instances, by creating entirely new provisions of law.

Section 102(a) clarifies that no provision of the Agreement will be given effect under domestic law if it is inconsistent with federal law, including provisions of federal law enacted or amended by the bill. Section 102(a) will not prevent implementation of federal statutes consistent with the Agreement, where permissible under the terms of such statutes. Rather, the section reflects the Congressional view that necessary changes in federal statutes should be specifically enacted rather than provided for in a blanket preemption of federal statutes by the Agreement.

The Administration has made every effort to include all laws in the implementing bill and to identify all administrative actions in this Statement that must be changed in order to conform with the new U.S. rights and obligations arising from the Agreement. Those include both regulations resulting from statutory changes in the bill itself and changes in laws, regulations, rules, and orders that can be implemented without a change in the underlying U.S. statute.

Accordingly, at this time it is the expectation of the Administration that no changes in existing federal law, rules, regulations, or orders other than those specifically indicated in the implementing bill and this Statement will be required to implement the new international obligations that the United States will assume under the Agreement. This is without prejudice to the President's continuing responsibility and authority to carry out U.S. law and agreements. As experience under the Agreement is gained over time, other or different administrative actions may be taken in accordance with applicable law to implement the Agreement. If additional action is called for, the Administration will seek legislation from Congress or, if a change in regulation is required, follow normal agency procedures for amending regulations.

d. Relationship to State Law

The Agreement's rules generally cover state and local laws and regulations, as well as those at the federal level. There are a number of exceptions to, or limitations on, this general rule, however, particularly in the areas of government procurement, labor, environment, investment, and cross-border trade in services and financial services.

The Agreement does not automatically "preempt" or invalidate state laws that do not conform to the Agreement's rules, even if a dispute settlement panel were to find a state measure inconsistent with the Agreement. The United States is free under the Agreement to determine how it will conform with the Agreement's rules at the federal and non-federal level. The Administration is committed to carrying out U.S. obligations under the Agreement, as they apply to the states, through the greatest possible degree of state-federal consultation and cooperation.

Section 102(b)(1) of the bill makes clear that only the United States is entitled to bring an action in court in the event that there is an unresolved conflict between a state law, or the application of a state law, and the Agreement. The authority conferred on the United States under this paragraph is intended to be used only as a "last resort," in the unlikely event that efforts to achieve consistency through consultations have not succeeded.

The reference in section 102(b)(2) of the bill to the business of insurance is required by virtue of section 2 of the McCarran-Ferguson Act (15 U.S.C. 1012). That section states that no federal statute shall be construed to supersede any state law regulating or taxing the business of insurance unless the federal statute "specifically relates to the business of insurance." Certain provisions of the Agreement (for example, Chapter Thirteen, relating to financial services) do apply to state measures regulating the insurance business, although "grandfathering" provisions in Chapter Thirteen exempt existing inconsistent (*i.e.*, "non-conforming") measures.

Given section 2 of the McCarran-Ferguson Act, the implementing act must make specific reference to the business of insurance in order for the Agreement's provisions covering the insurance business to be given effect with respect to state insurance law. Insurance is otherwise treated in the same manner under the Agreement and the implementing bill as other financial services under the Agreement.

e. Private Lawsuits

Section 102(c) of the implementing bill precludes any private right of action or remedy against the federal government, a state or local government, or a private party based on the provisions of the Agreement. A private party thus could not sue (or defend a suit against) the United States, a state, or a private party on grounds of consistency (or inconsistency) with the Agreement. The provision also precludes a private right of action attempting to require, preclude, or modify federal or state action on grounds such as an allegation that the government is required to exercise discretionary authority or general "public interest" authority under other provisions of law in conformity with the Agreement.

With respect to the states, section 102(c) represents a determination by the Congress and the Administration that private lawsuits are not an appropriate means for ensuring state compliance with the Agreement. Suits of this nature may interfere with the Administration's conduct of trade and foreign relations and with suitable resolution of disagreements or disputes under the Agreement.

Section 102(c) does not preclude a private party from submitting a claim against the United States to arbitration under Chapter Eleven (Investment) of the Agreement or seeking to enforce an award against the United States issued pursuant to such arbitration. The provision also would not preclude any agency of government from considering, or entertaining argument on, whether its action or proposed action is consistent with the Agreement, although any change in agency action would have to be consistent with domestic law.

f. Implementing Regulations

Section 103(a) of the bill provides the authority for new or amended regulations to be issued, and for the President to proclaim actions implementing the provisions of the Agreement, as of the date the Agreement enters into force. Section 103(b) of the bill requires that, whenever possible, all federal regulations required or authorized under the bill and those proposed in this Statement as necessary or appropriate to implement immediately applicable U.S. obligations under the Agreement are to be developed and promulgated within one year of the Agreement's entry into force. In practice, the Administration intends, wherever possible, to amend or issue the other regulations required to implement U.S. obligations under the Agreement at the time the

Agreement enters into force. The process for issuing regulations pursuant to this authority will comply with the requirements of the Administrative Procedures Act, including requirements to provide notice of and an opportunity for public comment on such regulations. If issuance of any regulation will occur more than one year after the date provided in section 103(b), the officer responsible for issuing such regulation will notify the relevant committees of both Houses of Congress of the delay, the reasons for such delay, and the expected date for issuance of the regulation. Such notice will be provided at least 30 days prior to the end of the one-year period.

g. Dispute Settlement

Section 105(a) of the bill authorizes the President to establish within the Department of Commerce an office responsible for providing administrative assistance to dispute settlement panels established under Chapter Twenty-Two of the Agreement. This provision enables the United States to implement its obligations under Article 22.5 of the Agreement. This office will not be an "agency" within the meaning of 5 U.S.C. 552, consistent with treatment provided under other U.S. free trade agreements, including the North American Free Trade Agreement ("NAFTA") and free trade agreements with Australia, Chile, Singapore, Morocco, the Dominican Republic and Central America, Bahrain, Oman, and Peru. Thus, for example, the office will not be subject to the Freedom of Information Act or the Government in the Sunshine Act. Since they are international bodies, panels established under Chapter Twenty-Two are not subject to those acts.

Section 105(b) of the bill authorizes the appropriation of funds to support the office established pursuant to section 105(a).

h. Effective Dates

Section 107(b)(1) of the bill provides that the first three sections of the bill as well as section 207(g), Title I, and Title V of the bill go into effect on the date of enactment of the bill. Section 107(b)(2) provides that certain amendments made by the bill take effect upon enactment, but will apply with respect to Korea only when the Agreement enters into force.

Section 107(a) of the bill provides that the provisions of the bill and the amendments to other statutes made by the bill, other than those described in section 107(b), take effect on the date the Agreement enters into force. Section 107(c) of the bill provides that the provisions of the bill (other than section 107(c) itself and Title V) and the amendments to other statutes made by the bill (except the amendments made by Title V) will cease to have effect on the date on which the Agreement terminates.

2. Administrative Action

No administrative changes will be necessary to implement Chapters One, Twenty-One, Twenty-Three, and Twenty-Four.

Article 22.1.1 of the Agreement requires each government to designate a contact point to facilitate communications regarding the Agreement. The Office of the United States Trade

Representative ("USTR") will serve as the U.S. contact point for this purpose. In addition, Article 22.2 of the Agreement establishes a Joint Committee to oversee the implementation of the Agreement and the work of committees and other bodies established under the Agreement. The U.S. Trade Representative, or his or her designee, will represent the United States on the Joint Committee.

The Agreement calls for the United States and Korea to develop a list of independent experts willing to serve as panelists to settle disputes between the parties that may arise under the Agreement. USTR will consult with the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate ("Trade Committees") as it develops the list of panelists. USTR will provide the Trade Committees with the names of the experts it is considering, and detailed background information on each, at least 30 days before submitting the names of any nominees to Korea.

Annex 22-B of the Agreement establishes a committee comprised of officials from each government to review whether conditions on the Korean Peninsula may be appropriate for further economic development through the establishment and development of outward processing zones (OPZ).

Each step in the review process is contingent on the unanimous consent of committee members. The committee will establish criteria that must be met before goods from any OPZ may be considered "originating goods" for purposes of the Agreement, and thereby eligible to receive preferential tariff treatment under the Agreement. If the committee determines that goods from an OPZ should qualify as originating goods, it will issue a recommendation to that effect to the two governments. Furthermore, Congress would have to consider and enact, and the President would have to sign into law, additional legislation before any goods from an OPZ would be eligible for preferential duties under the Agreement.

U.S. law currently prohibits, including pursuant to the International Emergency Economic Powers Act, direct and indirect imports of all goods, services, and technology from North Korea, absent a license from the Department of Treasury's Office of Foreign Assets Control (OFAC). This broad prohibition also applies to goods, services, and technology from North Korea that are used as components of finished goods of, or substantially transformed in, a third country. OFAC issues an import license only if it is determined that the importation is consistent with U.S. law, national security, and foreign policy objectives, as well as our international obligations. Neither the Agreement nor this implementing bill alters U.S. sanctions on North Korea, including those imposed by Executive Order 13570 of April 18, 2011. Persons who violate U.S. sanctions may be subject to substantial civil and criminal penalties.

Chapter Two (National Treatment and Market Access for Goods)

1. Implementing Bill

a. Proclamation Authority

Section 201(a) of the bill grants the President authority to implement by proclamation U.S. rights and obligations under Chapter Two of the Agreement through the application or elimination of customs duties and tariff-rate quotas ("TRQs"). Section 201(a) of the bill authorizes the President to:

- modify or continue any duty;
- keep in place duty-free or excise treatment; or
- impose any duty

that the President determines to be necessary or appropriate to carry out or apply Articles 2.3, 2.5, and 2.6, and Annex 2-B, Annex 4-B, and Annex 22-A of the Agreement. In addition, Section 201(d) of the bill authorizes the President to proclaim the duty rates for passenger cars and trucks specified in the February 10, 2011 Exchange of Letters.

The proclamation authority with respect to Article 2.3 of the Agreement authorizes the President to provide for the continuation, phase-out, and elimination, according to the Schedule of the United States to Annex 2-B of the Agreement, of customs duties on imports from Korea that meet the Agreement's rules of origin.

The proclamation authority with respect to Articles 2.5 and 2.6 of the Agreement authorizes the President to provide for the elimination of duties on particular categories of imports from Korea. Article 2.5 pertains to the temporary admission of certain goods, such as commercial samples, goods intended for display at an exhibition, and goods necessary for carrying out the business activity of a person who qualifies for temporary entry into the United States. Article 2.6 pertains to the importation of goods: (i) returned to the United States after undergoing repair or alteration in Korea; or (ii) sent from Korea for repair or alteration in the United States.

The proclamation authority with respect to Annex 22-A of the Agreement authorizes the President to increase duties on passenger vehicles up to the prevailing U.S. Normal Trade Relations (NTR) (known internationally as most-favoured nation or MFN) duty rate if a dispute settlement panel determines that Korea has acted inconsistently with or nullified or impaired an obligation under the Agreement and that this action materially affects the sale, offering for sale, purchase, transportation, distribution or use of U.S. motor vehicles.

Section 201(b) of the bill authorizes the President, subject to the consultation and layover provisions of section 104 of the bill, to:

- modify or continue any duty;
- modify the staging of any duty elimination set out in Annex 2-B of the Agreement, pursuant to an agreement with Korea under Article 2.3.3 of the Agreement;

- keep in place duty-free or excise treatment; or
- impose any duty

by proclamation whenever the President determines it to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Korea provided by the Agreement.

Section 104 of the bill sets forth consultation and layover steps that must precede the President's implementation of any duty modification by proclamation. This would include, for example, modifications of duties under section 201(b) of the bill. Under the consultation and layover provisions, the President must obtain the advice of the appropriate private sector advisory committees (pursuant to section 135 of the Trade Act of 1974) and the ITC on the proposed action. The President must submit a report to the Trade Committees setting forth the action proposed, the reasons for the proposed action, and the advice of the private sector and the ITC. The bill sets aside a 60-day period following the date of transmittal of the report for the President to consult with the Trade Committees on the action. Following the expiration of the 60-day period, the President may proclaim the action.

The President may initiate the consultation and layover process under section 104 of the bill on enactment of the bill. However, under section 103(a) of the bill, any modifying proclamation cannot take effect until the Agreement enters into force. In addition to modifications of customs duties, these provisions apply to other Presidential proclamation authority provided in the bill that is subject to consultation and layover, such as authority to implement a proposal to modify the Agreement's specific rules of origin pursuant to an agreement with Korea under Article 6.14 of the Agreement.

Section 201(c) of the bill provides for the conversion of existing specific or compound rates of duty for various goods to *ad valorem* rates for purposes of implementing the Agreement's customs duty reductions. (A compound rate of duty for a good would be a rate of duty stated, for example, as the sum of X dollars per kilogram plus Y percent of the value of the good.)

b. Customs User Fees

Section 203 of the bill implements U.S. commitments under Article 2.10.4 of the Agreement, regarding customs user fees on originating goods, by amending section 13031(b) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c(b)). The amendment provides for the immediate elimination of the merchandise processing fee for goods qualifying as originating goods under Article 4.2, Annex 4-A, or Chapter Six of the Agreement. Customs processing of goods qualifying as originating goods under the Agreement will be financed by money from the General Fund of the Treasury. This is necessary to ensure that the United States complies with obligations under the General Agreement on Tariffs and Trade 1994 by limiting fees charged for the processing of non-originating imports to amounts commensurate with the processing services provided. That is, fees charged on such non-originating imports will not be used to finance the processing of originating imports.

2. Administrative Action

As discussed above, section 201(a)(1) of the bill authorizes the President to proclaim duty-free treatment for certain goods to carry out Article 2.5 (temporary admission of certain goods) and Article 2.6 (repair or alteration of certain goods) of the Agreement. The Secretary will issue regulations to carry out this portion of the proclamation.

Chapter Three (Agriculture)

No statutory or administrative changes will be required to implement Chapter Three.

Chapter Four (Textiles and Apparel)

1. Implementing Bill

a. Textile or Apparel Safeguard

Article 4.1 of the Agreement makes remedies available to domestic textile and apparel industries that have sustained or are threatened by serious damage from imports of textile or apparel goods for which duties have been reduced or eliminated under the Agreement. Article 4.1 also sets forth procedures for obtaining such remedies. The Administration does not anticipate that the Agreement will result in injurious increases in textile or apparel imports from Korea. Nevertheless, the Agreement's textile or apparel safeguard procedure will ensure that relief is available if needed.

The safeguard mechanism applies when, as a result of the reduction or elimination of a customs duty under the Agreement, textile or apparel goods of Korea are being imported into the United States in such increased quantities, in absolute or relative terms, and under such conditions as to cause serious damage or actual threat thereof to a U.S. industry producing like or directly competitive goods. In these circumstances, Article 4.1 permits the United States to suspend the reduction of any rate of customs duties on the imported good provided for under the Agreement or increase duties on the imported goods to a level that does not exceed the lesser of the prevailing U.S. NTR (MFN) duty rate for the good or the U.S. NTR (MFN) duty rate in effect at the time the Agreement entered into force.

Subtitle C of Title III of the bill (sections 331 through 338) implements the Agreement's textile and apparel safeguard.

Section 331(a) of the bill establishes that an interested party may file a request for a textile or apparel safeguard measure with the President, who must review the request to determine whether to commence consideration of the request on its merits. Under section 331(b) of the bill, if the President determines that the request contains information necessary to warrant consideration on the merits, the President must provide notice in the *Federal Register* stating that the request will be considered and seeking public comments on the request. The notice will contain a summary of the request itself and the dates by which comments and rebuttals must be received. Subject to protection of confidential business information, if any, the full text of the request will be made available on the Department of Commerce, International Trade Administration's website.

Section 332 of the bill sets out the procedures to be followed in considering the request. Section 332(a)(1) of the bill provides for the President to determine whether, as a result of the reduction or elimination of a duty provided for under the Agreement, a "Korean textile or apparel article" is being imported into the United States in such increased quantities, in absolute terms or relative to the domestic market for that article, and under such conditions that imports of the article cause serious damage, or actual threat thereof, to a domestic industry producing an article that is like, or directly competitive with, the imported article. Section 301(2) of the bill defines "Korean textile or apparel article" to mean an article listed in the Annex to the World Trade Organization ("WTO") Agreement on Textiles and Clothing that qualifies as an originating good under section 202(b) of the bill. The President's determination corresponds to the determination required under Article 4.1 of the Agreement. Section 332(a)(2) of the bill includes criteria for determining serious damage or actual threat thereof, consistent with Article 4.1.2 of the Agreement.

Section 332(b) of the bill identifies the relief that the President may provide to a U.S. industry that the President determines is facing serious damage or actual threat thereof. Such relief may consist of (a) the suspension of any further reduction in the rate of duty imposed on the article or (b) an increase in tariffs to the lesser of: (i) the NTR (MFN) duty rate in place for the textile or apparel article at the time the relief is granted; or (ii) the NTR (MFN) duty rate for that article on the day before the Agreement entered into force.

Section 333 of the bill provides that the maximum period of relief under the textile or apparel safeguard shall be four years in the aggregate. The initial period of import relief may be up to two years. The President may extend the relief for up to two years, however, if he determines that continuation is necessary to remedy or prevent serious damage and to facilitate adjustment, and that the domestic industry is, in fact, adjusting to import competition.

Section 334 of the bill provides that relief may not be granted to an article under the textile and apparel safeguard if: (i) relief previously has been granted to that article under the textile and apparel safeguard; or (ii) the article is subject, or becomes subject, to a safeguard measure under (a) Chapter Ten of the Agreement (corresponding to Subtitle A of Title III of the bill), or (b) chapter 1 of Title II of the Trade Act of 1974.

Section 335 of the bill provides that on the date import relief terminates, imports of the textile or apparel article that was subject to the safeguard action will be subject to the rate of duty that would have been in effect on that date in the absence of the relief.

Section 336 of the bill provides that authority to provide relief under the textile and apparel safeguard will expire ten years after the date on which duties on the article are eliminated pursuant to the Agreement.

Under Article 4.1.6 of the Agreement, if the United States provides relief to a domestic industry under the textile and apparel safeguard, it must provide Korea "mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the [safeguard]." If the United States and Korea are unable to agree on trade liberalizing compensation, Korea may increase tariffs equivalently on U.S. goods. The obligation to provide compensation (and the right to increase tariffs absent agreement on compensation) terminates when the safeguard relief ends.

Section 123 of the Trade Act of 1974 (19 U.S.C. 2133), as amended, authorizes the President to provide trade compensation for global safeguard measures taken pursuant to chapter 1 of title II of the Trade Act of 1974. Section 337 of the implementing bill extends that authority to measures taken pursuant to the Agreement's textile or apparel safeguard provisions.

Finally, section 338 of the bill provides that confidential business information submitted in the course of consideration of a request for a textile or apparel safeguard may not be released absent the consent of the party providing the information. It also provides that a party submitting confidential business information in a textile or apparel safeguard proceeding must submit a non-confidential version of the information or a summary of the information.

b. Enforcement of Textile and Apparel Rules of Origin

In addition to lowering barriers to trade in textile and apparel goods, the Agreement includes anti-circumvention provisions designed to ensure the accuracy of claims of origin and to prevent circumvention of laws, regulations, and procedures affecting such trade. Article 4.3 of the Agreement provides for verifications to determine the accuracy of claims of origin for textile or apparel goods, and to determine that exporters and producers are complying with applicable laws, regulations, and procedures regarding trade in textile or apparel goods.

Under Articles 4.3.3 and 4.3.5 of the Agreement, at the request of the United States, the government of Korea must conduct a verification. The object of a verification under Article 4.3.3 is to determine whether a claim of origin for a textile or apparel good is accurate. The object of a verification under Article 4.3.5 is to determine whether an exporter or producer is complying with applicable customs laws, regulations, and procedures or to determine whether claims of origin for textile or apparel goods exported or produced by that person are accurate.

Under Article 4.3.8 of the Agreement, the United States may take appropriate action during a verification, including suspending the application of preferential treatment to textile or apparel goods exported or produced by the person subject to the verification. Under Article 4.3.10 of the Agreement, the United States also may take appropriate action if, after 12 months, it is unable to make the requisite determination. Generally, there are two situations in which the United States would be unable to make the required determination. One would be, *e.g.*, due to lack of cooperation on the part of the exporter or producer. The second would be when the United States has sufficient information, and based on that information determines that: (1) a claim of origin is not accurate; or (2) an exporter or producer is not complying with applicable customs laws, regulations, and procedures, and therefore that claims of origin for textile or apparel goods produced by that person are not accurate.

Section 207 of the bill implements Article 4.3 of the Agreement. Section 207(a) of the bill authorizes the President to direct the Secretary to take "appropriate action" while a verification requested by the Secretary is being conducted. The purpose of such verification is to determine compliance with applicable customs law or to determine the accuracy of a claim that a particular good is an originating good or a "good of Korea." Under section 207(b) of the bill, such action may include, but is not limited to, suspension of liquidation of entries of textile or apparel goods exported or produced by the person that is the subject of the verification.

Under section 207(c) of the bill, if the Secretary is unable to confirm within 12 months of making a verification request that a claim of origin for a good is accurate or, more generally, that a Korean exporter or producer is complying with applicable customs laws, regulations, and procedures regarding trade in textile or apparel goods, the President may determine what further "appropriate action" to take. Under section 207(d) of the bill, "appropriate action" in the case of a verification under Article 4.3.5 of the Agreement would include denying preferential treatment under the Agreement to any textile or apparel goods exported or produced by the person subject to the verification, and denying entry of such goods into the United States. In the case of a verification under Article 4.3.3 of the Agreement, "appropriate action" would include denying preferential treatment to a textile or apparel good that is the subject of the verification and denying entry of such a good into the United States. Any action taken under section 207(c) of the bill may remain in effect until the Secretary receives information sufficient to make a determination under section 207(a) of the bill or until such earlier date as the President may direct.

Under section 207(e) of the bill, the Secretary may publish the name of a person that the Secretary has determined: (i) is engaged in circumvention of applicable laws, regulations, or procedures affecting trade in textile or apparel goods; or (ii) has failed to demonstrate that it produces, or is capable of producing, textile or apparel goods.

Section 207(f) of the bill implements paragraph 9 of Annex 4-B of the Agreement. Pursuant to paragraph 9, if Korea so requests, the United States must require an importer in the United States claiming preferential tariff treatment for a Korean good under Annex 4-B of the Agreement to submit a certificate of eligibility completed and signed by an authorized official of the Korean government. Section 207(f) authorizes the Commissioner of Customs to implement this requirement.

Section 207(g) of the bill provides that at the request of a government of a country such as Korea that is a party to a free trade agreement with the United States, as provided for in the agreement, the Secretary may request to verify production of any textile or apparel good in order to assist that government in determining whether a claim of origin under the agreement for a textile or apparel good is accurate or whether an exporter, producer, or other enterprise located in the United States involved in the movement of textile or apparel goods is complying with applicable customs laws, regulations, and procedures regarding trade in textile or apparel goods.

c. Fibers, Yarns, or Fabrics Not Available in Commercial Quantities

Under the specific rules of origin for textile and apparel goods set out in Annex 4-A of the Agreement, fibers, yarns, or fabrics that are not available in commercial quantities in a timely manner in the United States are treated as if they originate in the United States or Korea, regardless of their actual origin, when used as inputs in the production of textile or apparel goods. Annex 4-B of the Agreement provides for the United States to determine that specific fibers, yarns, or fabrics are not available in commercial quantities. If the United States determines, at the request of an "interested entity" (a potential or actual purchaser or supplier, or a Party), that a fiber, yarn, or fabric is unavailable in commercial quantities in a timely manner in the United States, or if it determines that no interested entity objects to the request, the United States will add the material to the list of such materials contained in Appendix 4-B-1 of the Agreement.

Annex 4-B also authorizes the United States to remove a material from the list in response to a request from an interested entity. The United States may take this action beginning six months after it publishes notice of its determination that the material has become commercially available in the United States.

Section 202(o)(3) of the bill implements those provisions of Annex 4-B of the Agreement that provide for the United States to modify the list of materials in the list of the United States in Appendix 4-B-1 of the Agreement after the Agreement enters into force.

Specifically, subparagraph (C)(i) of Section 202(o)(3) of the bill provides that an interested entity may request the President to determine that a fiber, yarn, or fabric is not available in commercial quantities in the United States and to proclaim that the material is included in the list of the United States in Appendix 4-B-1 of the Agreement.

Subparagraph (C)(ii) of Section 202(o)(3) authorizes the President to determine whether the material is commercially available in a timely manner in the United States. Subparagraph (C)(iii) of Section 202(o)(3) provides that if the President determines that the material is not commercially available in a timely manner in the United States, or if no interested entity has objected, he may issue a proclamation adding the fiber, yarn, or fabric to the list of the United States in Appendix 4-B-1 of the Agreement. The President normally must issue the proclamation within 30 business days of receiving a request. However, subparagraph (C)(iv)(II) of Section 202(o)(3) provides that the President may take up to 60 business days if the President decides he lacks sufficient information to make the determination within 30 business days. Subparagraph (C)(v) of Section 202(o)(3) provides for proclamations to take effect when published in the *Federal Register*.

Subparagraph (D) of Section 202(o)(3) provides that in the event that the President takes no action in response to a request to add a material to the list, the request shall be considered to be denied.

Under subparagraph (E)(i) of Section 202(o)(3), an interested entity may request the President to remove any fiber, yarn, or fabric that the United States has included on its list in

Appendix 4-B-1 of the Agreement. Subparagraph (E)(ii) of Section 202(o)(3) provides for the President to issue a proclamation carrying out a request if he determines within 30 business days after the request is submitted that the material is available in commercial quantities in a timely manner in the United States. Subparagraph (E)(iii) of Section 202(o)(3) provides that this type of proclamation may take effect no earlier than six months after it is published in the *Federal Register*.

Subparagraph (F) of Section 202(o)(3) calls for the President to establish procedures for interested entities to submit requests for changes in the list of the United States in Appendix 4-B-1 of the Agreement and to submit comments and supporting evidence before the President determines whether to change the list.

2. <u>Administrative Action</u>

a. Textile and Apparel Safeguard

The interagency Committee for the Implementation of Textile Agreements (CITA) will perform the function of receiving requests for textile or apparel safeguard measures under section 331 of the bill, making determinations of serious damage or actual threat thereof under section 332(a) of the bill, and providing relief under section 332(b) of the bill. CITA will issue procedures for requesting such safeguard measures, for making its determinations under section 332(a), and for providing relief under section 332(b). CITA will perform these functions pursuant to a delegation of the President's authority under the bill.

b. Enforcement of Textile and Apparel Rules of Origin

Section 207 of the bill provides that the Secretary may request Korea to initiate verifications in order to determine whether claims of origin for textile or apparel goods are accurate or whether exporters and producers are complying with applicable laws, regulations, and procedures regarding trade in textile or apparel goods. The President will delegate to CITA his authority under section 207(a) of the bill to direct appropriate U.S. officials to take an action described in section 207(b) of the bill while such a verification is being conducted. The President will also authorize CITA to direct pertinent U.S. officials to take an action described in section 207(d) in the case of an adverse determination or if it is unable to make the necessary determination. If CITA decides that it is appropriate to deny preferential tariff treatment or deny entry to particular goods, CITA will issue an appropriate directive to U.S. Customs and Border Protection (CBP).

Section 207 of the bill provides the exclusive basis in U.S. law for CITA to direct appropriate action implementing Article 4.3 of the Agreement.

c. Fibers, Yarns, or Fabrics Not Available in Commercial Quantities

The President will delegate to CITA his authority under section 202(o)(3) of the bill, which establishes procedures for changing the list of fibers, yarns, or fabrics not available in commercial quantities in a timely manner set out in the list of the United States in Appendix 4-B-1 of the Agreement.

CITA will publish procedures under which interested entities may request that CITA: (i) add a fiber, yarn, or fabric to the list of the United States in Appendix 4-B-1 of the Agreement; or (ii) remove a fiber, yarn, or fabric from the list. These procedures will set out the information required to be submitted with a request. CITA will publish notice of requests that meet these requirements. CITA will provide an opportunity for interested entities to submit comments and evidence regarding a request, and to rebut evidence that other interested entities have submitted, before CITA makes a determination.

CITA will make determinations under section 202(o)(3) of the bill on a case-by-case basis taking into account factors relevant to the request. Such factors ordinarily would include the physical and technical specifications of the fiber, yarn, or fabric that is the subject of the request, and evidence demonstrating the extent to which manufacturers in the United States are able to supply the item in commercial quantities in a timely manner. CITA will provide public notice of its determinations.

Chapter Five (Pharmaceutical Products and Medical Devices)

1. Implementing Bill

No statutory changes will be required to implement Chapter Five.

2. Administrative Action

Chapter Five of the Agreement addresses market access for pharmaceutical products and medical devices. Under the chapter, if U.S. federal healthcare programs list new pharmaceutical products or medical devices for reimbursement purposes, or set the amount of reimbursement for pharmaceutical products or medical devices, the United States must ensure that the procedures and criteria the programs apply are fair, reasonable, and non-discriminatory. No change in U.S. regulation or practice is required to implement Chapter Five.

<u>Chapter Six (Rules of Origin and Origin Procedures)</u>

1. <u>Implementing Bill</u>

a. General

Section 202 of the implementing bill codifies the general rules of origin set forth in Chapter Six of the Agreement. These rules apply only for the purposes of this bill and for the purposes of implementing the customs duty treatment provided under the Agreement. An originating good for the purposes of this bill would not necessarily be a good of or import from Korea for the purposes of other U.S. laws or regulations.

Under the general rules, there are three basic ways for a good of Korea to qualify as an "originating" good and, therefore, be eligible for preferential treatment when it is imported into the United States. First, a good is originating if it is "wholly obtained or produced entirely in the territory of Korea, the United States, or both." The term "good wholly obtained or produced entirely in the territory of Korea, the United States, or both" is defined in section 202(n)(5) of the bill and includes, for example, minerals extracted from the territory of Korea, the United States, or both; animals born and raised in the territory of Korea, the United States, or both; and waste and scrap derived from production of goods that takes place in the territory of Korea, the United States, or both.

The term "good wholly obtained or produced entirely in the territory of Korea, the United States, or both" includes "recovered goods." These are parts resulting from the disassembly of used goods that are brought into good working condition in order to be combined with other recovered goods and other materials to form a "remanufactured good." The term "remanufactured good" is separately defined in section 202(n)(20) of the bill to mean a good falling within Chapter 84, 85, 87 or 90 of the HTS or heading 9402 that: (i) is entirely or partially comprised of recovered goods; and (ii) has a similar life expectancy and enjoys a factory warranty similar to such a good that is new.

Second, the general rules of origin provide that a good is "originating" if the good is produced in the territory of Korea, the United States, or both, and the materials used to produce the good that are not themselves originating goods are transformed in such a way as to cause their tariff classification to change and to meet other requirements, as specified in Annex 4-A or Annex 6-A of the Agreement. Such additional requirements include, for example, performing certain processes or operations related to textile or apparel goods in the territory of Korea, the United States, or both, or meeting regional value content requirements, sometimes in conjunction with changes in tariff classification.

Third, the general rules of origin provide that a good is "originating" if the good is produced entirely in the territory of Korea, the United States, or both, exclusively from materials that themselves qualify as originating goods.

A footnote in Chapter Six of the Agreement makes clear that originating goods are not automatically "admissible" into either country's territory. As is the case for all goods exported to the United States, "originating goods" must comply with applicable U.S. laws and regulations, including import prohibitions, sanctions, and licensing requirements, in order to be admitted into the territory of the United States.

The remainder of section 202 of the implementing bill sets forth specific rules related to determining whether a good meets the Agreement's specific requirements to qualify as an originating good. For example, section 202(c) of the bill implements provisions in Annex 6-A of the Agreement that require certain goods to have at least a specified percentage of "regional value content" to qualify as originating goods. It prescribes alternative methods for calculating regional value content, as well as a specific method that may be used in the case of certain automotive goods. Section 202(f) of the bill provides that a good is not disqualified as an originating good if it contains *de minimis* quantities of non-originating materials that do not undergo a change in tariff classification. Other provisions in section 202 of the bill address how materials are to be valued, how to determine whether fungible goods and materials qualify as originating or non-originating, as well as a variety of other matters.

Section 202(l) of the bill allows a good to be shipped through a third country without losing its status as an originating good, provided certain conditions are met. While in a third country, the good may not be further produced, except that it may be unloaded, reloaded, or preserved, if necessary. Whether the good is unloaded, reloaded, or preserved in a third country, or is simply shipped through the third country, the good must, while in that country, remain under customs control.

Section 202(l) recognizes that, in modern commerce, a good may not be directly shipped from Korea to the United States, or vice versa; for example, shipments may be consolidated at an interim port. At the same time, in order to ensure that the preferential tariff treatment under the Agreement inures to producers in Korea and the United States, rather than producers in third countries, an originating good may not be further produced in a country that is not a party to the Agreement. Requiring the good to remain under customs control provides greater traceability of the good to ensure that no further production occurred.

b. Proclamation Authority

Section 202(o)(1) of the bill authorizes the President to proclaim the specific rules of origin in Annex 4-A and Annex 6-A of the Agreement, as well as any additional subordinate rules necessary to carry out the customs duty provisions of the bill consistent with the Agreement. In addition, section 202(o)(2) of the bill gives authority to the President to modify certain of the Agreement's specific origin rules by proclamation, subject to the consultation and layover provisions of section 104 of the bill. (See item 1.a of Chapter Two, above.)

Various provisions of the Agreement expressly contemplate that Korea and the United States may agree to modify the Agreement's rules of origin. Article 6.14 of the Agreement calls for the two governments to consult regularly after the Agreement's entry into force to discuss possible amendments or modifications to Chapter Six of the Agreement and its Annex. In addition, Article 4.2.3 of the Agreement calls for the Parties to consult at either Party's request to consider whether rules of origin for particular textile or apparel goods should be modified to address issues of availability of supply of fibers, yarns, or fabrics in the territories of the Parties.

Section 202(o)(2) of the bill expressly limits the President's authority to modify by proclamation specific rules of origin pertaining to textile or apparel goods (listed in Chapters 50 through 63 of the HTS and identified in Annex 4-A of the Agreement). However, those rules of origin may be modified by proclamation within one year of entry into force of the Agreement, to correct typographical, clerical, or other non-substantive technical errors. As discussed above, section 202(o)(3) of the bill, also provides the President with authority to proclaim modifications to the rules of origin limited to fibers, yarns, or fabrics that are not available in commercial quantities in the United States.

c. Disclosure of Incorrect Information and Denial of Preferential Treatment

Article 6.19.3 of the Agreement provides that a Party may not impose a penalty on an importer who makes an invalid claim for preferential tariff treatment under the Agreement if the importer did not engage in negligence, gross negligence, or fraud in making the claim or, after discovering that the claim is invalid, promptly and voluntarily corrects the claim and pays any customs duty owing. Article 6.18.6 of the Agreement provides if an importing country determines through verification that an importer, exporter, or producer has engaged in a pattern of conduct in providing false or unsupported certifications or other representations that a good qualifies as originating, it may suspend preferential tariff treatment under the Agreement for identical goods covered by any subsequent certifications or other representations that that person may make. The suspension may continue until the importing country determines that the importer, exporter, or producer is in compliance with applicable laws and regulations governing claims for preferential tariff treatment under the Agreement.

Section 204(a) of the bill implements Article 6.19.3 of the Agreement for the United States by amending section 592(c) of the Tariff Act of 1930 (19 U.S.C. 1592(c)). Section 204(b) of the bill implements Article 6.18.6 of the Agreement for the United States by amending section 514 of the Tariff Act of 1930 (19 U.S.C. 1514).

d. Claims for Preferential Tariff Treatment

Article 6.19.5 of the Agreement provides that an importer may claim preferential tariff treatment for an originating good within one year of importation, even if no such claim was made at the time of importation. In seeking a refund for excess duties paid, the importer must provide to the customs authorities information substantiating that the good was in fact an originating good at the time of importation.

Section 205 of the bill implements U.S. obligations under Article 6.19.5 of the Agreement by amending section 520(d) of the Tariff Act of 1930 (19 U.S.C. 1520(d)) to allow an importer to claim preferential tariff treatment for originating goods within one year of their importation.

e. Exporter and Producer Certifications

Article 6.15 of the Agreement provides that an importer may base a claim for preferential tariff treatment on either (i) a written or electronic certification by the importer, exporter, or producer, or (ii) the importer's knowledge that the good is an originating good, including through reasonable reliance on information in the importer's possession that the good is an originating good. (The Agreement allows certain exceptions, for example, for goods with a customs value less than or equal to $1,000.) If an exporter issues a certification, it must either be based on the person's knowledge that the good is originating or supported by a separate certification issued by the producer.

Article 6.20 of the Agreement sets out rules governing incorrect certifications of origin issued by exporters or producers. Where an exporter or producer becomes aware that a certification of origin contains or is based on incorrect information, it must promptly and voluntarily notify in writing every person to whom the exporter or producer issued the certification of any change that could affect the accuracy or validity of the certification. If it does so, neither Party may impose a penalty.

Section 204(a) of the bill implements U.S. obligations under Article 6.20 of the Agreement by amending section 592 of the Tariff Act of 1930 (19 U.S.C. 1592). New subsection (j) of section 592 of the Tariff Act, as added by section 204(a) of the bill, imposes penalties on exporters and producers that issue false KFTA certifications of origin through fraud, gross negligence, or negligence. These penalties do not apply where an exporter or producer corrects an error in the manner described above.

f. Recordkeeping Requirements

Article 6.17 of the Agreement sets forth record keeping requirements that each government must apply to its importers. U.S. obligations under Article 6.17 of the Agreement regarding importers are satisfied by current law, including the record keeping provisions in section 508 of the Tariff Act of 1930 (19 U.S.C. 1508).

Article 6.17 also sets forth record keeping requirements that each government must apply to exporters and producers issuing certifications of origin for goods exported under the Agreement. Section 206 of the bill implements Article 6.17 of the Agreement for the United States by amending the customs record keeping statute (section 508 of the Tariff Act of 1930).

As added by section 206 of the bill, subsection (i) of section 508 of the Tariff Act of 1930 defines the terms "KFTA certification of origin" and "records and supporting documents." It then provides that a U.S. exporter or producer that issues a KFTA certification of origin must make, keep, and, if requested pursuant to rules and regulations promulgated by the Secretary, render for examination and inspection a copy of the certification and such records and supporting documents. The exporter or producer must keep these records and supporting documents for five years from the date it issues the certification. New subsection (j) of section 508 of the Tariff Act of 1930 also sets forth penalties for violations of this record keeping requirement.

2. <u>Administrative Action</u>

The rules of origin in Chapter Six of the Agreement are intended to direct the benefits of customs duty elimination under the Agreement principally to firms producing or manufacturing goods in Korea and the United States, not third countries. For this reason, the rules ensure that, in general, a good is eligible for benefits under the Agreement only if it is: (i) wholly produced or obtained in the territory of Korea, the United States, or both; or (ii) undergoes substantial processing in the territory of Korea, the United States, or both.

a. Claims for Preferential Treatment

Section 208 of the bill authorizes the Secretary to prescribe regulations necessary to carry out the tariff-related provisions of the bill, including the rules of origin and customs user fee provisions. The Secretary will use this authority in part to promulgate any regulations necessary to implement the Agreement's provisions governing claims for preferential treatment. Under Article 6.15 of the Agreement, an importer may claim preferential treatment for a good based on either (i) a written or electronic certification by the importer, exporter, or producer, or (ii) the importer's knowledge, including through reasonable reliance on information in the importer's possession, that the good is originating. A certification need not be in a prescribed format, but must include the elements set out in Article 6.15.2 of the Agreement. Under Article 6.19.1 of the Agreement, an importing Party must grant a claim for preferential tariff treatment made in accordance with Chapter Six of the Agreement, unless its customs officials issue a written determination that the claim is invalid as a matter of law or fact.

b. Verification

Under Article 6.18 of the Agreement, customs officials may use a variety of methods to verify claims that goods imported from the other Party satisfy the Agreement's rules of origin. Article 4.3 of the Agreement sets out special procedures for verifying claims that textile or apparel goods imported from the other Party meet the Agreement's origin rules. (See item 1.c of Chapter Three, above.) U.S. officials will carry out verifications under Articles 6.18 and 4.3 of the Agreement pursuant to authorities under current law. For example, section 509 of the Tariff Act of 1930 (19 U.S.C. 1509) provides authority to examine records and issue summonses to determine liability for duty and ensure compliance with U.S. customs laws.

<u>Chapter Seven (Customs Administration and Trade Facilitation)</u>

1. <u>Implementing Bill</u>

No statutory changes will be required to implement Chapter Seven of the Agreement.

2. Administrative Action

a. Inquiry Point

Article 7.1.2 of the Agreement requires each government to designate an inquiry point for inquiries from interested persons on customs matters. CBP will serve as the U.S. inquiry point for this purpose. Consistent with Article 7.1.2 of the Agreement, CBP will post information on the Internet at "www.cbp.gov" on how interested persons can make customs-related inquiries.

b. Advance Rulings

Treasury regulations for advance rulings under Article 7.10 of the Agreement (including on classification, valuation, origin, and qualification as an originating good) will parallel in most respects existing regulations in Part 177 of the Customs Regulations for obtaining advance rulings. For example, a ruling may be relied on provided that the facts and circumstances represented in the ruling are complete and do not change. The regulations will make provision for modifications and revocations as well as for delaying the effective date of a modification where the firm in question has relied on an existing ruling. Advance rulings under the Agreement will be issued within 90 days of receipt of all information reasonably required to process the application for the ruling.

Chapter Eight (Sanitary and Phytosanitary Measures)

No statutory or administrative changes will be required to implement Chapter Eight.

Chapter Nine (Technical Barriers to Trade)

1. Implementing Bill

No statutory changes will be required to implement Chapter Nine.

2. Administrative Action

Article 9.8 of the Agreement establishes an inter-governmental Committee on Technical Barriers to Trade ("TBT"). A USTR official responsible for TBT matters or trade relations with Korea will serve as the U.S. coordinator for the committee. Annex 9-B of the Agreement establishes an Automotive Working Group that will serve as an early warning system for potential trade barriers, allowing the United States to provide timely input into the development, implementation, and enforcement of standards, technical regulations, and conformity assessment procedures affecting motor vehicles. A USTR official responsible for TBT matters or trade relations with Korea will serve as the U.S. coordinator for this working group. The Working Group will include or consult as appropriate with officials from the National Highway Traffic Safety Administration and the Environmental Protection Agency and their Korean counterparts, as well as other relevant government regulatory agencies. The Working Group may also include or consult with private sector experts and stakeholders as the two governments consider necessary and appropriate.

Chapter Ten (Trade Remedies)

1. Implementing Bill

Subtitle A of Title III of the bill implements in U.S. law the safeguard provisions set out in Chapter Ten of the Agreement. Subtitle B of Title III of the bill implements the special safeguard for motor vehicles set out in Section D of the February 10, 2011 Exchange of Letters. Subtitle D of Title III of the bill implements the global safeguard provisions set out in Chapter Ten of the Agreement. (As discussed under Chapter Four, above, Subtitle C of Title III of the bill implements the textile or apparel safeguard provisions of the Agreement.)

a. Safeguard Measures

Subtitle A of Title III of the bill, sections 311 through 316, authorizes the President, after an investigation and affirmative determination by the ITC (or a determination that the President may consider to be an affirmative determination), to suspend duty reductions or impose duties temporarily up to NTR (MFN) rates on a "Korean article" when, as a result of the reduction or elimination of a duty under the Agreement, the article is being imported into the United States in such increased quantities and under such conditions as to be a substantial cause of serious injury or threat of serious injury to a domestic industry that produces a like or directly competitive good. The standards and procedures set out in these provisions closely parallel the procedures set forth in sections 201 through 204 of the Trade Act of 1974 (19 U.S.C. 2251 - 2254).

Section 301(1) of the bill defines the term "Korean article" to mean a good that qualifies as an originating good under section 202(b) of the bill. Section 301(2) of the bill defines the term "Korean motor vehicle article" to mean a good provided for in HTS heading 8703 or 8704 that qualifies as an originating good under section 202(b) of the bill.

Section 311 of the bill provides for the filing of petitions with the ITC and for the ITC to conduct safeguard investigations initiated under Subtitle A. Section 311(a)(1) of the bill provides that a petition requesting a safeguard action may be filed with the ITC by an entity that is "representative of an industry." As under section 202(a)(1) of the Trade Act of 1974, the term "entity" is defined to include a trade association, firm, certified or recognized union, or a group of workers.

Section 311(a)(2) of the bill permits a petitioning entity to request provisional relief as if the petition had been filed under section 202(a) of the Trade Act of 1974. Section 311(a)(3) of the bill requires that any claim of "critical circumstances" with respect to an increase of imports from Korea be included in the petition. It is a necessary element in a claim for provisional relief under section 202(d)(2) of the Trade Act of 1974, which is made applicable to Subtitle A safeguards proceedings through section 311(c) of the bill.

Section 311(b) of the bill sets out the standard to be used by the ITC in undertaking an investigation and making a determination in Subtitle A safeguard proceedings.

Section 311(c) of the bill makes applicable by reference several provisions of the Trade Act of 1974. These are the definition of “substantial cause” in section 202(b)(1)(B) of that act, the factors listed in section 202(c) applied in making determinations, the provisional relief provisions in section 202(d), the hearing requirement of section 202(b)(3), and the provisions of section 202(i) permitting confidential business information to be made available under protective order to authorized representatives of parties to a safeguard investigation.

Section 311(d) of the bill exempts from investigation under this section Korean articles, that have previously been the basis for according relief under Subtitle A to a domestic industry.

Section 312(a) of the bill establishes deadlines for ITC determinations following an investigation under section 311(b) of the bill. The ITC must make its injury determination within 120 days of the date on which it initiates an investigation (or 180 days if critical circumstances are alleged).

Section 312(b) of the bill makes applicable the provisions of section 330(d) of the Tariff Act of 1930, which will apply when the ITC Commissioners are equally divided on the question of injury or remedy.

Under section 312(c) of the bill, if the ITC makes an affirmative determination, or a determination that the President may consider to be an affirmative determination, under section 312(a) of the bill, it must find and recommend to the President the amount of import relief that is necessary to remedy or prevent the serious injury and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition. The relief that the ITC may recommend is limited to that authorized in section 313(c) of the bill. Similar to procedures under the global safeguards provisions in current law, section 312(c) of the bill provides that only those members of the ITC who agreed to the affirmative determination under section 312(a) of the bill may vote on the recommendation of relief under section 312(c).

Under section 312(d) of the bill, the ITC is required to transmit a report to the President not later than 30 days after making its injury determination. The ITC’s report must include: (i) the ITC’s determination(s) under section 312(a) of the bill and the reasons supporting the determination(s); (ii) if the determination under section 312(a) is affirmative or may be considered to be affirmative by the President, any findings and recommendations for import relief and an explanation of the basis for each recommendation; and (iii) any dissenting or separate views of ITC Commissioners. Section 312(e) of the bill requires the ITC to make public its report promptly and to publish a summary of the report in the *Federal Register*.

Section 313(a) of the bill directs the President, subject to section 313(b) of the bill, to take action not later than 30 days after receiving a report from the ITC containing an affirmative determination or a determination that the President may consider to be an affirmative determination. The President must provide import relief to the extent that the President determines is necessary to remedy or prevent the injury the ITC has found and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition. Under section 313(b), the President is not required to provide import relief if the President determines that the relief will not provide greater economic and social benefits than costs.

Section 313(c)(1) of the bill sets forth the nature of the relief that the President may provide. In general, the President may take action in the form of:

- a suspension of further reductions in the rate of duty to be applied to the articles in question; or

- an increase in the rate of duty on the articles in question to a level that does not exceed the lesser of the existing NTR (MFN) rate or the NTR (MFN) rate of duty imposed on the day before the Agreement entered into force.

Section 313(c)(1) also sets out a special rule for duties applied on a seasonal basis.

Under section 313(c)(2) of the bill, if the relief the President provides has a duration greater than one year, the relief must be subject to progressive liberalization at regular intervals over the course of its application.

Section 313(d) of the bill provides that the period for import relief under a Subtitle A safeguard may not exceed three years in the aggregate. The initial period of import relief may be up to two years. The President may extend the period of import relief by up to one year, however, if he determines that continuation of relief is necessary to remedy or prevent serious injury and to facilitate adjustment to import competition, and that there is evidence that the industry is making a positive adjustment to import competition. That determination must follow an affirmative determination (or a determination that the President may consider to be an affirmative determination) by the ITC to the same effect.

Section 313(e) of the bill specifies the duty rate to be applied to Korean articles after termination of a safeguard action. On the termination of relief, the rate of duty is the rate that would have been in effect for those articles but for the provision of such relief.

Section 313(f) of the bill exempts from relief any article that is: (i) subject to import relief under the global safeguard provisions in U.S. law (chapter 1 of Title II of the Trade Act of 1974) or (ii) subject to import relief under the textile and apparel safeguard in Subtitle C.

Section 314 of the bill provides that the President's authority to take action under Subtitle A expires ten years after the date on which the Agreement enters into force, unless the period for elimination of duties on the article exceeds ten years. In cases where the period of duty elimination exceeds ten years, relief with respect to the article may be provided until the Agreement calls for duties on the article to be eliminated. The President may take action under Subtitle A after the 10-year duty elimination period, or any longer elimination period for a particular product, only if the government of Korea consents.

Section 315 of the bill allows the President to provide trade compensation to Korea, as required under Article 10.4 of the Agreement, when the United States imposes relief through a Subtitle A safeguard action. Section 315 provides that for purposes of section 123 of the Trade Act of 1974, which allows the President to provide compensation for global safeguards, any relief provided under section 313 of the bill will be treated as an action taken under the global safeguard provisions of U.S. law (sections 201 through 204 of the Trade Act of 1974).

Section 316 of the bill amends section 202(a) of the Trade Act of 1974 to provide that the procedures in section 332(g) of the Tariff Act of 1930 with respect to the release of confidential business information are to apply to Subtitle A safeguard investigations.

The Administration has not provided classified information to the ITC in past safeguard proceedings and does not expect to provide such information in future proceedings. In the unlikely event that the Administration provides classified information to the ITC in such proceedings, that information would be protected from publication in accordance with Executive Order 12958.

b. Motor Vehicle Safeguard Measures

Section 321 of the bill implements the special safeguard for motor vehicles set out in Section D of the February 10, 2011, Exchange of Letters. It provides that, for a Korean motor vehicle article: (1) articles that have previously been the basis for according relief to a domestic industry under Subtitle A are not exempt from investigation; (2) relief is not subject to progressive liberalization at regular intervals over the course of its application; (3) the President may extend the effective period of any import relief by up to 2 years (for a total of 4 years) if the requirements for extension set forth in section 313(d)(2)(A) are met; and (4) relief may be provided at any time up to 10 years after the date the relevant duties are eliminated under section 201(d) or the Agreement, as the case may be.

c. Global Safeguard Measures

Section 341 of the bill implements the global safeguard provisions of Article 10.5 of the Agreement. It authorizes the President, in granting global import relief under sections 201 through 204 of the Trade Act of 1974, to exclude imports of originating articles from the relief when certain conditions are present.

Specifically, section 341(a) of the bill provides that if the ITC makes an affirmative determination, or a determination that the President may consider to be an affirmative determination, in a global safeguard investigation under section 202(b) of the Trade Act of 1974, the ITC must find and report to the President whether imports of the article from Korea considered individually that qualify as originating goods under section 202(b) are a substantial cause of serious injury or threat thereof. Under section 341(b) of the bill, if the ITC makes a negative finding under section 341(a) of the bill the President may exclude any imports that are covered by the ITC's finding from the global safeguard action.

2. Administrative Action

Article 10.8 of the Agreement establishes an intergovernmental Committee on Trade Remedies. A USTR official with responsibilities for trade remedies matters or trade relations with Korea will serve as the U.S. coordinator for the Committee.

Pursuant to Article 10.7.3 of the Agreement, the Department of Commerce will notify the government of Korea when it receives a properly documented antidumping (AD) or countervailing duty (CVD) petition with respect to imports from Korea. In the case of CVD petitions, the Department will afford representatives of Korea an opportunity to consult with Department officials regarding the petition; in the case of AD petitions, the Department will afford representatives of Korea a meeting or other similar opportunities, consistent with 19 U.S.C. 1673a(b)(3).

Consistent with Article 10.7.4, the Department will provide the government of Korea with information regarding its procedures for requesting price undertakings and provide an opportunity for that government and Korean exporters to consult with the Department regarding proposed undertakings. The opportunity to request an undertaking is provided for under U.S. law and regulation and is available in all investigations. Any agreement with respect to an undertaking must conform to conditions specified in U.S. law. Article 10.7 of the Agreement is not subject to the Agreement's dispute settlement provisions.

Implementation of these obligations does not require any changes to U.S. AD or CVD laws or regulations.

Chapter Eleven (Investment)

1. Implementing Bill

Section 106 of the bill authorizes the United States to use binding arbitration to resolve claims by investors of Korea under Article 11.16.1(a)(i)(C) or Article 11.16.1(b)(i)(C) of the Agreement. Those articles concern disputes over certain types of government contracts, and section 106 of the bill clarifies that the United States consents to the arbitration of such disputes. No statutory authorization is required for the United States to engage in binding arbitration for other claims covered by Article 11.16 of the Agreement. Provisions allowing arbitration of certain contract claims have regularly been included in U.S. bilateral investment treaties over recent decades, as well as in the free trade agreements with Chile, Singapore, Morocco, Central America and the Dominican Republic, Oman, and Peru.

2. **Administrative Action**

No administrative changes will be required to implement Chapter Eleven.

Chapter Twelve (Cross-Border Trade in Services)

No statutory or administrative changes will be required to implement Chapter Twelve.

Chapter Thirteen (Financial Services)

No statutory or administrative changes will be required to implement Chapter Thirteen.

Chapter Fourteen (Telecommunications)

No statutory or administrative changes will be required to implement Chapter Fourteen.

Chapter Fifteen (Electronic Commerce)

No statutory or administrative changes will be required to implement Chapter Fifteen.

Chapter Sixteen (Competition-Related Matters)

No statutory or administrative changes will be required to implement Chapter Sixteen.

Chapter Seventeen (Government Procurement)

1. **Implementing Bill**

Chapter Seventeen of the Agreement establishes rules that certain government entities, listed in Annex 17-A of the Agreement, must follow in procuring goods and services. The Chapter's rules will apply whenever these entities undertake procurements valued above thresholds specified in Annex 17-A of the Agreement.

In order to comply with its obligations under Chapter Seventeen of the Agreement, the United States must waive the application of certain federal laws, regulations, procedures and practices that ordinarily treat foreign goods and services and suppliers of such goods and services less favorably than U.S. goods, services, and suppliers. Section 301(a) of the Trade Agreements Act of 1979 (19 U.S.C. 2511(a)) authorizes the President to waive the application of such laws, regulations, procedures, and practices with respect to "eligible products" of a foreign country designated under section 301(b) of that Act. By virtue of taking on the procurement-related obligations in Chapter Seventeen, Korea is eligible to be designated under section 301(b) of the Trade Agreements Act and will be so designated.

The term "eligible product" in section 301(a) of the Trade Agreements Act is defined in section 308(4)(A) of that Act for goods and services of countries and instrumentalities that are parties to the WTO Agreement on Government Procurement (GPA) and countries that are covered under the NAFTA and other recent free trade agreements. Korea is a party to the GPA and U.S. agencies covered under the GPA must currently treat Korean goods and services as "eligible products" for procurements above specified dollar thresholds. When it enters into force, the Free Trade Agreement will lower those thresholds for Korean goods and services and those thresholds will apply to procurements conducted by all of the U.S. government entities subject to the GPA, plus procurements of the U.S. Social Security Administration.

Section 401 of the bill amends the definition of "eligible product" in section 308(4)(A) of the Trade Agreements Act. As amended, section 308(4)(A) of that Act will provide that, for Korea, an "eligible product" means a product or service of Korea that is covered under the Agreement for procurement by the United States. This amended definition, coupled with the President's exercise of his authority under section 301(a) of the Trade Agreements Act, will allow U.S. government entities covered by the Agreement to purchase on non-discriminatory terms products and services from Korea that fall within the lower thresholds established under the Agreement.

2. <u>Administrative Action</u>

As noted above, Annex 17-A of the Agreement provides that U.S. government entities subject to Chapter Seventeen of the Agreement must apply the chapter's rules to goods and services from Korea when they make purchases valued above certain dollar thresholds. USTR will notify the Federal Acquisition Regulatory Council ("FAR Council") of the thresholds that pertain to Korea under the Agreement. The FAR Council will then incorporate those thresholds into the Federal Acquisition Regulation in accordance with applicable procedures under the Office of Federal Procurement Policy Act.

Article 17.7 of the Agreement clarifies that a procuring entity is not precluded from preparing, adopting, or applying "technical specifications" to promote the conservation of natural resources and the environment, or to require a supplier to comply with generally applicable laws regarding fundamental principles and rights at work and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, in the territory in which the good is produced or the service is performed. Thus, for example, a procuring entity is permitted to require a foreign producer to comply with laws guaranteeing freedom of association and protecting collective bargaining rights that generally apply in the territory in which the good is produced, even if that law does not apply to that foreign producer based on its location in an export processing zone.

Finally, neither this provision nor any other provision of Chapter Seventeen of the Agreement will affect application of the Davis-Bacon Act and related Acts (40 U.S.C. 3141 - 48 and 29 C.F.R. 5.1).

Chapter Eighteen (Intellectual Property Rights)

No statutory or administrative changes will be required to implement Chapter Eighteen.

Chapter Nineteen (Labor)

1. Implementing Bill

No statutory changes will be required to implement Chapter Nineteen.

2. Administrative Action

Article 19.5.1 of the Agreement establishes a Labor Affairs Council comprising senior officials from each Party. Article 19.5.3 of the Agreement calls for each government to designate an office to serve as a contact point with the other country and the public. The Department of Labor's Bureau of International Labor Affairs (ILAB) will serve as the U.S. contact point for these purposes, and will consult with USTR in carrying out this function.

Chapter Twenty (Environment)

1. Implementing Bill

No statutory changes will be required to implement Chapter Twenty.

2. Administrative Action

Article 20.6.1 of the Agreement establishes an Environmental Affairs Council, comprising senior-level officials, including officials with environmental responsibilities, from each Party. Article 20.9.1 of the Agreement provides that either government may request consultations with the other concerning any matter arising under the chapter and contemplates that each government will designate a contact point to receive such requests. USTR's Office of Environment and Natural Resources will serve as the U.S. contact point for this purpose.

TITLE V – OFFSETS

Increase in Penalty on Paid Preparers Who Fail to Comply with Earned Income Tax Credit Due Diligence Requirements

Section 501 of the bill amends section 6695 of the Internal Revenue Code of 1986 to increase from $100 to $500 the penalty on tax return preparers who fail to comply with the due diligence requirements for determining eligibility for the earned income tax credit.

Requirement for Prisons Located in U.S. to Provide Information for Tax Administration

Section 502 of the bill amends subchapter B of chapter 61 of the Internal Revenue Code of 1986 to require all prisons located in the United States to submit annually to the IRS a list of names and valid Social Security numbers of all inmates serving sentences of one year or more to assist in identifying fraudulent returns filed by prisoners.

Merchandise Processing Fee Rate

Section 503 of the bill amends section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) to provide for an increase in the current merchandise processing fee rate charged by Customs and Border Protection for formal entries to 0.3464 percent *ad valorem* and increases the cap on the range of such rate from 0.21 percent to 0.3464 percent *ad valorem*. The amendment does not affect the limitations imposed on user fees for goods under free trade agreement implementing acts, including section 203 of this bill. The change in rate addresses the increased costs Customs and Border Protection is incurring. The last legislative change to the merchandise processing fee occurred in 1995. The provision will be effective from December 1, 2015, through June 30, 2021.

Customs User Fee Extension

Section 504 of the bill amends section 13031 of COBRA to extend until August 2, 2021 the merchandise processing fees (MPFs) and until December 8, 2020 the passenger and conveyance processing fees authorized under that act.

Timing of Estimated Corporate Tax Payments

Section 505 of the bill increases the amount of the required installment of estimated tax otherwise due from a corporation with at least $1 billion in assets in (1) July, August, or September 2012 by 0.25 percent; and (2) July, August, or September 2016 by 2.75 percent. The bill reduces the next required installment to reflect the prior increase.