DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Parts 351, 353, and 355

[Docket No. 950306068–6361–04]

RIN 0625–AA45

Antidumping Duties; Countervailing Duties

AGENCY: International Trade Administration, Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce (''the Department'') hereby revises its regulations on antidumping and countervailing duty proceedings to conform the Department's existing regulations to the Uruguay Round Agreements Act, which implemented the results of the Uruguay Round multilateral trade negotiations. In addition to conforming changes, in these regulations the Department has sought to: where appropriate and feasible, translate the principles of the implementing legislation into specific and predictable rules, thereby facilitating the administration of these laws and providing greater predictability for private parties affected by these laws; simplify and streamline the Department's administration of antidumping and countervailing duty proceedings in a manner consistent with the purpose of the statute and the President's regulatory principles; and codify certain administrative practices determined to be appropriate under the new statute and under the President's Regulatory Reform Initiative.

DATES: The effective date of this final rule is June 18, 1997. See § 351.701 for applicability dates.

FOR FURTHER INFORMATION CONTACT: Michael Rill (202) 482–3058. For information concerning matters relating to the scope of orders or changed circumstances reviews, contact the Office of Policy (202) 482–4412.

SUPPLEMENTARY INFORMATION:

Background

The publication of this notice of final rules completes a significant portion of the process of developing regulations under the Uruguay Round Agreements Act (''URAA''). This process began when the Department took the unusual step of requesting advance public comments in order to ensure that, at the earliest possible stage, we could consider and take into account the views of the private sector entities that are affected by the antidumping (''AD'') and countervailing duty (''CVD'') laws. On February 27, 1996, the Department published proposed rules dealing with AD and CVD procedures and AD methodology (''AD Proposed Regulations''). The Department received over five hundred written public comments regarding the AD Proposed Regulations. On June 7, 1996, the Department held a public hearing, and, thereafter, received over one hundred additional post-hearing written public comments on the AD Proposed Regulations.[1]

In drafting these final rules, the Department has carefully reviewed and considered each of the hundreds of comments it received. While we have not always adopted suggestions made by commenters, we found the comments to be extremely useful in helping us to work our way through the legal and policy thickets created by the massive rewriting of our operating statute. Therefore, we are extremely grateful to those who took the time and trouble to express their views regarding how the Department should administer the AD and CVD laws in the future.

In addition, in these final rules, the Department has continued to be guided by the objectives described in the AD Proposed Regulations. Specifically, these objectives are: (1) Conformity with the statutory amendments made by the URAA; (2) the elaboration through regulation of certain statements contained in the Statement of Administrative Action (''SAA'');[2] and (3) consistency with President Clinton's Regulatory Reform Initiative and his directive to identify and eliminate obsolete and burdensome regulations.

Explanation of the Final Rules

General Background

Consolidation of Antidumping and Countervailing Duty Regulations

As described in the AD Proposed Regulations, in response to the President's Regulatory Reform Initiative and to reduce the amount of duplicative material in the regulations, the Department proposed to consolidate the AD and CVD regulations into a new part 351, and to remove parts 353 and 355. The Department did not receive any comments concerning the consolidation of the regulations, and, upon further review, we believe that the consolidation reduces duplication and makes the AD/CVD regulations easier to use. Accordingly, we are promulgating a single part 351, and are removing parts 353 and 355.

The structure of part 351 is as follows. Subpart A (Scope and Definitions) is based on former subpart A of parts 353 and 355. Among other things, the regulations contained in subpart A deal with general definitions applicable to AD/CVD proceedings, the record for such proceedings, *de minimis* standards for countervailable subsidies and dumping margins, and the rates to be applied in the case of nonproducing exporters or AD proceedings involving nonmarket economy countries.

Subpart B (Antidumping and Countervailing Duty Procedures) is based on former subpart B of parts 353 and 355. As indicated by the title, subpart B deals with procedural aspects of AD and CVD proceedings. Where the procedures for AD and CVD proceedings are different, the regulations in subpart B so specify.

Subpart C (Information and Argument) is based on former subpart C of parts 353 and 355. Subpart C establishes rules for AD/CVD proceedings regarding such matters as the submission of information, the treatment of business proprietary information, the verification of information, and determinations based on the facts available. Certain portions of subpart C dealing with the treatment of business proprietary information and administrative protective order procedures were the subject of a separate notice of proposed rulemaking

[1] The prior notices published by the Department as part of its URAA rulemaking activity are: (1) Advance Notice of Proposed Rulemaking and Request for Public Comments (*Antidumping Duties; Countervailing Duties; Article 1904 of the North American Free Trade Agreement*), 60 FR 80 (Jan. 3, 1995); (2) Advance Notice of Proposed Rulemaking: Extension of Comment Period (*Antidumping Duties; Countervailing Duties; Article 1904 of the North American Free Trade Agreement*), 60 FR 9802 (Feb. 22, 1995); (3) Interim Regulations; Request for Comments (*Antidumping and Countervailing Duties*), 60 FR 25130 (May 11, 1995); (4) Proposed Rule; Request for Comments (*Antidumping and Countervailing Duty Proceedings; Administrative Protective Order Procedures; Procedures for Imposing Sanctions for Violation of a Protective Order*), 61 FR 4826 (Feb. 8, 1996); (5) Notice of Proposed Rulemaking and Request for Public Comments (*Antidumping Duties; Countervailing Duties*), 61 FR 7308 (Feb. 27, 1996); (6) Extension of Deadline to File Public Comments on Proposed Antidumping and Countervailing Duty Regulations and Announcement of Public Hearing (*Antidumping Duties; Countervailing Duties*), 61 FR 18122 (April 24, 1996); (7) Announcement of Opportunity to File Public Comments on the Public Hearing of Proposed Antidumping and Countervailing Duty Regulations (*Antidumping Duties; Countervailing Duties*), 61 FR 28821 (June 6, 1996); (8) Notice of Proposed Rulemaking and Request for Public Comments (*Countervailing Duties*), 62 FR 8818 (Feb. 26, 1997); and (9) Extension of Deadline to File Public Comments on Proposed Countervailing Duty Regulations (*Countervailing Duties*), 62 FR 19719 (April 23, 1997).

[2] *Statement of Administrative Action Accompanying H.R. 5110*, H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess. (1994).

and request for public comments on February 8, 1996. 61 FR 4826. A separate notice of final regulations will be published for these portions of subpart C.

Subpart D (Calculation of Export Price, Constructed Export Price, Fair Value, and Normal Value) is based on former subpart D of part 353. Subpart D deals with methodologies for identifying and measuring dumping.

Subpart E is designated ''[Reserved].'' Proposed rules to be included in subpart E were published in a separate notice of proposed rulemaking and request for public comments on February 26, 1997. 62 FR 8818. The Department will publish a separate notice of final regulations after reviewing and considering public comments submitted in connection with proposed subpart E.

Subpart F (Cheese Subject to In-Quota Rate of Duty) is based on subpart D of former part 355, and implements section 702 of the Trade Agreements Act of 1979, as amended by the URAA.

Comments on Overall Drafting Approach

The Department received a few comments regarding the overall drafting approach used in the AD Proposed Regulations. One commenter complimented the Department on its use of introductory paragraphs before each regulation, but noted that in several instances the language of the introductory paragraph did not accurately reflect the content of the regulation itself. In addition, this same commenter noted that in several instances, the Department's use of the citation signal ''See'' to a particular statutory provision was ambiguous. We have taken this commenter's suggestions to heart, and in drafting these final regulations we have reviewed the introductory paragraphs and our citation signals in order to improve the clarity and precision of these regulations.

A different commenter noted that in the AD Proposed Regulations, when the Department referred to a particular section of the statute, it referenced only the Tariff Act of 1930 (the ''Act'') itself, not the section of the U.S. Code where the section is codified. This commenter suggested that to make the regulations more ''user friendly,'' the Department should refer to the relevant U.S. Code section of the Act or to both the U.S. Code and the Act.

While we appreciate the spirit in which this suggestion was made, we have not adopted it in drafting these final regulations. For years, the Department generally has referenced sections of the Act in its regulations, and we are not aware of any objections having been raised regarding this drafting practice (other than the instant comment). The absence of objections to this practice, as well as the absence of any other comments endorsing the use of U.S. Code citations, suggests to us that those who use these laws are comfortable with our practice of referencing sections of the Act. As for the suggestion that we reference both the Act and U.S. Code sections, given the numerous statutory references in these final regulations, the adoption of this suggestion would add considerably to the overall length of the regulations without, in our view, contributing significantly to their ease of use.

Explanation of Particular Provisions

In drafting these final regulations, the Department carefully considered each of the comments received. In addition, we conducted our own independent review of those provisions of the AD Proposed Regulations that were not the subject of public comments. The following sections contain a summary of the comments we received and the Department's responses to those comments. In addition, these sections contain an explanation of any changes the Department has made to the AD Proposed Regulations either in response to comments or on its own initiative. The following sections do not contain a discussion of those provisions that remain unchanged from the AD Proposed Regulations and that were not the subject of any public comments.

Subpart A—Scope and Definitions

Subpart A of part 351 sets forth the scope of part 351, definitions, and other general matters applicable to AD/CVD proceedings.

Section 351.102

Section 351.102 sets forth definitions of terms that are used throughout part 351. With respect to most of the definitions contained in § 351.102, we received no comments. Definitions that we have added or revised, or on which we received comments, are discussed below.

We received one general comment suggesting that we number each of the definitions contained in § 351.102(b) as a separate numbered paragraph. According to the commenter, the absence of subparagraph numbering will make shorthand references to a particular definition impossible and will render definitions difficult to locate.

We have not adopted this suggestion, because we have followed the guidelines set forth in the *Document Drafting Handbook* 1991 ed. (Office of the Federal Register), which states, at page 21, that ''paragraph designations are not required for the terms being defined, if the terms are listed in alphabetical order,'' as is the case with respect to § 351.102(b). Because the definitions in § 102(b) are listed in alphabetical order, we do not believe that it will be difficult to locate a particular definition. In addition, we do not believe that the format we have used precludes shorthand references.

Affiliated persons; affiliated parties: Many commenters claimed that because the statute and the SAA do not provide sufficient guidance as to when the Department will consider an affiliation to exist by virtue of ''control,'' the Department should provide clearer guidance in the regulations. In this regard, we received a number of specific suggestions relating to the issue of ''control,'' many of which had been submitted previously.

As a general observation, the Department appreciates the desire for additional detail regarding the concept of affiliation. To the extent possible, we have attempted to provide additional guidance in this explanatory material. However, we continue to believe that it would be premature to codify much guidance in the form of a regulation. As explained in the AD Proposed Regulations, 61 FR at 7310, we believe that it is more appropriate to develop our practice regarding affiliation through the adjudication of actual cases.

Turning to specific suggestions, several commenters suggested that the definition should state that in order for control to exist within the meaning of section 771(33) of the Act, a relationship must affect the subject merchandise or foreign like product. These commenters argued that the purpose of such a requirement would be to winnow out those relationships that, while unquestionably close enough to constitute control in the abstract, do not affect the production or sale of the product that the Department is examining. According to these commenters, this approach is in line with the statement in the AD Proposed Regulations, 61 FR at 7310, that the Department would look at the ability to impact production, pricing, or cost, an analysis which, they claimed, must be directed at the product under investigation or review.

In general we agree with the suggestion that we focus on relationships that have the potential to impact decisions concerning production, pricing or cost. This does not mean however, that proof is required that a relationship in fact has

had such an impact. In this regard, section 771(33), which refers to a person being ''in a position to exercise restraint or direction,'' properly focuses the Department on the ability to exercise ''control'' rather than the actuality of control over specific decisions. Therefore, we will consider the full range of criteria identified in the SAA, at 838, in determining whether ''control'' exists. Moreover, we do not believe that we should ignore situations in which a control relationship, while relating directly to another product or another type of commercial activity, could affect decisions involving the production, pricing or cost of the merchandise under consideration. Therefore, in these types of situations, where a control relationship exists, the respondent will have to demonstrate that the relationship does not have the potential to affect the subject merchandise or foreign like product.

Several commenters suggested that the Department reconsider the statement in the preamble to the AD Proposed Regulations, 61 FR at 7310, that ''temporary market power, created by variations in supply and demand conditions, would not suffice [as evidence of control].'' With respect to this comment, we continue to believe that temporary market power generally would not constitute sufficient evidence of control. However, where the issue arises, the Department will conduct a case-by-case examination to determine whether market power is truly ''temporary.''

Another commenter suggested that the regulations state that in analyzing control, the Department will focus on long-term, rather than short-term, relationships. With respect to this suggestion, the Department normally will not consider firms to be affiliated where the evidence of ''control'' is limited, for example, to a two-month contract. On the other hand, the Department cannot rule out the possibility that a short-term relationship could result in control. Therefore, the Department will consider the temporal aspect of a relationship as one factor to consider in determining whether control exists. In this regard, we also should note that we do not intend to ignore a control relationship that happens to terminate at the beginning (or comes into existence at the end) of a period of investigation or review.

A number of commenters asked that the Department refrain from finding an affiliation in situations where the applicable national law prevents one firm from exercising control over another. With respect to this suggestion, the Department will take national laws into account in examining the existence of control. However, the Department also will consider whether, national laws notwithstanding, there is any *de facto* control.

Many commenters requested that the Department establish (1) rebuttable presumptions for when control does or does not exist; (2) bright-line thresholds establishing when control does not exist; and (3) specific examples in the regulations of relationships that do or do not constitute control. We have not adopted these suggestions, because they require the type of fact-specific determinations that the Department is not prepared to make at this time. As discussed above, the Department intends to establish guidelines concerning affiliation gradually as we gain experience through the resolution of issues in actual cases.

One commenter suggested that the Department should find control to exist only if a relationship resulted in an impact on prices or other significant terms of sale. The Department has not adopted this suggestion, because we do not agree that it is appropriate to require evidence regarding the actual impact of a relationship. Because section 771(33) refers to a person being ''in a position to exercise restraint or direction,'' we are required to examine the ability to control, not the actual exercise of control.

Another commenter suggested that the Department should not consider ''normal commercial relationships'' as giving rise to control. We have not adopted this suggestion, because ''normal'' is a subjective term that lacks any clear definition. In our view, a standard of ''normality'' would be subject to substantial confusion, argument, and litigation. More importantly, there is nothing in the statute or the legislative history that suggests that ''normal commercial relationships'' cannot give rise to control. To the contrary, the SAA at 838 states: ''A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.'' Each of the relationships described in this passage can be characterized as ''normal'' in the sense that they are commercial relationships commonly entered into by firms. Nevertheless, notwithstanding the ''normality'' of these commercial relationships, the SAA indicates that they can give rise to control.

One commenter suggested that the Department clarify that the provision of a loan by one firm to another on terms consistent with commercial considerations will not constitute control. The Department has not adopted this suggestion, because we do not believe that the fact that a loan is provided on terms consistent with commercial considerations is necessarily dispositive with respect to the issue of control. For example, in situations where the supply of credit is limited, the availability of a loan, regardless of the loan's terms, may allow the lender to exercise control over the recipient of the loan.

Several commenters suggested that the Department should define legal or operational control as the ''enforceable ability to compel or restrain commercial actions.'' As a further refinement of this suggestion, one commenter suggested that the Department should find control only if one firm is capable of forcing another firm to act against its own interests.

The Department has not adopted these suggestions, because we do not believe that ''enforceability'' is a requisite factor under section 771(33). In addition, in the case of the second suggestion, we believe that focusing on the speculative question of what is or is not in a firm's interests would render our analysis of affiliation less, rather than more, predictable.

Aggregate basis: We received one comment concerning the definition of the term ''aggregate basis,'' a term that describes CVD proceedings in which the Department, under section 777A(e)(2)(B) of the Act, determines a single country-wide subsidy rate applicable to all exporters and producers. The commenter suggested that we substitute the word ''principally'' for ''solely'' so that the definition would read: '' 'Aggregate basis' means the calculation of a country-wide subsidy rate based principally on information provided by the foreign government.'' According to the commenter, the purpose of the modification would be to avoid confusion when the Department conducts a CVD investigation or review on an aggregate basis, but one or more producers request an individual review or exclusion.

We have adopted this suggestion, although not for the reason suggested. Although section 777A(e) of the Act establishes a preference for individual countervailable subsidy rates, section 777A(e)(2) provides for alternative methods where there are a large number of exporters or producers involved in an investigation or review. Under section 777A(e)(2)(B), one of these alternatives is to determine a single country-wide subsidy rate. Should the Department

have to use the country-wide rate method of section 777A(e)(2)(B), the Department will not review firms individually, although, where practicable, the Department will consider requests for an individual zero rate in an administrative review under § 351.213(k). In addition, while the Department will consider requests for exclusions from firms that claim to have received no countervailable subsidies, the Department will not calculate subsidy rates to be applied to merchandise produced or exported by such firms. Instead, the Department merely will determine whether or not a firm requesting exclusion receives countervailable subsidies in more than *de minimis* amounts. If the firm does not, the Department will exclude the firm. If the firm does receive more than *de minimis* countervailable subsidies, the Department will not exclude the firm, and will apply to that firm the country-wide subsidy rate.

Thus, the definition of ''aggregate basis'' is not inaccurate insofar as it relates to the calculation of individual rates and the granting of exclusions. On the other hand, the definition, as drafted, fails to reflect the fact that even in a CVD proceeding in which the Department calculates a single country-wide rate, it may have to obtain information from one or more firms with respect to certain types of subsidies, such as equity infusions. Therefore, we have substituted the word ''principally'' for ''solely'' to reflect this fact.

Country-wide subsidy rate: One commenter suggested that we add to § 351.102(b) a definition of ''country-wide subsidy rate.'' The proposed definition included a statement that the Secretary shall use ''the smallest applicable and feasible jurisdictional unit consistent with'' the definition of ''country'' in section 771(3) of the Act. The thrust of the comment was that the Department should calculate separate ''country-wide subsidy rates'' for individual subnational jurisdictions, such as provinces or states. A different commenter opposed this suggestion.

We have not adopted this suggestion, because the statute does not require the Department to calculate state- or province-specific subsidy rates. The Department rejected province-specific rates in *Certain Softwood Lumber Products from Canada*, 57 FR 22570, 22578–80 (1992), and the Department's position was sustained in *Certain Softwood Lumber Products from Canada*, No. USA–92–1904–01, Slip op. 139–43 (FTA Panel May 6, 1993). We do not believe that any of the statutory amendments made by the URAA warrants a different outcome. Moreover, there is no indication in the legislative history that Congress intended any change to the Department's practice in this regard.

Ordinary course of trade: We received several comments concerning the Department's proposed definition of the term ''ordinary course of trade.'' Some of these comments dealt with the definition in general, while other comments focussed on particular aspects of the definition.

The definition in general: One commenter stated that the definition should establish a presumption that sales are in the ordinary course of trade until a party demonstrates otherwise on a sale-by-sale basis (with the exception of home-market sales at prices below cost of production). This commenter also argued that the standards for making such a claim should be exacting, and that no general unsupported conclusions should suffice to exclude selected transactions. This commenter also urged the Department to omit from the regulation examples of sales that might be outside the ordinary course of trade, stating that each case should turn on its facts.

We have adopted this suggestion in part. We have not adopted the suggestion regarding the establishment of a presumption, because we believe that judicial precedent is sufficiently clear that the party making the claim bears the burden of proving that sales are outside the ordinary course of trade. *See, e.g., Koyo Seiko Co., Ltd.* v. *United States*, Slip op. 96–101 (Ct. Int'l Trade June 19, 1996), pp. 22–25, and cases cited therein. In addition, we have not adopted the suggestion that we delete references to particular types of sales that might be considered as outside the ordinary course of trade. Given the illustrative examples of such sales in the SAA, we believe that it is appropriate to provide guidance to parties by describing certain types of transactions that, depending on the facts, might be deemed to be outside the ordinary course of trade.

However, we have modified the definition so as to emphasize the fact-specific nature of ordinary course of trade analyses. As revised, the definition states that, as required by judicial precedent, the Secretary will evaluate ''all the circumstances particular to the sales in question.''

Another commenter expressed satisfaction with the proposed definition, but suggested that the Department's placement of the closed parenthesis in the definition was incorrect. We agree that we misplaced the closed parenthesis. However, we have corrected the error by restating the parenthetical as a separate sentence.

Abnormally high profits: Several commenters objected to the reference in the proposed definition to ''merchandise sold * * * with abnormally high profits.'' According to one commenter, neither the statute nor the SAA refers to ''abnormally high profits'' as a factor in considering whether merchandise is sold in the ordinary course of trade. In addition, this commenter asserted that the inclusion of this factor in the definition would invite respondents to argue for the exclusion of allegedly overly profitable sales.

Another commenter acknowledged that the SAA does discuss sales with ''abnormally high profits'' as being outside the ordinary course of trade, but that it does so in the context of constructed value profit. This same commenter also argued that the proposed definition is overtly biased in favor of respondents, because it does not provide for the exclusion of sales with abnormally ''low'' profits as being outside the ordinary course of trade. A third commenter, also noting that the proposed definition does not refer to sales with abnormally ''low'' profits, requested that the Department either delete the reference to abnormally high profits or revise the definition to refer to ''merchandise sold at aberrational prices or profits.''

We have not adopted these suggestions. With respect to the propriety of including in the definition any reference to sales with abnormally high profits, we believe that the SAA warrants such a reference. As acknowledged by one of the commenters, the SAA at 839–40 does refer to sales with abnormally high profits as being outside the ordinary course of trade. Although this reference is made in the context of constructed value profit, we believe that it applies in other contexts, as well. The SAA at 839 itself notes that ''constructed value serves as a proxy for a sales price.'' Thus, where normal value is based on constructed value, the constructed value is supposed to approximate what a price-based normal value would be if there were usable sales. Because, according to the SAA, a constructed value that included a profit element based on sales with abnormally high prices would not constitute an acceptable normal value, it follows that it would be improper to use sales with abnormally high profits as a basis for a price-based normal value.

With respect to the suggestion that the Department will be overwhelmed with arguments from respondents claiming

that particular sales have abnormally high profits, as discussed above, the burden of establishing that a particular sale is outside the ordinary course of trade rests on the party making the claim. Over time, we believe that this evidentiary burden will ensure that only serious claims are presented to the Department.

Finally, we do not believe that the proposed definition favors respondents. When one considers the proposed definition in light of the entire statute and the SAA, it is apparent that the Department may exclude sales with both abnormally low (*i.e.,* negative) and abnormally high profits from a dumping analysis. The only difference is that the Department considers sales with abnormally low profits under the rubric of ''sales below cost of production'' and section 773(b) of the Act. However, as section 771(15)(A) of the Act makes clear, sales that are disregarded under section 773(b)(1) as being below cost are considered to be outside the ordinary course of trade.

Off-quality merchandise: One commenter requested that the Department delete the reference in the proposed definition to ''off-quality merchandise.'' According to this commenter, neither the statute nor the SAA mentions ''off-quality merchandise,'' and such merchandise may be in the ordinary course of trade in certain industries and markets.

We have not adopted this suggestion. Contrary to the comment, the SAA at 839 does refer to ''off-quality merchandise,'' albeit in the context of constructed value profit. For the reasons set forth above in connection with the issue of ''abnormally high profits,'' we believe that this reference is relevant to the general definition of ''ordinary course of trade.'' As for the argument that sales of ''off-quality merchandise'' may be in the ordinary course of trade in certain industries and markets, the inclusion of the reference to ''off-quality merchandise'' does not mean that sales of such merchandise are automatically outside the ordinary course of trade. As discussed above, and as the revised definition now makes clear, the Secretary will conclude that particular sales are outside the ordinary course of trade only after an evaluation of all of the circumstances.

Samples and Prototypes: One commenter suggested that the Department should consider sales of sample and prototype merchandise to be outside the ordinary course of trade, and should exclude such sales from its calculations of dumping margins. We have not adopted this suggestion for several reasons. First, there needs to be some limit on the number of items included in a non-exhaustive list of examples. While we do not disagree that there may be instances in which the Department might consider sales of samples or prototypes to be outside the ordinary course of trade, the commenter acknowledged that such sales already may be embraced by the regulatory reference to merchandise ''sold pursuant to unusual terms of sale.'' Second, the commenter requested that sales of samples or prototypes be excluded from the dumping margin calculation altogether. However, as both the Department and the courts have made clear on numerous occasions, the statutory exclusion for sales outside the ordinary course of trade applies only to sales used to determine foreign market value (now normal value), not sales used to determine U.S. price (now export price or constructed export price). Thus, the courts have sustained the inclusion of all United States sales whether in or out of the ordinary course of trade. *See, e.g., Bowe Passat Reinigungs-Und Wäschereitechnik GMBH* v. *United States,* 926 F. Supp. 1138, 1147–49 (Ct. Int'l Trade 1996), and cases cited therein.

Price adjustment: We have added to § 351.102(b) a definition of the term ''price adjustment.'' This term is intended to describe a category of changes to a price, such as discounts, rebates and post-sale price adjustments, that affect the net outlay of funds by the purchaser. As discussed in connection with § 351.401, below, such price changes are not ''expenses'' as the Department usually uses that term, but rather are changes that the Department must take into account in identifying the actual starting price. Numerous commenters requested clarification on whether price adjustments would be treated as direct or indirect expenses. As discussed more fully below, price adjustments are neither direct nor indirect expenses, although they impact price as additions or deductions.

Sale or likely sale: The proposed definition of ''likely sale,'' which was based on 19 CFR §§ 353.2(t) and 355.2(p), defined this term as meaning ''a person's irrevocable offer to sell.'' One commenter suggested that the Department liberalize this definition to encompass something less than an irrevocable offer to sell.

Although the Department has not adopted this particular suggestion, we have taken another look at the ''irrevocable offer'' standard. Because most AD/CVD petitions are based on sales, rather than likely sales, the Department rarely has applied this standard. However, in one case where the use of the irrevocable offer standard was at issue, the court criticized the standard. *Kerr-McGee Chemical Corp.* v. *United States,* 765 F. Supp. 1576 (Ct. Int'l Trade 1991). Therefore, the Department has decided to eliminate the definition of ''likely sale'' in § 351.102(b). Should the meaning of this term become an issue in future cases, we will interpret the term in light of the statute and the legislative history.

Segment of the proceeding: One commenter suggested that paragraph (2) of the definition of ''segment of the proceeding'' include a reference to scope inquiries, because such inquiries are separately reviewable under section 516A of the Act. We have adopted this suggestion, and have revised paragraph (2) of the definition accordingly.

Another commenter did not object to the definition itself, but stated that the Department should treat each whole review as a separate proceeding, and should rely upon the record from each proceeding only in connection with that particular proceeding. Because this commenter did not propose any revisions to the definition, we have not made any changes to the definition based on this comment.

Suspension of liquidation: One commenter suggested that in order to eliminate confusion created by ''suspensions'' ordered by agencies other than the Department, such as the Customs Service, the Department should add to § 351.102 a definition of ''suspension of liquidation.'' The commenter included a proposed definition that, in general, defined ''suspension of liquidation'' as a suspension of liquidation specifically ordered by the Department under the authority of title VII or title X of the Tariff Act, or by the courts in litigation involving antidumping or countervailing duties. No commenter opposed this suggestion.

We have adopted the suggestion, and have added to § 351.102(b) a definition of ''suspension of liquidation'' along the lines suggested by the commenter. However, we have modified the language proposed by the commenter in order to make the definition more accurate with respect to suspensions of liquidation ordered by courts.

Section 351.104

Section 351.104 defines what constitutes the official and public records of an AD/CVD proceeding, and prohibits the removal of a record or any portion thereof unless ordered by the Secretary or required by law.

In connection with § 351.104(a)(1) and its list of examples of materials that will be included in the official record,

one commenter suggested that the Department add to this list ''changes to the electronic database that are made by Commerce (or by respondents)'' and ''computer programs.'' Although the material described by the commenter is, as a matter of practice, included in the official record, we have not adopted this suggestion. As the commenter acknowledged, paragraph (a)(1) merely contains examples of material that will be included in the record, and is not itself an exhaustive list. The commenter did not indicate that the absence of a reference in the former regulations to computer programs or changes to the electronic database gave rise to difficulties in actual cases. In the absence of such difficulties, we see no need to revise this regulation.

One commenter supported § 351.104(a)(2)(ii), which deals with the inclusion in the official record of documents returned to the submitter. The commenter requested that this provision remain unchanged. The Department has not revised this provision.

Section 351.105

Section 351.105 defines the four categories of information applicable to AD/CVD proceedings: public, business proprietary, privileged, and classified. After a review of proposed § 351.105 and the comments submitted pertaining to that section, we have left § 351.105 unchanged, but for some stylistic changes involving the substitution of ''that'' for ''which.''

One commenter suggested that the proposed definition of ''public information'' in § 351.105(b) is too narrow, because it excludes business information claimed by the submitter to be business proprietary unless the submitter has published the information or otherwise made it public. According to this commenter, the definition should include all non-classified information that a party learns through any lawful means outside the context of disclosure under an administrative protective order (''APO''). The commenter cited, for example, information acquired through market research that may not have been published or made generally available to the public at large. In addition, this commenter proposed that the definition of ''business proprietary information'' contained in § 351.105(c) expressly exclude all ''public information'' as the commenter would define ''public information.''

For the following reasons, the Department has not adopted this suggestion. The Department places a high priority on the safeguarding of business proprietary information. The definition of ''public information'' in § 351.105(b) is identical to the definition of that term in former 19 CFR §§ 353.4(a) and 355.4(a). Absent some evidence that the definition interferes with a party's ability to defend its interests in an AD/CVD proceeding, we are reluctant to transform what heretofore has been considered as business proprietary information into public information. However, the commenter did not offer any evidence that the Department's longstanding definition of ''public information'' has had this effect. Instead, the commenter merely asserted that it is not the Department's role ''to regulate lawfully acquired commercial information.''

The same commenter suggested that the Department should amend § 351.105(b) so as to add the following additional category of information normally considered as public: ''descriptions of reporting methodologies, such as allocation methods.'' We have not adopted this suggestion, because here, too, there is no indication that the absence of a reference in § 351.105(b) to this type of information has interfered with a party's ability to defend its interests in an AD/CVD proceeding.

We should note, however, that the former regulations did not, and these regulations will not, preclude a party from arguing in a given case that business proprietary treatment should not be accorded to particular information. In this regard, § 351.104(b)(3) continues to treat as ''public information'' information ''that the Secretary determines is not properly designated as business proprietary.'' However, we should emphasize here that where a party seeks to challenge the business proprietary status of certain information, it should take care to ensure that in submitting its challenge to the Secretary, it does not inadvertently disclose the information in dispute.

Finally, we received two comments that essentially suggested that the Department delete proposed § 351.105(c)(10), which provides for business proprietary treatment of the position of a domestic producer or workers regarding a petition. According to one commenter, § 351.105(c)(10) would effectively preclude industrial users and consumers from commenting on the issue of industry support for a petition, because users and consumers would not be eligible to obtain this information under APO. In addition, both commenters were skeptical regarding the ability of the Department to grant APO access to this information in a timely manner so that ''interested parties'' will be able to comment on the issue of industry support within the 20-day statutory deadline. A third commenter, however, opposed deleting paragraph (c)(10), although it agreed that the Department should expedite the APO process.

We have not adopted this suggestion for several reasons. As we stated in the AD Proposed Regulations, 61 FR at 7314, several commenters indicated that, due to concerns regarding commercial retaliation, business proprietary treatment may be necessary in order to encourage domestic producers and workers to present their candid views regarding a petition. The instant commenters did not challenge the validity of these concerns. As for APO disclosure, the Department is aware of the need for expedited disclosure with respect to information concerning industry support, and is confident that it will be able to process APO requests in a timely manner that allows interested parties to exercise their right to comment on the existence of industry support for a petition.

Section 351.106

Section 351.106 deals with the *de minimis* standard, and implements section 703(b)(4) and section 733(b)(3) of the Act. After reviewing proposed § 351.106 and the comments pertaining to that section, we have left § 351.106 unchanged.

One commenter objected to the fact that the *de minimis* standard for reviews remained at 0.5 percent, and suggested that this was inconsistent with the spirit, if not the letter, of the AD Agreement. We have left the *de minimis* standard for reviews at 0.5 percent, because, as stated in the AD Proposed Regulations, 61 FR at 7312, this result is required by the statute and is consistent with both the AD Agreement and the SCM Agreement.

As discussed above in connection with § 351.102(b), one commenter suggested a definition of ''country-wide subsidy rate'' that would have provided for the application of country-wide subsidy rates on a state-or province-specific basis. This same commenter, assuming the adoption of its prior suggestion, proposed that we add a paragraph to § 351.106 that would have applied the *de minimis* standard to country-wide rates on a state-or province-specific basis. The same commenter that opposed the prior suggestion also opposed the instant suggestion concerning the *de minimis* standard. Because we have not adopted the prior suggestion, we are not adopting the corresponding suggestion regarding the *de minimis* standard; *i.e.*,

we will not apply the *de minimis* standard on a subnational level.

We have left unchanged proposed § 351.106(c)(2), which applies the *de minimis* standard to the assessment of antidumping duties. Applying the *de minimis* standard to assessments on an importer-specific basis resolves the inconsistency between the treatment of cash deposits and assessments. If a *de minimis* amount of estimated duties is not worth collecting, then there is no reason to believe that a *de minimis* level of definitively determined duties is worth assessing and collecting either. Paragraph (c)(2) also avoids an inconsistency between the administration of the AD and CVD laws, something that the Department has expressed as one of its goals.

One commenter contended that the Department should not apply the *de minimis* standard to the assessment of antidumping duties, because such a policy does not result in any reduction in the Department's administrative burden, is contrary to the SAA, and is not allowed by the statute. This commenter cited the statutory requirement that antidumping duties be imposed ''in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise'' for the proposition that the Department never may decline to assess antidumping duties, regardless of how small such duties may be. With regard to the SAA, this commenter contended that the SAA expressly limits the application of the *de minimis* standard to the collection of deposits only by stating: ''Commerce will continue its present practice in reviews of waiving the collection of estimated cash deposits if the deposit rate is below 0.5 percent *ad valorem,* the existing regulatory standard for *de minimis.*''

As noted above, the Department will apply the *de minimis* standard to the assessment of antidumping duties on an importer-specific basis. Regarding the commenter's statutory arguments, we believe that the statute is silent on the issue. Although the statutory provisions cited provide that the Department must assess duties, as the courts have recognized, these provisions do not specify any particular assessment methodology. *See, e.g., FAG Kugelfischer Georg Schafer KGaA* v. *United States,* Slip Op. 95–158, 1995 Ct. Int'l. Trade LEXIS 209 (1996), *aff'd,* No. 96–1074 (Fed. Cir. May 20, 1996). Significantly, the statutory provisions cited by the commenter do not address how the Department should apply the *de minimis* standards in reviews. Instead, the only mention of such standards applying in reviews is contained in the SAA. However, the SAA statement cited by the commenter (that the Department will continue its practice of waiving cash deposits below 0.5 percent in reviews) does not address the assessment issue at all. Read in context, the statement refers to the fact that the *de minimis* standard in reviews will continue to be 0.5 percent, as opposed to the new 2 percent standard for AD investigations. This statement does not address the issue of whether the application of the 0.5 percent standard is limited to the collection of cash deposits of estimated duties. As the Department noted in the AD Proposed Regulations, 61 FR at 7312, the only statement addressing that issue in the SAA is the general statement that ''*de minimis* margins are regarded as zero margins.'' The commenter offers no policy arguments for adopting an approach that would limit the application of the *de minimis* standard to the deposit of estimated duties.

Another commenter agreed with the Department's proposal to apply the *de minimis* standard to the assessment of antidumping duties. In addition, this commenter proposed that the Department clarify that where an importer purchases from more than one exporter, the importer will receive producer-specific assessment rates, and that no duties will be assessed for individual *de minimis* rates.

In general, we agree with this comment, although we do not believe that revisions to the regulations are necessary. As discussed below, under § 351.212(b)(1), the Department, as it has in many previous cases, will calculate importer-specific assessment rates for each producer or exporter reviewed. Thus, if one importer purchases from several producers or exporters, the Department will assign that importer an assessment rate for each producer or exporter. The Department will apply the *de minimis* standard to these individual assessment rates.

Proposed paragraph (c)(2) provided that the Secretary will instruct the Customs Service to liquidate without regard to antidumping duties all entries of subject merchandise for which the Secretary calculates an assessment rate that is *de minimis* (*i.e.,* less than 0.5 percent *ad valorem*. Two commenters noted that the proposed regulations did not indicate which entries will be subject to paragraph (c)(2) if it is issued in final form. According to the commenters, paragraph (c)(2) should apply to all entries that are unliquidated as of the date of issuance of the final regulations.

The Department recognizes the need for guidance on this issue, but has not adopted the solution proposed. Instead, the Department will apply paragraph (c)(2) to all liquidations done pursuant to final results in reviews that the Department initiates after the effective date of these regulations. This approach is consistent with the applicability date set forth in § 351.701. In addition, this approach is necessary in order to avoid the extreme administrative burden the Department would face if it applied paragraph (c)(2) retroactively, in which case the Department would have to amend the numerous liquidation instructions that it has sent to the Customs Service over the years. Normally, the Customs Service liquidates entries soon after the Department issues liquidation instructions. However, the Department has no way to determine whether the Customs Service has liquidated all entries subject to liquidation instructions, because liquidation may have been delayed for reasons unrelated to the existence of an AD order. Therefore, to implement the commenters' proposal, the Department would have to amend all of its previously issued liquidation instructions.

One commenter expressed concern that the Department will apply paragraph (c)(2) based upon *de minimis* weighted-average dumping margins. With respect to this comment, we note that Department usually uses the term ''weighted-average dumping margin'' to refer to an exporter-or producer-specific margin that the Department uses for cash deposit purposes. As discussed above, the Department normally will apply paragraph (c)(2) on the basis of *importer-specific* assessment rates. However, although the Department has been calculating importer-specific assessment rates for some time, there are some cases that are held up in litigation. In these cases, we may not be able to calculate importer-specific assessment rates, because the record does not contain the necessary information. In such situations, where the Department issues assessment instructions at the conclusion of the litigation, we will apply the *de minimis* rule on the basis of the weighted-average dumping margin calculated for the exporter or producer.

Section 351.107

We have added a new § 351.107 that deals with (1) the establishment of deposit rates in situations involving a nonproducing exporter, (2) the selection of the appropriate deposit rate where entry documents do not identify the

producer of subject merchandise, and (3) the calculation of rates in AD proceedings involving nonmarket economy countries.

Nonproducing exporters: In the AD Proposed Regulations, 61 FR at 7311, the Department requested additional public comment on the issue of whether to promulgate special rules regarding the rates applicable to exporters that are not also producers, such as trading companies. We noted that one alternative would be to calculate a separate rate for each exporter/producer combination.

One commenter suggested that the Department should apply this approach in all instances. Other commenters argued that the Department should not codify an across-the-board rule, but instead should establish rates for exporter/producer combinations on a case-by-case basis. Another commented that it would be inappropriate to determine rates solely on the basis of exporter/producer combinations, and that normally the Department should base deposits of estimated duties on the rate calculated for the producer.

The Department agrees with the comments suggesting that it is appropriate in some instances to establish rates for exporter/producer combinations. Therefore, in paragraph (b)(1)(i), we have provided for the establishment of such ''combination rates.''

We believe that combination rates are appropriate, because, in an AD proceeding, the Department usually investigates or reviews sales by a nonproducing exporter only if that exporter's supplier sold the subject merchandise to the exporter without knowledge that the merchandise would be exported to the United States. While we agree with one commenter that in these instances the producer's pricing is not at issue, we are concerned about the proper application of any deposit rate determined on the basis of the exporter's pricing. Establishing a deposit rate for an exporter and, without regard to the identity of the supplier, applying that rate to all future exports by that exporter could lead to the application of that rate even if other suppliers sold to the exporter with knowledge of exportation to the United States. This would enable a producer with a relatively high deposit rate to avoid the application of its own rate by selling to the United States through an exporter with a low rate. Therefore, in order to ensure the proper application of deposit rates, the Department believes that it should establish, where appropriate, individual rates for nonproducing exporters in combination with the particular supplier or suppliers from whom the exporter purchased the subject merchandise.

On the other hand, the Department believes that there are situations where it may be inappropriate and/or impractical to establish combination rates. For example, it may not be necessary to establish combination rates when investigating or reviewing nonproducing exporters that are not trading companies, such as original equipment manufacturers. In addition, it may not be practicable to establish combination rates when there are a large number of producers, such as in certain agricultural cases. The Department will make such exceptions to combination rates on a case-by-case basis.

Another instance in which the Department assigns rates to exporters is in AD investigations and reviews of imports from nonmarket economies (NMEs). In those cases, if sales to the United States are made through an NME trading company, we assign a noncombination rate to the trading company regardless of whether the NME producer supplying the trading company has knowledge of the destination of the merchandise. One exception to this NME practice occurs where we find no dumping and exclude an exporter from an AD order. Where exclusions are involved, we publish a combination rate to address the same concerns described above regarding redirection of exports through an excluded trading company. Nothing in § 351.107(b)(1) is intended to change our policy for assigning rates in NME proceedings.

The Department also believes it is not appropriate to establish combination rates in an AD investigation or review of a producer; *i.e.,* where a producer sells to an exporter with knowledge of exportation to the United States. In these situations, the establishment of separate rates for a producer in combination with each of the exporters through which it sells to the United States could lead to manipulation by the producer. Furthermore, the Department recognizes that in many industries it is not uncommon for a producer to sell some amount of merchandise purchased from other producers. In such situations, the Department generally intends to establish a single rate for such a respondent based on its status as a producer, although unusual circumstances may warrant the application of a combination rate.

The Department also generally agrees with the comment that, in AD cases, if an exporter changes its supplier, the supplier's rate should be applied for deposit purposes rather than the ''all-others'' rate. Therefore, paragraph (b)(2) provides that for purposes of deposits, the Department will apply the producer's rate to entries if the Department has not established previously a deposit rate for the particular exporter/producer combination or the exporter alone. If the Department has not calculated an individual rate for the producer, the Department will apply the ''all-others'' rate. Again, nothing in this section is intended to change our practice regarding the rates assigned to NME exporters. In particular, an ''all-others'' rate may not be calculated in an NME proceeding or, if it is, it may not apply to the new shippers covered in this section.

In the case of CVD proceedings, subject merchandise may be subsidized by means of subsidies provided to both the producer and the exporter. In the Department's view, all subsidies conferred on the production of subject merchandise benefit that merchandise, even if it is exported to the United States by a reseller rather than the producer itself. Therefore, the Department calculates countervailable subsidy rates on the basis of any subsidies provided to the producer, as well as those provided to the exporter in any investigation or review involving exports by a nonproducing exporter. As a result, rates established for particular combinations of exporters and producers are the most accurate rates. Moreover, as in an AD proceeding, combination rates help to ensure the proper application of combination rates when other producers sell through the same exporter.

As in AD proceedings, in CVD proceedings there may be situations in which it is not appropriate or practicable to establish combination rates. In such situations, the Department will make exceptions to its combination rate approach on a case-by-case basis. In addition, for a new combination of exporter and producer, the Department believes that it should apply the supplier's rate, rather than the ''all-others'' rate, for deposit purposes. Therefore, under paragraph (b)(2), in a CVD proceeding the Department intends to apply the producer's rate to entries for deposit purposes if the Department has not established a rate for the particular exporter/producer combination or the exporter alone. If the producer's rate is applicable, but the Department has not established a rate for that producer, the Department will apply the ''all-others'' rate.

In this regard, however, in a CVD proceeding, the Department intends to establish a deposit rate for each

producer that it investigates or reviews, even if during the period of investigation or review the producer happened to be selling to the United States through a reseller. The purpose of this approach is to ensure that if the producer subsequently begins to export to the United States directly, the Department will be able to apply a deposit rate based on the producer's own level of subsidization, as opposed to the ''all-others'' rate.

The proper application of rates to entries for deposit purposes generally requires that the producer of the merchandise be identified. Accordingly, under paragraph (c), if an entry does not identify the producer (or the exporter's supplier if the exporter is not the producer), the Department will instruct the Customs Service to use the higher of: (1) the highest of any combination rate involving that exporter, (2) the highest rate for any producer other than a producer for which the Secretary has established a combination rate involving the exporter in question, or (3) the ''all-others'' rate. The objective of paragraph (c) is to prevent an exporter from obtaining a lower deposit rate by means of withholding the identity of its supplier from the Customs Service.

As an example of how paragraph (c) would operate, assume that in an AD proceeding the existing rates are: Exporter A/Producer 1—5 percent; Exporter B/Producer 2—20 percent; Producer 1—18 percent; Producer 2—15 percent; and All Others—10 percent. If an entry did not identify the producer of subject merchandise exported by Exporter A, the Department would instruct the Customs Service to apply Producer 2's deposit rate of 15 percent. 15 percent would be the appropriate rate if Producer 2 were the supplier, and it also is the highest of the possible rates applicable had the producer been identified (those rates being 5, 10, and 15 percent in this example). Producer 1's rate of 18 percent would not be appropriate, because the Department already would have established that, when Producer 1 exports through Exporter A, the appropriate rate is 5 percent.

Nonmarket economy cases: The second sentence of the definition of ''rates'' in proposed § 351.102(b) provided the Department with the authority to apply a single AD margin to all producers and exporters from a nonmarket economy (''NME'') country. We have moved that sentence to paragraph (d) of § 351.107.

As explained in the AD Proposed Regulations, 61 FR at 7311, the Department elected not to codify its current presumption that a single rate will be applied in NME cases. We received several comments on this issue.

Four commenters suggested that the Department codify its current presumption of a single rate. Three of these commenters viewed the presumption as correct, because the fact that a country is an NME carries with it an assumption that the government controls all exporters. Moreover, these commenters asserted that NME governments, due to their control, can funnel sales of the subject merchandise through, or transfer production of the subject merchandise to, the entity that receives the most favorable dumping margin. These commenters further urged the Department to extend the presumption of control beyond the central NME government to provincial and municipal governments, as well. One commenter that urged the Department to codify the presumption of a single rate also argued that the presumption is consistent with the statute, because all NME companies are under common ownership and, hence, comprise a single exporter. Consequently, in this commenter's view, the Department should calculate a single dumping margin just as it would calculate a single dumping margin in situations where the Department ''collapses'' market economy producers under common ownership. This same commenter urged the Department to make clear that the NME-wide rate calculated as a consequence of the presumption is different from the ''all-others'' rate described in section 735(c)(1)(B)(i)(II) of the Act.

One commenter opposed the presumption. In discussing the People's Republic of China (''PRC''), this commenter pointed to the reforms that have been instituted in the PRC economy, claiming that the underlying premise of the presumption—that the central government controls exporters—is erroneous. According to the commenter, the Department's experience in administering the presumption confirms this conclusion, because in virtually every case since the Department instituted the presumption, individual PRC producers have been able to demonstrate that they are entitled to their own rates. Consequently, this commenter argued, the Department should abandon the presumption of a single NME-wide rate, and non-investigated exporters in an NME should receive an all-others rate. Another commenter asked that even if the Department does not codify the presumption, the Department should clarify that it will continue to calculate separate rates in appropriate cases.

Several commenters went on to make specific suggestions for amending the so-called ''separate rates test''; *i.e.*, the conditions that must be met for rebutting the presumption. One commenter urged the Department to incorporate into the separate rates test the affiliated party criteria from section 771(33) of the Act and §§ 351.102(b) and 351.401(f) of the regulations. In this commenter's view, the affiliated party criteria provide appropriate guidance on when parties under common ownership should be subject to a single AD rate. A second commenter recommended amending the test to include an assessment of possible central government influence in the future. Also, in this commenter's view, the NME exporter seeking a separate rate should be required to present affirmative evidence that the government is not involved in the exporter's pricing decision. In other words, this commenter claimed, an absence of evidence of control should not be sufficient to rebut the presumption. Finally, this commenter suggested that, because of the potential for circumvention, the Department should calculate individual rates only for manufacturers, and not for export trading companies.

Another commenter pointed to the unfairness of having to prove the negative; *i.e.*, the absence of control. This commenter also suggested that the Department should focus on events during the period of investigation and not speculate about events that might occur in the future. Two commenters urged the Department to provide an opportunity for firms to receive separate rates in those situations where the Department chooses not to investigate all exporters. In their view, instead of using the punitive NME-wide rate, the Department should assign these non-investigated exporters an average dumping margin calculated on the basis of investigated firms receiving separate rates.

As in the proposed regulations, we have refrained from codifying the presumption of a single rate in NME AD cases. Nor have we adopted a modified version of the presumption. We appreciate the many thoughtful comments that we received on this topic. However, because of the changing conditions in those NME countries most frequently subject to AD proceedings, we do not believe it is appropriate to promulgate the presumption or the separate rates test in these regulations. Instead, we intend to continue developing our policy in this area, and the comments that were submitted will help us in that process. We would like

to clarify, however, that we do intend to grant separate rates in appropriate circumstances, and that our decision not to codify the presumption or the separate rates test should not be seen, as one commenter suggested, as a decision not to grant separate rates. Also, as discussed above in connection with § 351.107(b)(1), we intend to continue calculating AD rates for NME export trading companies, and not the manufacturers supplying the trading companies.

Subpart B—Antidumping Duty and Countervailing Duty Procedures

Subpart B deals with AD/CVD procedures, and is based on subpart B of part 353 and part 355 of the Department's former regulations.

Section 351.202

Section 351.202 deals with the contents of, and filing requirements for, AD/CVD petitions. We received several comments regarding proposed § 351.202.

Contents of petitions: Proposed § 351.202(b), consistent with the statute, provided that a petition must contain specified information ''to the extent reasonably available to the petitioner.'' One commenter suggested that the Department revise § 351.202(b) so as to make clear that the ''reasonably available'' standard is flexible, and that, in particular, the Department expressly acknowledge in the regulation that cost is a relevant consideration in determining what is ''reasonably available.''

We have not adopted this suggestion. While we do not disagree with the proposition that the ''reasonably available'' standard is flexible, we believe that the word ''reasonably'' makes this flexibility manifest. In addition, while we also do not disagree with the notion that cost to a petitioner is a factor in determining what is reasonably available, it is only one of many possible factors. To identify in the regulation one factor to the exclusion of others might result in undue emphasis being placed on the factor of cost. The ''reasonably available'' standard has been in the statute for many years, and we believe that it provides sufficient guidance to petitioners as to the efforts they must undertake in providing information to the Department.

The same commenter objected to the requirement in proposed § 351.202(b)(3) that a petitioner provide production data for each domestic producer identified by the petitioner. This commenter argued that Article 5.2 of the AD Agreement and Article 11.2 of the SCM Agreement merely require that a petitioner provide aggregate production data for all known domestic producers. A second commenter supported proposed § 351.202(b)(3) as drafted, arguing that the SAA at 861 clearly requires producer-specific production data.

We do not agree with the first commenter's interpretation of articles 5.2 and 11.2. However, even if that interpretation were correct, it is the U.S. statute that controls. The SAA clearly requires that a petitioner provide producer-specific production data, subject, of course, to the proviso that such information is reasonably available to the petitioner. This information is necessary in order to enable the Department to determine whether an adequate portion of domestic producers support a petition, an inquiry which is based on production volumes of domestic producers. Therefore, we have left § 351.202(b)(3) unchanged.

Two commenters suggested that the Department coordinate with the Commission with respect to regulations dealing with the contents of petitions, and that the Department incorporate into § 351.202(b) the specific requirements contained in the Commission's corresponding regulation. In addition, these commenters suggested that, in light of the Commission's proposed § 207.11(b)(2)(iv), the Department should revise its own proposed § 351.202(b)(8) so as to require volume and value information regarding the subject merchandise for the most recent three-year period, as opposed to a two-year period.

We have adopted these suggestions in part. The Commission completed its rulemaking activity and issued final rules on July 22, 1996. *See* 61 FR 3818. These final rules contain a revised 19 CFR § 207.11 that deals with the contents of AD/CVD petitions. We have incorporated elements of the Commission's regulations into § 351.202(b) where the information identified in § 207.11 is of the same general type as that sought by the Department. With respect to the identity of importers, we have revised proposed § 351.202(b)(9) so as to require telephone numbers for each importer identified, to the extent such information is reasonably available to the petitioner. On the other hand, we have not incorporated elements of § 207.11 where the information identified in that regulation is not of the same general type as that sought by the Department. For example, we have not included the requirement of § 207.11(b)(2)(iv) that a petitioner identify each product for which the petitioner requests the Commission to seek pricing information in its questionnaires. Finally, we have added a sentence to paragraph (a) that advises petitioners to refer to the Commission's regulations concerning petition contents.

With respect to the suggestion that we require three, rather than two, years of volume and value information, as required by proposed § 207.11(b)(2)(iv), we note that the Commission deleted this provision in its final rule. Therefore, we are not adopting this suggestion for purposes of § 351.202(b).

Amendments to petitions: One commenter objected to the substitution of ''may'' for ''will'' in proposed § 351.202(e) (''The Secretary may allow timely amendment of the petition''). The commenter argued that the substitution is improper, because it confers on the Department more discretion than is allowed by section 732(b)(1) of the Act. We have retained the language of the proposed rule. In our view, the statute, by permitting the Secretary to establish on a case-by-case basis the timing and conditions for any amendments to a petition, confers considerable discretion. We continue to believe that the word ''may'' more accurately reflects this discretionary authority than does the word ''will.''

Pre-initiation communications: Commenting on proposed § 351.202(i), one commenter suggested that because the statutory limitation on pre-initiation communications is limited to comments that are *unsolicited* by the Department, the Department should revise § 351.202(i) so as to clarify that the Department retains the discretion to ''solicit'' comments on its own initiative. According to this commenter, the Department's interpretation of the SAA in the AD Proposed Regulations is incorrect. *See* 61 FR at 7313. The commenter argued that while the SAA limits the pre-initiation *right of parties* to comment to the issue of industry support, Congress deliberately used the word ''unsolicited'' in sections 702(b)(4)(B) and 732(b)(3)(B) of the Act in order to provide the Department with the discretion to solicit comments on any issue where necessary. Two other commenters submitted similar comments.

Three commenters, however, opposed the suggestion described in the preceding paragraph. In addition, these commenters proposed that the Department revise the proposed regulations so as to expressly state that the Department will *not* solicit information from sources other than domestic interested parties.

We have not adopted either of these competing suggestions. As noted above,

in drafting these regulations, the Department has sought to avoid repeating the statute to the extent possible. Consistent with this objective, in proposed § 351.202(i), the Department sought to do no more than clarify that the filing of a notice of appearance would not constitute a ''communication'' within the meaning of the statute. The Department referred in paragraph (i) to sections 702(b)(4)(B) and 732(b)(3)(B) merely to provide a context for this clarification. As for the Department's discussion of the SAA mentioned by the first commenter, this discussion was in response to suggestions that the Department should solicit comments regarding a petition, an activity clearly not contemplated by the statute or the SAA.

Each group of commenters is asking the Department to place a different gloss on the statute. At this time, we do not believe that either gloss is necessary or appropriate. However, in view of the fact that both groups of commenters apparently misinterpreted the Department's intent in drafting proposed § 351.202(i), we have revised that paragraph to clarify that it deals only with the treatment of notices of appearance.

We should note that the Department has no intention of soliciting comments concerning the adequacy and accuracy of a petition. In this regard, the Department intends to follow the general rule articulated by the Federal Circuit in *United States* v. *Roses, Inc.*, 706 F.2d 1563 (1983), that, in order to determine whether a petition is adequate under the law, the Department should look only within the four corners of the petition. This general principle is now incorporated in sections 702(b)(4)(B) and 732(b)(3)(B) of the Act.

The three exceptions to this rule are those specified in the Act and the SAA: for comments concerning industry support for the petition; for inquiries concerning the status of the Department's consideration of the petition; and for government-to-government consultations in CVD investigations. With respect to industry support, the statutory exception is necessary in part because the issue of industry support cannot be revisited after initiation. The SAA at 194 makes clear that the Department is to construe this exception narrowly. The Department may accept and answer inquiries concerning the status of the Department's consideration of a petition, because such inquiries do not constitute comments on the accuracy and adequacy of the petition itself. In the case of CVD investigations, section 702(b)(4)(B) expressly directs the Department to provide the government of the exporting country with an opportunity for consultations on the petition. This requirement implements Section 13.1 of the SCM Agreement. The Department will determine what weight to give to any information received during the course of such consultations on a case-by-case basis.

Other comments: One commenter argued that it was improper for a Department official to counsel a petitioner in preparing a petition and then, after the petition is formally filed, participate in an analysis of the adequacy of the petition. According to this commenter, such activity gives rise to an appearance of impropriety and violates the Department's own rules on ethical conduct. The commenter proposed a revision to § 351.202 which would have (1) required the Department to disclose publicly the names of all Department personnel who assisted in the preparation of a petition; and (2) precluded any such official from participating in the relevant AD/CVD proceeding once the petition was filed.

We have not adopted this comment, and we disagree strongly with its underlying premise. We do not believe that Department personnel lose their objectivity or impartiality regarding the merits of a petition when they have provided advice to a petitioner in the preparation of a petition. In addition, we do not believe that there is an appearance of impropriety or a violation of the Department's rules of ethical conduct when such personnel participate in an AD/CVD proceeding triggered by the filing of a petition with respect to which they may have offered pre-filing advice.

The same commenter also suggested that the Department revise proposed § 351.202(i)(2), which provides that, in the case of a CVD petition, the Department will invite the government of the exporting country involved for consultations under Article 13.1 of the SCM Agreement. Consistent with other comments made by this commenter based on its analysis of the statutory term ''country,'' the commenter suggested that the Department modify paragraph (i)(2) to provide that the Department also will invite for consultations the government of any political subdivision of a named country.

We have not adopted this suggestion. Although there certainly are situations in which the statute treats political subdivisions as ''countries,'' this is not one of those situations. Section 702(b)(4)(A)(ii) of the Act refers to consultations with a ''Subsidies Agreement country.'' In our view, a state or provincial government does not meet the definition of ''Subsidies Agreement country'' in section 702(b) of the Act.

Moreover, under Article 13.1, the obligation of the United States is to consult with ''Members'' of the WTO, a term that excludes subnational governments, such as states and provinces. While the central government of a WTO Member may choose to be accompanied at consultations by representatives of subnational levels of government, the Department will not embroil itself in the internal politics of another country by inviting such representatives to participate in Article 13.1 consultations.

Finally, one commenter proposed that the following sentence be added to proposed § 351.202(c): ''Other filing requirements are set forth in § 351.303.'' The purpose of this addition would be to put petitioners on notice as to the existence and location of distinct filing requirements. The Department agrees with this suggestion, and we have revised paragraph (c) accordingly.

Other changes: In light of the recent reorganization of Import Administration, we have revised § 351.202(h)(2) to provide that persons seeking information concerning petitions should contact Import Administration's Director for Policy and Analysis.

Section 351.203

Section 351.203 deals with determinations regarding the sufficiency of an AD or CVD petition, and implements sections 702(c) and 732(c) of the Act. We received several comments regarding § 351.203.

Adequacy of allegations: Three commenters made suggestions relating to proposed § 351.203(b)(1), which provides that ''the Secretary, on the basis of sources readily available to the Secretary, will examine the accuracy and adequacy of the evidence provided in the petition and determine whether to initiate an investigation.'' While these commenters agreed that proposed § 351.203(b)(1) was consistent with the statute, they were concerned that the Department's commentary in the AD Proposed Regulations and/or the Department's practice was not. In the commentary, we described our prior practice in reviewing a petition and stated that this practice was consistent with the type of review contemplated by the new statute. In particular, we noted that it was the Department's practice to seek additional information when a particular allegation lacked sufficient support or appeared aberrational, even though the allegation was supported by some documentation. 61 FR at 7313.

One of the three commenters, however, stated that the practice described amounted to the weighing of evidence, and that this practice is inconsistent with the legislative history of the Trade Agreements Act of 1979, a legislative history that the SAA endorsed. This commenter proposed that the 1979 legislative history be incorporated into § 351.203(b)(1).

The second of the three commenters also complained that the Department's commentary suggested the weighing of evidence, and disagreed that the Department's proposal was consistent with past practice. Asserting that the statute and legislative history do not envision an adversarial pre-initiation proceeding, this commenter proposed that the Department clarify that (1) it will not allow respondents to bring public information to the Department's attention for purposes of assessing the sufficiency of a petition; and (2) that the new regulations are not intended to increase the burden on petitioners for initiating investigations.

The third of the three commenters agreed with proposed § 351.203(b)(1) and the accompanying commentary, but alleged that over time, the Department has been subjecting petitioners to substantially increased demands for additional factual support. Therefore, while not suggesting any changes to § 351.203(b)(1) or the commentary, this commenter suggested that the Department review its practice to ensure that that practice is consistent with the regulation and the commentary.

We agree that the pre-initiation process should not become an adversarial process between the petitioner and potential respondents. On the other hand, however, the Department has a statutory obligation to examine the accuracy and adequacy of the evidence provided in the petition, an exercise which necessarily entails making some judgments regarding the quantity and quality of the information contained in a petition. Whether or not such an examination constitutes the ''weighing of evidence'' is, in our view, largely a question of semantics. However, we believe that the practice described in the commentary accompanying proposed § 351.203(b)(1) does not result in an adversarial process and that this practice is consistent with the legislative history of the 1979 Act. That legislative history states, *inter alia*, that a petition must be ''*reasonably* supported by the facts alleged.'' H.R. Rep. No. 317, 96th Cong., 1st Sess. 51 (1979) (emphasis added). In our view, this means that the mere provision of *any* documentation is not necessarily sufficient, and the Department, where appropriate, should be able to seek additional information where support for a particular allegation is weak or information appears aberrational.

Therefore, we have not changed proposed § 351.203(b)(1) in light of these comments. However, we wish to reiterate what we said in the commentary accompanying proposed § 351.203(b)(1); namely, that we do ''not believe that the new statutory standard constitutes a significant departure from past Department practice.'' 61 FR at 7313.

Sources readily available: Commenting on proposed § 351.203(b)(1), one commenter suggested that the regulations make clear that ''sources readily available'' to the Department include any information that is relevant to its evaluation of a petition and that is submitted by an interested person further to the Department's request. We have not adopted this suggestion, because we prefer to develop our interpretation of this new statutory term on a case-by-case basis.

The same commenter urged the Department to refrain from allowing a petitioner to comment on any pre-initiation submissions that a respondent interested party makes in response to a Department request. Presumably, this commenter was referring to the following statement in the preamble to the AD Proposed Regulations: ''The Department will give the petitioner an opportunity to comment on any such information acquired by the Department.'' 61 FR at 7313. We have not adopted this suggestion either, because we continue to believe that it is appropriate to provide a petitioner with an opportunity to comment on information collected during the pre-initiation process.

Also in connection with proposed § 351.203(b)(1), another commenter proposed that after the phrase ''sources readily available to the Secretary,'' the Department should add the following clause: ''including information provided to the Department by foreign governments during the consultations required under 19 U.S.C. § 1671a(b)(4)(A)(ii). * * *'' This commenter was referring to the pre-initiation consultations provided for in Article 13.1 of the SCM Agreement and referred to in section 702(b)(4)(A)(ii) of the Act. According to the commenter, the ''right to consult is meaningless if the Department were not to consider information provided in the consultations in making its decision whether to initiate an investigation and, if so, on what programs.'' Another commenter, however, opposed this suggestion, arguing that neither the statute nor the Department's practice concerning CVD petitions allows the Department to transform Article 13.1 consultations into pre-initiation litigation.

While we have not adopted the suggestion, we do not disagree with the thrust of the first commenter's position. Under Article 13.1 of the SCM Agreement, foreign governments have a right to consultations prior to the initiation of an investigation. The purpose of these consultations is to clarify the matters referred to in a petition. The right to consultations is specifically provided for in § 702(b)(4)(A)(ii) of the Act. We note that under § 702(b)(4)(B), the Department is prohibited from accepting any unsolicited oral or written communication from potential respondents, except as provided for under the aforementioned provision of the Act requiring that foreign governments be given an opportunity for consultations. Therefore, we believe that the Department may consider relevant information provided by a foreign government prior to the initiation of an investigation. The use of such information and the weight given to it, either prior to the initiation decision or during an investigation, will be determined by the Department on a case-by-case basis.

Industry support: Commenting on proposed § 351.203(e)(1), one commenter suggested that when measuring domestic production as an index of industry support for a petition, the Department (1) never should measure production over a period of less than twelve months; and (2) should retain the flexibility to examine a period greater than twelve months in appropriate circumstances. A second commenter endorsed proposed § 351.203(e)(1), arguing that the use of the word ''normally'' in that provision provided the Department with the necessary flexibility to use periods greater or lesser than twelve months when appropriate.

We have left § 351.203(e)(1) unchanged. Because the statutory standard for determining industry support is new, we are reluctant to adopt a regulation that would preclude, in all cases, the use of a period shorter than twelve months. As observed by the second commenter, there may well be industries for which use of a shorter period is appropriate. While we expect that in most cases the Department will use a twelve-month period, use of the word ''normally'' provides us with sufficient flexibility to use longer or shorter periods when appropriate.

One commenter suggested that the Department revise proposed § 351.203(e)(3) to provide that: (1) the Department may base the position of workers on a statistically valid sampling of the views of individual workers; and (2) the views of workers and management be recorded in writing and certified in accordance with § 351.303(g). A second commenter objected to these suggestions, arguing that (1) the first commenter's notion of sampling effectively would rewrite the statute; and (2) a separate certification requirement is unnecessary, because § 351.303(g) already requires certification of submissions containing factual information.

We have not adopted the first commenter's suggestions. With respect to sampling of individual workers, this suggestion would require a level of regulatory detail greater than what we consider to be appropriate at this time. The statute does provide for the use of statistically valid sampling methods to determine industry support, but only when there are a large number of producers in the relevant industry. In the AD Proposed Regulations, we deliberately refrained from elaborating on what is, for the Department, a new and untried method for determining industry support. For purposes of these final regulations, we continue to believe that we should develop this method on a case-by-case basis. With respect to the first commenter's suggestion regarding filing requirements for industry positions, we agree with the second commenter that the changes proposed are redundant and unnecessary.

Another commenter sought clarification with respect to proposed § 351.203(e)(3), a provision that states that the Secretary will accord equal weight to the positions of management and workers regarding a petition. The commenter stated that the 25 percent threshold for determining industry support should not be subject to § 351.203(e)(3), apparently based on the commenter's belief that this provision somehow undermines the 25 percent threshold. A second commenter offered an interpretation of the first commenter's comment, and suggested, based on its interpretation, that the commenter's ''complaint should be dismissed.''

The first commenter did not seek a change to the regulation, and we do not believe that a change is necessary. However, the Department wishes to confirm that in situations where the views of the management and workers of a firm negate each other, the production of the firm in question will be included as part of the total production of the domestic like product for purposes of applying the 25 percent threshold in sections 702(c)(4)(A)(i) and 732(c)(4)(A)(i) of the Act.

The same commenter also sought clarification that all interested parties would be given access to non-confidential information related to the positions of domestic producers and workers. With respect to this comment, the Department can confirm that public information (*e.g.*, non-business proprietary information) concerning the positions of producers and workers will be included in the public record of an AD/CVD proceeding. Under § 351.104(b), the public record will be available to the public, including interested parties, for inspection and copying in Import Administration's Central Records Unit.

Another commenter made some suggestions regarding proposed § 351.203(e)(5), which deals with determinations of industry support in cases where the petitioner alleges the existence of a regional industry. This commenter proposed that in regional industry cases, the Department should (1) determine the position of all members of the national industry regarding the petition, initiate based upon support within the alleged region, but terminate the investigation for lack of interest if there is insufficient support from producers within the region or nation, as determined by the Commission in its preliminary determination; and (2) consult extensively with the Commission prior to initiation regarding the adequacy of the regional industry allegation and, if the Commission's advice is that the alleged region is questionable, advise the petitioner to withdraw the petition and refile it as a national case or with a more properly defined region. According to the commenter, such an approach is necessary (1) to address the ''anomaly'' in the statute that arises when the Commission rejects a regional industry alleged in a petition; and (2) to ensure that allegations of regional industry in a petition are not used to circumvent the industry support requirements.

A second commenter opposed these suggestions. First, this commenter noted, the statute addresses this very situation, because the statute expressly states that (1) the Department shall determine industry support based on production in the region alleged in the petition, and (2) the Department shall not reconsider a determination of industry support once it is made. Second, there is no ''anomaly'' limited to regional industry cases, because in any case, including a case in which the petitioner alleges a national industry, the Commission may define the relevant product in such a way that the scope of the relevant industry analyzed for injury purposes differs from the scope of the industry analyzed for purposes of determining industry support. Third, there is no basis for the Department to revisit its industry support determination based on the Commission's preliminary determination, because in its final determination the Commission may change the definition of the industry at issue yet again, or even revert back to the definition originally alleged in the petition. Finally, the second commenter suggested that the first commenter's concerns about circumvention were overblown, stating that the first commenter did not understand the difficulties involved in bringing a regional industry case.

In light of these comments, and because the SAA is clear on this point, we have deleted paragraph (e)(5).

Other comments: One commenter submitted a comment concerning proposed § 351.203(c)(2), which requires that, after initiation of an investigation, the Secretary provide a public version of the petition to all known exporters who sell for export to the United States. Section 351.203(c)(2) makes an exception for situations where the number of exporters is ''particularly large.'' The commenter suggested that the Department should invoke the exception only in situations where the number of exporters is ''exceptionally large.'' We have not adopted this suggestion, because the phrase ''particularly large'' tracks the language of the SAA and the relevant provisions of the AD Agreement and the SCM Agreement.

The same commenter also suggested that § 351.203(c)(2) provide that, upon request, any exporter, producer, or importer of subject merchandise be provided, free of charge, with a public version of the petition. We have not adopted this suggestion, because § 351.104(b) adequately deals with matters relating to access to the public record, including the public version of a petition.

Section 351.204

Section 351.204 deals with issues relating to the time period and persons to be examined in an investigation, voluntary respondents, and exclusions. In the section title, we have substituted ''Time periods'' for ''Transactions'' to reflect more accurately the contents of § 351.204.

Period of investigation in AD investigations: In proposed

§ 351.204(b)(1), the Department revised the period of investigation (''POI'') for antidumping investigations. In the past, the Department normally used a six-month POI that ended with the month in which the petition was filed. 19 CFR § 353.42(b)(1) (1995). In § 351.204(b)(1), the Department expanded the POI from six months to four fiscal quarters (twelve months), with the exception of nonmarket economy cases. In addition, the Department provided that the POI would consist of the four most recently completed fiscal quarters as of the month *preceding*, instead of including, the month in which the petition was filed or in which the Secretary self-initiated an investigation. Finally, the Department preserved its discretion to use a different POI in appropriate circumstances.

We received several comments concerning this change in the standard AD POI. One commenter, while approving the expansion of the POI to twelve months, objected to reliance upon fiscal quarters completed as of the month preceding the month in which a petition was filed. According to this commenter, domestic industries are badly buffeted by dumped imports at least up to the date of the filing of a petition. If the Department relied on completed fiscal quarters, however, it would ignore at least two months worth of dumping activity, activity that was automatically covered by the Department's former POI. In addition, this commenter asserted, the use of months, rather than fiscal quarters, ''has worked well generally in the past and has not demonstrably been an impediment to verification.'' Therefore, this commenter proposed that the standard AD POI be the twelve-month period ending in the month of filing or self-initiation, and that respondents should have the burden of proving that a different POI is appropriate.

A second commenter, on the other hand, generally supported the use of fiscal quarters, but believed that the Department should rely on completed quarters as of the end of the month of filing or self-initiation. In addition, this commenter objected to the expansion of the POI from six months to twelve months, arguing that the Department had not explained the reasons for this expansion and that it appeared to be inconsistent with the Department's stated goal of easing reporting requirements and permitting more efficient verification.

With respect to the expansion of the POI to twelve months, we believe that this expansion is required by Article 2.2.1, note 4 of the AD Agreement. Note 4 states: ''The extended period of time should normally be one year but shall in no case be less than six months.'' Although this statement is made in the context of analyzing sales below the cost of production, implicit in the statement is the assumption that the POI in an AD investigation normally will be one year. Therefore, we have not adopted the suggestion of the second commenter that we revert to a normal POI of six months.

With respect to the use of completed fiscal quarters rather than months, while we do not dispute the first commenter's assertion that domestic industries may be buffeted by dumped imports in the months immediately preceding the filing of a petition, these imports would not be subject to antidumping duties, regardless of whether they were covered by the POI. Moreover, the timing of a petition filing often can address such concerns. In addition, we continue to believe that defining the POI in terms of completed fiscal quarters, rather than calendar months running from the date of filing, will generate considerable savings in time and money for both the Department and the parties involved in AD proceedings. Our experience is that a considerable amount of time is spent in reconciling AD submissions (that until now have been based on calendar months) to a firm's accounting records (that typically are based on fiscal quarters). However, we should emphasize that § 204(b)(1) refers to the POI that the Secretary ''normally'' will use. Therefore, the Department retains the discretion to depart from its standard POI where warranted by the circumstances of a case.

Finally, we are not adopting the suggestion that we base our POI on completed fiscal quarters as of the end of the month of filing or self-initiation. In general, we believe that it is more appropriate to investigate only sales made prior to the filing of a petition to alleviate concerns about the effect of the petition on pricing practices.

Period of investigation in CVD investigations: One commenter suggested that we retain the modifier ''normally'' in the second sentence of proposed § 351.204(b)(2). According to this commenter, the Department should retain the flexibility to adopt as the POI the fiscal year of the foreign government or the main responding company.

We have retained the word ''normally'' in the second sentence. However, we have changed the second sentence of § 351.204(b)(2). Originally, this sentence would have required the Secretary to set the POI as the most recently completed calendar year, if the fiscal years of the *government* and the exporters or producers differed. This language did not correctly reflect our past practice, a practice that we do not wish to change. The new language simply deletes the reference to the government's fiscal year. Thus, the Department normally will set the POI according to the fiscal year of the individual exporters or producers. Only if the fiscal years of the exporters or producers differ, will the POI be the most recently completed calendar year. In the case of investigations conducted on an aggregate basis, the Department's normal POI will continue to be based on the most recently completed fiscal year for the government in question.

Acceptance of voluntary respondents: Two commenters submitted virtually identical comments objecting to the requirement in proposed § 351.204(d)(2) that a voluntary respondent submit a questionnaire response before the Department decides whether to examine the voluntary respondent individually. Citing the Department's AD investigation on *Pasta from Italy*, these commenters claimed that an exporter will not be willing to expend the time and financial resources required to prepare a questionnaire response without some prior assurance by the Department that it will conduct an individual examination of the firm. Therefore, they concluded, this requirement discourages voluntary responses and, thus, violates Article 6.10.2 of the AD Agreement.

To remedy this alleged violation of international law, the commenters proposed that the Department require only that any exporter not selected as a mandatory respondent submit a letter if it is interested in submitting a voluntary response. Based on these letters, the Department would decide which, if any, voluntary respondents it would examine. Only after being selected would voluntary respondents be required to submit questionnaire responses.

We have not adopted this suggestion, because the approach that the commenters objected to is made necessary by the requirements of sections 777A(c)(2)(B) and 782(a) of the Act. Where the Department does not examine all known producers and exporters, it often selects for examination all producers or exporters ''that can be reasonably examined'' in accordance with the requirements of section 777A(c)(2)(B) of the Act. The selected producers and exporters in this group normally represent the largest number of respondents the Department believes it can examine at that time. The Department normally will decide the number of selected respondents very early in the proceeding; *i.e.*, before it

issues questionnaires to the selected respondents. Therefore, it frequently is the case that the Department cannot make a determination as to whether additional voluntary respondents can be reasonably examined until after the deadline for questionnaire responses has passed (*e.g.*, one or more selected respondents have not responded). If the additional voluntary respondents did not begin to prepare their questionnaire responses until after the Department received questionnaire responses from the selected respondents, the Department would not be able to complete the investigation or review within the statutory deadlines. Therefore, additional voluntary respondents must submit the complete questionnaire response by the deadlines in accordance with section 782(a) of the Act. In addition, we do not believe that section 782(a) ''discourages'' voluntary responses within the meaning of Article 6.10.2. Instead, it simply recognizes the constraints on the Department's resources that must be taken into account in determining whether we can accept a voluntary response. In order to help potential voluntary respondents decide, prior to acceptance as a respondent, whether to submit a questionnaire response, we intend to accept voluntary responses based on the order in which written requests to be accepted as voluntary respondents are submitted. In those instances where we can make earlier determinations to accept voluntary responses, we will do so.

One commenter submitted a comment suggesting that § 351.204 be amended to incorporate requests by voluntary respondents to be included in the pool of companies investigated in cases conducted on an ''aggregate'' basis. We have not adopted this suggestion, because under the statute, only CVD investigations are to be conducted on an ''aggregate basis,'' and it is clear from the comment that the commenter was addressing AD investigations.

Voluntary respondents and the all-others rate: Proposed § 351.204(d)(3) provided that in calculating an all-others rate, the Secretary will exclude weighted-average dumping margins or countervailable subsidy rates calculated for voluntary respondents. In the preamble to the AD Proposed Regulations, the Department explained that the purpose of this provision was to prevent manipulation and to maintain the integrity of the all-others rate. One commenter argued that this provision is inconsistent with the statute and should be deleted.

We do not agree with this comment, and have retained the rule as drafted. The statute does not define the term ''investigated'' and does not directly address the question of whether voluntary respondents should be considered to be part of the Department's investigation. Because the statute does not resolve the issue, we look to the AD Agreement for guidance as to the best interpretation of the Act, in keeping with the requirement that, to the extent possible, a statute be interpreted in a manner consistent with the international obligations of the United States.

Article 9.4 of the AD Agreement provides that the duties applied to ''exporters or producers not included in the examination'' (*i.e.*, ''all-others'') may not exceed the weighted-average margin for the ''selected exporters or producers.'' This implies that those exporters or producers not ''selected'' are not considered to be included in the ''examination.'' Therefore, the better interpretation of section 735(c)(5) is that producers who are not ''selected'' by the Department (*i.e.*, voluntary respondents) are not considered to have been ''examined'' (*i.e.*, investigated), so that their margins should not contribute to the ''all-others'' rate. In effect, the Department conducts parallel proceedings for voluntary respondents.

As we noted in the preamble to the AD Proposed Regulations, exclusion of voluntary respondents from the determination of the all-others rate serves the obvious purpose of preventing distortion or outright manipulation of the all-others rate. The producers or exporters most likely to submit voluntary responses are those with reason to believe that they will obtain a lower margin by volunteering than they would obtain by being subject to the all-others rate. Inclusion of rates determined for voluntary respondents thus would be expected to distort the weighted-average for the respondents selected by the Department on a neutral basis.

Exclusions: In the AD Proposed Regulations, 61 FR at 7315, the Department requested additional public comment on the issue of whether there should be special exclusion rules for firms, such as trading companies, that export, but do not produce, subject merchandise. We noted that one alternative would be to limit the exclusion of a nonproducing exporter to the subject merchandise produced by those producers that supplied the exporter during the period of investigation. Several commenters supported this approach, citing the potential for other producers to avoid the imposition of duties by selling through an excluded exporter. Other commenters argued that if an exporter is excluded, the exclusion should apply to all exports by that exporter, regardless of the producer.

The Department agrees with the first group of commenters that normally the exclusion of a nonproducing exporter should be limited. Therefore, we have added a new paragraph (e)(3) to provide that the exclusion of a nonproducing exporter normally will be limited to subject merchandise produced or supplied by those companies that supplied the exporter during the period of investigation.

In an AD investigation, the Secretary may grant an exclusion to a nonproducing exporter if the Secretary investigates the exporter's sales and determines that the dumping margins on those sales are not greater than *de minimis*. However, to prevent other producers from selling through an excluded exporter in order to avoid the imposition of duties, the Secretary normally will apply the exclusion only to the exporter's exports of subject merchandise purchased from those producer(s) found by the Secretary to lack knowledge of the exportation of the merchandise to the United States. This limitation is appropriate, because the lack of knowledge by these producers provided the basis for investigating and establishing a rate for the exporter.

In a CVD investigation, the basis for the exclusion of a nonproducing exporter is that neither the exporter nor the producers or suppliers of subject merchandise sold by the exporter received more than *de minimis* net countervailable subsidies. Therefore, it is appropriate to limit the exclusion to merchandise purchased from the same suppliers and producers.

With respect to requests for exclusion in a CVD investigation conducted on an aggregate basis, we have renumbered paragraph (e)(3) as paragraph (e)(4), and we have revised paragraph (e)(4)(iv) to clarify that in the case of a non-producing exporter, the foreign government must certify that neither the exporter nor the exporter's supplier received more than *de minimis* countervailable subsidies during the review period.

One commenter proposed that (1) the regulations make clear that the Department has the authority to ''bring back'' under an order an excluded company if the Department subsequently finds in a review that the company is dumping, and (2) the regulations retain the requirements of §§ 353.14 and 355.14 of the Department's prior regulations. According to the commenter, the Department required a company with a

zero or *de minimis* dumping margin or CVD rate to certify that the company would not dump or receive countervailable subsidies in the future. The commenter contended that this certification authorized the Department to review excluded firms to confirm that they were acting in a manner consistent with the certification. In addition, this commenter claimed that because AD/CVD orders apply to countries, rather than to individual companies, the Department has the authority to review excluded companies.

We have not adopted these suggestions. With respect to the notion of ''bringing back'' excluded companies, as a matter of administrative practice, the Department never has reviewed sales of excluded companies, with the exception of situations in which nonexcluded companies attempt to funnel their ''non-excluded'' merchandise through an excluded company. There is no indication in either the statute or the SAA that Congress intended the Department to make such a radical departure from its prior practice concerning exclusions. Moreover, we believe that the ''inclusion'' of an excluded company would be inconsistent with Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement (both of which require termination where the amount of dumping or subsidization is *de minimis*).

As for former §§ 353.14 and 355.14, with the exception of CVD investigations conducted on an aggregate basis, these provisions are no longer necessary in light of the amendments to the statute made by the URAA, and, in any event, never functioned in the manner suggested by the commenter. These provisions, notwithstanding their titles, functioned as a mechanism for considering requests by voluntary respondents to be investigated. As stated by the Department when it adopted § 351.14:

> If the Department includes a producer or reseller in its investigation and determines that the producer or reseller had no dumping margin during the period of investigation, the Department would automatically exclude that producer or reseller from the antidumping duty order, even if the producer or reseller did not request exclusion under the procedures described in [§ 353.14]. The purpose of this section merely is to provide an opportunity for producers and resellers that the Department might not otherwise include in its investigation to request that the Department specifically include and investigate them.

Final Rule (Antidumping Duties), 54 FR 12742, 12748 (1989). The Department made a virtually identical statement with respect to § 355.14. *Final Rule (Countervailing Duties),* 53 FR 53206, 52316 (1988).

Given their original purpose, §§ 353.14 and 355.14 have become superfluous in light of section 782(a) of the Act and § 351.204(d) (which establish new procedures for dealing with voluntary respondents) and § 351.204(e)(3) (which deals with exclusion requests in CVD investigations conducted on an aggregate basis). Under these provisions, decisions on exclusions will be based on a firm's actual behavior, as opposed to assertions regarding its possible future behavior.

Other comments: One commenter suggested that § 351.204 be modified to state explicitly that the Department retains the right to seek and obtain information from importers in the United States of subject merchandise. We have not adopted this suggestion. While we do not disagree with the proposition that the Department may seek information from importers, we also do not believe that there is any doubt concerning the Department's authority to seek such information. Therefore, we do not feel that the suggested modification is necessary.

Section 351.205

Section 351.205 deals with preliminary AD and CVD determinations. Two commenters noted that, in connection with proposed § 351.205(c), the Department deleted (1) the requirement that a preliminary determination include the factual and legal conclusions for the Department's determination, and (2) the requirement that the Department notify the parties to the proceeding. They suggested that paragraph (c) be revised so as to include these requirements.

While we do not disagree with the substance of the comments, we do not believe that a revision to paragraph (c) is appropriate. Section 777(i) of the Act requires the Department to include its factual and legal conclusions in a preliminary determination, and sections 703(f) and 733(f) of the Act require the Department to notify the petitioner and other parties to an investigation. Therefore, given our overall approach of avoiding repetitions of the statute, we have not made the revisions suggested.

Section 351.206

Section 351.206 deals with critical circumstances findings. In connection with § 351.206, one commenter sought clarification that provisional measures would not be imposed on merchandise imported prior to the date of initiation of an AD or CVD investigation. We can confirm that provisional measures will not be imposed on merchandise entered prior to the date of initiation. Section 351.206(d), which deals with retroactive suspension of liquidation, refers to sections 703(e)(2) and 733(e)(2) of the Act. These sections provide that suspension of liquidation may not apply to merchandise entered prior to the date on which notice of the determination to initiate is published in the **Federal Register**. *See also* SAA at 878.

Section 351.207

Section 351.207 deals with the termination of investigations. We received several comments regarding § 351.207 from one commenter.

First, the commenter objected to the proviso in § 351.207(b)(1) that the Secretary may terminate an investigation if ''the Secretary concludes that termination is in the public interest.'' The commenter argued that because the relevant provisions of the statute do not require a public interest finding, the regulations should not enlarge upon the statutory criteria.

We have not adopted this suggestion, because the legislative history of the Trade Agreements Act of 1979 indicates that Congress intended that the Secretary make a public interest finding before terminating a self-initiated investigation or an investigation in which a petition is withdrawn. *See, e.g., Trade Agreements Act of 1979 Statements of Administrative Action,* H.R. Doc. No. 153, Pt. II, 96th Cong., 1st Sess. 400, 418 (1979); and S. Rep. No. 249, 96th Cong., 1st Sess. 54, 70–71 (1979). We believe that this legislative history remains relevant in interpreting the post-URAA version of the Act. Moreover, there is no indication in the legislative history of the URAA that Congress intended that the Department abandon the requirement of a public interest finding.

Second, in connection with § 351.207(c), the commenter suggested that the Department clarify that its authority to terminate an investigation due to lack of interest is unaffected by those statutory provisions prohibiting the post-initiation reconsideration of industry support for a petition. We have not adopted this suggestion, because, as the Department stated in the AD Proposed Regulations, 61 FR at 7315, the SAA is clear on this point.

Finally, in connection with § 351.207(b)(2), the commenter suggested that in light of the prohibition against voluntary export restraints found in the WTO Agreement on Safeguards, the Department should exercise sparingly its discretion to terminate an investigation based on a

foreign government's agreement to limit the volume of imports of subject merchandise into the United States. The commenter did not suggest any modifications to § 351.207(b)(2), and we have left that provision unchanged.

Section 351.208

Section 351.208 deals with suspension agreements and suspended investigations. Most of the comments we received regarding § 351.208 dealt with our proposed deadlines for initialing and signing suspension agreements.

Deadlines: In proposed § 351.208(f)(1)(i), we advanced the deadline for submitting a proposed suspension agreement to 15 days after a preliminary determination in an AD investigation and 5 days after a preliminary determination in a CVD investigation. As explained in the AD Proposed Regulations, the purpose of this change was to reduce burdens on all parties and Department staff. 61 FR at 7316. Public reaction to this change in deadlines was mixed, cutting across respondent/domestic industry lines.

On the domestic industry side, one commenter strongly supported the change, while another commenter thought the AD deadline too short. On the respondent side, one commenter supported the change, but three commenters considered the revised deadline to be too short.

After careful consideration of these comments, we have left the deadlines as set forth in proposed § 351.208(f)(1)(i). Several of the commenters seeking a longer deadline argued that exporters are not in a position to consider whether or not they desire to propose a suspension agreement until the preliminary determination has been issued. We can understand why respondent interested parties might wish to see the results of a preliminary determination before formally submitting a proposed suspension agreement. However, in our view, a respondent interested party that is entertaining a suspension agreement as an option may begin its deliberations as soon as the Department initiates an investigation instead of waiting until the Department issues a preliminary determination. If a respondent interested party begins its deliberations early, we believe that the deadlines set forth in § 351.208(f)(1)(i) provide sufficient time in which to digest the results of a preliminary determination.

We received other comments regarding deadlines, in addition to those described above. One commenter suggested that the Department give itself authority to extend the deadlines where necessary. We agree with this suggestion, but note that it already is addressed by § 351.302(b), which provides the Secretary with authority to extend, for good cause, any time limit established by part 351.

Another commenter suggested that in order to provide the Department with more flexibility, the deadlines should run from the date of publication of a preliminary determination instead of the date of issuance. We have not adopted this suggestion. In order to accomplish our objective of reducing burdens, we deliberately chose the date of issuance, because one week can elapse between the date of issuance and the date of publication in the **Federal Register**. However, we believe that § 351.302(b), discussed in the preceding paragraph, addresses the commenter's concerns, because it permits the Secretary to extend a deadline for good cause.

Another commenter suggested that if the deadline for submitting proposed suspension agreements in CVD investigations remains at 5 days from the preliminary determination, the timeframe should be modified to 5 *business* days, excluding applicable foreign holidays. We have adopted this suggestion in part by changing the deadline from 5 days to 7 days. However, we have not adopted the suggestion concerning the exclusion of foreign holidays. If, in a particular case, the occurrence of a foreign holiday should make this deadline unworkable, this is something that the Secretary could consider under the extension authority of § 351.302(b).

Suspension agreement procedures: We received several comments concerning the procedures to be followed in entering into a suspension agreement. One commenter, arguing that current procedures deprive petitioners of meaningful input, suggested that the Department amend § 351.208(f)(1) to: (1) require the foreign exporters or foreign government to serve a copy of the proposed suspension agreement on the petitioner at the same time that it is submitted to the Department; (2) require the Department thereafter to consult with all parties and to request written comments from all parties regarding the terms of the agreement and whether the agreement is in the public interest; and (3) require the Department to consider domestic industry opposition to a suspension agreement as a strong indicator that the agreement is not in the public interest.

Before addressing the specific suggestions, we should note at the outset that, in our view, the Department's existing procedures have not denied petitioners meaningful input regarding decisions to enter into suspension agreements. Department precedents offer numerous examples of revisions to proposed suspension agreements that the Department has made in response to petitioners' comments. While the Department may not always agree with all of a petitioner's comments, this does not mean that the Department has not carefully considered those comments.

As for the specific suggestions, we have not adopted them for the following reasons. With respect to the suggestion that the party proposing a suspension agreement serve a copy on the petitioner, we note that sections 704(e) and 734(e) of the Act contemplate that the Department will notify the petitioner of a proposed suspension agreement and provide the petitioner with a copy of the proposed agreement at the time of notification. In our experience, this process has worked well in the past and there is no need to change it at this time. With respect to the suggestion that the Department consult with, and request written comments from, all parties, sections 704(e)(1) and 734(e)(1) require the Department to consult only with the petitioner, a requirement reflected in § 351.208(f)(2)(iii). Other parties have a right to comment on a proposed suspension agreement, however, and we do not believe it is necessary or appropriate to impose an additional consultation requirement on Department staff. With respect to written comments, sections 704(e)(3) and 734(e)(3) permit all interested parties to submit comments and information, a right that is already reflected in § 351.208(f)(3). Finally, with respect to the suggestion concerning the significance of domestic industry opposition, this is something to which the Department would accord considerable weight when assessing the public interest. However, the Department must assess the public interest based on all the facts, and we do not believe it appropriate to issue a regulation that singles out one factor to the exclusion of others.

Another commenter suggested that before entering into a suspension agreement, the Department should consult potentially affected consuming industries and potentially affected producers and workers in the domestic industry, including producers and workers not party to the investigation. As discussed above, we do not believe it is necessary or appropriate to expand the consultation requirements beyond those set forth in the statute. However, we have revised paragraph (f)(3) so as to

expressly permit industrial users and consumers to submit written argument and factual information concerning a proposed suspension agreement.

Regional industry cases: One commenter stated that the Department should clarify § 351.208, in accordance with the new statutory language, to make it clear that (1) it is not easier for respondents to obtain a suspension agreement in a regional industry investigation, and (2) the Department has no more obligation to accept a suspension agreement in a regional industry investigation than in any other investigation. We agree that a suspension agreement in a regional industry investigation is subject to the same requirements as a suspension agreement in a national industry investigation (including the public interest requirement), and that the Department need not accept an agreement in a regional industry investigation if those requirements are not met. However, because the SAA at 859 makes this clear, we do not think that additional clarification is necessary.

Revision to paragraph (f)(1): Although not the subject of public comments, we have made certain stylistic revisions to paragraph (f)(1) in order to make this provision accurate and more readable.

Section 351.209

Section 351.209 deals with the violation of suspension agreements. Of the comments we received regarding this section, most related to proposed § 351.209(b)(2), which deals with the resumption of suspended investigations that had not been completed under sections 704(g) or 734(g) of the Act. Proposed § 351.209(b)(2) provided that the Secretary may ''update previously submitted information where the Secretary deems it appropriate to do so.''

Although one commenter supported the use of updated information, three commenters opposed the use of updated information. Each of the latter commenters argued that the use of updated information constitutes poor policy, because it effectively rewards parties that violate or take advantage of a suspension agreement. In addition, two of the commenters referred to sections 704(j) and 734(j) of the Act, which provide that in making a final determination the Secretary ''shall consider all of the subject merchandise, without regard to the effect of any [suspension] agreement. . . .'' According to one of the two commenters, these two statutory provisions preclude the use of updated information. According to the second of the two commenters, these provisions preclude the use of updated information except in the unusual case where the Department is able to account for the effect of the terminated suspension agreement.

While we do not believe that sections 704(j) and 734(j) necessarily preclude the use of updated information, we have concluded that, in light of the Department's limited experience with resumed investigations, it would be premature at this time to resolve this issue in the regulations. Therefore, we have revised paragraph (b)(2) by deleting the phrase dealing with updated information.

One commenter also questioned whether § 351.209(b) was intended to broaden the circumstances under which it can be determined that a suspension agreement has been violated. In this regard, our intent was neither to broaden nor to narrow these circumstances.

Section 351.210

We received two comments concerning § 351.210, which deals with final determinations in investigations. As it did with respect to proposed § 351.205(c), one commenter objected to the deletion of (1) the requirement that the Department include in a final determination its factual and legal conclusions; and (2) the requirement that the Department notify parties of a final determination. As we stated above in connection with § 351.205(c), because the Act clearly imposes these requirements on the Department, these requirements need not be reiterated in the regulations.

Another commenter suggested that the Department codify its practice of treating a request for a postponement of a final determination as a request for the extension of provisional measures. We agree with this suggestion. However, instead of assuming that a request for postponement includes an implied request for an extension of provisional measures, we prefer to rely on the Department's discretionary authority to deny requests for postponements of final determinations. More specifically, the absence of a request to extend provisional measures would constitute a compelling reason, within the meaning of § 351.210(e)(1), for denying a request to postpone a final determination. Therefore, we have revised § 351.210(e) so as to provide that in the case of a request for postponement made by exporters, the Secretary will not grant the request unless it is accompanied by a request for an extension of provisional measures to not more than 6 months.

Section 351.211

Section 351.211 deals with the issuance of AD and CVD orders. We received several suggestions concerning proposed § 351.211(c), which established special procedures concerning the assessment of duties in proceedings in which the Commission identified a regional industry. Based on our own review of paragraph (c) and these suggestions, we have deleted paragraph (c) and substituted in its place a new § 351.212(f). A discussion of the suggestions and this new provision appears below under ''Section 351.212.''

Section 351.212

Section 351.212 deals with matters related to the assessment of antidumping and countervailing duties. We received several comments relating to automatic assessment of duties and the calculation of assessment rates.

Automatic assessment: Under the former regulations, if the Department did not receive a request for the review of particular entries of subject merchandise, the Department would instruct the Customs Service to liquidate those entries and assess duties at the cash deposit rate applied to those entries at the time of entry. In proposed § 351.212(c), the Department proposed to assess duties on entries for which there was no review request ''at rates equal to the rates determined in the most recently completed segment of the proceeding. . . .'' The Department believed that by relying on more current rates as the basis for the assessment of duties, the number of requests for reviews would decline.

Several commenters opposed this change, some describing their opposition as ''strong.'' They argued that the proposed change would create an undue element of uncertainty, because at the time when a party would have to decide whether to request a review, it would not know the rate that would be applied to its entries if it did not request a review. This would force parties to request reviews solely to protect their interests, thereby defeating the purpose of the proposal. They also argued that the proposal would result in more work for the Customs Service, a point the Department recognized in 1989. Finally, even those who did not oppose the change argued that proposed § 351.212(c) needed additional refinements in order to provide some minimum degree of certainty.

In light of the comments received, the Department has decided to continue its current practice with respect to automatic assessment; *i.e.*, if an entry is

not subject to a request for a review, the Department will instruct the Customs Service to liquidate that entry and assess duties at the rate in effect at the time of entry. We have made the appropriate revisions to paragraph (c).

Antidumping duty assessment rates: Proposed § 351.212(b)(1) dealt with the method that the Department will use to assess antidumping duties upon completion of a review. In proposed paragraph (b)(1), the Department provided that it normally will calculate an ''assessment rate'' for each importer by dividing the absolute dumping margin found on merchandise reviewed by the entered value of that merchandise. As such, paragraph (b)(1) merely codified an assessment method that the Department has come to use more and more frequently in recent years.

Historically, the Department (and, before it, the Department of the Treasury) used the so-called ''master list'' (entry-by-entry) assessment method. Under the master list method, the Department would list the appropriate amount of duties to assess for each entry of subject merchandise separately in its instructions to the Customs Service. However, in recent years, the master list method has fallen into disuse for two principal reasons. First, in most cases, respondents have not been able to link specific entries to specific sales, particularly in CEP situations in which there is a delay between the importation of merchandise and its resale to an unaffiliated customers. Absent an ability to link entries to sales, the Department cannot apply the master list method. Second, even when respondents are able to link entries to sales, there are practical difficulties in creating and using a master list if the number of entries covered by a review is large. Preparing a master list that covers hundreds or thousands of entries is a time-consuming process, and one that is prone to errors by Department and/or Customs Service staff. Therefore, as the Department explained in the AD Proposed Regulations, 61 FR at 7317, the Department would consider using the master list method of assessment only in situations where there are few entries during a review period and the Department can tie those entries to particular sales.

Several commenters suggested that the Department clarify that it will apply the master list method if the importer can demonstrate that the assessment rate approach would distort the amount of duty assessed as compared to the amount assessed under the master list method. In addition, one of these commenters urged the Department to clarify that, regardless of the assessment method used, the Department will not consider merchandise entered prior to the suspension of liquidation to be ''subject merchandise'' under section 771(25) of the Act. Finally, one commenter supported proposed paragraph (b)(1), and urged the Department to apply the assessment rate method to all outstanding unliquidated entries, regardless of whether the Department conducted the applicable review under the pre-or post-URAA version of the Act.

The Department has adopted proposed paragraph (b)(1) without change. As noted above, and as recognized by most of the commenters, to a large extent, paragraph (b)(1) simply codifies the Department's current practice.

With respect to the suggestions that the Department continue to apply the master list method on a case-by-case basis, in our view, the fact that a respondent is able to link its sales to entries, in itself, constitutes an insufficient basis for using the master list method. As discussed above, there are practical problems inherent in the use of the master list method wholly apart from the linkage problem.

Thus, based on the results of each review, the Department generally will assess duties on entries made during the review period and will use assessment rates to effect those assessments. However, on a case-by-case basis, the Department may consider whether the ability to link sales with entries should cause the Department to base a review on sales of merchandise entered during the period of review, rather than on sales that occurred during the period of review. These two approaches differ, because, in the case of CEP sales, the delay between importation and resale to an unaffiliated customer means that merchandise entered during the review period often is different from the merchandise sold during that period. Because of the inability to tie entries to sales, the Department normally must base its review on sales made during the period of review. Where a respondent *can* tie its entries to its sales, we potentially can trace each entry of subject merchandise made during a review period to the particular sale or sales of that same merchandise to unaffiliated customers, and we conduct the review on that basis. However, the determination of whether to a review sales of merchandise entered during the period of review hinges on such case-specific factors as whether certain sales of subject merchandise may be missed because, for example, the preceding review covered sales made during that review period or sales may not have occurred in time to be captured by the review. Additionally, the Department must consider whether a respondent has been able to link sales and entries previously for prior review periods and whether it appears likely that the respondent will continue to be able to link sales and entries in future reviews. The Department must consider these factors because of the distortions that could arise by switching from one method to another in different review periods. Also, in cases in which the Department is sampling sales under section 777A of the Act, other complicating factors mitigate against using entries during the POR as the basis for the review.

Finally, the fact that the amount of duties assessed may differ depending on the method used is not necessarily grounds to conclude that the assessment rate method is distortive, because neither the Act nor the AD Agreement specifies whether sales or entries are to be reviewed, nor do they specify how the Department must calculate the amount of duties to be assessed. *See, Torrington Co.* v. *United States,* 44 F.3d 1572, 1578 (Fed. Cir. 1995). Moreover, as the Court of International Trade has recognized in upholding the Department's assessment rate method, a review of sales, rather than entries, ''appears not to be biased in favor of, or against, respondents.'' *FAG Kugelfischer Georg Schafer KgaA* v. *United States*, 1995 Ct. Int'l. Trade LEXIS 209, *10 (1995), *aff'd*, 1996 U.S. App. LEXIS 11544 (Fed. Cir 1996).

With respect to the issue of whether merchandise entered prior to suspension of liquidation is ''subject merchandise,'' the Department addressed this issue in *Stainless Steel Wire Rod from France*, 61 FR 47874, 47875 (Sept. 11, 1996), in which the Department stated:

> Sales of merchandise that can be demonstrably linked with entries prior to the suspension of liquidation are not subject merchandise and therefore are not subject to review by the Department. Merchandise that entered the United States prior to the suspension of liquidation (and in the absence of an affirmative critical circumstances finding) is not subject merchandise within the meaning of section 771(25) of the Act.

Finally, with respect to the effective date of paragraph (b)(1), in many cases the Department currently is applying the assessment rate method. However, the Department cannot apply this method to all unliquidated entries. Because liquidation of entries may have been delayed by the Customs Service for reasons unrelated to the collection of

antidumping duties, applying this method to all unliquidated entries would require the amendment all of our prior liquidation instructions. Not only would this place an enormous burden on the Department and the Customs Service, it also would cause uncertainty for the importing community.

For these reasons, the Department will apply paragraph (b)(1) only to assessment instructions issued on the basis of final results in reviews initiated after the effective date of these regulations. As noted previously, however, because this regulation merely codifies a past practice, the Department will apply the assessment rate method in those cases that are not technically subject to the regulation. However, the Department will do so as a matter of practice, and not as a regulatory requirement. The purpose of having an effective date is to ensure that the Department is not required to amend old assessment instructions based on reviews in which the Department did not collect the necessary information.

Regional industry cases: As noted above, we received suggestions from one commenter regarding proposed § 351.211(c), which established special procedures for proceedings in which the Commission identified a regional industry. Under paragraph (c), which was designed to implement sections 706(c) and 736(d) of the Act, the Secretary could except from the assessment of duties merchandise of an exporter or producer that did not supply the region during the POI.

While the commenter generally supported the procedures set forth in § 351.211(c), it suggested several improvements. First, it suggested that the Department clarify that a petitioner has a right to respond to certifications submitted by an exporter or producer. In its post-hearing comments, this commenter further refined this suggestion by proposing that the Department require certifications from foreign exporters and producers to be submitted early in the investigation, rather than at its end.

Second, for purposes of certifying and establishing whether an exporter or producer exported subject merchandise for sale in the region concerned during the POI, the commenter suggested that the relevant POI be the ITC's POI. According to the commenter, the Department's normal one-year POI is too short, and the Commission's normal three-year POI is preferable.

Third, the commenter suggested that U.S. importers should be required to certify to the Customs Service, upon entry into the United States of merchandise from an exporter or producer whose merchandise has been excepted from assessment, whether that merchandise will be sold in the region concerned. If an importer certified that merchandise would be sold in the region, the importer would be required to notify the Department directly so that the Department could direct that merchandise of the exporter or producer in question would be subject to the assessment of duties.

Finally, in its post-hearing comments, the commenter suggested that the certifications of exporters and producers should include the period *after* the POI. In this regard, it noted that paragraph (c), as drafted, required that the certifications of U.S. importers cover the period after the POI.

We believe these suggestions have considerable merit, and with, certain exceptions, we have incorporated them into these final regulations. However, after reviewing the commenter's suggestions and proposed § 351.211(c), we came to the conclusion that instead of creating an entirely new procedure, it would be more administrable for the Department to consider requests for an exception from the assessment of duties in the context of an existing procedural mechanism. Among other things, this would ensure that domestic interested parties have ample opportunity to comment on requests for an exception, something which was one of the primary concerns of the commenter. Entries of subject merchandise from an exporter or producer that did not supply the region concerned during the original POI would be subject to cash deposit requirements. However, because final duties would not be levied if, in a review, the exporter or producer established its eligibility for an exception from assessment, this procedure is consistent with Article 4.2 of the AD Agreement and Article 16.3 of the SCM Agreement.

Therefore, we have added a new paragraph (f) to § 351.212 to deal with requests for an exception from the assessment of duties in regional industry cases. The procedures for obtaining an exception would work as follows. First, paragraph (f)(1) sets forth the basic standard for obtaining an exception, and incorporates some of the suggestions of the commenter.

Paragraph (f)(2) provides that requests for an exception from assessment will be considered in the context of an administrative review or a new shipper review. Paragraph (f)(2)(i) provides that an exporter or producer seeking an exception from assessment must request an administrative review or a new shipper review under § 351.213 or § 351.214, respectively. The request for review must be accompanied by a request that the Secretary determine whether subject merchandise of the exporter or producer satisfies the requirements of paragraph (f)(1) and should be excepted from the assessment of duties. The exporter or producer may request that the Secretary limit the review to a determination as to whether an exception should be granted. In addition, a request for review and exception from assessment must be accompanied by the certifications described in paragraphs (f)(2)(i) (A) and (B).

If the requirements of paragraph (f)(2)(i) and § 351.213 or § 351.214, as the case may be, are satisfied, the Secretary will initiate an administrative review or a new shipper review. The Secretary will conduct the review in accordance with § 351.221. However, under paragraph (f)(2)(ii), the Secretary may limit the review to a determination as to whether an exception from assessment should be granted if requested to do so by the exporter or producer under paragraph (f)(2)(i). Notwithstanding the submission of such a request, the Secretary could decline to conduct a limited review if, for example, a domestic interested party had requested an administrative review of the particular exporter or producer.

Under paragraph (f)(3), if the Secretary determines that the exporter or producer satisfies the requirements for an exception from assessment, the Secretary will instruct the Customs Service to liquidate entries without regard to antidumping or countervailing duties. These instructions would apply only to entries of subject merchandise of the exporter or producer concerned that were covered by the review. Future entries of subject merchandise would remain subject to cash deposit requirements for estimated duties, although the exporter or producer could seek an exception from assessment for future entries in a subsequent review.

Paragraph (f)(4) describes the actions that the Secretary will take if the Secretary does not grant an exception from assessment. Under paragraph (f)(4)(i), if the review was not limited to the question of an exception from assessment, the Secretary will instruct the Customs Service to assess duties in accordance with § 351.212(b); *i.e.,* to assess duties in accordance with the results of the review. Under paragraph (f)(4)(ii), however, if the review was limited to the question of an exception from assessment, the Secretary will apply the automatic assessment provisions of § 351.212(c).

Returning to the commenter's suggestions, because we now have opted

to deal with requests for exception from assessment in the context of reviews, we have not adopted the suggestion concerning the early submission of certifications in an investigation. By dealing with requests for an exception in the context of a review, domestic interested parties should have ample opportunity to scrutinize, and comment on, the certifications submitted by an exporter or producer.

In addition, we have not adopted the suggestion that we use the Commission's POI. Neither section 703(c) nor section 706(d) expressly state whether the relevant POI is the Department's or the ITC's. However, we think that section 751(a)(2)(B) of the Act provides guidance as to what Congress intended. Section 751(a)(2)(B), which deals with new shipper reviews, refers to an

> exporter or producer [that] did not export the merchandise * * * to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation. * * *

The Department interprets this section as referring to the Department's period of investigation, because the section is directed to the Department. If Congress had intended that the Department use the Commission's POI for purposes of determining whether an exporter was a new shipper under section 751(a)(2)(B), it would have said so explicitly. Given the obvious interrelationship between section 751(a)(2)(B) and sections 706(c) and 736(d), the more reasonable interpretation is that ''period of investigation,'' as used in the latter two sections, means the Department's POI.

Provisional measures deposit cap: Although we have not revised proposed paragraph (d) in these final regulations, the Department is using this opportunity to clarify that the provisional measures deposit cap contained in paragraph (d) will apply to entries subject to an AD order secured by bonds as well as cash deposits, as stated in that paragraph.

On July 29, 1991, the Court of International Trade (the CIT) invalidated the Department's AD regulation on the provisional measures deposit cap (19 CFR § 353.23) in a case on televisions from Taiwan. *Zenith Electronics* v. *United States,* 770 F. Supp. 648. The CIT followed this precedent on July 28, 1992, in a challenge to a review of televisions from Korea. *Daewoo Electronics* v. *United States,* 794 F. Supp. 389 (*Daewoo I*). On September 30, 1993, the Court of Appeals for the Federal Circuit reversed the CIT's decision in the Korean television case, and upheld the regulation. *Daewoo Electronics* v. *United States,* 6 Fed. 3d 1511 (*Daewoo II*). As a result of the Federal Circuit's decision, the CIT subsequently vacated its July 29, 1991, order in Taiwan televisions. The Department never amended its regulation, and the original regulation (now replicated in paragraph (d)) remains valid. For this and other reasons discussed below, paragraph (d) and its predecessor provision should be applied to all entries as though the CIT never invalidated it.

Section 733(d)(2) of the Act provides that an importer of merchandise subject to an AD investigation must post bonds, cash deposits, or other security for entries of the subject merchandise between the Department's affirmative preliminary determination of sales at less than fair value and the Commission's final injury determination.

Assuming an AD order is imposed, a manufacturer or importer may request an administrative review under section 751(a) of the Act to determine the actual amount of antidumping duties due on the sales during this period. Section 737(a)(1) of the Act provides that, if the amount of a cash deposit collected as security for an estimated antidumping duty is different from the amount of the antidumping duty determined in the first section 751 administrative review, then the difference shall be disregarded, to the extent that the cash deposit collected is lower than the duty determined to be due under a section 751 administrative review. This is called the provisional measures deposit cap, and applies to entries between publication of the Department's preliminary determination and the Commission's final determination of injury.

The provisional measures deposit cap for countervailing duties (section 707 of the Act), on the other hand, explicitly provides that the cap applies whether the entry is secured by a cash deposit or by a bond or other security. That is, the Act at first glance appears to apply the cap to entries secured both by cash deposits and by bonds in CVD cases, but only by entries secured cash deposits in AD cases.

Since 1980, the Department, by regulation, took the position that the difference between the AD and CVD provisions in the statute was an oversight, and the agency thus applied the provisional cap to entries secured both by bonds and by cash deposits in both AD and CVD cases. 19 C.F.R. § 353.50 in pre-1989 regulations; 19 CFR § 353.23 in the post-1989 regulations.

On July 29, 1991, in a case involving televisions from Taiwan, the CIT rejected the Department's interpretation that the statutory differences between the AD and CVD provisions were an oversight, based on its analysis of the statute and the Tokyo Round AD Code. It ruled that, in AD cases, the provisional measures deposit cap applied only to entries secured by cash deposits. *Zenith.*

The Department decided it would not appeal the decision when it became final, and published notice of its acquiescence in the **Federal Register**. 57 FR 45769 (1992). It also announced that, from the date of the decision, it would apply the cap only to entries secured by cash deposits in AD cases. However, the Department never amended its regulations to be consistent with this position.

In 1992, the CIT followed its Taiwan television decision on the cap in a case involving televisions from Korea. (*Daewoo I*) Respondents appealed the decision on this issue to the Federal Circuit.

Although not directly before it, the Federal Circuit reviewed the reasoning in the *Zenith* decision while deciding *Daewoo II.* The Federal Circuit disagreed with the *Zenith* reasoning. It found that the statute does not prohibit the application of the cap to bonds, that the Department's interpretation was reasonable, and it overruled the CIT's decision. On September 30, 1994, the Federal Circuit held that the Department's regulation was valid, and that the cap can apply where duties are secured by bonds as well as cash deposits. In footnote 17 of its decision, the Federal Circuit noted with respect to the Department's **Federal Register** notice:

> After the Court of International Trade issued its opinion in *Zenith II* [in 1991], Commerce indicated that it would follow that holding, but prospectively only. The court here rejected that limitation [to cash deposits]. In view of our resolution of this issue, the changed regulation may have prospective application only [from October 5, 1992 forward].

Thus, the Federal Circuit, erroneously treating our public notice as an amendment to the Department's regulations, held that the ''amended regulation'' could only be applied prospectively from the date it was adopted, October 5, 1992. It was not valid during the time between the CIT decision in *Zenith* and the date of the **Federal Register** notice. The Department's **Federal Register** notice, however, did not amend its original regulation; it only stated that it did not intend to appeal the *Zenith* decision and

would change its practice. Therefore, the original regulation remained valid from the date the CIT overturned it to the present.

In addition, on October 21, 1994, when the *Zenith* decision became final, the CIT vacated its original 1991 decision in Korean televisions with regards to the cap. *Zenith,* Slip Op. 94–170.

Section 351.213

Section 351.213 deals with administrative reviews under section 751(a)(1) of the Act. We received a few comments concerning § 351.213.

Publication of preliminary dumping margins: One commenter suggested that the Department refrain from including individual, company-specific preliminary dumping margins in its published notices of preliminary results of review. We have not adopted this suggestion, because, in our view, section 777(i)(2)(A)(iii)(II) of the Act requires that individual margins be included in the published notice of preliminary results.

Deferral of administrative reviews: To reduce burdens on parties and the Department, in proposed § 351.213(c) the Department established a procedure by which the Secretary could defer the initiation of an administrative review for one year if (i) the request for review was accompanied by a request that the Secretary defer the review; and (ii) no relevant party to the proceeding objected. One commenter strongly supported this proposal, but two commenters opposed it. According to the two opponents, deferral of reviews lacks a statutory basis, is inconsistent with legislative intent, and may not result in a reduction of burdens. In addition, the opposing commenters argued that the requirement that no party object to deferral is an inadequate procedural safeguard. They claim that the Department may apply pressure on petitioners to acquiesce in requests for deferrals, citing instances in which petitioners have requested postponements of final determinations as an accommodation to the Department.

After considering the comments, we have left § 351.213(c) unchanged, except for (1) minor revisions to paragraph (c)(1)(ii) aimed at improving the clarity of that provision; and (2) an addition to paragraph (c)(3) that extends the deadline in § 351.301(b)(2) for submitting factual information. As stated by the commenter supporting the change, we believe that the deferral process will save ''time and money, for both the Department and the parties.'' In addition, we do not think that it is inconsistent with the statute or legislative intent to defer a review for one year where all parties consent. As for the claim that the ''no objection'' requirement is an inadequate safeguard, while it is true that the Department, at times, may take the initiative in suggesting that parties request postponements or extensions, the Department does not ''pressure'' parties into submitting such requests. In the case of a request for a deferral, if a deferral is not in the interests of a particular party, that party will be free to object without risk of any adverse consequences.

Rescissions of administrative reviews: Commenting on proposed § 351.213(d)(1) and its 90-day limit on withdrawals of a request for a review, one commenter suggested that the provision be modified so as to allow the Department to rescind an administrative review after the 90-day period has expired if (1) the party that initially requested the review withdraws its request, and (2) no other party objects to the rescission within a reasonable period of time. According to the commenter, such a rule would avoid the burden and expense of completing reviews that none of the parties want.

We agree that the 90-day limitation may be too rigid. However, we believe that the Department must have the final say concerning rescissions of reviews requested after 90 days in order to prevent abuse of the procedures for requesting and withdrawing a review. For example, we are concerned with the situation in which a party requests a review, the Department devotes considerable time and resources to the review, and then the party withdraws its requests once it ascertains that the results of the review are not likely to be in its favor. To discourage this behavior, the Department must have the ability to deny withdrawals of requests for review, even in situations where no party objects.

Therefore, in § 351.213(d)(1), we have retained the 90-day requirement. In addition we have added a new sentence, taken from 19 CFR §§ 353.22(a)(5) and 355.22(a)(3), that essentially provides that if a request for rescission is made after the expiration of the 90-day deadline, the decision to rescind a review will be at the Secretary's discretion.

Extension of review period: One commenter suggested that if the Department has the authority to defer the initiation of an administrative review, it follows that it has the authority to begin an administrative review early, or to extend the period of a particular review beyond one year. This commenter stated that in certain industries where prices change rapidly, it is important to have duty deposit rates that are as current as possible. The commenter suggested a revision to proposed § 351.213(e)(1) that would permit the Secretary to extend the period of an administrative review, for good cause shown, up to the date on which questionnaire responses are due.

We believe that the regulation, as drafted, is sufficiently flexible to address these concerns in extraordinary circumstances. Section 351.213(e)(1)(i) states that the period of review ''normally'' will be linked to the anniversary month of the order. The use of ''normally'' indicates that the Secretary has the discretion to use some other period in appropriate circumstances, but the Department will exercise this discretion only in very unusual circumstances.

Duty absorption: Proposed paragraph (j) established administrative review procedures for analyzing antidumping duty absorption. We have made several changes to paragraph (j) in response to the comments received.

Timing of the absorption inquiry: Three commenters argued that proposed paragraph (j)(1) was unlawful to the extent that it allowed for absorption inquiries during reviews other than those occurring in the second and fourth years following the publication of an AD order. In response, two other commenters argued that section 751(a)(4) of the Act does not preclude parties from requesting, or the Department from conducting, a duty absorption inquiry during administrative reviews other than the second and fourth. One of these two commenters further argued that the retention of the authority to conduct absorption inquiries in any review would prevent automatic filings of requests by petitioners in the second and fourth reviews.

A sixth commenter asserted that for orders entered in 1993, section 751(a)(4) provides for duty absorption determinations in reviews commenced in 1995 and 1997. Therefore, in the view of this commenter, proposed paragraph (j)(1) is inconsistent with the statute to the extent that it provides for absorption inquiries in reviews commencing in 1996 and 1998.

We have not revised paragraph (j)(1) in light of these comments. Paragraph (j)(1), in accordance with section 751(a)(4), provides for the conduct, upon request, of absorption inquiries in reviews initiated two and four years after the publication of an AD order. As noted by the commenters, paragraph (j)(1) also provides for such inquiries in

reviews initiated in the second and fourth years following the continuation of an AD order as the result of a sunset review under section 751(c) of the Act. The reason for this schedule is that (1) duty absorption findings are intended for use in the five-year sunset reviews conducted by the Department and the Commission (*see* SAA at 885), and (2) there will be subsequent sunset reviews of AD orders that remain in place following the completion of an initial sunset review (*see* section 751(a)(c)(1)(C) of the Act). Moreover, section 751(a)(4) does not preclude the Department from conducting absorption inquiries in reviews initiated in the second and fourth years after continuation.

With respect to the comment concerning AD orders published in 1993, under section 751(c)(6)(C) of the Act, these orders constitute ''transition orders'' because they were in effect on January 1, 1995, the date on which the WTO Agreement became effective with respect to the United States. Under section 751(c)(6)(D) of the Act, the Department is to treat transition orders, such as the 1993 orders in question, as being issued on January 1, 1995. Therefore, paragraph (j)(2) properly permits absorption inquiries for transition orders to be requested in any administrative review initiated in 1996 or 1998, because these are the second and fourth years after the date on which transition orders are deemed to be issued.

Who can request an absorption inquiry: We have modified paragraph (j)(1) to clarify that only domestic interested parties may request a duty absorption inquiry. This is consistent with the Department's view that one exporter or producer may not request an administrative review of another exporter or producer.

Deadline and content of request: Two commenters supported as reasonable the Department's proposal to impose a deadline of 30 days after initiation on requests for absorption inquiries. One of these commenters also suggested that the Department require requests for absorption inquiries to be made on a respondent-specific basis.

Two other commenters argued that the Department should eliminate the 30-day deadline. One of these two commenters argued that the 30-day requirement was not reasonable in cases in which the necessary evidence of absorption is already before the Department. The other commenter stated that, because a respondent's questionnaire response would not be available to a domestic interested party within the first 30 days of an administrative review, the Department should extend the request period until after the date on which questionnaire responses are filed.

A fifth commenter suggested that requests for duty absorption inquiries should contain legitimate and substantial evidence of duty absorption. In response, two other commenters argued that the Department should not impose any special burden on a party requesting an absorption inquiry, and that any such burden would be contrary to section 751(a)(4).

With respect to these comments, we agree with the commenters who stated that the 30-day deadline is reasonable. No change in the deadline is necessary, because any domestic interested party requesting an absorption inquiry will not have to supply any information to the Department other than the name(s) of the respondent(s) to be examined for duty absorption.

We also agree with the suggestion that absorption inquiry requests be respondent-specific, and we have made appropriate revisions to paragraph (j)(1). In the Department's view, a requirement that the request identify the respondents to be examined is not unreasonable, and such a requirement will spare the Department the burden of conducting an absorption inquiry of respondents in which the domestic industry is not interested.

Finally, we have not adopted the suggestion that requests for duty absorption inquiries must be accompanied by evidence of duty absorption. In our view, any such requirement would be contrary to section 751(a)(4).

Substantive criteria: One commenter argued that the Department should set forth in the regulations substantive criteria regarding duty absorption. This commenter further proposed that as part of these criteria, the Department should give an exporter or producer credit for negative dumping margins.

A second commenter agreed with the need for substantive criteria, and argued that the Department should find duty absorption whenever an affiliated entity pays either estimated or final antidumping duties. This commenter also asserted that the regulations should state expressly that a finding of absorption does not result in the treatment of the absorbed duties as a cost in the Department's calculations of dumping margins.

A third commenter, also supporting the promulgation of substantive criteria, suggested that the Department must develop a ''bright-line'' test to review and examine intracompany transfers of capital. This commenter also asserted that the Department should make clear that the duty absorption provision applies only to final, assessed antidumping duties, not to estimated antidumping duty deposits.

We have not adopted the suggestions that we promulgate substantive duty absorption criteria. The Department will need experience with absorption inquiries before it is able to promulgate such criteria. However, we have added a new paragraph (j)(3) that clarifies that the Department will limit the absorption inquiry to information pertaining to antidumping duties determined in the administrative review in which the absorption inquiry is requested. In our view, this limitation flows directly from the objective of section 751(a)(4), which is to identify producers or exporters that have affiliated importers and that continue to dump while the affiliated importer pays the antidumping duties. *See,* S. Rep. No. 412, 103d Cong., 2d Sess. 44 (1994). Limiting the inquiry in this manner precludes any approach to duty absorption that attempts to measure the degree to which the duties determined in a prior review period were passed on to unaffiliated purchasers, and precludes basing absorption on estimated antidumping duty deposits.

Exception from assessment of duties in regional industry cases: In light of the revised procedure for obtaining an exception from the assessment of duties in regional industry cases, discussed above in connection with § 351.212, we have added a new paragraph (l) that cross-references § 351.212(f).

Administrative reviews of CVD orders conducted on an aggregate basis: With respect to requests for zero rates in administrative review of CVD orders that are conducted on an aggregate basis, we revised paragraph (k)(1)(iv) to clarify that in the case of a non-producing exporter, the foreign government must certify that neither the exporter nor the exporter's supplier received more than *de minimis* subsidies during the review period.

Section 351.214

Proposed § 351.214 established procedures for conducting new shipper reviews, a new type of review provided for in section 751(a)(2)(B) of the Act. We received several comments concerning new shipper reviews, some of which related to § 351.214 and some of which related to other sections. For ease of discussion, we will address here those comments concerning other sections.

Initiation of a new shipper review: Three commenters suggested that the regulations clarify that the Department may initiate a new shipper review based

on an irrevocable offer for sale. They argue that if an irrevocable offer is considered sufficient for purposes of initiating an investigation, it should be considered sufficient for purposes of initiating a new shipper review. In addition, they argued that the statute does not preclude this approach, and they cited to one instance in which the Department allegedly initiated a new shipper review based on an irrevocable offer. Another commenter, however, argued in response that the statute precludes the initiation of a new shipper review in the absence of a sale or entry during the relevant review period, although the commenter did not cite the particular provision of the statute containing this preclusion. Yet another commenter suggested that the Department clarify that a person can request a new shipper review as long as there is a *bona fide* sale of subject merchandise to the United States, even if that merchandise has not yet been shipped to or entered the United States.

We agree that the Department should clarify the basis on which an exporter or producer may request a new shipper review. Therefore, in paragraph (b), we have added a new paragraph (b)(1) and have renumbered the remainder of paragraph (b) accordingly. Under paragraph (b)(1), an exporter or producer may request a new shipper review if it has exported subject merchandise to the United States or if it has sold subject merchandise for export to the United States. Thus, an exporter or producer may request a new shipper review prior to the entry of subject merchandise.

We have not adopted the suggestion that an irrevocable offer for sale would suffice for purposes of initiating a new shipper review. First, as discussed above in connection with § 351.102(b) and the definition of ''likely sale,'' we have deleted the irrevocable offer standard from the regulations. More generally, however, we do not believe it appropriate to base a new shipper review on anything short of a sale. The initiation of new shipper reviews and the issuance of questionnaires requires an expenditure of administrative resources by the Department that is not inconsiderable when cumulated across all AD/CVD proceedings. In our view, the Department should not expend these resources unless there is a reasonable likelihood that there ultimately will be a transaction for the Department to review; namely, as discussed below, an entry and sale to an unaffiliated purchaser. In the case of an offer, because the offer may or may not result in a sale, we do not believe that there is a sufficient likelihood of an eventual entry and sale to warrant the expenditure of resources on the initiation of a new shipper review.

The same commenter requested that the regulations clarify that one shipment or sale is sufficient for a new shipper to be entitled to a review, assuming that the other requirements of § 351.214(b) are satisfied. While we do not disagree with the proposition that a new shipper review may be initiated based on a single transaction, we believe that the regulation, as proposed, makes this clear. As discussed below, we have revised § 351.214(f)(2) to provide that the Secretary may rescind a new shipper review if there ''has not been an entry and sale.'' In our view, the use of the singular indicates that a single transaction is sufficient for purposes of initiating and completing a new shipper review.

Citing the possibility of meritless claims for new shipper reviews, one commenter, referring to proposed paragraph (b) (now paragraph (b)(2)), suggested that the Department require additional documentation from an exporter claiming to be a new shipper. Specifically, this commenter stated that the Department should require: (1) Documentation concerning the exporter's offers to sell merchandise in the United States; (2) documentation identifying the exporter's sales activities in the United States; (3) an identification of the complete circumstances surrounding the exporter's sales to the United States, as well as any home market or third country sales; (4) in the case of a non-producing exporter, an explanation of the exporter's relationship with its producer/supplier; (5) an identification of the exporter's relationship to the first unrelated U.S. purchaser; and (6) a certification from the purchaser that it did not purchase the subject merchandise from the exporter during the POI of the original investigation. Another commenter opposed this suggestion.

While the Department has no interest in dealing with meritless claims for new shipper reviews, by the same token, we do not want to discourage meritorious claims. The information requirements that this commenter would impose might discourage legitimate new shippers from requesting new shipper reviews. Moreover, some of the information sought (*e.g.*, the complete circumstances surrounding an exporter's home market or third country sales) appears to be of little relevance in determining whether an exporter is a new shipper to the United States. Therefore, we have not adopted this suggestion.

Another commenter questioned the implication, in the case of a CVD proceeding, that the foreign government will be required to provide a full response to a Department questionnaire. Presumably, the commenter was referring to proposed § 351.214(b)(5) and the requirement that a person requesting a new shipper review certify that it ''has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire.'' According to the commenter, if the foreign government cooperated during the original CVD investigation and provided a full response to the Department's questionnaire, another questionnaire response would not be necessary.

We have not revised § 351.214(b)(5) in light of this comment, because it overlooks the fact that the period of review in a new shipper review will be different from the POI of the original CVD investigation. Therefore, just as in the case of an administrative review, the Department will require information from the foreign government concerning any countervailable subsidies conferred during the period of review. In addition, as stated in the AD Proposed Regulations, the purpose of this particular certification requirement is ''to minimize situations in which [the Department] will be forced to rely upon the facts available.'' 61 FR at 7318.

Completion of a new shipper review: One commenter suggested that the Department clarify that a sale to an unaffiliated person along with an entry during the review period should be a prerequisite for completing a new shipper review. This commenter interpreted the references in proposed § 351.214(f)(2) to ''entries, exports, or sales'' as indicating that the Department might complete a new shipper review even in the absence of an entry and sale to an unaffiliated person during the review period.

In drafting proposed § 351.214, our intent was that the Department would complete a new shipper review only if there were an entry during the review period and a sale to an unaffiliated person. However, we appreciate that proposed § 351.214(f)(2), as drafted, does not accurately reflect this intent. Therefore, we have revised § 351.214(f)(2) to clarify this particular point.

Another commenter suggested that the Department modify proposed § 351.214(f)(2) to allow a review to continue if there were no entries during the review period but an entry occurred within 30 days after initiation. We have not adopted this suggestion. The

Department does not disagree with the notion that the Secretary should have the discretion to expand the review period in appropriate cases. However, given our lack of experience with this new procedure, we are reluctant to select 30 days as the relevant cut-off point for all cases. There may be cases in which the cut-off point should be greater or lesser than 30 days. In our view, § 351.214(f)(2)(ii) appropriately provides the Department with a more flexible approach for dealing with the types of problems envisioned by the commenter.

Conduct of new shipper reviews: One commenter also suggested that the regulations should provide that, in each new shipper review, the Department will send a questionnaire to the U.S. customer seeking information concerning the *bona fide* nature of the new shipper transaction. According to the commenter, such an approach would safeguard against new shippers conspiring with an unaffiliated U.S. customer to engage in a single transaction at a high price that would generate a dumping margin and deposit and assessment rates of zero. Again, another commenter opposed this suggestion.

We have not adopted this suggestion, because we believe that the statutory and regulatory schemes provide adequate safeguards against such manipulation, should it actually occur. It bears emphasis that in the scenario described by the commenter, a new shipper obtaining a dumping margin of zero would not be excluded from the order. Instead, its merchandise would remain subject to the AD order, and if the new shipper later began to sell at dumped prices, antidumping duties could be assessed with interest for any underpayment of estimated duties.

The same commenter made a suggestion regarding proposed §§ 351.221(b)(3) and 351.307(b)(iv), which together provide that the Department will conduct a verification in a new shipper review if the Secretary determines that good cause for verification exists. The commenter suggested that the regulations clarify that it will be the Department's normal practice to conduction a verification in a new shipper review.

We have not adopted this suggestion. While new shipper reviews constitute a new procedure, new shippers themselves are not a new phenomenon. Under the former statutory and regulatory scheme, the Department reviewed new shippers and assigned them their own rates in the context of reviews under section 751(a)(1) of the Act (now defined in § 351.102(b) as ''administrative reviews''). Under this scheme, the Department would not automatically conduct a verification in any review that involved a new shipper. We do not believe that the creation of a separate review mechanism for new shippers, in and of itself, warrants a departure from this practice. In addition, making verification the norm in all new shipper reviews would impose a considerable administrative burden on the Department. For these reasons, therefore, we have not adopted the suggestion.

A different commenter suggested that the regulations provide that the new shipper review period always will encompass all shipments of the subject merchandise made by the new shipper during the period preceding initiation of the review. This commenter cited the situation in which, in an AD proceeding, a new shipper waits until the end of the year following its first shipment to request a review. Because, according to the commenter, the period of review in an AD new shipper review may be the six-month period immediately preceding the anniversary or semiannual anniversary month, the review would not capture shipments, including the first shipment, made in the first six months. In addition, the commenter argued that in a CVD proceeding, because, under proposed § 351.214(g)(2), the normal new shipper review period would be the most recently completed calendar year, a shipment made before initiation but outside the calendar year would not be captured in the review period.

We have not adopted this suggestion, because we do not believe it is necessary. In the case of AD proceedings, while § 351.214(c) permits a new shipper to wait one year before requesting a review, it does not require a new shipper to do so. A new shipper can ensure that its first shipment is covered by submitting a request for a review at the earliest possible date. Moreover, in the case of new shipper reviews initiated after the anniversary month of an order, the period of review normally will be twelve, not six, months.

In the case of CVD proceedings, while it is possible that a review period based on the most recently completed calendar year may not capture a new shipper's first shipment because that shipment occurs after the calendar year in question, we believe that § 351.213(e)(2), which is cross-referenced in § 351.214(g)(2), and § 351.214(f)(2)(ii) provide the Department with sufficient flexibility to resolve any problems that may arise by modifying the standard review period.

This commenter also claimed that proposed paragraph (g) creates an anomaly by providing for different review periods for AD and CVD proceedings. The commenter suggested that the Department revise paragraph (g) so that the review periods for both AD and CVD new shipper reviews coincide.

The Department does not see any ''anomaly,'' because the POI and POR for AD and CVD investigations and reviews normally are different. *See* §§ 351.204(b) and 351.213(e). Moreover, the commenter did not offer any explanation as to why they should be identical. Therefore, we have not adopted this suggestion.

Deadlines for completing new shipper reviews: Another commenter, apparently referring to proposed § 351.214(d), contended that the timing of initiation of new shipper reviews was not consistent with the intent that new shippers be accorded expedited reviews. This commenter urged the Department to treat new shipper reviews more expeditiously, and alleged that the AD Agreement provides for such reviews at any time after an order is issued.

We have not adopted this suggestion, because, in our view, § 351.214(d) is consistent with section 751(a)(2)(B)(ii) of the Act, which, in turn, is consistent with Article 9.5 of the AD Agreement. Article 9.5 does not prescribe exactly when an authority must commence a new shipper review, but simply requires that such a review be ''initiated * * * on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member.'' This is precisely what section 751(a)(2)(B)(ii) and § 351.214(d) accomplish, because they provide for initiation on an accelerated basis as compared to an administrative review.

A different commenter suggested that to ensure that the Department completes new shipper reviews within the statutory deadlines, the regulations should provide that a new shipper would no longer have to post a bond or make a cash deposit for subject merchandise if a new shipper review extends beyond 270 days. According to the commenter, such a provision is necessary because a new shipper allegedly has no effective judicial remedy if a review extends beyond the 270-day period. We have not adopted this suggestion, because we do not believe that the Department has the authority (and the commenter does not cite to any authority) to do what the commenter suggests.

Bonding requirements: One commenter, presumably referring to proposed § 351.214(e), suggested that instead of permitting the posting of

bonds (in lieu of cash deposits) only when the Secretary initiates a new shipper review, the Department should permit the posting of bonds to be suspended immediately upon acceptance of a request for a new shipper review. We have not adopted this suggestion, because section 751(a)(2)(B)(iii) of the Act provides that the Secretary may direct the Customs Service to allow the posting of a bond ''at the time a review * * * is initiated. * * *''

Another commenter suggested that upon the initiation of a new shipper review, the new shipper should have the option of replacing its estimated duty deposits with a bond or other security. Specifically, this commenter suggested that in the case of merchandise entered prior to the initiation of the new shipper review, the Department should direct the Customs Service to refund all estimated duty deposits with interest, provided that the new shipper replaces those deposits with a bond or other security. We have not adopted this suggestion, because it is required by neither the statute nor the AD Agreement, and its implementation would result in a considerable administrative burden for the Department and the Customs Service.

Citing to proposed § 351.214(e) and the importer's option to post a bond in lieu of a cash deposit, one commenter suggested that the regulations provide for the payment of interest on liquidation, even where the importer has opted to post bond in lieu of cash deposits. We have not adopted this suggestion, because it would be inconsistent with the Department's general approach that interest may not be imposed where an importer has posted a bond or other security in lieu of a cash deposit. The Federal Circuit sustained this approach in *The Timken Co.* v. *United States*, 37 F.3d 1470 (1994), and the commenter did not offer any justification for applying a different approach in the context of new shipper reviews.

Duty assessments: One commenter suggested that the Department revise § 351.214 so as to ensure that the rate determined in a new shipper review will apply to any entries that occurred before the new shipper review period. The commenter proposed changes to paragraphs (b) and (g).

We have not adopted this suggestion, because we do not believe that it is necessary. Although § 351.214 gives a new shipper the option of waiting for up to one year before requesting a new shipper review, it does not require a new shipper to do so. A new shipper can ensure that its initial shipments are covered by the rates determined in a new shipper review by promptly requesting a new shipper review at a sufficiently early date.

Multiple reviews: One commenter objected to proposed § 351.214(j), which deals with situations where there are multiple reviews (or requests for review) of merchandise from a particular exporter or producer. According to the commenter, a new shipper should be guaranteed a new shipper review when multiple reviews covering the same merchandise are requested. The commenter cited Article 9.5 of the AD Agreement and the requirement that new shippers must have an opportunity for a review ''on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member.'' The commenter argued that the objective of Article 9.5 would be thwarted if the Department chose to terminate or not initiate a new shipper review in favor of a more protracted administrative review. The commenter proposed revised language that would have guaranteed a new shipper review if the request for review was made within six months of the first shipment. If the request was made later than six months and the merchandise already was the subject of a different type of review, the Secretary could decline to initiate a new shipper review.

With respect to this suggestion, we are mindful of the requirements of Article 9.5. In drafting a solution to the problem of multiple reviews, our intent was to provide the Secretary with sufficient flexibility so that the Secretary could opt to use the review mechanism that, in light of the facts, would be most likely to provide a new shipper with its own rate at the earliest possible date. Therefore, we believe that our objective was not inconsistent with that of the commenter.

On the other hand, as noted previously, new shipper reviews are a new procedure with which we have little experience. In our view, the proposal suggested by the commenter may be too rigid to accommodate all of the possible permutations that may arise in actual cases. Therefore, we have not adopted the suggestion, and have left § 351.214(j) somewhat open-ended in terms of the Secretary's discretion. We should emphasize again, however, that our intent is that the Secretary will exercise this discretion in a manner that provides a new shipper with its own individual rate at the earliest possible date.

Expedited reviews in CVD proceedings for noninvestigated exporters: In proposed paragraph (k), the Department established procedures for expedited reviews in CVD proceedings of exporters that the Department did not individually examine in the original CVD investigation. Upon further review, we have made several revisions to paragraph (k).

First, we have consolidated proposed paragraphs (k)(1) and (k)(2) into a single paragraph (k)(1). Paragraph (k)(1) continues to require that a request for review be submitted within 30 days of the date of publication in the **Federal Register** of the countervailing duty order. In addition, instead of providing for the initiation of paragraph (k) reviews in the semi-annual anniversary month or the anniversary month, in a revised paragraph (k)(2) we have provided that the Secretary will initiate a review in the month following the month in which a request for review is due.

Second, we have made certain changes to paragraph (k)(3) to better reflect the distinctions between a paragraph (k) review and a new shipper review. Under paragraph (k)(3)(i), the period of review will be the period of investigation used by the Secretary in the investigation that gave rise to the CVD order. This change will enable the Department to use government data from the original investigation, thereby enabling the Department to truly expedite the review. The objective is to provide a noninvestigated exporter with its own cash deposit rate prior to the arrival of the first anniversary month of the order, at which point the exporter may request an administrative review. In this regard, in paragraph (k)(3)(iii) we have clarified that the final results of a paragraph (k) review will not be the basis for the assessment of countervailing duties, except, of course, under the automatic assessment provisions of § 351.212(c).

Finally, because the Department will be reviewing the original period of investigation, we have provided in paragraph (k)(3)(iv) for the exclusion from a CVD order of a firm for which the Secretary determines an individual countervailable subsidy rate of zero or *de minimis*. However, the Secretary will not exclude an exporter unless the information on which the exclusion is based has been verified.

One commenter made two comments concerning proposed § 351.214(k). First, the commenter questioned the basis for not extending the opportunity to post bonds to reviews conducted under § 351.214(k). Second, the commenter questioned the implication that the foreign government will be required to provide a full response to the Department's questionnaire.

With respect to the first comment, we have not extended the opportunity to post a bond to these types of reviews because this option is not required by either the statute or the SCM Agreement. With respect to the second comment, for the reasons discussed in the preceding paragraph, we do not agree with the comment. However, the comment has identified a lack of precision in proposed (k)(1) regarding the information to be provided by an exporter requesting a review of this type. Therefore, we have added a new paragraph (k)(1)(iii) to clarify that an exporter must certify that it has informed the government of the exporting country that it will be required to provide a full questionnaire response.

One commenter argued that paragraph (k) should be extended to permit expedited reviews of exporters that were not investigated in an antidumping investigation. With respect to this comment, as stated in the AD Proposed Regulations, paragraph (k) implements Article 19.3 of the SCM Agreement. 61 FR at 7318. Article 19.3 requires expedited reviews for exporters that were not ''actually investigated'' in a CVD investigation. Because the AD Agreement does not contain a similar requirement, we have continued to limit paragraph (k) to CVD proceedings.

Exception from assessment of duties in regional industry cases: In light of the revised procedure for obtaining an exception from the assessment of duties in regional industry cases, discussed above in connection with § 351.212, we have added a new paragraph (l) that cross-references § 351.212(f).

Section 351.216

Section 351.216 deals with changed circumstances reviews under section 751(b) of the Act. In connection with § 351.216, one commenter suggested that the Department should adopt objective criteria for determining changed circumstances that would take into account the best interests of the current American industry rather than merely the interests of the petitioner. The commenter then described a series of scenarios for which, the commenter claimed, the regulations do not provide express answers. The commenter appeared to be focusing on so-called ''no-interest revocations.'' According to the commenter, the regulations, as drafted, provide a petitioner with a veto.

We have not revised the regulations in light of this comment, because we believe that the proposed regulations adequately take into account the interests of domestic producers other than the petitioner. First, § 351.216(b) provides that any interested party may request a changed circumstances review. Therefore, U.S. producers other than the petitioner may request such a review. Second, insofar as no-interest revocations are concerned, § 351.222(g)(1)(i) states that the lack of interest must be expressed by ''[p]roducers accounting for substantially all of the production of the domestic like product to which the order (or the part of the order to be revoked) or suspended investigation pertains.* * *'' Thus, a petitioner does not acquire a ''veto'' due to its status as petitioner.

Another commenter suggested that § 351.216 be revised so as to provide for a determination as to whether the domestic industry supports the continuation of an order. We have not adopted this suggestion, because it is inconsistent with legislative intent to preclude reconsideration of support for a petition after the initiation of an investigation. *See* sections 702(c)(4)(E) and 732(c)(4)(E) of the Act; SAA at 863.

Several commenters argued that the Department's existing regulatory procedures inadequately deal with situations of short supply. These commenters proposed a number of substantive and procedural changes in the areas of revocation, changed circumstances reviews, and temporary relief. Other commenters opposed the creation of a regulatory short supply provision. The commenters expressed concern that such a provision would undermine the AD/CVD law by creating a huge loophole, raising the cost of AD/CVD procedures, and interfering with the economic impact of an order. These commenters argued that a short supply provision would allow unfair low prices to continue and thereby thwart U.S. companies from renewing production in those products. The commenters also argued that no statutory authority exists in U.S. law to create a short supply provision.

With respect to revocation, several commenters suggested that the Department codify in the regulations its authority to revoke an order (or terminate a suspended investigation) in part with respect to particular products included within the scope of an order or suspended investigation. Another commenter proposed that demonstration of a lack of domestic availability would create a rebuttable presumption that the continued inclusion of the product within an order does not serve the purpose for which AD/CVD relief is granted, and, unless the petitioning industry rebutted the presumption, the Department would revoke the order with respect to the particular product. The commenter proposed also that the regulations set forth specific standards and procedures that would allow parties to demonstrate that a product covered by an order is not available domestically.

With respect to changed circumstances reviews, several commenters proposed that the regulations be amended to provide that lack of domestic availability of a product constitutes a ''changed circumstance'' sufficient to warrant a changed circumstance review. Other commenters proposed that the regulations provide that the mere allegation of lack of domestic availability is sufficient to trigger a changed circumstances review. Commenters also proposed that lack of domestic availability or, alternatively, an allegation of lack of domestic availability, should constitute ''good cause'' under section 751(b)(4) of the Act to initiate a changed circumstances review less than two years after the issuance of an order or the suspension of an investigation.

Several commenters specifically objected to the proposal that lack of domestic availability alone would trigger the initiation of a changed circumstances review. These commenters argued that a lack of interest or consent by the petitioning industry should be the only factor relevant to the decision to initiate a changed circumstances review of products alleged to be unavailable domestically. Other commenters argued that an express lack of interest in continuing the order is required to show ''good cause.'' They argued that, especially in the first two years after issuance of an order, industries that had been injured by dumped imports would be unable to begin or renew production if they continued to confront dumped goods.

Additionally, with respect to changed circumstances reviews, several commenters proposed specific regulatory deadlines governing the initiation and completion of changed circumstances reviews in cases based on lack of domestic availability. Another commenter also suggested that the Department adopt internal deadlines now and consider regulatory deadlines at a later date. Certain commenters also suggested that the Department revise its regulations to allow industrial users or consumers to file requests for changed circumstances reviews with respect to particular products covered by an order or suspended investigation.

With respect to temporary relief, several commenters proposed that the Department establish procedures that

provide for temporary relief in appropriate cases. In a similar vein, one commenter suggested that in the case of a suspension agreement based on quantitative restraints, the regulations should require the inclusion of a provision in the agreement that would permit the Department to suspend temporarily quantitative restrictions on the import of particular products that are not available domestically.

As is clear from these comments, the issues raised under the rubric of ''domestic availability'' represent the positions of parties with conflicting interests. The Department believes, however, that it is possible to provide relief to industries from unfair trade practices while also ensuring that products in which the affected industry has no interest are properly removed from, or not included in the scope of an order. As discussed in more detail below, through administrative practice, the Department has developed procedures that, in our view, adequately address the interests of both domestic producers and domestic users. In these regulations, we have modified some of these procedures in light of the comments received. In addition, we have created two new procedures specifically to address parties' concerns. Both the new and modified procedures are designed to ensure that products in which the affected industry has no interest are removed from, or not included in the scope of an order, without undermining the Department's ability to effectively enforce the AD/CVD law.

Two important new procedures we will implement are intended to avoid, in the first instance, situations where products in which the domestic industry has no interest are included in the scope of an order. These new procedures will, at the outset of a proceeding, focus on the proposed scope of an investigation. The Department believes that early attention to product coverage issues will alleviate the need to revisit these issues in the future.

First, we will include in our checklist of items raised to petitioners during pre-filing consultations, whether the proposed scope of a proceeding is an accurate reflection of the product for which the domestic industry is seeking relief. The Department's experience, in some cases, has been that proposed product coverage may be unintentionally over inclusive. This situation typically arises in cases where the proposed scope of an investigation is worded broadly or covers numerous HTS classification subheadings including subject and nonsubject merchandise. Raising these types of coverage issues during the pre-filing consultation period will give petitioners the opportunity to focus the scope on those products causing injury to the domestic industry. The resulting refined scope will contain a more accurate reflection of intended product coverage. In addition, the Department believes that beginning an investigation with more carefully defined scope language and tariff classifications will reduce the need to address product coverage issues later during the course of the proceeding.

Even after reconsideration of product coverage based on pre-filing consultations, petitioners may not be aware that the scope is over inclusive until U.S. purchasers have an opportunity to review the scope language and tariff classifications. As a result, as a second new procedure, we also will set aside a specific period early in an investigation for issues regarding product coverage to be raised. This new specific comment period will provide parties with ample opportunity to address product coverage issues. Petitioners will then have the opportunity to reconsider product coverage and the Department can amend the scope of the investigation if warranted. Given the timing of any amendments, the ITC may be able to take the refined scope into account in defining the domestic like product for injury purposes. In addition, early amendment will partially alleviate the reporting burden on respondents and avoid suspension of liquidation and posting of bonds or cash deposits on products of no interest to petitioners.

No regulations are needed to implement these two new procedures. We believe that affirmatively addressing product coverage, both pre-filing and early in an investigation, is the single most effective means to address the parties' concerns. This approach results in less ambiguity over coverage and avoids problems inherent in later clarifications and modifications to an order. In addition, resolution of product coverage issues early in a proceeding reduces costs for all parties by diminishing the necessity for later changed circumstances reviews or scope inquiries.

With respect to revocation, we believe that, as a matter of administrative practice, the Department's authority to issue such partial revocations or terminations already is well-established. For example, in *New Steel Rail, Except Light Rail, from Canada,* 61 FR 11607 (March 21, 1996), the Department issued a partial revocation with respect to certain 100 lb. rail. Similarly, in *Certain Cut-to-Length Carbon Steel Plate from Canada,* 61 FR 7471 (Feb. 28, 1996), the Department issued a partial revocation with respect to certain cobalt 60-free steel. To make clear the Department's commitment to the use of this established authority, we have codified this practice in section 351.222 (g). The Department, however, has not adopted the commenters' suggestions with respect to temporary relief because we believe that prompt and permanent revocation (or termination), where warranted by the facts, has been an adequate mechanism and is one which provides greater predictability for all parties. We will continue to consider the efficacy of our approach as this issue arises in individual cases.

We have not adopted the proposal that demonstration of lack of domestic availability creates a rebuttable presumption that, unless rebutted by the petitioning industry, would lead to automatic revocation of the order with respect to a particular product. Shifting the burden of proof would constitute a dramatic change from the Department's current practice.

We also have not adopted the proposal that lack of domestic availability, or an allegation thereof, constitutes a ''changed circumstance'' sufficient to warrant a changed circumstances review. Nor have we adopted the proposal that lack of, or the alleged lack of domestic availability automatically constitutes ''good cause'' to initiate an expedited changed circumstances review. The Department has an established practice of partially revoking an order after a changed circumstances review in certain situations where an interested party has alleged that a product should not be subject to an order and the petitioner or the domestic industry expresses a lack of interest in continuing the order with respect to the particular product. Furthermore, the Department has, in appropriate circumstances, initiated a changed circumstances review less than two years after the issuance of an order where the petitioners agreed there was ''good cause'' to conduct a review with respect to a particular product. *See Flat Panel Displays from Japan,* 57 FR 58791 (1992). We believe that Department practice, therefore, can adequately meet the needs of both the domestic industry and the domestic users of the particular product.

With respect to the suggestion that the Department adopt specific regulatory deadlines for changed circumstances reviews in cases where an interested party has alleged that a particular product should not be subject to an order, we agree that a deadline for

initiation is appropriate, and we have revised § 351.216(b) to provide for a 45-day deadline for initiation decisions. In addition, we recognize that the Department can complete changed circumstances reviews more quickly in cases in which there is agreement on the issues. Therefore, we have revised § 351.216(e) to require the Secretary, in such cases, to issue final results of review within 45 days after initiation. As revised, these regulations would permit the Secretary to issue final results within, roughly, 90 days of the receipt of a request for review. However, because changed circumstances reviews, by their nature, are fact-specific and often involve unique issues, we continue to believe that in situations where there is no agreement on the issues, a deadline of 270 days is appropriate for the completion of a changed circumstances review.

Finally, the Department has not adopted the suggestion that industrial users or consumers be allowed to file requests for changed circumstances reviews because we believe that it would conflict with the statutory scheme contemplated by Congress. Section 751(b)(1) of the Act refers only to requests for a changed circumstances review from an ''interested party.'' In addition, the Act and the SAA make a clear distinction between ''interested parties'' and other participants in an AD/CVD proceeding. On the other hand, section 751(b)(1) of the Act permits the Department to self-initiate a changed circumstances review when it ''receives information * * * which shows changed circumstances sufficient to warrant a review. * * *'' Nothing in these regulations alters the Department's authority under that provision. Despite statements that section 751(b) of the Act puts industrial users at a disadvantage with regard to supply concerns, the Department's experience has been that the requirements of the section have not prevented requests for changed circumstance reviews.

Section 351.218

Section 351.218 deals with sunset reviews under section 751(c) of the Act. We received a few comments concerning different aspects of § 351.218.

Initiation of sunset reviews: One commenter noted that proposed § 351.218(c) fails to account for sunset reviews other than the first sunset review. We agree that this oversight should be corrected, and we have revised paragraph (c) accordingly. In addition, we also have added a reference in paragraph (c) to the statutory provisions governing the initiation of sunset reviews of transition orders.

Another commenter suggested that the Department amend paragraph (c) to ensure that the intent of initiating a sunset review prior to the start of the last year of an order is made clearer. We have not revised paragraph (c) in light of this comment, because, in our view, the regulation already is clear that the Secretary, in certain circumstances, may issue an early initiation of a sunset review.

Sunset review procedures: One commenter argued that there should be no routine issuance of questionnaires in sunset reviews, and noted that the proposed regulations were ambiguous on this point. The commenter observed that proposed § 351.221(b)(2), which applies to reviews generally, calls for the issuance of questionnaires in every case. On the other hand, proposed § 351.221(c)(5)(i), which deals with sunset reviews in particular, provides that the notice of initiation of a sunset review will contain a request for information described in section 751(c)(2) of the Act. According to the commenter, these information requests may obviate the need for the Department to issue questionnaires.

Although we have yet to conduct an actual sunset review, we agree with the commenter that it may not be necessary to issue questionnaires in every sunset review. Accordingly, we have revised § 351.221(c)(5) by adding a new paragraph (iii) which permits the Secretary to refrain from issuing the questionnaires called for by § 351.221(b)(2). Of course, the Secretary would retain the discretion to issue questionnaires in sunset reviews in appropriate situations.

The same commenter also argued that because it is not anticipated that parties will have to submit much additional factual information in a sunset review, there should be no need for the Department to conduct verifications in sunset reviews. However, the commenter noted, proposed § 351.307(b)(1)(iii) requires a verification if the Department determines to revoke an order as the result of a sunset review. The commenter argued that verification should occur only for good cause, and that § 351.307(b)(1)(iii) should be revised to refer only to revocations under section 751(d)(1) of the Act, and not to revocations under section 751(d)(2) resulting from a sunset review.

We have not adopted this suggestion, because section 782(i)(2) of the Act provides that the Department will verify all information relied upon in making ''a revocation under section *751(d)* of the Act'' (emphasis added). Thus, section 782(i)(2) does not distinguish between revocations under section 751(d)(1) and revocations under section 751(d)(2).

Finally, this commenter suggested that the Department amend proposed § 351.218(e)(2) to set forth specifically the time limits for transition orders. We have not adopted this suggestion. Because the schedule in section 751(c)(6) of the Act for conducting sunset reviews of transition orders refers to the completion of activity by both the Department and the Commission, we believe it more appropriate to simply include in paragraph (e)(2) a reference to the relevant provisions of the statute.

Substantive guidelines: Three commenters suggested that § 351.218 should include standards and guidelines for determining the likelihood of dumping in a sunset review. (One of these commenters actually submitted its comment in connection with § 351.222(i)). One commenter simply noted the absence of standards and guidelines. However, the other commenter, proceeding from the premise that there is an internationally agreed preference for the revocation of old orders, made specific suggestions concerning the contents of standards and guidelines. At a minimum, this commenter suggested, the regulations should incorporate the relevant discussion from the SAA. A third commenter essentially suggested that the regulations should put the burden of proof on the domestic industry, and that the Department should consider arguments from petitioners valid only if the preponderance of the evidence supports their claim.

We have not adopted these suggestions. Due to our lack of experience with sunset reviews, we do not believe it appropriate at this time to elaborate in regulations on the substantive standards to be applied in determining whether dumping would be likely to continue or resume if an order were revoked. As for the suggestion that we incorporate into the regulations relevant language from the SAA, as noted previously, we generally have refrained from repeating in these regulations the language of the statute or the SAA.

We should note, however, that we do not agree with the statement by the one commenter that there is an internationally agreed preference for the revocation of old orders. The commenter does not elaborate on the precise source of this preference, and we do not find one in either the AD Agreement or the SCM Agreement. All that these agreements require is that

national authorities periodically review an order or suspended investigations to determine whether the maintenance of the order or suspended investigation is necessary to remedy injurious dumping or countervailable subsidization. In addition, we find no basis in either the statute or the agreements for placing the burden of proof on the domestic industry.

Section 351.221

Section 351.221 deals with review procedures. In paragraph (c)(7)(i) of this section, we moved the word ''will'' from that paragraph to the beginning of paragraph (c)(7).

We received one comment concerning § 351.221(b), in which the commenter stated that the regulation should provide that the results of a review include the Department's factual and legal bases for the determination. As noted previously in connection with a related comment, we have not included this requirement in the regulations because it already is clearly provided for in section 777(i) of the Act.

One commenter suggested that proposed § 351.221(c)(4) should be revised so as to provide for the issuance of preliminary results of review in the case of Article 8 Violation and Article 4/Article 7 reviews under section 751(g) of the Act and § 351.217. According to the commenter, while the Department should conduct these special reviews on an expedited basis, this objective can be preserved without eliminating an ''essential step'' in the review process.

We have not adopted this suggestion. In the case of an Article 8 Violation review, the review will be premised on a WTO ruling that the foreign government in question has violated its international obligations concerning the notification and use of so-called ''green light'' subsidies. In our view, in this situation, it is important to act as quickly as possible in order to provide the relevant domestic industry the relief to which it is entitled.

In the case of Article 4/Article 7 reviews, we also believe that swift action is essential to ensure that the United States promptly implements its international obligations in situations where the United States has prevailed in a dispute under Article 4 or Article 7 of the SCM Agreement. Moreover, we believe that Article 4/Article 7 reviews will be sufficiently straightforward so as to obviate the need for the issuance of preliminary results.

Section 351.222

Section 351.222 deals with the revocation of orders and the termination of suspended investigations. We received several comments relating to certain aspects of § 351.222.

Intervening periods: In proposed § 351.222 (b) and (c), the Department retained the requirement of the former regulations that an order or suspended investigation may be revoked or terminated based on the absence of dumping for three consecutive years or the absence of countervailable subsidization for three (or in some cases five) consecutive years. However, in proposed § 351.222(d), the Department established a new procedure under which a review of an ''intervening year'' would not be necessary if (1) the Department conducted a review of the first and third (or fifth) years and found no dumping or countervailable subsidization for those time periods; and (2) the Secretary is satisfied that during the unreviewed intervening years there were exports to the United States in commercial quantities of subject merchandise. As the Department explained, the purpose of paragraph (d) was to reduce the Department's workload by removing the incentive for companies to request reviews that they otherwise might not request.

Several commenters supported paragraph (d), while others opposed it. All of the commenters opposing paragraph (d) argued that it would not reduce the Department's workload, because if the first administrative review of an order or suspended investigation resulted in a rate of zero, the domestic industry likely would request a review in the second period to ensure that there was no dumping or subsidization during intervening years. In addition, one opposing commenter argued that paragraph (d) would allow a respondent to engage in significant dumping and still secure revocation. Another commenter suggested that a domestic interested party might not be in a position to know whether a particular producer is selling in commercial quantities. Yet another commenter argued that in cases where the Department relied on sampling and applied sample rates to non-sampled companies, there would be no basis for assuming that the non-sampled companies were not dumping in the beginning and ending years, or in the intervening years.

Having considered these comments carefully, we have retained paragraph (d). While it may be true that in many instances a domestic industry will request a review of an intervening year to ensure that dumping margins or countervailable subsidy rates did, in fact, remain at zero, we believe that there also will be cases where the domestic industry, based on its own knowledge of what is going on in the marketplace, will refrain from requesting a review because it is satisfied that dumping or countervailable subsidization has ceased. In terms of the Department's workload, this constitutes an improvement over the existing situation, in which a respondent must request a review for each year in order to obtain a revocation or termination.

As for the argument that a respondent might engage in significant dumping during an intervening year, one of the opponents of paragraph (d) admits that a domestic interested party could request a review if it believed that this was taking place. Similarly, while a domestic interested party may not know the precise volumes sold by a particular company, we believe, based on our experience, that domestic interested parties generally are sufficiently aware of marketplace developments so as to know whether a company is selling in commercial quantities. Finally, with respect to the comment concerning sampling, any sample used by the Department must be statistically valid. Therefore, we do not believe that it is illogical to extrapolate the results of sampling in the beginning and ending years to intervening years.

One commenter suggested that if paragraph (d) is retained, the Department should revise various paragraphs in § 351.222(e) so as to require, in addition to the certifications already required, that a request for revocation be accompanied by information concerning the volume and value of exports of subject merchandise during the initial period of investigation and each of the last three (or five) consecutive years. We have not adopted this suggestion, because we do not believe that this information needs to be provided at the same time as the request for revocation is submitted. However, the Department intends to request this type of information in the course of its review of the ending year in the three- or five-year period. Such information would be necessary to fulfill the requirement of § 351.222(d)(1) that the Secretary ''must be satisfied that, during each of the three (or five) years, there were exports to the United States in commercial quantities of the subject merchandise to which a revocation or termination will apply.''

Turning to supporters of paragraph (d), one supporter suggested certain amendments. First, the commenter suggested that the Department eliminate the requirement of commercial shipments during intervening years. According to the commenter, the presence of shipments during the

intervening years is irrelevant because the U.S. industry would not have been the victim of dumped or subsidized imports, and the available evidence from the first and last reviews would indicate that AD or CVD rates were not a factor in the absence of imports and that dumping or subsidization had ceased.

We have not adopted this suggestion, because we do not accept the premise that the absence of shipments in the intervening years is irrelevant. The underlying assumption behind a revocation based on the absence of dumping or countervailable subsidization is that a respondent, by engaging in fair trade for a specified period of time, has demonstrated that it will not resume its unfair trade practice following the revocation of an order. If the respondent is not selling in commercial quantities characteristic of that company or industry for the duration of the specified period, this assumption becomes weaker.

Moreover, we believe that it is reasonable to presume that if subject merchandise, shipped in commercial quantities, is being dumped or subsidized, domestic interested parties will react by requesting an administrative review to ensure that duties are assessed and that cash deposit rates are revised upward from zero. If domestic interested parties do not request a review, presumably it is because they acknowledge that the subject merchandise continues to be fairly traded. However, neither presumption can be made when merchandise is not being shipped in commercial quantities.

This same commenter also suggested that paragraph (d) be revised so as to permit more than one intervening unreviewed year in an AD proceeding or more than three unreviewed years in a CVD proceeding. According to the commenter, there may be reasons why a respondent might not request revocation at the earliest possible opportunity, such as cash flow difficulties that would preclude the respondent from incurring the expense of a review, or the respondent simply might miss the deadline for requesting a review. The Department agrees with this suggestion and has revised paragraphs (d)(2), (e)(1)(iii), (e)(2)(ii)(C), and (e)(2)(iii)(C) accordingly.

Revocation based on absence of review requests: In the AD Proposed Regulations, the Department eliminated its prior ''sunset revocation'' procedures based on the absence of requests for administrative reviews. These procedures previously were set forth in 19 CFR §§ 353.25(d)(4) and 355.25(d)(4). One commenter asked that the Department reconsider its elimination of these types of revocations.

The Department has reconsidered this matter, but continues to believe that these types of revocations should be eliminated. The procedures called for by §§ 353.25(d)(4) and 355.25(d)(4) result in a considerable administrative burden on Department staff, a burden that is unnecessary in light of the new sunset review procedure contained in section 751(c) of the Act and § 351.218 of these regulations.

Nonproducing exporters: As in the case of exclusions, in the AD Proposed Regulations, 61 FR at 7319, the Department requested additional public comment on the issue of whether there should be special revocation rules for firms, such as trading companies, that export, but do not produce, subject merchandise. We noted that one alternative would be to limit any revocation of a nonproducing exporter to the subject merchandise produced by those producers that supplied the exporter prior to revocation. The comments we received on this issue mirrored those concerning special exclusion rules for nonproducing exporters. For the same reasons discussed above with respect to exclusions, the Department believes it is appropriate to normally limit the revocation of a nonproducing exporter to that exporter's exports of subject merchandise produced by those producers that supplied the exporter during the years that formed the basis for the revocation. Therefore, we have added paragraphs (b)(3) and (c)(4) to provide that the partial revocation of an order with respect to a nonproducing exporter will be limited to that exporter's exports of subject merchandise produced or supplied by those companies that supplied the exporter during the time period that formed the basis for the revocation.

Other changes: In paragraph (g)(3)(vii), we corrected a typographical error. Also, we revised the structure of paragraph (j) to conform to **Federal Register** drafting guidelines.

Section 351.224

Section 351.224 deals with the disclosure of calculations and procedures for the correction of ministerial errors.

Section 351.224(b) provides for automatic disclosure normally within five days after the date of public announcement of the preliminary or final determination or final results of review. One commenter proposed that the regulations provide for release of disclosure materials on the same day that the Department releases its determination or results, and that comments on clerical errors be due 10 days thereafter. Another commenter proposed that the regulations permit disclosure of draft preliminary determinations and draft final determinations and results of review, and provide for filing of comments identifying ministerial errors, prior to their public announcement. A third commenter proposed that the regulations permit disclosure and correction of ministerial errors before publication of the Department's determination or results of review because an interested party may file an appeal immediately upon publication of the final, effectively removing jurisdiction from the Department and hence requiring litigation and court approval for correction of ministerial errors.

We have not adopted these proposals. In response to concerns about needless litigation arising out of lengthy review of ministerial error allegations, the Department has streamlined the disclosure and ministerial error correction process by providing a 30-day time frame for response to ministerial error allegations. While nothing prevents the Department from, for example, releasing disclosure materials on the day of public announcement, it is unlikely given the amount of work necessary to prepare the **Federal Register** notice, draft decision memoranda, finalize the computer programs, assemble the disclosure materials, etc., that the Department would be able to shorten the timing of disclosure even further.

Section 351.224(c) provides for filing of comments regarding ministerial errors. Paragraph (c)(1) indicates that the Department will not consider comments concerning ministerial errors made in the preliminary results of review. One commenter proposed that the regulations clarify that while the Department will not amend preliminary results to correct ministerial errors, it will consider comments concerning ministerial errors made in preliminary results in parties' case briefs. The commenter is concerned that the language in the proposed regulation suggests that the Department is prohibited from considering comments concerning ministerial errors until after the final results have been issued. The Department agrees that the language in the proposed regulation could be misconstrued. It was not our intention to suggest that the Department would not consider comments concerning ministerial errors made in preliminary results of review during the course of

the review. Rather, we meant only to indicate that the Department will not issue amended preliminary results to correct ministerial errors. Therefore, we have adopted the commenter's proposal and have amended the regulation to clarify that we will consider comments concerning ministerial errors made in a preliminary results of a review in a party's case brief. The alleged errors, therefore, will be addressed in the final results of review.

Two commenters proposed that the proposed regulations be amended to provide for correction of ministerial errors in preliminary results calculations because of ''significant commercial harm'' caused by publication of erroneous preliminary dumping margins in administrative reviews. We have not adopted this proposal. As the Department explained in the preamble to the proposed regulations, unlike a preliminary determination in an investigation, which may result in the suspension of liquidation and the imposition of provisional measures, a preliminary results of review has no immediate legal consequences. *See* 61 FR at 7321. As a result, a more judicious use of Department resources is to correct any ministerial errors made in a preliminary results of review in the final results. The Department is unable to comment on the commenters' concern that not correcting ministerial errors in preliminary results of review results in ''significant commercial harm'' because the commenters offered no examples or further explanation as to what they meant.

Section 351.224(c)(3) establishes the time limits for filing replies to comments. One commenter proposed that the regulations permit the filing of responses to allegations of ministerial errors in the context of preliminary determinations because the proposed timetable provides sufficient time for the Department to analyze such responses in addition to the original submissions. We have not adopted this proposal. Paragraph (c)(3) provides that replies to comments must be filed not later than five days after the date on which such comments are filed. There is an exception for replies to comments in connection with a significant ministerial error in a preliminary determination. As the Department explained in the preamble to the proposed regulations, because of greater time constraints due, in part, to the fact that Department personnel conduct verification soon after the announcement of a preliminary determination, the Department will not consider replies to comments in a preliminary determination. *See* 61 FR at 7321. Given the short time between public announcement of a preliminary determination and departure for verification, the Department disagrees with the commenter's suggestion that the proposed timetable provides sufficient time for the Department to analyze replies to comments in a preliminary determination. Any reply that a party wishes to make should, therefore, be included in that party's case brief so that the Department may address the reply in its final determination.

Section 351.224(e) provides for the analysis of any comments received and the announcement of the issuance of a correction notice normally not later than 30 days after the date of public announcement of the Department's preliminary or final determination or final results of review. One commenter proposed that the proposed regulations be modified to provide for announcement of the Department's decision on ministerial error allegations no later than 25 days after publication of the final in the **Federal Register**. Another commenter expressed strong support for the 30-day time frame set forth in the proposed regulations. The Department has not made any changes to the provision. A period of 30 days after the date of public announcement (the Department's regulation) or 25 days after publication in the **Federal Register** (the commenter's proposal) is roughly the same because there are typically three to seven days between the date of public announcement of a Department decision and the date of publication of that decision in the **Federal Register**. We have chosen to tie the deadline for issuance of a correction notice to the date of public announcement because the other deadlines in the ministerial regulation are also tied to the date of public announcement.

Sections 351.224(g) and (f) define *ministerial error* and *significant ministerial error,* respectively. One commenter proposes that the regulations clarify that ministerial errors do not include ''substantive'' errors, *i.e.,* errors which call a data submission into question in terms of basic accuracy or credibility. The commenter also proposed that the regulations state explicitly that parties are not allowed to submit new evidence beyond the time frame for submitting information to show or deny the existence of an error.

The Department has not adopted these proposals. The provisions of § 351.224—covering disclosure of *the Department's* calculations and procedures for correction of ministerial errors—only apply to ministerial errors, as defined in paragraphs (f) and (g), and, hence, only to errors made by the Department. Errors made by *respondents* in their submissions to the Department, such as transposing digits as a result of a data input error or other computer errors resulting in the omission of data cited as examples by the commenter, are not governed by the provisions of § 351.224. Prior to the deadline for submission of factual information, the Department's practice normally is to accept a respondent's correction of an error in its own data because the Department has time to review, analyze, and where applicable, verify the corrected data. Where a respondent alleges an error in its own data only after the deadline for submission of factual information, frequently after the preliminary determination or results of review, the Department's longstanding practice has been to correct the respondent's own clerical errors only if the Department can assess from information already on the record that an error has been made, that the error is obvious from the record, and that the correction is accurate. *See, e.g., Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Italy,* 57 FR 8295, 8297 (1992). In light of the Federal Circuit's decision in *NTN Bearing Corp.* v. *United States,* Slip Op. 94–1186 (1996), however, the Department is in the process of reevaluating its policy for correcting clerical errors of respondents. We believe that it is appropriate to develop such a policy through practice. *See Certain Fresh Cut Flowers From Colombia,* 61 FR 42833, 42833–34 (August 19, 1996) (proposing a number of conditions under which we would accept corrections of a respondent's own clerical error). As a result, we do not believe that a regulation on this issue would be appropriate at this time.

Section 351.225

Section 351.225 details the procedural and substantive rules for scope rulings, including rulings involving the anticircumvention provisions of section 781 of the Act. We have noted below the few changes made from the AD Proposed Regulations.

Suspension of liquidation: In connection with proposed paragraph (l), a number of commenters urged that, contrary to previous practice and the proposed regulation, the Department should suspend liquidation of possibly affected entries at the time of the formal initiation of a scope inquiry, and that this suspension should continue unless and until the Department makes a final negative ruling. These commenters argued that proposed paragraph (l) is

contrary to the purpose of the statute, which is designed to provide relief from imports of merchandise that, in the context of a scope inquiry, the Department already has determined to have been dumped. They noted that because scope rulings only clarify, and do not expand, the scope of an order, the Department must view any merchandise that it determines to be within the scope of an order as always having been within the scope. Therefore, they asserted, the Department should suspend liquidation when it initiates a formal scope inquiry (if liquidation is not already suspended), and this suspension should apply to all unliquidated entries. Finally, these commenters argued that the Department should terminate suspension of liquidation only upon the issuance of a negative final determination.

Another commenter suggested that to help address the problem of imports escaping the assessment of duties, the Department should impose a deadline on the formal initiation of scope inquiries following the receipt of a request for a scope ruling or an anticircumvention inquiry. In addition, one commenter asked the Department to specify that the suspension of liquidation and the imposition of a cash deposit requirement will apply prospectively from the date of an affirmative scope ruling. Other commenters supported the suspension of liquidation provisions in proposed paragraph (l).

The Department believes that, for the most part, the suspension of liquidation rules in paragraph (l) are appropriate and has not changed them. Suspension of liquidation is an action with a potentially significant impact on the business of U.S. importers and foreign exporters and producers. The Department should not exercise this governmental authority before it has first given all parties a meaningful opportunity to present relevant information and defend their interests, and before the Department gives a reasoned explanation for its action. Formal initiation of a scope inquiry by the Department represents nothing more than a finding by the Department that it cannot resolve the issue on the basis of the plain language of the scope description or the clear history of the original investigation. It would be extremely unfair to importers and exporters to subject entries not already suspended to suspension of liquidation and possible duty assessment with no prior notice and based on nothing more than a domestic interested party's allegation. Because, when liquidation has not been suspended, Customs, at least, and perhaps the Department as well, have viewed the merchandise as not being within the scope of an order, importers are justified in relying upon that view, at least until the Department rules otherwise. Therefore, the Department will not order the suspension of liquidation until it makes either a preliminary or final affirmative scope ruling, whichever occurs first.

Nonetheless, the Department is cognizant of the concerns expressed on this issue by representatives of domestic interested parties. In particular, the Department is concerned that significant delays in initiating scope inquiries can be harmful. Accordingly, we have amended paragraph (c), in accordance with a suggestion made by one commenter, to impose a time limit of 45 days, from the date of receipt of a request for a scope ruling, on the determination whether to initiate a formal scope inquiry under § 351.225. This deadline will apply to all scope requests, including requests relating to circumvention. Although the Department will continue to resolve scope questions, where it can, on the basis of the plain language of the scope description and the clear history of the original investigation without initiating a formal inquiry, the Department will do so in 45 days or less.

In further recognition of the concerns expressed by domestic interested parties, the Department also has revised paragraph (l) to make a suspension of liquidation, when ordered in conjunction with a preliminary or final affirmative ruling, effective as to entries of all affected merchandise that are made on or after the date of initiation of the scope inquiry and that remain unliquidated as of the date of publication of the affirmative ruling.

Anticircumvention/Major input rule: Several commenters noted a discrepancy between proposed paragraphs (g) and (h) relating to the application of the ''major input'' rule under section 773(f)(3) of the Act. Under proposed paragraph (g), which deals with products completed or assembled in the United States, the application of the major input rule was discretionary when valuing parts or components acquired from an affiliated person. Under proposed paragraph (h), the application of the major input rule was mandatory in dealing with products completed or assembled in other foreign countries. One commenter suggested that use of the major input rule be mandatory in all cases. Another suggested that it be discretionary in all cases.

The SAA at 894 states that affiliation ''* * * *can* result in application of the major input rule * * *'' (emphasis added). Therefore, the Department has revised paragraph (h) to make application of the rule discretionary for purposes of both U.S. and third country assembly. We also have corrected a typographical error in the last sentence of paragraph (g).

Several commenters suggested that, in applying paragraphs (g) and (h), the Department should not apply the major input rule in determining the value of parts and components originating in the country subject to the order. They argued that the statute requires a determination of whether such parts and components constitute a significant percentage of the final value of the finished product. Because the major input rule provides for the use of cost of production to value such parts or components, use of the rule, they asserted, necessarily would omit a profit element, thereby understating the value of the parts or components.

The Department has not made the change suggested by these commenters. First, the SAA, as noted above, clearly contemplates the use of the major input rule in appropriate circumstances. Second, the statute clearly states that in dealing with inputs from affiliated persons, the Department may use the higher of transfer price, market value, or cost of production to ''determine the value of the major input. * * *'' Thus, cost of production may be used as the basis of the ''value'' of such an input. Finally, as noted above, the application of the major input rule is discretionary. Should the Department encounter a case in which the application of this rule would, in our judgment, be inappropriate, we will explore other methods of valuing such parts or components.

Anticircumvention/Other issues: Several commenters suggested that the Department should provide more definitive guidance on what constitutes circumvention. One commenter suggested a ''safe harbor'' of 35 percent value added in determining whether the value added in a process of assembly or completion in the United States or a third country is ''significant.'' Another commenter suggested the adoption of value-added ranges for what the Department will consider ''significant'' in examining assembly or completion or assembly in the United States or a third country. Another suggested that the Department adopt a standard of considering production in the United States or a third country as ''significant'' and simple assembly as not ''significant''. Still another commenter proposed that the Department develop a framework for analyzing scope issues

and a comprehensive set of factors within that framework.

The Department has not adopted these suggestions because we believe that the wide variety of products and processes encountered in AD/CVD proceedings makes the adoption of any more specific standards inadvisable at this time. To establish a ''safe harbor'' or specific guidelines might result in the incorrect classification of substantial production operations as ''insignificant'' and ''screwdriver'' operations as ''significant.'' As we gain more experience, we will consider promulgating more detailed rules.

One commenter suggested that for purposes of determining whether completion or assembly processes in the United States or a third country are minor or insignificant, the Department should require all relevant factors in sections 781(a)(2) and 781(b)(2) to be present and demonstrably insignificant before finding that circumvention exists. The Department has not adopted this suggestion, because we believe it to be at odds with the statute, which requires only that all the listed factors be taken into account. Adoption of this suggestion would, we believe, restrict the application of the anticircumvention provisions in a manner contrary to the intent of the law.

Another commenter suggested that the regulations (1) provide that all anticircumvention inquiries will encompass at least the four most recent fiscal quarters of any respondent subject to the inquiry, and (2) make verification mandatory in all anticircumvention inquiries. The Department has not adopted these suggestions because we believe that the exact periods appropriately covered in an anticircumvention inquiry may vary widely and are best left to a case-by-case judgment. Also, verification can and will be conducted whenever the Department believes it appropriate, but it is unnecessary to mandate it in every case.

One commenter argued that because the emphasis in anticircumvention inquiries concerning completion or assembly in the United States or a third country is now on whether that process is minor or insignificant, any parts or components sourced from third countries should not be included in making that judgment. We have not adopted this suggestion. The commenter is correct about the change in emphasis in anticircumvention inquiries. However, the Department also must determine whether the value of the parts or components from the subject country is a significant portion of the total value of the merchandise. Any parts or components sourced from a third country necessarily form part of the total value of any such merchandise.

Another commenter suggested that the regulations make clear that the requirement that merchandise circumventing an order be of the same ''class or kind'' as the merchandise subject to the order be broadly construed to include within the same class or kind of merchandise a component and a finished product. According to the commenter, such a construction is necessary to effectuate Congress' intent and is fully consistent with the terms of the statute, the Department's past practice and judicial precedent.

The Department has not adopted this suggestion. As we stated in the AD Proposed Regulations, 61 FR at 7322, ''the term ''class or kind'' in the circumvention context is not broader than the merchandise covered by an order for other purposes of the statute.

One commenter suggested that the Department include in the regulations the factors for applying section 781(c) of the Act, the ''minor alterations in the merchandise'' provisions, that are enumerated in the Senate Report on the URAA. The Department believes that the adoption of this suggestion would be inappropriate. While the Department may apply them in practice, formal adoption of them might be so restrictive as to make it more difficult to reach sound decisions on such questions, given the widely varying fact patterns encountered in such inquiries.

Scope procedures: One commenter suggested that the final regulations clarify that the Department has the authority to self-initiate anticircumvention and other types of scope inquiries. According to the commenter, the proposed regulation did not state expressly that the Department could self-initiate a scope inquiry.

The Department has not adopted this suggestion, because we believe that the regulation as proposed is clear that the Department has the authority to self-initiate an anticircumvention inquiry, as well as any other type of scope inquiry. The proposed regulation makes clear that the term ''scope ruling'' includes rulings relating to anticircumvention, and § 351.225(b) clearly provides for self-initiated scope inquiries.

Another commenter requested that the four-month time limit for resolving formally initiated scope inquiries run from the date of receipt of a request for a ruling, not the date of initiation of an inquiry. The Department believes that such a change would so compress the time available for making scope decisions as to hamper our ability to make decisions that are both timely and proper. Accordingly, we have not adopted this suggestion. However, as noted above, we have adopted a 45-day time limit on the initiation of scope inquiries to ensure that there are no undue delays in the resolution of scope issues.

One commenter suggested, in the context of comments regarding scope issues, that the Department establish presumptions concerning the domestic unavailability of a product at issue. According to the commenter, these presumptions would be based upon allegations by petitioners and the products produced by them. With respect to this comment, the Department has addressed it in the section of this notice dealing with comments relating to lack of domestic availability.

Another commenter suggested that the Department specify in the regulations that scope rulings are clarifications, not modifications, of the scope of an order. We have not adopted this suggestion, because we believe that this principle is so well-established that a regulation is not necessary.

One commenter suggested that the regulations be revised to require the Department, after issuing an affirmative scope ruling, to (1) canvas known importers to detect covered imports, and (2) then advise Customs to proceed to suspend liquidation on entries of such merchandise. The same commenter requested a regulation that would require immediate electronic transmission from the Department to the Customs Service of all final scope rulings.

The Department believes that a canvassing process would be an enormous burden, and one that is neither contemplated in the statute or its legislative history nor necessary for effective enforcement of the law. Accordingly, we have not adopted this suggestion. To the extent that electronic transmittals of scope rulings to the Customs Service is meritorious, it is unnecessary and inappropriate to provide for this in the regulations.

Two commenters asked the Department to revise the regulations to clarify that in the case of an industrial user that has participated in any segment of a proceeding, the Department will include the industrial user on the scope service list and will notify the industrial user of a ruling under § 351.225(d). With respect to this suggestion, it was our intent in the proposed regulations that all persons, whether interested parties, industrial users, or a representative consumer group, would be included on the scope service list and would be notified of

scope rulings. Therefore, we are modifying the language in paragraphs (d) and (n) of § 351.225 to clarify this intent.

One commenter suggested that the Department require service on *all* parties included on the scope service list only in the case of an application for a scope ruling. This commenter suggested that other documents should be served only on those parties that entered an appearance in the scope inquiry. According to the commenter, proposed § 351.225(n) and § 351.303(f) both require service of all documents on all parties included on the scope service list.

The Department does not believe that a revision of § 351.225(n) is necessary. In our view, paragraph (n) makes clear that the term ''scope service list'' differs from the term ''service list,'' and that only applications for scope rulings need to be served on all parties included on the scope service list. As for service of all other submitted documents, the requirements of § 351.303(f) apply, which require only service on parties included on the normal ''service list'; *i.e.*, those parties that have entered an appearance and, in the case of business proprietary information, have obtained an APO for the particular scope inquiry. As noted above, we have modified § 351.225(d) so that all parties included on the scope service list will be notified of scope rulings.

The same commenter made a suggestion concerning paragraph (l)(4), which provides for the inclusion of a product within a pending review if, within 90 days after initiation of the review, the Secretary issues a final scope ruling that the product is included within the scope. The commenter suggested that we should extend the 90-day period if the Secretary extends the time for a preliminary determination in the review.

The Department has not adopted this suggestion because the decision to extend the time for a preliminary review determination often comes only a short time before the expiration of the normal time limit and well after the expiration of 90 days. Therefore, we could not implement the proposal in a manner that would allow the Department to request and receive the needed additional information in a timely manner.

Another commenter made a suggestion regarding proposed § 351.225(l)(4). Paragraph (l)(4) provides, among other things, that if the Secretary determines after 90 days of the initiation of a review that a product is included within the scope of an order or suspended investigation, the Secretary may decline to seek sales information concerning the product for purposes of the review. The commenter suggested that although it may not be practicable, for purposes of an *ongoing* review, to collect information on sales found to be within the scope of an order, the Department should collect this information for use in a subsequent review.

The Department has not adopted this suggestion, because we do not believe it appropriate to collect information for a review that has not yet been, and may never be, requested. However, paragraph (l)(4) makes clear that while the Department may not collect information regarding sales of a particular product, it will not disregard those sales for purposes of the ongoing review. Instead, the Department will calculate dumping margins or CVD rates, and will issue appropriate assessment instructions, for sales of such products on the basis of non-adverse facts available. Moreover, during the next requested review, if any, the Department will examine all sales of the products determined to be within the scope of the order or suspended investigation that were sold during the time period covered by that review.

Finally, in connection with proposed § 351.225(k), one commenter suggested that the Department should revise its scope criteria by developing a framework for analyzing scope issues, and then developing a comprehensive set of factors within that framework. In particular, according to this commenter, to provide greater certainty for industrial users of merchandise that may be covered by an investigation or order, the Department should include factors that examine both consumption and production substitutability.

In our view, this suggestion relates to the broader topic of domestic non-availability. Accordingly, we have addressed this suggestion in the portion of this notice dealing with issues relating to domestic non-availability.

Other Procedural Comments

In addition to the comments discussed above, we received other comments relating to AD/CVD procedures that were not necessarily tied to a particular provision of the AD Proposed Regulations. These comments are addressed below.

Publication of remand determinations: Numerous commenters representing both domestic and foreign interests suggested that the Department should make remand determinations more accessible to the public, although the details of the particular suggestions differed. Some commenters argued that the Department should publish remand determinations in the **Federal Register**, or at least publish a notice indicating the existence of a remand determination. Others argued that, at a minimum, the Department should make remand determinations more easily obtainable once their existence is known.

The Department agrees that remand determinations constitute an important source of precedential material, and that currently it is unduly difficult for private parties to obtain access to remand determinations. Indeed, in some instances, it has proven unduly difficult for Department personnel to obtain copies of these documents. Therefore, we agree that new procedures are necessary.

On the other hand, we do not agree with the assertion that, as a legal matter, remand determinations must be published in the **Federal Register**, and we are reluctant to incur the expense of such publication when less expensive alternatives are available. In addition, we do not believe that it is necessary to publish a **Federal Register** notice announcing the existence of a remand determination, because the court or binational panel opinion giving rise to the remand determination will indicate to the public that a case has been remanded and that a remand determination will be forthcoming.

Accordingly, the Department intends to take the following steps to make remand determinations more readily accessible. First, the Department will place the public version of each remand determination on its Internet page so that remand determinations will be available electronically. While this step may not permit electronic research, if there is sufficient interest in conducting such research we would expect that one or more of the commercial online research systems would begin to include remand determinations in their databases, just as they do in the case of ITC determinations that are not published in the **Federal Register**.

Second, the Department will place the public version of a remand determination in the public file (located in the Department's Central Records Unit) for the AD/CVD proceeding to which the determination pertains. In addition, to further facilitate access, the Central Records Unit also will maintain a separate, chronological file containing public versions of all remand determinations.

The Department hopes that through these steps it will have addressed the concerns giving rise to the comments. If these steps prove to be inadequate, we

remain open to further suggestions on improvement.

Third country AD petitions: One commenter suggested that the Department include in its regulations a provision for implementing new section 783 of the Act, which deals with third country antidumping petitions. The commenter also suggested that any regulation should expressly provide that such petitions may be filed on behalf of a regional industry or industries in the third country. We have not adopted this suggestion because we believe that it is more appropriately addressed to the Office of the U.S. Trade Representative.

Binding ruling procedure: A few commenters proposed that the Department should institute a system for issuing binding letter rulings under which persons could obtain advance rulings regarding the application of the Act and the regulations to particular factual scenarios. Absent misrepresented, incomplete, or changed facts, these rulings would be binding for purposes of an AD/CVD proceeding, unless revoked. Even when revoked, the revocation of the ruling would have prospective effect only.

We have not adopted this proposal for several reasons. First, the proponents of this binding letter ruling system contemplated an essentially *ex parte* procedure in which the Department would issue binding rulings within 30 days of receipt of a request for a ruling. In our view, such a procedure would conflict with the numerous procedural safeguards in the Act that are designed to ensure that all sides involved in an AD/CVD proceeding have an equal opportunity to affect the outcome.

These procedural shortcomings cannot be overcome by the fact that parties would be able to challenge the validity of the ruling in, for example, an administrative review in order to have the ruling revoked. Because, under the proposal, the revocation of the ruling would have prospective, rather than retroactive, effect, a successful challenger still would have been denied the opportunity to have input concerning the application of the AD/CVD law to imports covered by a ruling prior to its revocation.

In addition to these procedural defects, we have serious doubts as to the compatibility of a binding letter ruling system with the requirements of section 751(a) of the Act. Section 751(a)(2)(C) of the Act provides that the Department must assess antidumping and countervailing duties (and establish cash deposit rates) in accordance with the results of reviews under section 751(a). Thus, a letter ruling could affect the rate at which entries are liquidated only to the extent that (1) the facts upon which the ruling was based are consistent with the administrative record established in the review, and (2) the Department adopts in the review the policies set forth in the ruling. With certain limited exceptions, it is doubtful that the Department could bind itself to apply the results of a letter ruling in a review.

Having said this, we would consider the adoption of a non-binding ruling procedure. At this point, however, we are uncertain as to whether parties would find such a procedure useful. In addition, the resource requirements that such a procedure would entail could be substantial. Nevertheless, we intend to continue the dialogue with persons having an interest in a possible letter ruling procedure. In addition, if a sufficient number of persons indicate an interest, we will convene a hearing on this topic.

Subpart C—Information and Argument

Subpart C of part 351 deals with collection of information and presentation of arguments to the Department.

Section 351.301

Section 351.301 sets forth the time limits for submission of factual information in investigations and reviews.

Time limits for submission of factual information in investigations and reviews: Section 351.301(b)(1) provides that with respect to investigations, submission of factual information is due no later than seven days before the verification of *any* person is scheduled to commence. Several commenters suggested that the deadline be revised to provide for submission of factual information no later than seven days before the verification of *the* respondent to which the information applies is scheduled to commence. The commenters expressed concern that the proposed regulation unjustly penalizes respondents whose information will not be verified until very late in the verification schedule and that where there are multiple respondents, the different respondents may not be aware of the other respondents' verification schedules.

We have not adopted this suggestion. In the past there has been some confusion over the deadline for submission of factual information. In furtherance of the goal of simplifying the Department's procedures, the regulations clarify that the deadline for submission of factual information is identical for all parties. Contrary to the suggestion that this penalizes respondents scheduled for verification late in the verification schedule, a single deadline ensures fairness in that all parties have an equal amount of time to submit factual information to the Department. Furthermore, a single deadline ensures that Department analysts have time to review submitted information before they depart for verification, particularly where they are scheduled to perform consecutive verifications of different respondents. The Department recognizes the concern that different respondents may not be aware of other respondents' verification schedules and, as such, will respond promptly to inquiries as to the date on which the first verification is scheduled to commence once that date has been set.

Section 351.301(b)(2) provides that with respect to administrative reviews, submission of factual information is due no later than 140 days after the last day of the anniversary month. One commenter suggested that the deadline for submission of factual information in administrative reviews be triggered by publication of the notice of initiation as are the deadlines for submission of factual information in other types of reviews. Another commenter suggested that the Department allow for submission of factual information in administrative reviews up to 30 days after the publication of the preliminary determination. A number of commenters also suggested that the Department should automatically extend the deadline for submission of factual information whenever it extends the deadline for the preliminary or final determinations in an administrative review.

We have not adopted these suggestions. The deadline for submission of factual information in administrative reviews is tied to the anniversary month because the statutory deadlines for preliminary and final determinations are tied to the anniversary month (*see* section 751(a)(3) of the Act). In contrast, the deadlines for submission of factual information in other types of reviews such as new shipper, changed circumstances, or sunset reviews are tied to the publication of the notice of initiation because the statutory deadlines for preliminary and/or final determinations in these proceedings are either tied to initiation or not prescribed (*see, e.g.*, paragraphs (a)(1)(B), (b), and (c) of section 751 of the Act). Furthermore, because the Department normally conducts verification prior to issuing its preliminary determination in an administrative review, a deadline for submission of factual information of up

to 30 days *after* the preliminary determination would not allow sufficient time for analysis and, if necessary, further submissions upon request prior to any scheduled verifications. Finally, although the regulations do not provide for automatic extension of the deadline for submission of factual information in reviews whenever the deadline for the preliminary or final determinations is extended, the Department may extend any time limit, including deadlines for submission of factual information, for good cause (*see* § 351.302). Because the Department's decision to extend the deadline for its determination in an administrative review may be based on the fact that, for example, there are a significant number of respondents to review or a number of complicated issues to resolve, automatic extension of the deadline for submission of factual information might result in the filing of additional information requiring further analysis and review, thereby frustrating the objective of the Department to allow additional time for making its determination.

Proposed sections 351.301(b) (1)-(4) provided that where verification is scheduled for a person, factual information requested by verifying officials will be due no later than seven days after the date on which the verification of that person is complete. Two commenters suggested that the seven-day deadline be eliminated and that Department analysts be allowed to establish the deadlines for such submissions on a case-by-case basis. One commenter suggested in the alternative that the regulations should qualify the deadline with the word ''normally'' to make it clear that the deadline can be extended where appropriate.

We have not eliminated the seven-day deadline for post-verification submissions; however, we have added the word ''normally'' to the regulations to clarify that the deadline can be extended where appropriate. The seven-day deadline provides an equal amount of time for all parties to file post-verification submissions upon request and provides guidance to other parties to the proceeding, including petitioners, as to when such submissions can be expected. Whether or not a regulation includes the qualifier ''normally,'' the Department retains the authority to extend any time limit established in these regulations unless precluded by statute (*see* § 351.302(b)). As stated in the preamble to the proposed regulations, ''[p]arties should not draw an inference that simply because a particular deadline does not explicitly address the Department's authority to extend such deadline that the Department may not do so. Unless expressly precluded by statute, the Secretary may extend any deadline for good cause'' (61 FR at 7325).

One commenter proposed that the regulations provide that petitioners are required to submit any pre-verification comments at least seven days before verification. We have not adopted this proposal. There is no limitation on the submission of comments—as opposed to new factual information—prior to verification. Written argument may be submitted at any time during the course of an AD/CVD duty proceeding through the submission of case and rebuttal briefs (*see* § 351.309 (note that § 351.309(c)(2) provides that the case brief must present all arguments that a party wants the Department to consider in its final determination or final results of review)). While it may be in a party's interest to submit pre-verification comments at least seven days before verification so that the Department has sufficient time to consider them prior to verification, it is not required.

Time limits for certain submissions: Section 351.301(c) sets forth the time limits for certain submissions, including information to rebut, clarify, or correct factual information submitted by another party, information in questionnaire responses, and publicly available information to obtain values for factors in nonmarket economy AD cases.

Submission of factual information to rebut, clarify, or correct factual information: Section 351.301(c)(1) provides that any interested party may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party at any time prior to the applicable deadline for submission of such factual information or, if later, 10 days after the date such factual information is served on the interested party or, if appropriate, made available under APO to the authorized applicant. Upon further review, we have revised this provision to eliminate potentially confusing language and to clarify that in no case will a party have less than 10 days to submit factual information to rebut, clarify, or correct factual information submitted by any other interested party.

Two commenters proposed that the regulations provide that only domestic interested parties be allowed to submit new factual information to rebut, clarify, or correct factual information submitted by foreign interested parties. According to the commenters, this would avoid the selective provision of rebuttal information by foreign interested parties. Another commenter proposed that the 10-calendar day deadline be changed to 10 business days.

We have not adopted either of these proposals. The prior regulations allowed only domestic interested parties to rebut, clarify, or correct factual information submitted by respondent interested parties. However, the Department reconsidered the regulation and the rationale behind it and determined that the goal of accurate determinations is enhanced by allowing any interested party and, as now provided in § 351.312, industrial users and consumers, to comment on submissions of factual information. One commenter specifically expressed support for this change. Additionally, the Department has maintained the 10-calendar day deadline. This deadline is relevant only where factual information is submitted less than 10 days before, on, or after (normally, only with the Department's permission) the applicable deadline for submission of factual information; at this point in the proceeding, the Department and the parties have an interest in finalizing the addition of new factual information to the record. The Department believes that 10 calendar days provide ample time for an interested party to rebut, clarify, or correct factual information submitted by another interested party.

Two commenters proposed that the regulations provide that any interested party may submit factual information to rebut, clarify, or correct factual information contained in the Department's verification reports. We have not adopted this proposal. Verification is the process by which the Department checks, reviews, and corroborates factual information previously submitted. Parties are free to comment on verification reports and to make arguments concerning information in the reports up to and including the filing of case and rebuttal briefs (note that § 351.309(c)(2) provides that the case brief must present all arguments that a party wants the Department to consider in its final determination or final results of review). In making their arguments, parties may use factual information already on the record or may draw on information in the public realm to highlight any perceived inaccuracies in a report. Though comment on the Department's verification findings is appropriate, submission of new factual information at this stage in the proceeding is not, because the Department is unable to verify post-verification submissions of new factual information.

Questionnaire responses: Section 351.301(c)(2) deals with questionnaire responses and other submissions on request. Section 351.301(c)(2)(ii) provides that the Department must give notice of certain requirements to each interested party from whom the Department requests information.

One commenter proposed that the Department should review and revise its questionnaire to reduce reporting burdens. In addition, the commenter suggested that the Department accept the reporting of financial data in the form consistent with the generally accepted accounting principles of the respondent's country of origin. The Department already has significantly revised its standard questionnaire to make it more ''user friendly'' and efficient by simplifying information requests and reducing reporting burdens. One of the areas in which the Department has simplified reporting burdens is in the reporting of cost data. Consistent with past practice and section 773(f)(1)(A) of the Act, the Department normally will calculate costs based on a respondent's records, if such records are kept in accordance with the generally accepted accounting principles of respondent's country of origin and reasonably reflect the costs associated with the production and sale of the merchandise. As such, much of the required reporting of cost and financial data is consistent with a respondent's normal books and records. However, given the requirements of the AD law, it is not always possible to accept the reporting of financial or cost data in the form such data are maintained in a respondent's books and records. To the extent that a party has specific suggestions for improvements in the Department's questionnaire and reporting requirements, the Department welcomes those suggestions. Also, if a questionnaire requirement poses specific difficulties in a particular proceeding, the respondent can request the Department to modify the requirement on an *ad hoc* basis.

One commenter proposed that the regulations provide a deadline for the introduction of issues so that respondents would have adequate time to research, draft, and translate a complete response. The Department has not adopted this proposal. Barring specific statutory or regulatory deadlines or subject matter constraints, parties may raise relevant issues which may arise throughout the course of an AD/CVD duty proceeding. A generalized deadline on raising issues would have unforeseeable consequences such that we do not feel confident in foreclosing debate on them in advance. Furthermore, the Department may request any person to submit factual information at any time during a proceeding (*see* § 351.301(c)(2)(i)).

Two commenters proposed that the regulations indicate that the Department is required to rapidly respond to a respondent's request for clarification of an information request. One of the commenters proposed a three-day deadline for response, which, if not met, would lead to an automatic extension of the time for the respondent to supply the information in question by the length on time it took the Department to provide the necessary clarification. The Department has not adopted this proposal. The Department makes every effort to respond to requests for clarifications as soon as possible. Hence, a specific regulatory deadline is unnecessary. While it is possible that the Department might find good cause for granting a request for an extension where response to a clarification request was delayed, an automatic extension provision could lead to the filing of clarification requests simply to extend the deadline for filing a questionnaire response or other submission.

One commenter proposed that the regulations provide that the Department must notify a party if the information it submitted is deficient and provide the party with an opportunity to remedy the deficiency. The Department has not adopted this proposal as this issue is covered specifically in the statute (*see* section 782(d) of the Act), and, as noted above, the Department has sought to avoid repeating the statute in the regulations. Parties will be informed in the initial questionnaire, and in supplemental questionnaires, that failure to submit requested information in the requested form and manner by the date specified may result in the use of facts available under section 776 of the Act and § 351.308. The Department's practice is to send a respondent a supplemental questionnaire where the Department needs clarification of a response or the Department seeks additional information to address questions arising out of reported information. The Department, however, will not necessarily repeat a precise or direct question that the respondent has not answered. The decision to specifically inform a party that information it submitted is deficient is a decision that can only be made on a case-by-case basis taking into consideration the Department's initial information request and the party's response to that request.

One commenter suggested that the Department reduce the scope of supplemental questionnaires to curb the use of data demands as a tactical measure by petitioners to harass respondents by imposing additional financial burdens on them. The Department disagrees with the characterization of the issuance of supplemental questionnaires as a method to harass respondents. In its supplemental questionnaires, the Department typically seeks clarification of reported information or seeks responses to questions precipitated by reported information. In drafting its supplemental questionnaires, the Department may incorporate lines of questioning based on input from petitioners. However, where the Department chooses to use input from petitioners, it does so precisely because such input is constructive. The Department only requests information it deems to be necessary and will continue to do so. However, a blanket requirement that supplemental data requests be reduced is inconsistent with the Department's obligation to conduct a thorough investigation based on the necessary facts.

Section 351.301(c)(2)(iii) provides that interested parties shall have at least 30 days from the date of receipt to respond to the full initial questionnaire. This subparagraph also provided that the ''date of receipt'' will be seven days from the date on which the initial questionnaire was ''transmitted.''

One commenter proposed that the regulations require the Department to release the questionnaire within five days after initiation. We have not adopted this proposal. Release of the questionnaire immediately after initiation, particularly in investigations, often is not possible because the Department needs input from companies, for example, to identify appropriate respondents, tailor information requests, and format requirements to the specific merchandise under investigation. The Department will continue its current practice of releasing the questionnaire as soon as possible.

Another commenter proposed that the regulations provide a mechanism under which the Department would consult with the parties and decide certain issues—such as date of sale, product matching criteria, the identity of affiliated parties, whether downstream sales by affiliated parties in the home market should be reported, and whether affiliated party transactions are at arm's length—prior to the issuance of the questionnaire. The Department has not adopted this proposal. Consistent with its normal practice, the Department already consults with parties and decides certain issues prior to issuance

of the questionnaire. For example, the Department normally consults with the parties to identify appropriate respondents or model matching criteria. However, deciding all of the issues listed by the commenter prior to release of the questionnaire is not feasible. Either an issue cannot be decided until the Department has reviewed and analyzed all of the submitted data or it is not practicable to gather all of the data necessary to decide the issue prior to release of the questionnaire given the statutory time limits for conduct of investigations and reviews.

Two commenters proposed that the regulations provide interested parties at least 30 days to respond to a questionnaire or any part of a questionnaire. Other commenters proposed that the regulations provide for at least 45 days to respond to the questionnaire or for automatic 15-day extensions upon request. Finally, another commenter proposed that the regulations provide for an additional 30 days to respond to a questionnaire that requests information on two administrative reviews in situations where the Department has deferred initiation of an administrative review for one year and that all deadlines for the deferred administrative review are counted with respect to the later POR's anniversary month. The SAA, at 866, provides that interested parties shall have at least 30 days from the date of receipt to respond to the full initial questionnaire. As the Department explained in the preamble to the proposed regulations, 61 FR at 7324, the time limit for response to individual sections of the questionnaire, if the Secretary requests a separate response to such sections, may be less than the 30 days allotted for response to the full questionnaire. For example, the Department anticipates that the response to section A of an AD questionnaire, which seeks general information about a company, will be due before the expiration of the 30-day period. The Department's ability to timely identify appropriate respondents, in particular, would be hampered were the Department to delay the deadline for submission of this information. The Department, therefore, has not adopted the proposal that parties be granted 30 days to respond to any part of the questionnaire. Likewise, the Department has not adopted the proposal that the regulatory deadline for questionnaire responses be extended to 45 days. Only with prompt responses will the Department be able to meet its statutory obligations of conducting timely investigations and administrative reviews. Parties can, if necessary, request an extension of the time limit for submission of a questionnaire response under § 351.302. The Department also has not adopted the proposal that the regulations provide a 60-day deadline for submission of questionnaire responses where the Department has deferred initiation of an administrative review. While the Department will examine and would like to adopt schedules that allow a longer questionnaire response time for deferred reviews, it is reluctant to adopt such a regulation prior to gaining experience in administering deferred reviews. The Department also believes that it is appropriate to determine a deadline on a case-by-case basis taking into consideration the companies and merchandise under review. Because the Department has no experience yet with the deferred administrative review provision and, hence, cannot foresee every timing issue that might arise, it has not codified in the regulations the proposal that all deadlines for the deferred administrative review be counted with respect to the later POR's anniversary month. The proposal on its face makes sense, however, and the Department will attempt to implement it in practice.

With respect to the ''transmission'' of the questionnaire, one commenter proposed that the regulations define ''transmitted'' and provide for notification of parties when ''transmission'' occurs. Another commenter proposed that the regulations provide that seven days should be added to the date of transmission of the questionnaire to calculate receipt date only where the agency does not have evidence that the questionnaire was actually received at an earlier date. One commenter opposed this second proposal.

We have not adopted either proposal. The Department considers the date of transmission to be the date the Department indicates on the questionnaire. Thus, it is obvious from looking at the document when ''transmission'' has ccurred, and, as such, it is not necessary to codify this definition in the regulations. The Department has not adopted the second proposal because it is not practicable for the Department to try and keep track of a possible range of receipt dates.

Section 351.301(c)(2)(iv) provides a 14-day deadline for notification by an interested party, under section 782(c)(1) of the Act, of difficulties in submitting a questionnaire response. Section 782(c)(1) of the Act provides that, if promptly asked to do so by an interested party, the Department may modify its requests for information to avoid imposing an unreasonable burden on that party.

One commenter proposed that the regulations recognize that the Department's questionnaire may be modified to reduce reporting burdens under certain circumstances pursuant to section 782(c)(1) of the Act. In our view, section 351.301(c)(2)(iv) of these regulations does just that.

Another commenter proposed that any notification by a foreign interested party of difficulties in submitting information in response to the Department's questionnaire must be placed formally on the record of the proceeding. With respect to this suggestion, it was always the Department's intent under § 351.301(c)(2)(iv) to require notification in writing. However, to avoid any confusion, the final regulation clarifies that such notification is to be submitted ''in writing.''

One commenter suggested that the regulations provide petitioners with a right to comment on requests to modify an original questionnaire at the time the request is made. The Department has not adopted this proposal. As the Department explained in the preamble to the proposed regulations, parties have the right generally to submit comments on any relevant issue throughout the course of a proceeding. As such, the Department does not believe that a specific regulation addressing this issue is necessary. *See* 61 FR at 7324.

One commenter proposed that the regulations ensure that difficulties experienced by interested parties (in particular, small companies) will be taken into account when the Department requests information and plans and conducts verification. In addition, the commenter proposed that the regulations include provisions that the Department will take into account the size of the respondent in assessing the adequacy of a response and also in determining whether facts available should be applied, and, if so, whether an adverse inference should be drawn.

With respect to these suggestions, section 782(c)(2) of the Act provides that the Department will take into account difficulties experienced by interested parties, particularly small companies, in supplying information, and will provide any assistance that is practicable. The statute does not indicate that the Department is specifically required to take into account the *size* of the company in assessing the adequacy of the response or whether application of adverse facts available is applicable. Rather, section 776(b) of the Act provides for use of an

adverse inference where the Department finds that an interested party ''has failed to cooperate by not acting to the best of its ability to comply with a request for information.'' Under this standard the Department may consider the size of a company in determining whether it acted to the best of its ability. Any decision to do so would be made on a case-by-case basis.

One commenter proposed that the regulations provide that the 14-day deadline for notifying the Department under section 782(c)(1) of the Act of difficulties in submitting information in response to a questionnaire is subject to extension upon request and that the request need not be made within the 14-day period. We have not adopted this proposal. Section 351.302 of these regulations contains the general provision for extensions of time limits upon request. As such, a specific provision regarding the 14-day deadline is unnecessary. Whether the Department would grant an extension of the 14-day period where the request for the extension was filed after the 14-day period had expired can only be determined on a case-by-case basis upon review of the party's explanation of the ''good cause'' for such a request and for the lateness of the request.

Section 351.301(c)(2)(v) indicates that a respondent interested party may request that the Department conduct a questionnaire presentation during which Department officials will explain the requirements of the questionnaire. One commenter proposed that the regulations clarify that explanations provided during a questionnaire presentation are not intended as a modification of the questionnaire or as an ''understanding'' between the Department and any respondent regarding the questionnaire, except as expressly provided in the questionnaire or subsequent modifications and supplements to the questionnaire. Furthermore, the commenter proposed that the regulations provide that the substance of a questionnaire presentation be memorialized for the record.

The Department agrees in principle with these proposals but does not believe that a specific regulation is necessary. Any modifications or supplements to the questionnaire, or any agreed-upon changes in reporting requirements between a respondent and the Department will be reflected in the record.

Submission of publicly available information to value factors: Section 351.301(c)(3) contains the time limits for submission of publicly available information to obtain values for factors in nonmarket economy AD cases. One commenter expressed support for the proposed deadlines. Another commenter proposed changing the deadline for such submissions to the date the case briefs are due. The commenter argued that this minor difference (the proposed deadlines are approximately 10 days before the date for submission of case briefs) will still allow the other parties to comment on the new information in their rebuttal briefs, while permitting the potential submitting parties to make the decision on what information is relevant, worth obtaining or placing on the record at a time when arguments in the case brief have been drafted, thus preventing missed documents or cluttering of the record with documents ultimately deemed unnecessary by the submitter.

While the Department agrees with some of the commenter's reasoning, it has not adopted this proposal for several reasons. First, the Department is concerned that the short deadline for filing rebuttal briefs, *i.e.*, five calendar days after case briefs are filed, will not allow parties enough time to prepare rebuttal arguments and review and comment on new factor information. Second, the Department does not believe that inclusion of new factual information with submission of arguments in case briefs allows for thorough analysis by the Department. Finally, inclusion of new factual information in case briefs is not consistent with the purpose of case briefs; namely to comment on what the Department did in its preliminary determination and to place before the Department any arguments that continue, in the submitter's view, to be relevant to the Secretary's final determination or results of review.

Time limits for certain allegations: Section 351.301(d) sets forth the time limits for certain allegations, including allegations concerning market viability, allegations of sales at prices below the cost of production, countervailable subsidy allegations, and upstream subsidy allegations. In response to suggestions from several commenters, we have added a time limit for allegations of purchases of major inputs from an affiliated party at prices below the affiliated party's cost of production.

Allegations regarding market viability: Section 351.301(d)(1) establishes a deadline for allegations regarding market viability of 40 days after the date on which the initial questionnaire was transmitted. Several commenters proposed a longer alternative deadline of 120 days after initiation. Another commenter proposed that the deadline for allegations regarding market viability be tied to the receipt of the response to the relevant section of the questionnaire instead of to the date of transmittal of the initial questionnaire.

We have not adopted either proposal. The information necessary to make allegations concerning market viability typically is contained in a respondent's section A response. Normally section A responses are due no later than 21 days after transmittal of the initial questionnaire. The 40-day deadline, therefore, should allow parties sufficient time to review the questionnaire responses and, if desired, make market viability allegations. The regulation makes clear that the Secretary may alter this time limit. The Secretary is likely to do so where the deadline for section A responses is extended, the responses themselves are so incomplete as to hinder a party's ability to make a market viability allegation, or the information necessary to make a market viability allegation is not available as part of the section A response.

Allegations of sales at prices below the cost of production: Section 351.301(d)(2) establishes the time limits in investigations and reviews for allegations of sales at prices below the cost of production (COP) under section 773(b) of the Act.

One commenter proposed that the deadline for cost allegations be extended by seven days to take into account the additional seven days for receipt of the questionnaire. We have not adopted this proposal because the proposed deadlines already take into account the seven days for receipt of the questionnaire by tying the deadline to the date of receipt of the relevant questionnaire response. Country-wide allegations do not depend on information contained in questionnaire responses.

A number of other commenters proposed eliminating entirely the notion of company-specific cost allegations for a number of reasons. One commenter argued that company-specific costs are not likely to be reasonably available to petitioner even after submission of the Section B response.

The Department has not adopted this proposal. Complete company-specific costs normally are not placed on the record until the Department requests them, *i.e.*, typically *after* the Department has initiated a cost investigation. Nonetheless, the Department commonly receives adequate company-specific cost allegations based on data that are reasonably available to the petitioner. In making company-specific cost allegations, petitioners often use data provided for difference in merchandise adjustments and data from a

respondent's financial statements which are submitted with a respondent's section A and B questionnaire responses. In addition, a domestic interested party may compare company-specific home market prices from a respondent's section B response with its own adjusted cost data in order to make a company-specific cost allegation (*see* section 773(b)(2)(A)(i) of the Act).

Two other commenters reasoned that country-wide cost allegations may provide reasonable grounds for an investigation of all respondents even if submitted after receipt of all sales responses because, for example, the allegation could demonstrate that prices among producers are similar and could be based on the cost data of the most efficient producer. The Department believes that where company-specific information has been placed on the record, any subsequent sales below cost allegation must take into consideration such information. As the Department noted in the preamble to the proposed regulations, the SAA at 833 states that the standard for initiation of a sales below cost investigation is the same as the standard for initiating an AD investigation. The Department interprets this to mean that an allegation of sales below cost, like an allegation of dumping, must be supported by information reasonably available to petitioner, including information already on the record. *See* 61 FR at 7324. Therefore, demonstrating that one company's sales are below cost does not demonstrate that other companies' sales are below cost if the other companies' information is reasonably available.

Finally, two additional commenters argued that respondents will do everything possible to avoid submitting responses that could form the grounds for the filing of a COP allegation. It is our experience that respondents do not behave in such a manner. We believe that it is unlikely respondents would intentionally submit grossly deficient responses simply to avoid providing data sufficient to form the basis for a cost allegation. To do so might subject them to the application of adverse facts available, surely a more daunting prospect than the possible initiation of a cost investigation.

One commenter argued that cost allegations on a country-wide basis are not permitted under the statute because the statutory ''reasonable grounds to believe or suspect'' standard for initiating a cost investigation has not changed since the Department adopted a policy of entertaining only company-specific allegations under the CIT's holding in *Al Tech Specialty Steel Corp.* v. *United States,* 575 F. Supp. 1277, 1281 (1983). Contrary to the commenter's suggestion, the SAA at 833 specifically provides for the consideration of cost allegations on a country-wide basis. The commenter also argued that a country-wide allegation must contain some demonstration of the representativeness of the presented data where there are substantial variants of the subject merchandise under investigation. The Department agrees that a country-wide allegation should contain some demonstration of the representativeness of the presented data, but only to the extent that pertinent data are reasonably available to the petitioner.

Allegations of purchases of major inputs from an affiliated party at prices below the affiliated party's cost of production: In response to several comments, we have added a new provision in these final regulations establishing deadlines for allegations under section 773(f)(3) of the Act regarding purchases of major inputs from an affiliated party at prices below the affiliated party's cost of production. One commenter proposed that the regulations provide that such allegations are due within seven days after a COP response is filed. Another commenter proposed that the deadlines be identical to the deadlines for cost allegations.

We have not adopted either of these proposed deadlines. Instead, new § 351.301(d)(3) provides for filing such allegations within 20 days after a respondent files a response to the relevant section of the questionnaire; *i.e.,* the section D response containing cost data. The applicability of this provision is limited, however. Specifically, because the Department's normal practice is to analyze an affiliated supplier's production cost data for major inputs whenever it conducts a cost investigation, this provision is only applicable where the Department has determined to base foreign market value on constructed value for reasons other than that sales were disregarded under the cost test.

Two commenters additionally proposed that the regulations establish a deadline for determining which inputs are deemed to be ''major.'' We have not adopted this proposal. The determination of which inputs are ''major'' must be made on a case-by-case basis taking into consideration the nature of the product, its inputs, and the company-specific information on the record.

Countervailable subsidy and upstream subsidy allegations: Proposed § 351.301(d)(3), now renumbered as § 351.301(d)(4), sets forth the time limits for countervailable subsidy allegations in investigations and reviews and upstream subsidy allegations in investigations. We received one comment regarding this provision which was supportive of the Department's treatment of this issue. After a further review of this provision, we have left it unchanged except for the change in numbering.

Targeted dumping allegations: Proposed § 351.301(d)(4), now renumbered as § 351.301(d)(5), sets forth the time limit for a targeted dumping allegation in an AD investigation. A number of commenters proposed that the deadline for targeted dumping allegations be eliminated, or, at a minimum, revised so as to merely require that an allegation of targeted dumping be made no later than the date case briefs are due. Two commenters reasoned that a targeted dumping analysis does not require the collection of additional data not requested in the questionnaire. Two other commenters reasoned that the deadline should be eliminated because the Department should always test for targeted dumping. One commenter supported the maintenance of a deadline for targeted dumping allegations. The Department has not adopted the proposals eliminating or changing the proposed deadline for targeted dumping allegations. The Department believes that the deadline of 30 days before the scheduled date of the preliminary determination will provide petitioners with sufficient time to analyze the applicable data and submit an allegation if appropriate. To extend the deadline would make it difficult for the Department to consider the allegation for the preliminary determination. However, the Department recognizes the burden such a deadline may place on domestic interested parties in some situations and intends to be flexible with respect to the deadline where appropriate. For example, if the timing of responses does not permit adequate time for analysis, the Department will consider that ''good cause'' to extend the deadline under § 351.302. Additional comments concerning the substantive targeted dumping provisions are discussed below in connection with § 351.414(f).

Section 351.302

Section 351.302 sets forth the procedures for requesting an extension of a time limit and clarifies the Department's authority to grant extensions. In addition, this section explains when and how the Department will reject untimely or unsolicited submissions.

Extension of time limits: Sections 351.302 (b) and (c) provide that the Department may extend a regulatory deadline based upon its own determination that there is good cause to do so or where an interested party shows good cause for such extension. One commenter expressed support for this provision. Another commenter proposed that extensions of up to 15 days will normally be granted upon a reasonable showing of good cause. A third commenter argued that the regulation providing for extensions for ''good cause shown'' is too restrictive and suggested that the regulation provide that the Department will grant an extension where it would not delay the completion of an investigation or review or cause other interested parties difficulties in representing their interests.

The Department has not specifically adopted these suggestions, but does recognize that some of these concepts factor into its decision as to whether good cause has been shown. As the Department indicated in the preamble to the proposed regulations, decisions regarding the possibility of extensions will be based on the ability of the party to respond within the original deadline and the parties' and the Department's ability to accommodate the requested extension. Thus, the Department believes that it is appropriate to determine whether to grant an extension, and for how long, based upon the facts in a particular proceeding. 61 FR at 7326.

Section 351.303

Section 351.303 contains the procedural rules regarding filing, format, service, translation, and certification of documents.

Time of filing: One commenter proposed that the regulations provide that in computing any period of time prescribed or allowed by the statute, the regulations, or the instructions of the Department, when the last day of the period is not a business day, the period runs to the first business day. In our view, the regulations as drafted accommodate the commenter's proposition. Specifically, § 351.303(b) provides that if the applicable time limit expires on a non-business day, the Secretary will accept documents that are filed on the next business day (*see also* § 351.103 describing the location and function of Import Administration's Central Records Unit).

The commenter also proposed that the regulations provide that whenever a period is less than 11 days, intermediate non-business days are excluded from the count. The Department has not adopted this proposal. The very few deadlines in these regulations of less than 11 days were specifically established by the Department after consideration of related timing issues.

Filing of submissions: One commenter suggested that the regulations provide that the additional copies of APO documents should be filed within the applicable time limits for filing business proprietary versions instead of waiting for the one-day lag rule so that analysts have an extra day to review the documents. The Department has not adopted this suggestion. A principal reason that the Department revised and codified the one-day lag rule in the regulations was to avoid the problem of analysts working from documents with mistakes in bracketing of business proprietary information. As a result, § 351.303(c)(2)(i) provides for filing of only one copy of the business proprietary version of a document within the applicable time limit; § 351.303(c)(2)(ii) provides for filing of six copies of the complete, final business proprietary version, *i.e.,* with bracketing mistakes corrected, on the next business day. This final version is the one distributed internally to the analysts. If parties wish to send additional courtesy copies directly to the analysts, they should similarly send this complete, final business proprietary version.

Document markings: We have made a minor change to § 351.303(d)(2)(v) to clarify that only the business proprietary version of a document filed under § 351.303(c)(2)(i) of the one-day lag rule should include the warning ''Bracketing of Business Proprietary Information is Not Final for One Business Day After Date of Filing'' on pages containing business proprietary information.

Translation to English: Section 351.303(e) requires that documents submitted in a foreign language be accompanied by an English translation. One commenter proposed that regulations provide that English language summaries of foreign language documents may be submitted in lieu of complete translations. We have not adopted this proposal. When parties are unable to comply with the English-translation requirement, the Department will work with them on an acceptable alternative. Furthermore, as explained in the preamble to the proposed regulations, parties may submit an English translation of pertinent portions of a non-English language document. 61 FR at 7326. Another commenter proposed that the regulations include this latter clarification. We agree that the clarification that parties may submit an English translation of only pertinent portions of a document, as opposed to the entire document, is helpful and have included it in the final regulations. The regulation makes clear, however, that parties must obtain the Department's approval for submission of an English translation of only portions of a document prior to submission to the Department.

Service of copies on other persons: Section 351.303(f) provides for service of documents filed with the Department on all other persons on the service list. The Department has received a number of informal suggestions and comments by parties seeking permission to serve certain documents by facsimile or other electronic transmission processes. The Department believes that under certain conditions, service by means other than personal service or first class mail is permissible. As a result, we have added new paragraph (f)(1)(ii) to provide for service of public versions and business proprietary versions containing only the server's own business proprietary information on other persons on the service list by facsimile or other electronic means, such as e-mail, where the intended recipient consents to such service. This provision does not apply to filing documents with the Department. Proposed paragraph (f)(1) has been renumbered as paragraph (f)(1)(i).

One commenter proposed that the regulations require the Department to serve all parties on the service list copies of any document that the Department transmits to another party in the proceeding. The commenter also proposed that the regulations require the Department to notify immediately all parties whenever it transmits a document to a party. A second commenter supported these proposals.

The Department has not adopted these proposals. We recognize the importance of making documents available to parties and believe that the current mechanisms for making documents available are adequate. Specifically, for documents the Department releases under APO, under the terms of the APO application (where parties may ask to receive all memoranda generated by the Department) the Department releases such documents to all parties under APO. All public documents, including public versions of documents containing business proprietary information, generated by the Department are made available to parties in our Central Records Unit (see § 351.103). As circumstances warrant, the Department also releases public

documents directly to parties other than the recipient and will continue to do so.

Certifications: Section 351.303(g) provides that each submission containing factual information must be accompanied by the appropriate certification regarding the accuracy of the information. One commenter proposed that the regulations provide that the required party certification may be submitted for the first time when the party files its public version and any corrections to its proprietary version. The Department has not adopted this proposal. A person must file the applicable certification(s) with each submission of factual information, including the original business proprietary version of a document filed with the Department, within the applicable time limits pursuant to § 351.303(c)(2). The public version and the final business proprietary version filed on the following business day must be identical to the business proprietary version filed the previous day except for any bracketing corrections. Therefore, there is no reason why the certification should change.

Another commenter proposed that to authenticate the date of certification, the Department should require an original dated certification sworn before an authorized equivalent to a notary public for each submission. One commenter opposed this proposal. We have not adopted this proposal. The Department believes that such a regulation would not provide substantially greater assurance of completeness and accuracy of submitted information, yet it would further complicate the process of submitting information. We assume that legal counsel, other representatives, and company officials are acting in good faith when they certify to the completeness and accuracy of a specific submission. For this reason, we also have not adopted regulations authorizing sanctions for certification violations as proposed by two commenters.

Section 351.304 [Reserved—APO]

Section 351.305 [Reserved—APO]

Section 351.306 [Reserved—APO]

Section 351.307

Section 351.307 deals with verification of information.

Conducting verification: One commenter suggested that there is no need for automatic verifications where the Department intends to revoke an order as the result of a sunset review. The commenter proposed that the regulations clarify that verifications for sunset reviews should occur only for good cause. The Department has not adopted this suggestion. Section 782(i) of the Act mandates that the Department conduct verification before revoking an order as the result of a sunset review.

Another commenter proposed that the regulations establish 30 days after receipt of the supplemental response as the deadline for verification requests. The commenter was concerned that because the Department frequently grants extensions to respondents to answer questionnaires and supplemental questionnaires, the ability of domestic interested parties to demonstrate the requisite ''good cause'' would be hampered by time constraints.

The Department has not adopted this suggestion. While the regulations establish a deadline for requesting verification in an administrative review upon request where no verification was conducted during either of the two immediately preceding administrative reviews (§ 351.307(b)(1)(v)), there is no deadline for requesting verification in an administrative review based on good cause (§ 351.307(b)(1)(iv)). Thus, nothing prevents domestic interested parties from making good cause arguments at any point in the review, including after supplemental responses are filed. However, the Department's practice is to conduct verification in administrative reviews prior to issuing its preliminary results. Good cause arguments made late in the proceeding may not allow sufficient time for the Department to conduct verification. The third-year verification provision has a deadline for domestic interested parties to request verification of 100 days after publication of the notice of initiation of review. This timeframe allows the Department sufficient time to prepare for verification.

Verification of a sample: Section 351.307(b)(3) provides that the Department may select and verify a sample of exporters and producers where it is impracticable to verify relevant factual information for each person due to the large number of exporters or producers included in an investigation or administrative review. One commenter proposed that the regulation be revised to provide that sample verifications will be relied upon in only exceptional circumstances, and that it is the Department's intention, in cases involving numerous potential respondents, to select a reasonable number of companies that can be examined and verified.

The Department has not adopted this proposal. As provided in the regulation, the Department may verify a sample of respondents where it is impracticable to verify every respondent due to the large number of companies included in an investigation or review. A decision as to whether it is impracticable to verify every respondent is made on a case-by-case basis, considering the circumstances particular to a specific investigation or review.

Verification report: Section 351.307(c) provides that the Department will issue a verification report. One commenter proposed that the regulations require the Department to issue a verification report normally no later than 30 days after completion of verification in an investigation, and no later than 14 days prior to the issuance of preliminary results in an administrative review. Another commenter proposed that the regulations provide that documents that are retained by the Department and designated as verification exhibits in the verification report be served within 48 hours after service of the verification report.

The Department has not adopted these proposals. Because the Department's standard practice is to issue verification reports and require service of verification exhibits as soon as possible after verification, the Department does not believe that specific regulatory deadlines are necessary.

Another commenter proposed that the regulations provide that verification reports will not be released to respondent's counsel for comments on bracketing proprietary information before release to domestic industry counsel because to do so allows respondents to obtain an unfair head-start on preparation of verification comments, case briefs, etc. An additional commenter proposed that draft verification reports, as well as the final report, should be included on the record.

The Department has not adopted either proposal. Because they are not final, draft verification reports, including reports where bracketing has not been finalized, are not included in the record or released generally to all interested parties. Furthermore, release of an unfinished version of the final document risks inadvertent release of business proprietary information belonging to the verified respondent. The sole purpose of providing this draft is to allow a respondent to comment on proper bracketing..

One commenter suggested that regulations should provide that within seven days of the completion of verification, the verifying official should memorialize for the administrative record all requests for new information as a result of the completed verification, the date verification for that company was completed, and any other official

requests for adjustments to the database relied on in the preliminary phase of the proceeding, whether or not considered new information. In addition, the commenter proposed that in a cover letter transmitting the requested information the government or person supplying the requested information should be required to separately identify every change to the computer database from the database relied on by the Department in the preliminary phase, identify every change to the computer database made as a result of the verifying officials' request, and certify that no changes have been made to the database relied on by the Department in the preliminary phase with the exception of those noted in the cover letter.

The Department does not believe that additional specific regulations are necessary, because Department practice already incorporates many of the commenters' suggestions. The Department intends to incorporate the remaining suggestions into its practice because they represent improvements to the verification process.

Procedures for verification: Section 351.307(d) describes certain procedures for verification. A number of commenters proposed that the regulations require the Department to provide respondents with the complete verification outline, including the date and place of verification, the information to be verified, and a detailed outline of verification steps to be followed, by a particular date prior to the commencement of verification. Some commenters proposed seven days; others proposed 14 days.

With respect to these suggestions, the Department in practice issues the verification outline normally not less than seven days prior to the commencement of verification. Thus, a specific regulation on this issue is unnecessary.

One commenter proposed that the regulations provide that any member of the verification team who is not an officer of the U.S. government must agree to be subject to the APO. We have not adopted this suggestion, because as part of the Department's standard practice, individuals that are not Department employees, such as interpreters or embassy personnel, are required to sign a standard non-disclosure agreement regarding limited disclosure of business proprietary information.

Two commenters opposed the Department's stated intention to require respondents to submit any computer programs used to identify sales subject to review in advance of verification. One commenter argued that the computer program was not likely to be helpful because it would reflect the unique aspects of each company's computer systems and it would be very difficult for someone not familiar with the company's computer system to understand the program. The other commenter argued that the record consists of the sales listing and not the programs used to generate that listing. A third commenter expressed support for the Department's intention to request the computer programs.

With respect to these suggestions, where helpful, the Department intends to require that, prior to the commencement of verification, respondents submit any computer programs used to identify the sales subject to investigation or review. If, over time, it becomes clear that nothing helpful to the verification process is gained by reviewing these computer programs, the Department will end this practice.

Another commenter proposed that the regulations provide that all parties have an opportunity to comment on significant aspects of verification, such as notice of verification and the verification outline. Another commenter proposed that the regulations provide that petitioners must submit any pre-verification comments no later than 14 days before the scheduled starting date of any verification.

We have not adopted these suggestions, because subject to the applicable statutory, regulatory, or submission-specific deadlines, parties are free to comment on any aspect of verification.

One commenter proposed that the regulations clarify that the scope of verification is limited to reviewing the accuracy of factual information submitted by respondents and that the Department will pay deference to the verification reports prepared by its analysts. The Department has not adopted these proposals. Consistent with section 782(i) of the Act, the Department will verify, where applicable, information relied on in making its final determination. The SAA at 868 states that the Department is not precluded from requesting further information during a verification. Contrary to the commenter's suggestion, therefore, the Department is not limited during verification to reviewing only the accuracy of factual information previously submitted by respondents. We agree that verification reports are evidence on the record that the Department must consider in making its final determination along with all other relevant information on the record.

Another commenter proposed that the regulations provide that if the Department is not able to trace information in the responses to documents generated by the company or government in the normal course of business or is not able to reconcile the cost of production response to the company's financial statements, the Department will reject the response and use facts available.

Section 776(a)(2)(D) of the Act provides that the Department may use facts available where a person provides information that cannot be verified. In the interest of not repeating statutory provisions in the regulations, the Department has not adopted this proposal.

Other comments: One commenter correctly pointed out that the preamble to the proposed regulations, 61 FR at 7327, incorrectly states that § 351.307(d)(2) provides for access to the records of persons not affiliated with respondents. The correct provision is § 351.307(d)(3).

Several commenters expressed support for the Department's rejection of suggestions by several other commenters that the Department allow a neutral third party to attend verification, copy all documentation relied upon in verification, allow all parties to review all draft verification reports, include in the record both the draft and final versions of the verification reports, conduct verification in Washington, and permit domestic counsel and consultants to participate at verification. *See* 61 FR at 7327 (discussing the Department's original response to these suggestions in the preamble to the proposed regulations). We continue to believe that the original suggestions should not be adopted in the final regulations.

Section 351.308

Section 351.308 deals with determinations on the basis of the facts available.

When to apply facts available: Section 351.308(b) provides that the Department may make a determination based on facts available in accordance with section 776(a) of the Act.

Two commenters proposed that the regulations provide that the Department should take into account the magnitude of the deficiencies or the effect on the margin in applying facts available. One of the commenters suggested that total facts available normally should not be applied unless there is a consistent pattern of inaccurate and unverifiable information which affects the reliability of a substantial portion of the information on which the Department

must rely for its determination. Another commenter proposed that the Department only apply total facts available under extreme circumstances, for example, where a respondent fails to answer a questionnaire, refuses to allow verification, or totally fails verification. An additional commenter proposed that the regulations require the use of facts available when the government or person objects to verification. Another commenter proposed that the regulations provide that facts available may be used to fill gaps in the record. Another commenter proposed that the regulations provide that partial facts available should only be used where the information deemed inaccurate or unverifiable affects a large number of the necessary costs or price comparisons, the information deemed to be inaccurate or unverifiable is likely to have a material effect on the outcome of the calculation, and insufficient transactions remain unaffected by the deficiency to base the dumping margins on those transactions alone.

We have not adopted these suggestions. Some suggestions unnecessarily limit the application of facts available; others already are directly covered by the statute or regulations.

Section 776(a) of the Act provides that the Department may make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information. In addition, § 351.307(b)(4) provides that if a person or government objects to verification, the Department may disregard any or all information submitted by the person in favor of use of facts available.

One commenter proposed that the regulations clarify that where information has been submitted on the record as to a particular issue, facts available will be used only if the information does not meet the requirements of section 782(e) of the Act. The commenter also suggested that § 351.308(a) should be modified to clarify that the use of facts available is subject to sections 782 (c)(1) and (e) of the Act regarding the Department's modification of certain information requirements and paragraph (e) of § 351.308.

We have not adopted these suggestions. Section 351.308(e) provides that the Department will not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the Department if the conditions listed under section 782(e) of the Act are met. This is different from the commenter's proposal that facts available will only be used if information does not meet the requirements of section 782(e) of the Act. Where the Department agrees to modifications of certain information requirements under sections 782(c)(1) of the Act, it would have no reason to apply facts available to a respondent that complied fully with the modified information requirements, barring other problems involving, for example, failure of verification completely or in part.

When to make an adverse inference: Section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party in selecting facts available where the Department finds that that party ''has failed to cooperate by not acting to the best of its ability to comply with a request for information.''

One commenter recognized that the regulations provide the Department with significant discretion in determining when a respondent is ''acting to the best of its ability,'' and urged the Department to apply this standard reasonably and fairly in actual practice. Other commenters proposed that the regulations provide that when a respondent fails to cooperate, the imposition of adverse inferences should be mandatory, not discretionary. These commenters argued that application of neutral facts available when a respondent fails to cooperate with requests for information would undermine the Department's ability to obtain complete, timely, and accurate information when carrying out its statutory obligations.

The Department does not agree that the imposition of adverse inferences is mandatory. Section 776(b) of the Act provides that if the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department, in reaching its determination, ''*may* use an inference that is adverse to the interests of that party in selecting from the facts otherwise available.''

A number of commenters proposed that the regulations should provide that generally a good faith effort to provide information responsive to the Department's request meets the ''best of its ability'' requirement. Several parties opposed the ''good faith effort'' standard, arguing that good faith has nothing to do with ''best of its ability.'' One commenter proposed that the regulations provide that in determining whether a respondent has acted to the best of its ability to supply requested data, the Department should take into account all information submitted by respondents. Another commenter suggested that the regulations provide that in determining whether a respondent's failure to provide certain data constitutes grounds for adverse inferences, the Department will consider all circumstances of the respondent's position, including the number of reviews in which identical information has been requested. One commenter proposed that the regulations provide that the Department is required to identify affirmative evidence of a respondent's bad faith before making an adverse inference. One commenter also proposed that the regulations provide that where the Department determines that an interested party has not made a good faith effort, the Department should be required to state on the record the reasons for its conclusion that the interested party had not made a good faith effort before drawing an adverse inference.

The Department has not adopted these proposals. As the Department explained in the preamble to the proposed regulations, the determination of whether a company has acted to the best of its ability will be decided on a fact- and case-specific basis. The Department will consider whether a failure to respond was due to practical difficulties that made the company unable to respond by the specified deadline. It is clear, however, that affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference. *See* 61 FR at 7327–28.

One commenter suggested that the regulations reserve ''punitive'' use of facts available for cases of deliberate misrepresentation of facts because it is not fair to penalize a company for making an economically rational decision about the costs and benefits of whether to participate in a proceeding. Two other commenters proposed that the regulations provide that no adverse inference should be drawn if a party submits information that is in the form that is regularly kept for corporate records, provided that such information is substantially equivalent to the information requested and the party shows that submitting the information requested in the required form would pose a significant burden. Another commenter proposed that the regulations clarify that if late in the

proceeding the Department disagrees with a respondent's methodology, as a result of which the necessary information is not on the record, no adverse inference should be drawn if there is no time to supplement the record. Other commenters proposed that the regulations require that where the Department disagrees with a respondent's methodology on a given adjustment or issue, the Department will provide respondents with a reasonable opportunity to provide any data necessary so that the Department's revised methodology can be based on the company's actual data rather than on adverse facts available.

The Department has not adopted these proposals. As discussed above, the Department will make its determination of whether to apply facts available on a fact- and case-specific basis. The determination of whether a company has acted to the best of its ability to comply with an information request can only be made based on the record evidence in a particular proceeding.

One commenter proposed that the regulations provide that the Department may conclude that a party has ''failed to cooperate by not acting to the best of its ability'' even though it has submitted some information to the agency, if it has not submitted other information requested or failed to clarify an inconsistency the agency identifies. In addition, the commenter proposed that the regulations provide that the Department may use available data in an adverse manner when the Department has determined that a party has failed to cooperate and when no alternative ''adverse'' information is available. The commenter was concerned that respondents may fail to cooperate by deliberately withholding information requested by the Department until verification, but then benefit from use of the information discovered at verification without an adverse inference being made because it becomes the only information available on the record.

While we do not disagree with the substance of the comment, we do not believe that this specific addition to the regulation is necessary. Under section 776 of the Act and § 351.308, the Department has the authority to adequately address these types of situations as they arise.

Another commenter proposed that the regulations provide that respondents must certify that their responses comply with prior Department rulings as to reporting requirements applicable to their company. The commenter also suggests that the regulations provide that the Department will make an adverse inference whenever a respondent fails to comply with prior Department rulings with regard to that company without identifying and justifying such non-compliance.

The Department has not adopted these proposals. The Department may reconsider its position on an issue during the course of a proceeding in light of the facts and arguments presented by the parties. Parties are entitled, at the risk of the Department determining otherwise, to argue against a prior Department determination.

Two commenters proposed that the regulations provide that failure to produce data from ''affiliated'' parties, over which a respondent has no real leverage or control, would not justify the use of adverse inferences. Another commenter proposed that the regulations should provide that where a respondent has made a good faith effort to obtain information from an affiliate, failure of the affiliate to provide the information should not give rise to an adverse inference. One commenter proposed that the Department avoid use of adverse facts available when a foreign law prohibits or constrains an affiliated party from providing to the respondent information requested by the Department. Several commenters also suggested that the regulations provide that failure to produce data where the timeframe for compiling data is unduly short, mistakes in calculations and unintentional errors of commission or omission, and failures to produce all requested documents should not justify the use of adverse inferences.

While we do not disagree with the substance of some of these comments, we do not believe the addition of these specific provisions is warranted. The Department will make determinations on the basis of the facts available and determine whether to apply adverse inferences on a fact- and case-specific basis.

What to use as facts available: One commenter urged the Department to apply its new regulations regarding the selection of facts available in a fair and flexible manner so as to faithfully implement the spirit of the law. Two other commenters proposed that the regulations provide that the Department should consider information submitted by respondents for use as facts available even if it is not ideal in all respects. Another commenter proposed that the regulations provide that in determining what data should be applied as facts available, the Department will take into account all information and arguments supplied by the parties including comments concerning the accuracy of the data to be used as facts available.

With respect to these suggestions, the Department will consider all information on the record, including comments from the parties, in determining what to use as facts available. No additional regulation is necessary to accomplish this.

Another commenter proposed that the regulations make clear that the Department will not follow its previous policy of applying the highest rate ever applied to the respondent to particular sales as ''partial BIA.'' This would be an unlawful use of an adverse inference, because the respondent would have provided information to allow the calculation of margins on the majority of its sales and thus presumably has cooperated to the best of its ability. We have not adopted this suggestion because, the fact that the Department has not adopted the two-tiered methodology for selecting BIA developed under the old law (*see* 61 FR at 7327) does not preclude the Department from applying information in a similar manner under the new facts available provision where such application would be consistent with the new law and regulations.

Several commenters proposed that the regulations provide that all respondents, regardless of the degree to which they are deemed to have cooperated, are entitled to submit comments on what to use as facts available, and to propose independent sources for use as secondary information. Another commenter opposed the proposition that noncomplying respondents be entitled to comment on what information should be used as facts available.

Although the Department has not adopted a specific regulation as suggested, nothing prevents parties from filing comments regarding what to use as facts available. Furthermore, the statute does not limit the specific sources from which the Department can obtain facts available.

One commenter proposed that the regulations provide that data contained in a petition will not be used if it is based on unreasonable and unsubstantiated assumptions, is otherwise distorted or is not corroborated. Another commenter proposed that the regulations provide that information in the petition should only be used as a last resort or when all parties agree to the use of such information, and that petition information may only be used to the extent that it is verifiable and consistent with findings in the investigation or review.

We have not adopted these proposals. Section 776(c) of the Act provides that,

to the extent practicable, the Department will corroborate secondary information, which includes the petition, from independent sources that are reasonably at the disposal of the Department. The Department believes the suggested additional restraints on the use of such information are not warranted.

Corroboration of secondary information: Section 351.308(d) provides that where the Department relies on secondary information, to the extent practicable the Department will corroborate that information from independent sources, such as published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review.

One commenter expressed support for the Department's rejection of the suggestion that information from a petition be deemed corroborated. The commenter suggested that the final regulations retain the requirement that information from a petition, like information from any other secondary source, must be corroborated.

We have retained this requirement. Consistent with the SAA at 870 and section 776(c) of the Act, §§ 351.308(c) and (d) provide that, to the extent practicable, the Department will corroborate secondary information, including information derived from a petition.

Another commenter proposed that the regulations provide that in determining what facts available to use, the Department will choose the most probative facts available. The Department has not adopted this proposal. The SAA at 870 explains that corroborate means that the Department must satisfy itself that secondary information to be used as facts available has probative value, not that the Department must choose the most probative information as facts available.

One commenter proposed that the regulations provide that the Department may consider information provided by industrial users and consumers in corroborating secondary information. Section 351.308(d) provides that independent sources used to corroborate secondary information ''may include, *but are not limited to,* published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review.'' The Department has not amended the regulation to include information provided by industrial users and consumers because it is unnecessary. The Department agrees with the commenter that the Department may also consider information provided by industrial users and consumers in corroborating secondary information. The regulation is clear that the list is not an exhaustive list of independent sources.

Section 351.309

Section 351.309 deals with written argument. We have made a minor change to paragraphs (c)(2) and (d)(2) to encourage parties to include a table of statutes, regulations, and cases cited in their case and rebuttal briefs in addition to summaries of their arguments.

Several commenters proposed that the Department accept reply briefs after a hearing. With respect to this proposal, in certain circumstances, the Department may request parties to file reply briefs after a hearing. The Department will decide whether to do so on a case-by-case basis.

Another commenter proposed that the deadline for filing rebuttal briefs in investigations and reviews, under § 351.309(d), be five business days after the filing of case briefs, instead of five calendar days. We have not adopted this proposal. Given the statutory time frame for completion of investigations and reviews, the Department has determined that five calendar days is appropriate.

Section 351.310

Section 351.310 deals with matters related to hearings.

One commenter proposed that the regulations retain the provision that certain high-level employees chair the hearing to ensure that the hearings are effective and useful. The commenter also proposed that the regulations provide that all Department employees who have been involved in the investigation or review normally will be present at the hearing to ensure that those individuals involved in the decision-making process will be familiar with all relevant issues prior to reaching the final determination.

While we agree with the substance of the comments, we do not believe that a specific regulation on this point is necessary. The Department's practice is to have a high-level employee chair the hearing and to ensure that employees involved in the proceeding attend the hearing.

Two commenters proposed that parties should be allowed to comment on any issue raised in the proceeding during the hearing, whether or not that issue is specifically addressed in the party's case brief or rebuttal brief. One commenter proposed that the regulations allow for witness testimony and the collection of new evidence at hearings.

The Department has not adopted these proposals. The introduction of testimony, other new evidence, and new arguments at the hearing is not feasible given that parties will have no way to prepare rebuttals or respond to introduction of new information and argument. Furthermore, the Department would have difficulty analyzing and verifying such new information and argument at this stage of the proceeding.

A number of commenters supported the proposed improvements to the hearing process including allowing for closed hearing sessions to discuss proprietary data. One commenter proposed that § 351.310(f) be revised to allow for consolidated hearings only if all interested parties in each case agree. The Department has not adopted this proposal. However, the Department certainly will take into consideration any opposition to consolidation of hearings in making is decision.

Another commenter proposed that the regulations provide that parties will be notified in advance of the hearing of the issues of concern to the Department. We have not adopted this proposal. The Department has on occasion requested that parties brief specific issues of concern to the Department and will continue to do so where necessary.

Section 351.311

Section 351.311 deals with countervailable subsidy practices discovered during an investigation or review. We received one comment regarding § 351.311 to the effect that the Department should: (1) clarify that § 351.311 covers a broad array of subsidies and subsidy practices; (2) clarify that petitioners do not carry the burden of establishing that a newly discovered subsidy is countervailable, but rather than a subsidy need only be potentially countervailable; and (3) specify how much time is insufficient to preclude the Department from considering a practice in the course of the proceeding. One commenter opposed these suggestions.

We have not adopted these suggestions. With respect to (1), we do not believe that the requested change is necessary, because § 351.311 is not limited by its terms to particular types of subsidies. With respect to (2), we believe that the phrase ''appears to provide a countervailable subsidy with respect to the subject merchandise'' adequately covers practices for which there may not have been a definitive determination of countervailability. Finally, with respect to (3), we agree with the opposing commenter that the time necessary to investigate a

particular subsidy practice will vary from case to case.

Section 351.312

Section 351.312 clarifies the regulatory provisions under which industrial users and consumers are entitled to provide information and comments and clarifies that all such submissions are subject to the Department's standard filing requirements.

One commenter proposed that the phrase ''concerning dumping or a countervailable subsidy'' be deleted from § 351.312(b) because it could be interpreted to limit the right of industrial users and consumers to comment or file information on only the existence or amount of dumping or subsidization. Another commenter proposed that the regulations provide that there is no limitation on the issues that industrial users may address. A third commenter proposed that the regulations define ''relevant factual information'' as used in § 351.312(b) to include information relevant strictly to the substantive issues before the Department, the sections of the statute involved, and the statutory mission of the Department so as to not allow already complex proceedings to be sidetracked because of information and argument submitted on irrelevant issues, such as the impact of orders on consumer prices. The commenter also proposed that the regulations provide for the return of information and briefs that go beyond this definition so that domestic interested parties would not feel obliged to rebut irrelevant argumentation.

We have not adopted these proposals. The language in § 351.312, which provides that industrial users and consumers may submit ''relevant factual information and written argument * * * concerning dumping or a countervailable subsidy'' parallels language in section 777(h) of the Act. The SAA at 871 also states that industrial users and consumers comments ''must concern matters relevant to a particular determination of dumping [or] subsidization * * *.'' This language is intended to clarify that submissions and comments by industrial users and consumers should focus on matters within the purview of the Department's statutory authority to investigate and review dumping and subsidization. In order to address the concerns raised by the commenters, we wish to clarify that industrial users and consumers are not limited to commenting on only the existence or amount of dumping, and, for example, are entitled to comment on the scope of an investigation. However, the Department will not consider comments on matters not within the Department's purview in antidumping and countervailing duty proceedings to be ''relevant.'' Although we recognize the concern raised by the third commenter regarding submissions on ''irrelevant'' issues, we do not consider it appropriate to have a regulation providing for the rejection of information or argument not ''relevant'' to the proceeding because the requisite subjective determinations concerning the relevancy of submissions or parts of submissions throughout the course of the proceeding would be too time consuming.

Proposed § 351.312(b) provided for the submission of relevant factual information and argument to the Department under § 351.301(b) and paragraphs (c) and (d) of § 351.309. Two commenters proposed that the regulations allow for submission of factual information and argument under all provisions of § 351.301 and § 351.309.

Upon further review, we have modified § 351.312(b) to allow for submission of relevant factual information and written argument by industrial users and consumers also under § 351.301(c)(1), providing for rebuttal, clarification, or correction of factual information submitted by another party, and under § 351.301(c)(3), providing for the submission of publicly available information to value factors under § 351.408(c). These provisions, in addition to the ones previously listed in § 351.312(b) provide industrial users and consumers the opportunity to submit relevant information and argument to the Department to assist us in our determinations. In addition, we note that nothing in the regulations or the statute precludes industrial users and consumers from making written submissions upon request from the Department.

One commenter proposed that the Department formally establish a practice of seeking industrial users' comments on the issue of industry support for a petition. With respect to this suggestion, section 732(c)(4)(E) of the Act provides for pre-initiation filing of comments on the issue of industry support for a petition only by those who would qualify as an ''interested party'' if an investigation were initiated. As a result, we have not adopted this proposal. However, the Department has the authority to seek comments from any person, including industrial users, and will determine whether to do so on a case-by-case basis.

Subpart D—Calculation of Export Price, Constructed Export Price, Fair Value, and Normal Value

Subpart D, which corresponds to subpart D of part 353 of the Department's prior regulations, deals with what is commonly referred to as ''AD methodology.'' Specifically, subpart D sets forth rules concerning the calculation of export price (''EP''), constructed export price (''CEP'') and normal value (''NV'').

Section 351.401

Section 351.401 deals with principles common to the calculation of export price, constructed export price and normal value.

Adjustments in general: Section 351.401(b) sets forth certain general principles that the Department will apply with respect to the adjustments that go into the calculation of export price, constructed export price, and normal value. We have revised paragraph (b) by inserting ''and'' between paragraphs (b)(1) and (b)(2). In addition, for the reasons discussed below, we have revised paragraph (b)(1).

Proposed paragraph (b)(1) stated that the party claiming an adjustment must establish the claim to the satisfaction of the Secretary. In connection with this paragraph, two commenters suggested that the Department expressly provide that the respondent bears the burden of establishing that selling expenses incurred in connection with home market sales are direct expenses and that selling expenses incurred in connection with U.S. sales are indirect expenses. These commenters also argued that the regulations should state that the respondent has the burden of establishing its entitlement to any downward adjustment to normal value and any upward adjustment to export price or constructed export price. They argued that, as drafted, proposed paragraph (b)(1) could be construed as placing on domestic interested parties the burden of establishing any downward adjustment to export price or constructed export price.

In drafting proposed paragraph (b)(1), our intent was not to break new ground, but rather to codify an established principle developed and applied over the years by the Department and the courts. According to this principle, the party in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment. In the context of adjustments to normal value, this rule was reflected in 19 CFR § 353.54 (1995) of the former regulations, which served

as the model for proposed paragraph (b)(1). Section 353.54 stated: ''Any interested party that claims an adjustment under §§ 353.55 through 353.58 must establish the claim to the satisfaction of the Secretary.''

Section 353.54, however, dealt only with adjustments to foreign market value (now normal value), whereas in proposed paragraph (b)(1), the Department was seeking to articulate a principle that would be applicable to the calculation of both normal value and export price (or constructed export price). Unfortunately, in the context of adjustments to the U.S. side of the AD equation, proposed paragraph (b)(1), as drafted, could be interpreted as shifting the burden to domestic interested parties, something that was not our intent.

Accordingly, we have revised paragraph (b)(1) to accurately reflect the principle discussed above. In particular, instead of referring to a ''claim'' for an adjustment in an undifferentiated manner, we have referred to the two separate components of an adjustment: The amount and the nature of an adjustment. With respect to establishing the ''nature'' of the adjustment, it is our intent to codify the well-established principle that the Secretary will treat a selling expense related to a U.S. sale as a direct expense unless a respondent interested party establishes to the Secretary's satisfaction that the expense is an indirect selling expense in nature. Conversely, the Secretary will treat a selling expense related to a foreign market sale as an indirect expense unless a respondent interested party establishes that the expense is direct in nature. As the courts have recognized, this assignment of the burden of proof is necessary to provide those in possession of the relevant information with an incentive to produce it. *See, e.g., RHP Bearings* v. *United States,* 875 F. Supp. 854, 859 (Ct. Int'l Trade 1995), and cases cited therein.

A different commenter maintained that proposed paragraph (b)(1) appropriately reflected the Department's practice of requiring a respondent to provide sufficient support for claimed adjustments without, at the same time, imposing rigid presumptions concerning the nature of adjustments. This commenter suggested, however, that the Department should further clarify paragraph (b)(1) by stating that the Department will consider both the nature of the expense and the individual circumstances of each respondent's records and accounting system when determining whether a respondent has provided sufficient support for an adjustment at issue.

This comment relates to another comment addressed in the section entitled ''Other Comments'' at the end of our discussion of subpart D. The issue common to both comments is the extent to which a firm's internal record keeping procedures should dictate the results of an AD analysis. As we state below with respect to the other comment, we have sought, and will continue to seek, ways in which the AD process can be made less onerous for all parties involved. However, the statute imposes certain standards, such as standards relating to adjustments to normal value and export price and constructed export price, that the Department is not free to revise in order to accommodate a particular respondent's accounting practices. Thus, while we certainly would take a respondent's records and accounting systems into consideration in determining whether that respondent had cooperated to the best of its ability, we have not adopted this suggestion to revise paragraph (b)(1).

Price adjustments: Proposed paragraph (c) restated the Department's practice with respect to price adjustments, such as discounts and rebates. The comments we received demonstrated a certain amount of confusion concerning the meaning of paragraph (c), as well as the nature of ''price adjustments'' in general. This confusion may be due, in part, to a lack of precision in the Department's terminology over the years.

In these final regulations, the Department has taken several steps aimed at alleviating that confusion. First, we have added a definition of the term ''price adjustment'' in § 351.102. As discussed above, contrary to the assumption of many commenters, price adjustments are not expenses, either direct or indirect. Instead, price adjustments include such things as discounts and rebates that do not constitute part of the net price actually paid by a customer.

Second, we have made a clarification in paragraph (c) itself. Paragraph (c) now provides that in calculating export price, constructed export price, or a price-based normal value, the Secretary will use a price that is net of any price adjustment that is reasonably attributable to the subject merchandise or the foreign like product. This use of a net price is consistent with the view that discounts, rebates and similar price adjustments are not expenses, but instead are items taken into account to derive the price paid by the purchaser.

The third clarification relates to the Department's policy regarding the allocation of price adjustments. The Department's policy concerning the allocation of both expenses and price adjustments is now contained in a single paragraph, paragraph (g), and is discussed in more detail below.

One commenter suggested that, at least for purposes of normal value, the regulations should clarify that the only rebates Commerce will consider are ones that were contemplated at the time of sale. This commenter argued that foreign producers should not be allowed to eliminate dumping margins by providing ''rebates'' only after the existence of margins becomes apparent.

The Department has not adopted this suggestion at this time. We do not disagree with the proposition that exporters or producers will not be allowed to eliminate dumping margins by providing price adjustments ''after the fact.'' However, as discussed above, the Department's treatment of price adjustments in general has been the subject of considerable confusion. In resolving this confusion, we intend to proceed cautiously and incrementally. The regulatory revisions contained in these final rules constitute a first step at clarifying our treatment of price adjustments. We will consider adding other regulatory refinements at a later date.

Movement expenses: Paragraph (e) deals with adjustments for movement expenses. At the outset, we should note that the Department has restructured paragraph (e) so that paragraph (e)(1) now deals with the term ''original place of shipment'' and paragraph (e)(2) deals with warehousing expenses.

In discussing proposed paragraph (e)(2) (now paragraph (e)(1)), the Department explained that in situations where the Department bases export price, constructed export price, or normal value on sales made by an unaffiliated reseller, the Department intended to measure the movement adjustment from the place of shipment by a reseller, as opposed to the production facility. *See* AD Proposed Regulations, 61 FR at 7330. One commenter observed that this was only a partial explanation, because it did not reflect the principle objective of the statute, which is, according to the commenter, to measure the deduction of movement expenses from both U.S. and foreign market prices from the point of production. Accordingly, the commenter proposed that the Department restate the general rule, as well as the application of the rule in a reseller situation.

The Department recognizes that the term ''seller'' in the proposed paragraph (e)(2) was subject to misinterpretation. Therefore, the Department has modified

this paragraph (which, again, is now paragraph (e)(1)) to clarify that, where the Department bases export price, constructed export price, or normal value on sales by the producer of the subject merchandise or foreign like product, the Department will deduct all movement expenses (including all warehousing) that the producer incurred after the goods left the production facility. However, in situations where the Department uses sales by an unaffiliated reseller (*i.e.*, a person that purchased, rather than produced, the subject merchandise or foreign like product and that is not affiliated with the producer), the Secretary may limit the deduction to movement and related expenses that the reseller incurred after the goods left the place of shipment of the reseller.

The purpose of distinguishing between sales by a producer and sales by an unaffiliated reseller is to avoid deducting expenses that form part of the reseller's cost of acquisition. In this regard, however, one commenter noted that there may be different delivery patterns for home market sales and sales to the United States. In response to this comment, the Department has made paragraph (e)(1) permissive, in order to maintain the flexibility needed to address certain delivery patterns by resellers that differ by market.

Another commenter suggested that paragraph (e) should require expressly that the Department limit adjustments to normal value to movement expenses that are shown to be reasonably attributable to sales of the foreign like product. In addition, the same commenter argued that the Department should not limit adjustments to EP or CEP in any way unless a respondent demonstrates that certain expenses are not reasonably attributable to sales of subject merchandise.

In our view, the issues raised by this commenter involve the allocation of expenses, a topic that the Department has dealt with under paragraph (g), discussed below. Therefore, the Department has not adopted this suggestion to revise paragraph (e).

Another commenter proposed that the Department modify paragraph (e)(1) (now paragraph (e)(2)) to eliminate the reference to warehousing expenses, because whether a particular direct warehouse cost is a movement expense or a selling expense is a fact-specific inquiry. This commenter argued that the proposed rule misleadingly suggested that all warehousing expenses are movement expenses, a concept that is at odds with past Department practice, unwarranted by case law, and unwarranted given commercial practices. According to the commenter, the proposed rule constituted a change in law and practice that was not intended in the URAA. As with all expenses and adjustments, the Department can seek information regarding the nature of any warehousing expenses in its questionnaire, instruct respondents accordingly, and make an appropriate determination, based on the record in each case, as to whether a particular expense qualifies as a movement expense or a selling expense.

The Department has not adopted this suggestion. The URAA specified, for the first time, that the Department is to deduct movement and related expenses from export price, constructed export price, *and normal value*, and that this deduction should account for all such expenses incurred after the merchandise left the place of production. In this regard, the SAA at 823 specifies that in calculating EP and CEP, the Department is to deduct ''transportation *and other expenses, including warehousing expenses*, incurred in bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States.'' (Emphasis added). The SAA includes similar language with respect to the corresponding adjustment to normal value. SAA at 827. In addition, the requirement to deduct warehousing expenses as movement expenses is made even more plain by the language of the Senate Report, which states that the Department must ''when included in the price used to establish normal value, deduct * * * transportation, warehousing, and other expenses incurred in bringing the merchandise from the original place of shipment in the exporting country to the place of delivery in the exporting country or a third country.'' S. Rep. No. 412, 103d Cong., 2d Sess. 70 (1994).

In light of these clear legislative instructions, the Department has continued to provide in paragraph (e)(2) for the treatment of warehousing expenses as movement expenses. However, the Department has modified this paragraph to clarify that the Department will not deduct factory warehousing as a movement expense.

Collapsing of producers: Proposed paragraph (f) described the circumstances under which the Department will treat two or more affiliated producers as a single entity (*i.e.*, ''collapse'' the producers). Proposed paragraph (f) provided for the collapsing of affiliated producers if (1) the producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities; and (2) there is a significant potential for the manipulation of price or production. In addition, paragraph (f) contained a non-exhaustive list of the factors to be considered in identifying a significant potential for the manipulation of price or production.

With respect to paragraph (f), several commenters suggested that the Department should provide that it will collapse affiliated producers only in extraordinary circumstances, an approach which, the commenters alleged, is the Department's current practice. These commenters also proposed that the regulations contain illustrations of the extraordinary circumstances in which the Department will collapse affiliated producers.

Other commenters urged that, in connection with the potential for manipulation, the Department delete the word ''significant.'' According to these commenters, this constitutes an unduly high threshold for collapsing, in conflict with what these commenters alleged to be the Department's existing practice.

Finally, one commenter suggested that the Department clarify that (1) not all of the criteria of paragraph (f) need to be present in order to collapse affiliated producers, and (2) the Department will look to the potential for future price manipulation.

The differing descriptions of the Department's practice offered by the commenters indicates that there has been a degree of confusion concerning the Department's practice of collapsing affiliated producers. We have promulgated paragraph (f) in order to clarify this practice. In particular, the Department has codified the ''significant potential'' criterion. The Department has not adopted the suggestion that it will collapse only in ''extraordinary'' circumstances. A determination of whether to collapse should be based upon an evaluation of the factors listed in paragraph (f), and not upon whether fact patterns calling for collapsing are commonly or rarely encountered.

On the other hand, we have retained the word ''significant'' with respect to the potential for manipulation. The suggestion that the Department collapse upon finding any potential for price manipulation would lead to collapsing in almost all circumstances in which the Department finds producers to be affiliated. This is neither the Department's current nor intended practice. As indicated in paragraph (f), collapsing requires a finding of more than mere affiliation.

We also have declined to include in the regulations examples of situations in which the Department will collapse

affiliated producers. In our view, these determinations are very much fact-specific in nature, requiring a case-by-case analysis, as reflected in the Department's determinations in actual cases, which are published in the **Federal Register**.

With respect to the suggestion that not all of the factors identified in paragraph (f) need be present in order to collapse affiliated producers, to the extent that this suggestion is directed at the factors relating to a significant potential for manipulation, we agree. However, we believe that this principle already is clearly reflected in proposed paragraph (f), and that an additional change is not necessary.

On the other hand, the factors concerning a significant potential for manipulation relate to only one of the two elements that must be present in order to collapse affiliated producers. In addition to finding a significant potential for manipulation, the Secretary also must find the requisite type of production facilities. To clarify this point, we have revised paragraph (f) so that paragraph (f)(1) refers to the two basic elements, while paragraph (f)(2) contains the non-exhaustive list of factors that the Secretary will consider in determining whether there is a significant potential for manipulation.

With respect to the suggestion that the regulations clarify that the Department will consider future manipulation as well as actual manipulation in the past, we agree that the Department must consider future manipulation. However, we believe the proposed regulation was sufficiently clear on this point. In this regard, we selected the standard of ''significant potential'' to deal with precisely this point. In the past, the Department at times had used a standard of ''possible manipulation.'' As recognized recently by the Court of International Trade, this latter standard may require evidence of actual manipulation, whereas a standard based on the potential for manipulation focuses on what may transpire in the future. *FAG Kugelfischer Georg Schafer KGaA* v. *United States*, slip op. 96–108 at 23 (July 10, 1996).

In addition to the changes described above, the Department also has changed what is now paragraph (f)(2)(ii) to clarify that the Department will examine not only whether affiliated producers share management or board members, but also whether they share board members or management with, for example, a common parent.

Allocation of expenses and price adjustments: Proposed paragraph (g) dealt with the treatment of expenses that are reported on an allocated basis. In response to the substantial number of comments we received concerning the subject of allocation, we have revised paragraph (g) to provide greater clarity with respect to the allocation of expenses. In addition, we have expanded the coverage of paragraph (g) to include the allocation of price adjustments, and we have revised the heading of paragraph (g) accordingly. Also, we have renumbered proposed paragraph (g) as paragraph (g)(1).

By way of background, neither the pre-URAA statute nor the Department's prior regulations addressed allocation methods, although issues relating to allocation methods arose in almost every AD investigation and review. Instead, the Department and the courts resolved these issues on a case-by-case basis. The resulting absence of guidelines has been responsible for a considerable amount of litigation that increased the costs of AD proceedings for all parties involved, including the Department. Therefore, the Department believes that its administration of the AD law would be enhanced by the adoption of some general guidelines on allocation methods that provide a greater measure of certainty and predictability.

The statute, as amended by the URAA, continues to be silent on the question of allocation methods. However, the SAA at 823–24 states that ''[t]he Administration does not intend to change Commerce's current practice, sustained by the courts, of allowing companies to allocate these expenses when transaction-specific reporting is not feasible, provided that the allocation method used does not cause inaccuracies or distortions.'' Although this statement was made in the context of deductions from constructed export price for direct selling expenses, we believe that the principle embodied in the statement applies equally to price adjustments and other types of selling expenses, as well.

The commenters disagreed with respect to the Department's treatment of allocated expenses and price adjustments and the interpretation to be accorded the language in the SAA. Several commenters argued that all allocations result in the attribution of expenses and price adjustments to some sales that did not incur them, and remove them from some sales that did. These commenters essentially argued that, as compared to transaction-specific reporting, all allocation methods are defective. Therefore, they asserted, the Department should consider all allocation methods to be inaccurate or distortive within the meaning of the SAA.

With respect to these comments, the Department agrees that allocated expenses or price adjustments may not be as exact as expenses or price adjustments reported on a transaction-specific basis. However, in our view, the drafters of the URAA and the SAA could not have intended that all allocations are inherently distortive or inaccurate for purposes of the AD law. Under such an interpretation (1) Congress and the Administration permitted something less than transaction-specific reporting, but (2) because allocation methods are *per se* inaccurate and distortive, only transaction-specific reporting is acceptable.

In our view, the drafters of the URAA and the SAA were not dealing with abstract concepts, but instead were dealing with issues concerning the application of a law to real life factual scenarios. As the Federal Circuit stated many years ago in connection with this very issue: ''In a purely metaphysical sense, Smith-Corona is correct in that the ad expense cannot be directly correlated with specific sales. Yet, the statute does not deal in imponderables.'' *Smith-Corona Group* v. *United States*, 713 F.2d 1568, 1581 (1983). Therefore, when the drafters referred to allocation methods as causing ''inaccuracies or distortions,'' they must have been referring to allocation methods that result in inaccuracies or distortions that are unreasonable in light of the objectives of the AD law.

General rule: With the preceding discussion in mind, we now turn to a discussion of the specific provisions of paragraph (g). Paragraph (g)(1) contains the basic principle that the Department will follow in dealing with allocated expenses and price adjustments, and continues to establish a preference for transaction-specific reporting. There are two principal changes from proposed paragraph (g).

First, we have revised paragraph (g)(1) to provide that the Secretary will consider allocated expenses and price adjustments if the Secretary is satisfied that the allocation method used ''does not cause inaccuracies or distortions.'' As discussed above, because all allocation methods are, in some sense, inexact, the Department intends to reject only those allocations methods that produce unreasonable inaccuracies or distortions.

Second, we have revised paragraph (g)(1) to cover the allocation of price adjustments. As discussed in connection with § 351.102(b) and the new definition of the term ''price adjustments,'' price adjustments are distinguishable from expenses.

In this regard, we received several comments that addressed the relevance of *Torrington* v. *United States*, 82 F.3d 1039 (Fed. Cir. 1996), to the allocation of price adjustments. In that case, although the Court appeared to question whether price adjustments constituted expenses at all, *id.*, at 1050, note 15, it held that assuming that the price adjustments in question were expenses, they had to be treated as direct selling expenses rather than indirect selling expenses. According to the Court, ''[t]he allocation of expenses . . . does not alter the relationship between the expenses and the sales under consideration.'' *Id.*, at 1051.

In our view, *Torrington* is of limited relevance to the instant issue, because the Court did not address the propriety of the allocation methods used in reporting the price adjustments in question. Instead, it simply stated that regardless of the allocation methods used, the Department could not treat the price adjustments as indirect selling expenses. Moreover, these regulations are consistent with the holding of the case, because, by distinguishing price adjustments from expenses, we have ensured that the Department will not treat price adjustments as any selling expenses, including indirect selling expenses.

Reporting allocated expenses and price adjustments: Paragraph (g)(2) deals with the information that a party must provide when reporting an expense or a price adjustment on an allocated basis. One commenter expressed concern that proposed paragraph (g) placed too much emphasis on the Department's responsibility to verify an allocation method, and insufficient emphasis on a respondent's obligation to demonstrate its entitlement to an adjustment based on a particular allocation method. We agree with the commenter, and have added paragraph (g)(2) in order to address the commenter's concern.

First, the party must demonstrate to the Secretary's satisfaction that it is not feasible to report the expense or price adjustment on a more specific basis. Such a demonstration should include an explanation of accounting systems, the manner in which the expenses or price adjustments are incurred or granted, and an explanation of the accounting practices in the industry in question.

In addition, paragraph (g)(2) also requires a party to explain why the allocation method used does not cause inaccuracies or distortions. With respect to this latter requirement, it is not our intent to require a party to ''prove a negative'' or demonstrate what the amount of the expense or price adjustment would have been if transaction-specific reporting had been used. However, the party must provide a sufficiently detailed explanation of the allocation method used so that the Department can make an initial judgment at the time when information is submitted as to the reasonableness of the method and, if necessary, issue a supplemental questionnaire. Of course, allocation methods, like any other type of factual information, are subject to verification.

In this regard, we have not identified in paragraph (g) itself specific types of allocation methods that the Department would consider as acceptable. Before doing so, we first would like to gain more experience in applying paragraph (g) in actual cases. However, there are certain types of allocation methods that we believe would be acceptable.

One such allocation method applies to cases where the Department uses averages, such as when using the average-to-average price comparison method under section 777A(d)(1)(A)(i) of the Act and § 351.414(d). In such instances, we would consider as acceptable an allocation method that allocates total expenses incurred, or total price adjustments made, in connection with sales included within an averaging group over those sales.

For example, assume that an averaging group consists of sales of products X, Y, and Z. The respondent in question is able to identify the warranty expenses incurred in connection with sales of X, Y, and Z in the aggregate, but cannot identify the warranty expenses incurred on a product-specific basis. In this situation, it would be acceptable for the respondent to allocate the total warranty expenses over total sales of products X, Y, and Z. Because the sales of products X, Y, and Z will be averaged together, transaction-specific reporting, if it were feasible, would achieve the same result as the allocation method just described.

In addition, while not addressed in paragraph (g), the Department normally will accept an allocation method that calculates expenses or price adjustments on the same basis as the expenses were incurred or the price adjustments granted. Thus, for example, where a producer offers a rebate conditioned on the purchase of a certain amount of merchandise, it would not be inaccurate or distortive to spread the value of the rebate over the purchases needed to earn the rebate. Similarly, if a producer granted a $100 rebate for a particular month, it would not be inaccurate or distortive to apportion that $100 over all sales made during that month. Such a method merely apportions the price adjustment over the sales on which it was actually earned.

Feasibility: Paragraph (g)(3) deals with the factors the Secretary will take into account in determining (1) whether transaction-specific reporting is not feasible under paragraph (g)(1); or (2) whether an allocation is calculated on as specific a basis as is feasible under paragraph (g)(2). Paragraph (g)(3) provides that among the factors the Secretary will take into account are: (i) the records maintained by the firm in the ordinary course of its business; (ii) normal accounting practices in the country and industry in question; and (iii) the number of sales made by the firm during the period of investigation or review.

In this regard, one commenter suggested that the Department should clarify that it will accept allocated expenses or price adjustments where transaction-specific reporting is neither appropriate nor ''reasonably feasible.'' In response, another commenter objected to any departure from the language of the SAA, which refers to ''feasible'' rather than ''reasonably feasible.''

With respect to these comments, the Department agrees with the second commenter that the standard in the SAA is ''feasible,'' not ''reasonably feasible.'' On the other hand, the feasibility of reporting transaction-specific information is not something that the Department can analyze in the abstract, but instead is something that the Department must consider on a case-by-case basis. For example, what may be feasible for firms in one industry may not be feasible for firms in another. In our view, paragraph (g)(3) appropriately reflects these types of considerations.

Some commenters suggested that in assessing the feasibility of transaction-specific reporting, the Department should look solely to the records of the party in question to determine what level of detailed reporting is feasible. The Department has not adopted this suggestion, because it might provide an incentive for firms that are (or are likely to be) subject to an AD proceeding to maintain their records in a less specific manner than they otherwise would. Although the Department will accept allocated expenses or price adjustments in certain circumstances, the regulations still retain a preference for transaction-specific information.

Allocation methods involving ''out-of-scope'' merchandise: Paragraph (g)(4) deals with the issue of allocation methods that involve ''out-of-scope'' merchandise. Specifically, paragraph (g)(4) deals with situations in which an allocation includes expenses or price

adjustments that were incurred or made in connection with sales of merchandise that is not ''subject merchandise'' or a ''foreign like product.'' In some cases, the inclusion of ''out-of-scope'' merchandise *per se* has been considered as rendering an allocation method as distortive and, thus, automatically unacceptable.

In our view, such a position is too extreme. An allocation method that includes ''out-of-scope'' merchandise is distortive only where the expenses or price adjustments likely are incurred or granted disproportionately on the out-of-scope or the in-scope merchandise. However, based on our experience, there is no basis for irrebuttably presuming such disproportionality without regard to the facts of a specific case.

Therefore, paragraph (g)(4) provides that the Secretary will not reject an allocation method solely because the method includes ''out-of-scope'' merchandise. Instead, the Secretary will apply the standards of paragraph (g) to ensure that the allocation method used is not inaccurate or distortive. However, in the case of these types of allocation methods, it will be particularly important that a party claiming an adjustment provide the explanation required under paragraph (g)(2) as to why the allocation method used is not inaccurate or distortive. In addition, the Secretary will pay special attention to the extent to which the out-of-scope merchandise included in the allocation pool is different from the in-scope merchandise in terms of value, physical characteristics, and the manner in which it is sold. Such information will be important in determining whether it is more or less likely that expenses were incurred, or price adjustments were made, in proportionate amounts with respect to sales of out-of-scope and in-scope merchandise.

Additional comments: In connection with the topic of allocation methods, many commenters made suggestions as to the manner in which the Department should classify expenses and price adjustments as direct or indirect. The Department has not adopted these suggestions for the following reasons. First, insofar as expenses are concerned, the method of allocating an expense does not dictate the nature of the expense. *Torrington, supra,* at 1051. Second, with respect to price adjustments, as discussed above, price adjustments are neither direct nor indirect expenses, but rather are additions or deductions necessary to arrive at the actual price paid by the customer.

Several commenters stated that the Department must be careful in evaluating (1) a respondent's procedures for granting price adjustments, and (2) the extent to which allocations used by a respondent in its normal business records are non-distortive. According to these commenters, if the Department sets standards that, in practice, result in the rejection of most or all allocated price adjustments and expenses, the result will be distorted comparisons.

The Department agrees with the notion that it should attempt to use allocations that are based on the most precise information available in light of a respondent's books and records. Such an approach helps to avoid comparisons that do not reflect the actual prices paid by customers or the actual expenses incurred by respondents. On the other hand, the Department cannot allow a respondent's accounting procedures to dictate the Department's methodology in a particular case. The Department always must balance the reporting burdens of respondents against the objective of obtaining accurate results. If a particular allocation method is unreasonably inaccurate or distortive, the Department cannot rely on that method simply because it is the only method that the respondent's records will allow.

Another commenter stated that the professed ''need'' to allocate price adjustments often flows from artificially narrow agency determinations regarding the scope of a proceeding. In addition, this commenter contended that the Department should expect foreign companies found guilty of injuring an American industry to adjust their accounting and bookkeeping practices to conform to the requirements of the AD law.

With respect to this comment, we are not persuaded that there is any relationship between the need to allocate adjustments and the Department's alleged narrowing of the scope of a proceeding. Moreover, the commenter appeared to be arguing more against the wisdom of narrowing subject merchandise than the propriety of accepting allocations. In our view, questions concerning the narrowness or breadth of the scope of a particular proceeding are more appropriately addressed on a case-by-case basis in actual AD proceedings. Finally, with respect to the comment regarding changes in respondents' record keeping practices, if the Department denies an adjustment because a firm's record keeping practices do not permit it to use an acceptable allocation method, we would expect that the firm would revise those practices if it hopes to have the Department grant the adjustment in some future segment of the particular proceeding.

Date of sale: Paragraph (i) deals with the identification of the date of sale for sales of the subject merchandise and foreign like product. Paragraph (i) continues to provide that the Secretary normally will consider the date of invoice, as recorded in a firm's records kept in the ordinary course of business, to be the date of sale.

Use of uniform date of sale: Several commenters supported the notion of using a uniform date for purposes of identifying the date of sale, and specifically endorsed the use of invoice date. According to these commenters, the use of a uniform date of sale would promote predictability.

Other commenters, however, opposed the use of a uniform date. According to these commenters, the use of a uniform date of sale is inconsistent with Article 2.4.1, note 8 of the AD Agreement. They also suggested that a reasonable reading of the statute does not support using the date of invoice, because that is not necessarily the date on which price and quantity are established, and, thus is not the date on which the domestic industry lost the ability to make a sale to a U.S. customer. In addition, some of these commenters argued that in situations where exchange rates fluctuate between the date on which the terms of sale are established and the date of invoice, the results of the Department's calculations will become less, rather than more, predictable.

In these final regulations, we have retained the preference for using a single date of sale for each respondent, rather than a different date of sale for each sale. Contrary to suggestions made by some of the commenters, this has been the Department's practice in the past.

Moreover, there are several valid reasons for this practice. First, by simplifying the reporting and verification of information, the use of a uniform date of sale makes more efficient use of the Department's resources and enhances the predictability of outcomes.

Second, as a matter of commercial reality, the date on which the terms of a sale are first agreed is not necessarily the date on which those terms are finally established. In the Department's experience, price and quantity are often subject to continued negotiation between the buyer and the seller until a sale is invoiced. The existence of an enforceable sales agreement between the buyer and the seller does not alter the fact that, as a practical matter, customers frequently change their

minds and sellers are responsive to those changes. The Department also has found that in many industries, even though a buyer and seller may initially agree on the terms of a sale, those terms remain negotiable and are not finally established until the sale is invoiced. Thus, the date on which the buyer and seller appear to agree on the terms of a sale is not necessarily the date on which the terms of sale actually are established. The Department also has found that in most industries, the negotiation of a sale can be a complex process in which the details often are not committed to writing. In such situations, the Department lacks a firm basis for determining when the material terms were established. In fact, it is not uncommon for the buyer and seller themselves to disagree about the exact date on which the terms became final. However, for them, this theoretical date usually has little, if any, relevance. From their perspective, the relevant issue is that the terms be fixed when the seller demands payment (*i.e.*, when the sale is invoiced).

Finally, with respect to the arguments that the date on which material terms are established is the date on which the domestic industry is injured and the date on which respondents rely for exchange rate purposes, in our view, these arguments beg the question of ''when are material terms established?'' In paragraph (i), we merely have provided that, absent satisfactory evidence that the terms of sale were finally established on a different date, the Department will presume that the date of sale is the date of invoice.

Therefore, for the foregoing reasons, we have continued to provide for the use of a uniform date of sale, which normally will be the date of invoice. However, we have revised paragraph (i) in response to suggestions that the Department clarify its authority to use a date other than date of invoice in appropriate cases. In some cases, it may be inappropriate to rely on the date of invoice as the date of sale, because the evidence may indicate that, for a particular respondent, the material terms of sale usually are established on some date other than the date of invoice. In proposed paragraph (i), we had intended this type of flexible approach through our use of the word ''normally.'' In light of the comments, however, we have revised paragraph (i) to provide that ''the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.''

Although the date of invoice will be the presumptive date of sale under paragraph (i), the Department intends to continue to require that a respondent provide a full description of its selling processes. Among other things, this information will permit domestic interested parties to submit comments concerning the selection of the date of sale in individual cases. Of course, a respondent also will be free to argue that the Department should use some date other than the date of invoice, but the respondent must submit information that supports the use of a different date. Finally, a respondent's description of its selling processes, like any other item of information, will be subject to verification.

If the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale. For example, in situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures, the Department usually will use a date other than the date of invoice. However, the Department emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed. A preliminary agreement on terms, even if reduced to writing, in an industry where renegotiation is common does not provide any reliable indication that the terms are truly ''established'' in the minds of the buyer and seller. This holds even if, for a particular sale, the terms were not renegotiated.

Date of invoice versus date of shipment: Several commenters argued that if the Department uses a uniform date of sale, it should use date of shipment rather than date of invoice. These commenters claimed that because respondents can control the timing of invoice issuance, they will be able to manipulate the Department's dumping calculations by manipulating the date of sale. According to these commenters, date of shipment is ''manipulation-proof,'' because the date on which merchandise is shipped is largely determined by the needs of the customer.

For several reasons, the Department has not adopted this suggestion. First, date of shipment is not among the possible dates of sale specified in note 8 of the AD Agreement. Second, based on the Department's experience, date of shipment rarely represents the date on which the material terms of sale are established. Third, unlike invoices, which can usually be tied to a company's books and records, firms rarely use shipment documents as the basis for preparation of financial reports. Thus, reliance on date of shipment would make verification more difficult.

Finally, with respect to the commenters' concerns regarding possible manipulation, we do not believe that these concerns warrant substituting date of shipment for date of invoice as the presumptive date of sale. As explained above, the Department will continue to require respondents to provide a full description of their sales processes. Moreover, these descriptions will be subject to verification, and we are confident that we will be able to uncover, through verification, attempts at manipulation. For example, the Department can verify the average length of time between invoice date and shipment date, and can scrutinize deviations from the norm. In addition, most firms have a standard invoicing practice (*e.g.*, three days after shipment, every two weeks). Where a firm does not have such a practice, or where it changes that practice, the Department will be particularly attentive to the possibility of manipulation of dates of sale.

Early resolution of date of sale issues: One commenter suggested that because issues surrounding date of sale must be resolved in the early stages of an investigation or review, the regulations should provide a mechanism under which the Department consults with the parties and decides these issues prior to the issuance of a request for information. This commenter was concerned that unilateral judgments by a respondent as to the appropriate date of sale can result in the unfair and prejudicial use of ''facts available'' should the Department ultimately disagree with that judgment.

The Department has not adopted this suggestion. While we recognize that it is preferable to settle issues regarding the date of sale early in an investigation or review, we believe that the mechanisms in place are adequate. First, the response to the section of the Department's questionnaire that addresses general selling practices, including selling processes, is due to the Department earlier than those sections that require information pertaining to specific sales, thereby allowing parties an early opportunity to comment on date of sale. Second, paragraph (i) will put parties on notice that, in the absence of information to the contrary, the Department will use date of invoice as the date of sale.

Finally, there is a limit on the Department's ability to guarantee that date of sale issues are always resolved

definitively at the outset of an investigation or review. Among other things, domestic interested parties must have an opportunity to comment on information describing a respondent's selling processes. In addition, the Department also must verify this information. In some cases, the Department may be persuaded by the arguments of domestic interested parties or the results of verification that its initial identification of the date of sale was in error.

Indirect export price: One commenter proposed that the Department make clear that its method for identifying the date of sale will not change the determination of when a sale constitutes an ''indirect export price'' sale. Although the Department has not revised the final regulations in light of this comment, we agree that the method for identifying the date of sale does not affect the method for determining whether a particular sale constitutes an ''indirect export price'' sale.

Long-term contracts: Several commenters raised issues concerning long-term contracts. One commenter suggested that the Department codify in the regulations its statement in the AD Proposed Regulations, 61 FR at 7330–7331, that the Department will continue to determine the date of sale for long-term contracts on a case-by-case basis, without presuming that date of invoice is the date of sale. Another commenter suggested that the Department should presume that the date of invoice is the date of sale in the case of long-term contracts.

The Department has not adopted either of these suggestions. Because of the unusual nature of long-term contracts, whereby merchandise may not enter the United States until long after the date of contract, the Department will continue to review these situations carefully on a case-by-case basis. In our view, paragraph (i) is sufficiently flexible so as to eliminate the need for a separate provision addressing long-term contracts. We should note, however, that date of invoice normally would not be an appropriate date of sale for such contracts. The date on which the material terms of sale are finally set would be the appropriate date of sale for such contracts.

Effect on reviews: One commenter argued that in implementing paragraph (i), the Department should ensure that, in conducting administrative reviews, it does not omit sales in those proceedings where some date other than invoice date was used as the date of sale in prior segments of the proceeding. Another commenter suggested that the Department should permit parties to continue to use the date of sale method established in prior segments.

Although we have not revised the regulations in light of these comments, the Department will be particularly attentive to the possibility that sales may be missed in administrative reviews in which the date of sale changes due to the implementation of paragraph (i). The Department will address these types of issues on a case-by-case basis to ensure that all sales are reviewed.

Currency conversions: One commenter proposed that the Department retain its prior practice, without adopting the date of invoice presumption, for purposes of establishing the date on which currency will be converted. Essentially, this commenter suggested that the Department establish two dates of sale, one for purposes of determining which sales to report, and a different one for exchange rate purposes.

We have not adopted this suggestion. There is no indication in the statute, the SAA, or the AD Agreement that the Department should use different dates of sale for different purposes. For all purposes, the date of sale is the date on which the material terms of sale are established. In promulgating paragraph (i), the Department merely has adopted a rebuttable presumption that this date is the date of invoice. The Department cannot adopt a system under which two different dates are identified as being the date on which the material terms of sale were established.

Other Comments Concerning § 351.401

Fair comparison: Two commenters contended that the AD Agreement and the URAA require that a dumping margin be based on a ''fair comparison.'' They believed that this requirement for a fair comparison should be carried forward into the regulations, which should state clearly that the Department will apply this principle to all aspects of its AD methodology, including decisions regarding the prices to be compared and the type and amount of adjustments to make to those prices. Another commenter suggested that the regulations, or at least the preamble, refer to a ''fair comparison'' as a fundamental requirement.

In response, another commenter, while agreeing that the purpose of the AD law is to reach a ''fair comparison'' between the sales being compared, argued that there is no reason to insert into the agency's regulations a requirement that, in the commenter's view, was vague. According to the commenter, in the statute Congress identified in detail the method for accomplishing a ''fair comparison.''

In our view, the regulations do not require any further clarification on this particular issue. Congress dealt explicitly with this question in the statute itself. Specifically, section 773(a) of the Act provides: ''In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows: [*i.e.*, in accordance with the provisions discussing the calculation of normal value].'' The House Report on the URAA provided further clarification by stating: ''The requirement of Article 2.4 of the Agreement that a fair comparison be made between the export price or constructed export price, and normal value is stated in *and implemented by* new section 773.'' H.R. Rep. No. 826, Pt. 1, 103d Cong., 2d Sess. 82 (1994) (emphasis added). Given the clarity of the statute and the legislative history on this point, we do not believe that additional elaboration in the regulations is necessary.

Indirect export price: One commenter suggested that the Department codify in the regulations its four-factor test for determining whether sales made through an affiliate located in the United States are classifiable as ''export price'' (formerly ''purchase price'') transactions. According to the commenter, this test for identifying so-called ''indirect export price sales'' is firmly rooted in Department practice, has been repeatedly approved by the courts, and was endorsed by Congress in the URAA. The commenter argued that because this test involves a fundamental issue in AD proceedings, the public would benefit from the codification of the test in the regulations.

A second commenter, however, objected to codification of the test. According to this commenter, because the four factors of the indirect export price test continue to be subject to interpretation, the Department should not restrict its discretion at this time by issuing a regulation. This commenter also disagreed specifically with the first commenter's articulation of some of the factors. Finally, referring to the factor dealing with inventory, this commenter suggested that if the Department should include the test in the regulations, the Department should clarify that the merchandise need only be included in inventory, not *physical* inventory.

We have not adopted the suggestion of the first commenter that we codify the ''indirect export price'' test in the regulations. While we do not disagree with the commenter's characterization of the test's pedigree, we have not attempted in these regulations to codify all aspects of the Department's AD methodology that are well-established. We generally have refrained from codifying principles that are clearly set forth in the statute and/or the legislative history. In our view, the ''indirect export price'' test is one of these principles. As for the suggestions of the second commenter, these suggestions are moot in light of our decision to refrain from codifying the ''indirect export price'' test.

Section 351.402

Section 351.402 deals with the calculation of export price and constructed export price under section 772 of the Act.

Adjustments to constructed export price: Proposed paragraph (b) addressed the expenses that the Department will deduct from the starting price in calculating constructed export price (''CEP'') under section 772(d) of the Act. In addition to a stylistic change, we have made one substantive revision to paragraph (b), as discussed below.

In proposed paragraph (b), the Department stated that it would adjust for ''expenses associated with commercial activities in the United States, no matter where incurred.'' Noting that this language only required a deduction for expenses associated with United States selling activities, several commenters argued that the Department should adjust for all expenses incurred on CEP sales, including expenses incurred in the foreign market. These commenters contended that proposed paragraph (b) was inconsistent with: (1) The plain language of section 772(d); (2) judicial precedent interpreting the pre-URAA version of the statute, which contained language identical to that of section 772(d); and (3) established Department practice.

A second set of commenters argued in response that, in calculating constructed export price, the Department may deduct from the starting price only those expenses associated with activities occurring in the United States. According to these commenters, expenses incurred in the exporting country that are *directly* attributable to United States sales (*i.e.,* that are not indirect expenses) are subject to adjustment under the circumstances of sale provision of section 773(a)(6)(C)(iii) of the Act.

In these final regulations, we have clarified that the Secretary will deduct only expenses associated with a sale to an unaffiliated customer in the United States. With respect to the suggestion of the first group of commenters that we deduct all expenses incurred in connection with the CEP sale, we do not believe such an approach is consistent with the statute. Although section 772(d)(1) is ambiguous on this particular point, section 772(f), which deals with the deduction of profit from CEP, refers to the expenses to be deducted under section 772(d)(1) as ''United States expenses,'' thereby suggesting that the coverage of section 772(d)(1) is limited to those expenses incurred in connection with a sale in the United States. In addition, the SAA makes clear that only those expenses associated with economic activities in the United States should be deducted from CEP. In discussing section 772(d)(1), the SAA states that the deduction of expenses in calculating CEP relates to ''expenses (and profit) *associated with economic activities occurring in the United States*.'' SAA at 823 (emphasis added).

In addition to conflicting with the SAA, the suggestion that we deduct all expenses would disrupt the statutory scheme with respect to the level-of-trade (''LOT'') adjustment. The statute clearly anticipates that an adjustment for differences in levels of trade will not be necessary every time the Department uses CEP. However, under the proposed interpretation, because the Department always would calculate CEP exclusive of all expenses and normal value inclusive of such expenses, CEP and normal value always would be at different levels of trade. Thus, an adjustment for differences in levels of trade would be necessary in almost every case. This would frustrate the legislative intent that the Department make comparisons at the same level of trade to the extent possible, and that the Department make level of trade adjustments only when such comparisons are not possible.

Finally, the Department believes that the deduction of all expenses from CEP would conflict with Article 2.4 of the AD Agreement. Article 2.4, on which section 772(d) is based, requires the deduction of costs ''incurred between importation and resale.'' The suggestion of the first group of commenters would call for the deduction of expenses that are incurred before importation and that do not relate to activities between importation and resale.

With regard to the argument concerning judicial and administrative precedents under the pre-URAA version of the statute, the Department notes that the URAA changed the manner in which CEP (formerly ''exporter's sales price'') is calculated. Because of this change, and in light of the clear intent expressed in the SAA, we do not believe that these old law precedents govern the interpretation of section 772(d)(1) with respect to this particular point.

Although we have not adopted the suggestion that we deduct all expenses from CEP, we have revised paragraph (b) to clarify its meaning. In the first sentence of paragraph (b), we have deleted the phrase ''no matter where incurred'' and have replaced it with the phrase ''that relate to the sale to the unaffiliated purchaser, no matter where or when paid.'' In addition, we have added the following new sentence: ''The Secretary will not make an adjustment for any expense that is related solely to the sale to an affiliated importer in the United States, although the Secretary may make an adjustment to normal value for such expenses under section 773(a)(6)(C)(iii) of the Act.''

The purpose of these changes is to distinguish between selling expenses incurred on the sale to the unaffiliated customer, which may be deducted under 772(d)(1), and those associated with the sale to the affiliated customer in the United States, which may not be deducted. In addition, the phrase ''no matter where or when paid'' is intended to indicate that if commercial activities occur in the United States and relate to the sale to an unaffiliated purchaser, expenses associated with those activities will be deducted from CEP even if, for example, the foreign parent of the affiliated U.S. importer pays those expenses. Finally, the reference to adjustments to normal value reflects our agreement with the comment that the Secretary may adjust for direct selling expenses (as well as assumed expenses) associated with the sale to the affiliated importer under the circumstance of sale provision, discussed below.

One commenter urged the Department to define ''selling expenses'' to exclude ''general and administrative expenses.'' The Department has not adopted this suggested change. Typically, the primary, if not sole, function of an affiliated U.S. importer is to sell. Therefore, many or all general and administrative expenses of such firms are properly considered as selling expenses and must be deducted under section 772(d)(1)(D).

Another commenter stated that, in the past, the Department would not deduct selling expenses in calculating CEP (formerly ESP) in AD proceedings involving nonmarket economies. According to the commenter, the

Department's stated reason for not making a deduction was its inability to make an offsetting circumstance-of-sale adjustment to normal value (formerly foreign market value). The commenter stated that the Department has reevaluated this particular practice, and now recognizes that the statute requires CEP deductions in nonmarket economy cases irrespective of whether a circumstance-of-sale adjustment is possible. The commenter suggests that the agency's regulations should reflect this change in practice, and should make clear that CEP deductions are required in nonmarket economy cases.

With respect to this suggestion, the commenter is correct concerning the Department's reevaluation of its practice. In a recent determination, the Department stated: ''Regarding the necessity of making CEP deductions, we have reevaluated our practice in this area and have concluded that CEP deductions are required by the plain language of the statute, which states in section 772(d)(2)(D) that CEP 'shall be reduced' by the selling expenses associated with economic activity in the United States. Consequently, we have made deductions to CEP for all selling expenses associated with economic activities in the United States in accordance with our practice.'' *Bicycles from the People's Republic of China,* 61 FR 19026, 19031 (April 30, 1996). However, because the statute is clear on this point, we do not believe that a change to paragraph (b) is necessary.

''Special rule'' for merchandise with value added after importation: Proposed paragraph (c) addressed the ''special rule'' of section 772(e) of the Act that is applicable in situations where imported merchandise is subject to further manufacture or assembly in the United States before it is sold to an unaffiliated customer. Except for the modification of the percentage threshold normally used to determine when the special rule applies (discussed below), we have not changed paragraph (c).

By way of background, prior to the enactment of the URAA, section 772(e)(3) of the Act required that the Department calculate ESP (now CEP) by deducting the amount of any increased value resulting from a process of manufacture or assembly performed on imported merchandise prior to its sale to an unaffiliated customer. In situations where the amount of value added in the United States was very large, the process of calculating this deduction was very difficult and time-consuming for the Department. In addition, the legislative history of section 772(e)(3) provided that if the final product sold did not contain a significant amount of the subject merchandise, the Department was to refrain from assessing antidumping duties, even though the merchandise may have been dumped.

Congress retained the U.S. value-added adjustment, in modified form, in section 772(d)(2) of the Act. However, in the URAA, Congress addressed the problems described in the preceding paragraph by providing an alternative method for dealing with imported merchandise for which a large amount of value is added in the United States. Under section 772(e), the merchandise no longer is excepted from the assessment of duties. In addition, instead of requiring that the Department calculate and deduct the precise amount of value added in the United States from the price of the finished product, section 772(e) permits the Department, in certain circumstances, to determine the dumping margin for value-added merchandise on some other basis, such as by relying on the dumping margins calculated on sales to unaffiliated customers for which no value was added in the United States. Under section 772(e), the Department may use an alternative method where the value added to the subject merchandise ''is likely to exceed substantially'' the value of the subject merchandise as imported. The SAA at 826 explains that this ''special rule'' does not require the Department to make a precise calculation of the value added. Instead, the phrase ''exceed substantially'' means that the Department estimates that the value added in the United States is ''substantially more than half'' of the price of the merchandise as sold to the unaffiliated customer. The SAA at 825–826 further explains that the intent of the new rule is to avoid requiring the Department to calculate and back out large amounts of value added, while also avoiding the undesirable result of subject merchandise escaping the assessment of antidumping duties entirely.

Threshold for applying the ''special rule'' and use of transfer prices: In proposed paragraph (c)(2), the Department provided that if the Secretary estimated the value added in the United States to be at least 60 percent of the price charged to the first unaffiliated purchaser, the Secretary normally would determine that the value added in the United States was likely to exceed substantially the value of the subject merchandise; *i.e.,* that the special rule applied. The Department reasoned that a 60 percent threshold met the SAA's requirement of ''substantially more than half.'' *See* AD Proposed Regulations at 7331. In addition, in estimating the value added, proposed paragraph (c)(2) called for the use of transfer prices between the foreign exporter/producer and the affiliated U.S. importer.

Several commenters argued against the adoption of a bright-line test for determining whether the estimated value added is ''substantially more than half,'' the finding that triggers the application of the special rule. These commenters argued that a bright-line test was inappropriate and inconsistent with the SAA. In addition, these commenters argued that if the Department insisted upon using a bright-line test, it should use a threshold higher than 60 percent. Finally, these commenters argued that the Department should not estimate the U.S. value added by relying on transfer prices, because of the risk that exporters might manipulate these prices to their advantage. Instead, they asserted, the Department should compare the price charged to unaffiliated customers for the finished goods to the constructed value (cost) of the imported merchandise.

A different group of commenters supported the use of a bright-line test and transfer prices. While most of these commenters also supported a 60 percent value-added standard, one commenter argued that in proceedings where the absolute volume of merchandise is large, the standard should be 50 percent value added. This latter commenter argued that a 50 percent standard is warranted because of (1) the heavy burden of reporting value added information in these types of cases, and (2) the alleged distortions in dumping margins caused by the value-added calculations.

With respect to the comments concerning the use of a bright-line test, the Department continues to believe that such a test is appropriate and desirable. Neither the SAA nor the statute indicates that the Department may not adopt guidelines in this area, and there are sound policy reasons for having a bright-line test. First, if the Department did not adopt a standard in these final regulations, the burden of establishing on a case-by-case basis the amount of value added that constitutes ''significantly more than half'' would erase the administrative savings that Congress intended section 772(e) to generate. Second, a bright-line standard enables the Department to inform respondents early in an investigation or review as to whether they will have to provide detailed value-added information.

We must emphasize, however, that the Department does not intend that its bright-line standard operate as an

irrebuttable presumption for all cases. The Department may use a different threshold where it is satisfied, based on the facts, that a different threshold is more appropriate in a particular case. In addition, the Department retains the discretion to refrain from applying the special rule in situations where there are an insufficient number of sales to unaffiliated customers to use as an alternative basis for determining the dumping margin on value added sales. Finally, because the purpose of section 772(e) is to reduce the administrative burden on the Department, the Department retains the authority to refrain from applying the special rule in those situations where the value added, while large, is simple to calculate.

With respect to the issue of transfer prices, paragraph (c)(2) continues to provide for the use of transfer prices in estimating U.S. value added. Section 772 and the SAA are silent on the precise manner by which the Department is to estimate the amount of value added. However, in discussing the alternate methods that the Department may use to determine CEP once the Department has determined that the special rule applies, the SAA at 826 states that the Department may use transfer prices. This suggests to us that, had the drafters of the statute and the SAA focussed on the matter, they would have permitted the use of transfer prices in estimating U.S. value added.

While the Department appreciates the arguments raised concerning the possible manipulation of transfer prices, in our view, there are several factors that minimize this danger. First, because a respondent does not control the selection of the alternative method used in situations where the special rule applies, a respondent will not know in advance whether it would be better or worse off through the application of the special rule. Thus, if a respondent chose to manipulate transfer prices, it would do so at its peril. Second, while transfer prices may be suspect, there are some independent constraints on transfer pricing, such as the transfer pricing rules of the U.S. Internal Revenue Service and the valuation rules of the Customs Service. Finally, as discussed below, to guard against the misuse of transfer prices, the Department has raised the bright-line threshold to account for the fact that any estimate of U.S. value added might be inflated due to artificial transfer prices.

We have balanced the dangers of using transfer prices against the alternatives. In our view, absent reliance on transfer prices, there is no other reasonable way to measure the amount of value added that accomplishes the burden-reducing objective of the special rule. The alternative suggested by the commenters (use of constructed value of the subject merchandise) would be as complex and burdensome a method as the method that section 772(e) was intended to replace.

Having explained our retention of a bright-line test based on the use of transfer prices, this brings us to the issue of the precise test that the Department should apply. The Department has reviewed proposed paragraph (c)(2), and agrees with the commenters that by increasing the threshold, the Department would ensure that the special rule applies only in appropriate circumstances. While the Department continues to believe that 60 percent is ''substantially more than half,'' the Department recognizes that section 772(e) requires an imprecise ''estimate,'' an estimate which, as discussed above, the Department must base in part on transfer prices. Because of the imprecision inherent in any estimate, in these final regulations we have adopted a standard of 65 percent, thereby providing additional assurance that the actual value added is substantially greater than half.

We have not adopted the suggestion that we use a 50 percent standard. As discussed above, the SAA states that the Department will apply the special rule only where the U.S. value added is ''substantially more than half'' of the total value of the finished product. Therefore, the Department cannot adopt a standard that would trigger the use of the special rule when the U.S. value added is only one half on the total value. Moreover, while the commenter making this suggestion cited the need to reduce the burden on respondents, the SAA indicates that the focus of section 772(e) was on reducing the burden on the Department. Finally, we do not agree with the commenter that the value added calculation is distortive or that the special rule was motivated by a concern over distorted calculations. While the legislative history demonstrates a recognition that the value added calculation is complex and time-consuming, there is no indication that Congress or the Administration considered the calculation to be distortive.

One commenter proposed that the regulations contain a presumption against use of the ''special rule'' when: (a) The final goods are trademarked; (b) an essential feature or characteristic of the further manufactured good exists at importation; (c) the transfer price to an affiliated person is less than the sales price of the imported component to an unaffiliated person; (d) sales to unaffiliated persons of identical or similar merchandise are not in significant quantity; or (e) the Secretary believes that the circumstances preclude use of the special rule. The Department has not incorporated this suggestion into the final regulations. However, we believe that under section 772(e) and paragraph (c), the Department has sufficient flexibility to refrain from applying the special rule where the circumstances so warrant. As for the specific circumstances identified by the commenter, whether these circumstances would justify a departure from the special rule would depend upon the facts of a particular case.

One commenter proposed that the Department calculate the amount of value added by comparing the price at which subject merchandise (without value added) is sold to unaffiliated customers to the price at which merchandise (with value added) is sold to unaffiliated customers. Although we believe that this method would be permissible, given our lack of experience in applying section 772(e), we have not codified this method in these final regulations.

Application of alternative methods to determine dumping margins: One commenter argued that under proposed paragraph (c)(3), the Department might assign dumping margins to special rule entries in situations where no dumping margins should be found at all. This commenter suggested that the Department should provide in its final regulation that its preferred approach in applying the special rule will be to determine the export price for sales subject to the rule based on the most similar sales of subject merchandise, and that such an export price will be used to compare to normal value. This commenter urged the Department to give careful consideration to all relevant differences between the ''special rule'' sales and the sales used in applying the ''special rule.''

We have not adopted this suggestion. In the Department's view, the methodology set forth in proposed paragraph (c)(3) for determining dumping margins on merchandise to which the special rule applies is in accordance with section 772(e). Section 772(e) authorizes the Department to use an alternative means of calculating the dumping margin where merchandise has a substantial amount of U.S. value added, including reliance on the dumping margins calculated on sales for which there is no U.S. value added. In adopting section 772(e), Congress and the Administration were aware that the dumping margins determined by use of these alternative means might not be

identical to those that would be determined if the Department were to calculate the precise amount of U.S. value added and deduct that amount from the price. However, they concluded that the burden on the Department of performing the value added calculations far outweighed any marginal increase in accuracy gained by such calculations.

Finally, with respect to the sales from which the Department will derive dumping margins to apply to special rule sales, we must emphasize that the Department has little experience with this new methodology. Therefore, the Department is not in a position at this time to provide a great deal of guidance beyond what is contained in section 772(e) and the SAA. However, we do believe that whether merchandise is identical may be a factor to consider in selecting the sales to be substituted for the value added sales. We do not believe, however, that most similar in the United States is a consideration, and have not, therefore, incorporated this comment in the rule.

Another commenter asked the Department to clarify that in applying the special rule, it will base surrogate margins on sales to unaffiliated persons only if those sales have been made in sufficient quantities. While the Department agrees with the substance of this comment, we do not believe that a regulation is necessary, because section 772(e) expressly requires that sales to an unaffiliated person be in ''a sufficient quantity.''

One commenter suggested that the Department clarify that, when the special rule applies, the Department will base its alternative methods for calculating a dumping margin exclusively on a producer's own information, as opposed to information pertaining to another exporter or producer. We have not adopted this suggestion. While the Department agrees that it should rely on a respondent's own data where possible, section 772(e) does not impose such a limitation. In some cases, it may be necessary for the Department to rely on another respondent's data, such as in situations where all of a particular respondent's sales have U.S. value added and are subject to the special rule.

One commenter proposed that the Department reflect in the final regulations the statement in the AD Proposed Regulations that the Department normally will base dumping margins for merchandise to which the special rule applies on margins calculated on other merchandise. The final regulation reflects the particular requirements of section 772(e) of the Act. As the Department explained in the AD Proposed Regulations, in situations in which the special rule applies, the Department normally will apply the methodology described in paragraph (c)(3); *i.e.*, assigning a margin equal to the weighted-average margin calculated based upon the prices of identical or other subject merchandise sold to unaffiliated parties.

CEP profit deduction: Proposed paragraph (d) dealt with the deduction of profit from CEP. Although we received several comments concerning the CEP profit deduction, for the reasons set forth below, we have left paragraph (d) unchanged.

Several commenters suggested that the Department clarify that the amount of profit to be deducted in calculating CEP may never be less than zero. In addition, these commenters contended that in calculating the total actual profit used to derive the CEP profit deduction, the Department must ignore all home market sales made at prices below the cost of production.

The Department has not adopted these suggestions. With respect to the first suggestion, we believe that section 772(f) and the SAA at 825 clearly provide that the profit deduction never may be less than zero. Therefore, we do not believe that a regulation is necessary on this point.

Regarding the suggestion concerning the treatment of below-cost sales, in order to determine the total actual profit earned by a respondent on the relevant sales, the Department must take into account sales made at a profit and sales made at a loss. As we stated in the AD Proposed Regulations, 61 FR at 7332, ''there is no provision in the statute for disregarding sales below cost in this context, and doing so would conflict with the statutory requirement to use 'actual profit.' ''

Several commenters urged the Department to retain the flexibility to calculate the CEP profit deduction on the basis of something less than all sales of the subject merchandise and the foreign like product throughout the period of investigation or review (*e.g.*, on the basis of a specific model or sales channel, or on a time period less than a full year). We have not adopted this suggestion, because we believe that paragraph (d)(1) provides the Department with sufficient flexibility to use such approaches in those instances where the facts so warrant.

However, we believe that such instances should be the exception, rather than the rule, because the suggested approaches would add yet another layer of complexity to an already complicated exercise and would be more susceptible to manipulation, which the Department wishes to safeguard against, as suggested by the Senate Report.

One commenter suggested that the Department provide further guidance regarding the calculation of the CEP profit deduction in situations where there are no useable home market or third country sales. We have not adopted this suggestion, because, as stated in the AD Proposed Regulations, 61 FR at 7332, the Department currently does not have enough experience to provide further guidance on this issue.

Another commenter, alleging that the Department generally calculates profit by deducting expenses from revenues, argued that to avoid double-counting, the Department should deduct all expenses, including imputed expenses, in calculating the CEP profit deduction. We have not adopted this suggestion, because the Department does not take imputed expenses into account in calculating cost. Moreover, normal accounting principles permit the deduction of only actual booked expenses, not imputed expenses, in calculating profit.

Other commenters proposed that the Department should (1) cap the CEP profit deduction by the amount of actual profit accruing on CEP sales, and (2) make a corresponding deduction from normal value. We have not adopted these suggestions. With respect to the first suggestion, as the Department stated in the AD Proposed Regulations, 61 FR at 7332, the statute does not authorize a cap on the amount of profit deducted from CEP. Moreover, the SAA at 825 states that the transfer price between the producer and the affiliated importer should not be used to determine the profit. In our view, this indicates that Congress and the Administration did not intend that there be a cap. With respect to the deduction of profit from normal value, we discuss this suggestion below in connection with § 351.410.

Finally, one commenter argued that the Department is required to calculate the CEP profit deduction on a transaction-specific basis. The final regulations do not reflect this approach. In our view, section 772(f), through its references to ''total actual profit'' and ''total expenses,'' clearly does not contemplate the calculation of the CEP profit deduction on a transaction-specific basis.

Reimbursement of antidumping duties and countervailing duties: Paragraph (f) deals with the deduction from export price or CEP of the amount of any reimbursed antidumping duties or countervailing duties. Although we

received several comments concerning duty reimbursement, for the reasons set forth below, we have left paragraph (f) unchanged.

Reimbursement of countervailing duties: In proposed paragraph (f), the Department expanded the scope of former 19 CFR § 353.26 to include the reimbursement of countervailing duties in situations where imported merchandise is subject to both AD and CVD orders. As the Department explained in the AD Proposed Regulations, 61 FR at 7332, the reimbursement of countervailing duties effectively is nothing more than a reduction in the price paid by the importer. Absent the reimbursement, the effective price paid by the importer would increase by the amount of any such duties. As such, a deduction for reimbursed countervailing duties is a necessary price adjustment in AD calculations.

Several commenters objected to the proposed change, asserting that the Department lacks statutory authority to deduct reimbursed countervailing duties. In addition, these commenters argued that such a deduction would violate Article 19.4 of the SCM Agreement, which prohibits the levying of countervailing duties in excess of the amount of subsidization found. They also claimed that the deduction could violate section 772(c)(1)(C) of the Act by permitting the imposition of both antidumping and countervailing duties to offset the same situation of dumping or export subsidization. Other commenters, however, supported a deduction for reimbursed countervailing duties, asserting that such a deduction is consistent with the SCM Agreement and the Act.

In these final regulations, we have retained the deduction for reimbursed countervailing duties. In the Department's view, this deduction is consistent with the SCM Agreement and the Act. A deduction for reimbursed countervailing duties neither increases the amount of countervailing duties assessed nor imposes duties for the same situation of dumping and export subsidization. The deduction simply recognizes that the reimbursement of countervailing duties constitutes a reduction in the price paid by the purchaser. Moreover, any reimbursement of countervailing duties on specific sales is directly tied to such sales and is no different in substance from any of the other types of price adjustments that the Department routinely factors into its calculations. Because antidumping duties are reduced by the amount of any countervailing duties attributable to an export subsidy, no double assessment is involved.

Finally, we do not believe that the absence of a statutory provision expressly dealing with the reimbursement of countervailing duties is fatal. The courts have long recognized the Department's ability to develop methodologies to deal with situations not expressly addressed by the statute. As the Federal Circuit stated in *Melamine Chemicals, Inc.* v. *United States*, 732 F.2d 924, 930 (1984), ''there is no stultifying requirement that [the Department] cite a statute detailing *in haec verba* the specific action it may take when confronted with a particular set of circumstances among the myriad that may occur.''

Reimbursement in general: Referring to situations involving affiliated importers, several commenters urged the Department to automatically investigate whether the foreign affiliate reimbursed the importer for antidumping or countervailing duties. Other commenters went even further, arguing that in cases involving affiliated importers, the Department should make an irrebuttable presumption that reimbursement has occurred, or, at a minimum, a rebuttable presumption. They alleged that because the Department treats affiliated exporters and importers as a single entity for virtually all other purposes, there is no reason to treat them differently for purposes of analyzing reimbursement.

We have not adopted these suggestions, because we do not believe that they are necessary or justifiable. As under former 19 CFR § 353.26, paragraph (f) applies to affiliated importers, and requires that they certify that they have not been reimbursed by the exporter. Should an affiliated importer fail to make this certification, the Department would deduct the appropriate amount of antidumping duties or countervailing duties to establish the EP or the CEP, just as it would in the case of an unaffiliated importer. Moreover, in our view, it is not justifiable to presume that the existence of an affiliation will result in reimbursement or that an affiliated U.S. importer, because of its affiliation, is more likely to file a false certification.

Section 351.403

Section 351.403 deals with sales and offers for sale and the use of sales to or through an affiliated party. Comments on this section addressed paragraph (c) and the approach the Department should take in determining whether sales to an affiliated party are an appropriate basis for determining normal value (the ''arm's length test''). Comments also addressed paragraph (d) and the issue of when the Department should require the reporting of sales made by affiliated customers (''downstream sales'').

Arm's length test: The Department's current policy is to treat prices to an affiliated purchaser as ''arm's length'' prices if the prices to affiliated purchasers are on average at least 99.5 percent of the prices charged to unaffiliated purchasers. We received several comments asking that we codify the current 99.5 percent test. We also received several comments asking that we refrain from codifying the 99.5 percent test, and that we instead develop and codify a new methodology for testing affiliated prices.

After considering the comments received on this issue, we have decided not to codify an arm's length test at this time. We believe that, while the 99.5 percent test has functioned adequately in numerous cases, there may be other methods available. We will continue to apply the current 99.5 percent test unless and until we develop a new method. If we develop a new methodology, the Department will describe that methodology in a policy bulletin. We will also publicly announce the issuance of policy bulletins and ensure that they are easily accessible to the public.

One commenter asked that the Department adopt a separate test for situations where the vast majority of a firm's sales are to affiliated parties. We have not adopted this suggestion, because we believe that, in this context, the appropriate means to make this determination is by comparison to known arm's length prices. In order to perform such an arm's length test, the Department first must establish that sales to unaffiliated purchasers are sufficient in number or quantity sold to serve as a benchmark for testing affiliated party transactions. If sales to unaffiliated purchasers are insufficient, we simply will not use sales to affiliated purchasers to determine normal value.

One commenter argued that in determining whether sales are at arm's length, the Department should consider normal business practices, such as volume discounts, preferences for longstanding customers, and differences due to level of trade. Many other commenters stated that under the 99.5 percent test, the Department correctly limits its examination to a comparison of prices.

The Department agrees that a proper comparison focuses on the comparability of prices charged to affiliated and unaffiliated purchasers. However, the Department also agrees

that it should take into account differences in levels of trade, quantities, and other factors that affect price. For example, in comparing prices charged to affiliated and unaffiliated purchasers, we would attempt to make comparisons on the basis of sales made at the same level of trade.

Several commenters argued that the Department should disregard not only affiliated party sales that fall below 99.5 percent, but also sales that fall above 100.5 percent. We have not adopted this suggestion. The purpose of an arm's length test is to eliminate prices that are distorted. We test sales between two affiliated parties to determine if prices may have been manipulated to lower normal value. We do not consider home market sales to affiliates at prices above the threshold to have been depressed due to the affiliation. Therefore, the Department should treat such sales in the same manner as sales to unaffiliated customers. However, if a party wishes to argue that sales at high prices to an affiliate are outside the ordinary course of trade, the Department would consider such arguments on a case-by-case basis.

Downstream sales: With respect to paragraph (d) and the use of ''downstream sales,'' certain commenters asked that the regulations provide that the Department normally will require a respondent to report downstream sales by an affiliated party to the first unaffiliated customer. Other commenters argued that the Department should require a respondent to report downstream sales only if the sales to the affiliated party are not made at arm's length.

The Department does not believe it necessary or appropriate to require the reporting of downstream sales in all instances. Questions concerning the reporting of downstream sales are complicated, and the resolution of such questions depends on a number of considerations, including the nature of the merchandise sold to and by the affiliate, the volume of sales to the affiliate, the levels of trade involved, and whether sales to affiliates were made at arm's length.

However, we have decided to codify the Department's current practice regarding the reporting of downstream sales when the volume of sales to affiliates is small. Under our current practice, we normally do not require the reporting of downstream sales if total sales of the foreign like product by a firm to all affiliated customers account for five percent or less of the firm's total sales of the foreign like product. In such situations, the Department calculates normal value on the basis of sales to unaffiliated customers and arm's-length sales to affiliated customers. In addition, in certain cases, the Department may decide that a percentage higher than five percent is an appropriate benchmark, and, in such cases, the Department will not require the reporting of downstream sales. Also, while the Department normally will calculate this percentage on the basis of total sales value, there may be cases where it is more appropriate to use total volume or sales quantity.

If the Department determines that an affiliate made downstream sales of a foreign like product, the Department usually will not require the reporting of both the sales to the affiliate and the downstream sales by the affiliate. We will examine the sales between the affiliated parties under paragraph (c). If sales to the affiliate fail the arm's-length test, the Department will require the respondent to report that affiliate's downstream sales. If sales to the affiliate pass the arm's-length test, the Department normally will not require the respondent to report the affiliate's downstream sales and will calculate normal value based on sales to the affiliate.

The Department will require a respondent to demonstrate in each segment of an AD proceeding that the reporting of downstream sales is not necessary. Similarly, the Department will analyze affiliated party transactions in each segment. In other words, the fact that the Department may have determined in an investigation or review that affiliated party transactions are at arm's length does not mean that the Department automatically will treat such transactions as being at arm's length in subsequent segments of a proceeding.

One commenter stated that the quantity of sales sold in the foreign market to an affiliated customer is not necessarily relevant to the calculation of a dumping margin, because the Department may compare those sales to a large number of sales in the U.S. market. Other commenters stated that all home market sales should be reported so that Department can address each situation on its facts. Another commenter stated that section 771(16) of the Act requires the reporting of all downstream sales of the foreign like product.

With respect to these comments, the Department believes that imposing the burden of reporting small numbers of downstream sales often is not warranted, and that the accuracy of determinations generally is not compromised by the absence of such sales. Even if a respondent demonstrates that its sales to affiliated parties account for less than five percent of its total sales, the Department still will require the respondent to report its sales to the affiliated parties. Where all sales to all affiliates represent less than 5 percent of total sales, and where the only match for a U.S. sale is a downstream sale, the Department normally will base normal value on constructed value, as opposed to requiring that a respondent report downstream sales.

In our view, this methodology does not conflict with section 771(16) of the Act, because section 771(16) deals with the type of merchandise for which the Department needs to obtain sales information. Section 771(16) does not require that the Department obtain information on all possible sales of the foreign like product.

Some commenters argued that where certain types of affiliation are involved, such as long-term supplier relationships, the Department should not require the reporting of downstream sales under paragraph (d), nor should the Department conduct an arm's-length test analysis under paragraph (c). We have not adopted this suggestion, because the Department believes that it should apply these provisions whenever there are transactions between parties that are affiliated within the meaning of section 771(33) of the Act. Therefore, if two parties are affiliated, any transactions between those parties are subject to paragraphs (c) and (d). However, in instances where a respondent does not report downstream sales, the Department will consider the nature of the affiliation in deciding how to apply facts available.

Section 351.404

Section 351.404 deals with the selection of the market to be used in establishing normal value. We have not made any changes from proposed § 351.404.

Viability, particular market situation, and representative price: In proposed paragraph (c)(1), the Department provided that decisions concerning the calculation of a price-based normal value generally will be governed by the Secretary's determination as to whether the market in a particular country is ''viable'' (*i.e.,* whether sales in that country constitute 5 percent or more of a firm's sales to the United States). In proposed paragraph (c)(2), however, the Department provided that the Secretary may decline to calculate normal value based on sales in a particular market if it is established to the satisfaction of the Secretary that (1) a particular market situation exists that does not permit a proper comparison, or (2) in the case of a third country, the price is not

representative. In addition, in the preamble to the AD Proposed Regulations, 61 FR at 7334, the Department stated that a party would have to submit ''convincing evidence'' in order to overcome a determination, based on an application of the 5 percent standard, that a particular market is an appropriate basis for calculating normal value.

Several commenters objected to the Department's proposed approach to the ''particular market situation'' criterion. According to these commenters, section 773(a)(1) of the Act identifies the ''particular market situation'' in the exporting country or in a third country as one of three coequal factors that the Department must consider in determining whether it may use sales in that country as the basis for calculating normal value. Therefore, they argued, it is improper for the Department to require that parties present ''convincing evidence'' of the extraordinary nature of a particular market situation before the Department will invoke this statutory provision. Consistent with the statute and the SAA, the Department's proposed regulations should not impose a higher evidentiary standard for determinations regarding the ''particular market situation'' than for other determinations that the Department makes during the course of an AD proceeding.

The Department has not revised paragraph (c) in light of these comments. There are a variety of analyses called for by section 773 that the Department typically does not engage in unless it receives a timely and adequately substantiated allegation from a party. For example, the Department does not engage in a fictitious market analysis under section 773(a)(2) absent an adequate allegation from a party. *See, e.g., Tubeless Steel Disc Wheels from Brazil,* 56 FR 14083 (1991); and *Porcelain-on-Steel Cooking Ware from Mexico,* 58 FR 32095 (1993). Likewise, the Department does not automatically request information relevant to a multinational corporation analysis under section 773(d) of the Act in the absence of an adequate allegation. *See, e.g., Certain Small Business Telephone Systems and Subassemblies Thereof from Taiwan,* 54 FR 31987 (1989); and *Appendix B, Antifriction Bearings from the Federal Republic of Germany,* 54 FR 18993, 19027 (1989). Also, as discussed above, the Department and the courts have held that the party claiming that a sale is not in the ''ordinary course of trade'' has the burden of proof. Significantly, both the ''ordinary course of trade'' and the ''particular market situation'' criteria appear in section 773(a)(1).

In short, the Department's AD methodology contains presumptions that certain provisions of section 773 do not apply unless adequately alleged by a party or unless the Department uncovers relevant information on its own. In our view, this is an eminently reasonable approach. A common feature of these provisions is that they call for analyses based on information that is quantitatively and/or qualitatively different from the information normally gathered by the Department as part of its standard AD analysis. If the Department were to routinely seek the information called for by these provisions in every case, the Department's ability to comply with its statutory deadlines would be significantly impaired. Moreover, in many instances, the exercise would prove to be pointless and a waste of resources for both the Department and the parties involved. For example, absent an adequate allegation, it would not make much sense to routinely investigate whether Japan is a nonmarket economy country merely to ensure that section 773(c) of the Act does not apply.

In the Department's view, the criteria of a ''particular market situation'' and the ''representativeness'' of prices fall into the category of issues that the Department need not, and should not, routinely consider. In this regard, we note that the SAA at 822, through its repeated use of the words ''may'' and ''might,'' appears to treat the ''particular market situation'' criterion as a discretionary criterion that is subordinate to the primary criterion of ''viability.'' In addition, the SAA at 821 recognizes that the Department must inform exporters at an early stage of a proceeding as to which sales they must report. This objective would be frustrated if the Department routinely analyzed the existence of a ''particular market situation'' or the ''representativeness'' of third country sales.

Having said this, however, we believe that the language in the preamble concerning ''convincing evidence'' was not consistent with proposed paragraph (c)(2) and was unartful, at best. It was not the Department's intent to establish an entirely new evidentiary standard, such as the ''clear and convincing evidence'' standard that is sometimes used in civil matters. Instead, by using the phrase ''if it is established to the satisfaction of the Secretary'' in paragraph (c)(2), we merely were attempting to provide that the party alleging the existence of a ''particular market situation'' or that sales are not ''representative'' has the burden of demonstrating that there is a reasonable basis for believing that a ''particular market situation'' exists or that sales are not ''representative.''

One commenter proposed that the Department recognize that significant sales to affiliated parties constitute a ''particular market situation'' that may cause a specific market to be ''inappropriate as a basis for determining normal value.'' The Department has not adopted this recommendation, because under the statute and these regulations, the Department may use affiliated party sales if they are made at arm's-length prices. If affiliated party sales are made at arm's-length prices, there is no basis for concluding that the mere fact of affiliation precludes a proper comparison. By definition, such sales are equivalent to sales to unaffiliated parties.

Another commenter suggested that the Department revise § 351.404 to allow the Department to reject a given third-country market if prices to that country are ''not representative *for reasons other than for supporting dumping.*'' In other words, if high prices in a third country support dumping to the United States, the Department should not disregard those prices as ''not representative.'' This commenter also argued that it would be useful for the regulations to contain a definition of ''representative,'' and that ''representative prices'' are market-set prices, as opposed to fictitious or artificial prices.

The Department has not included a definition of representative prices in these regulations, because the Department does not yet have sufficient experience with this new statutory term to provide meaningful guidance. However, the Department does not agree with the implication in the comment that ''not representative'' can mean only that the prices are unrepresentatively low, nor does the Department agree with the suggestion that it must identify the reasons for a particular respondent's pricing scheme.

Another commenter, referring to the Department's explanation of proposed § 351.404, proposed that the final regulation provide that the Department will interpret the term ''quantity'' in a broad manner. In addition, this commenter argued, the final rule should clarify that the Department always will determine quantity on the basis of the ''aggregate'' sales of the foreign like product. This commenter also urged the Department to define the terms ''representative,'' ''particular market situation,'' and ''proper comparison,''

and to use narrow definitions based on the language in the SAA. Finally, with regard to selection of a third country market, this commenter suggested that the Department elaborate on the ''other relevant factors'' it will consider under § 351.404(e)(3), and that the final regulation include a statement that all of the criteria do not have to be present in order to select a market and that no one criterion is dispositive.

The Department has not adopted these suggestions. First, with respect to ''quantity,'' because the SAA at 821 is clear that the term quantity is to be interpreted broadly, there is no need for a regulation. Second, regarding ''aggregate sales,'' the final regulation adopts the language of the proposed § 351.404(b)(2), which states that the Secretary ''normally'' will determine whether sales are in sufficient quantity based on ''aggregate'' sales of the foreign like product. We have retained the word ''normally'' in order to provide the Department with the flexibility to deal with unusual situations. Third, regarding definitions of terms, as suggested previously, ''particular market situation'', ''representative'' prices, and ''proper comparisons'' are new concepts added to the Act by the URAA. The Department does not have sufficient experience in applying these new terms to provide any additional guidance at this time. Finally, with respect to the selection of a third country market, in proposed § 351.404(e)(3), we left the term ''other relevant factors'' undefined precisely because we cannot foresee all of the possible factual scenarios that we may encounter in future cases. In addition, we believe that § 351.404(e) is sufficiently clear that (1) not all of the three criteria need be present in order to justify the selection of a particular market, and (2) no single criterion is dispositive.

Time limits: Proposed paragraph (d) cross-referenced proposed § 351.301(d)(1), in which the Department provided that allegations regarding viability, including allegations regarding a particular market situation or the unrepresentativeness of prices, must be submitted within 40 days after the date on which the initial AD questionnaire was transmitted. Section 351.301(d)(1) also authorized the Secretary to alter the 40-day time limit. We have addressed comments regarding § 351.301(d)(1) below in connection with our discussion of that section.

One commenter proposed that the regulations explicitly state that the Department will make its viability determination early in a proceeding. The Department has not adopted this suggestion. We agree that the Department should strive to make viability determinations early in an investigation or review, and, as noted above, we have drafted § 351.404 with this objective in mind. However, there may be instances in which the Department must delay or reconsider a decision on viability.

Section 351.405

Section 351.405 deals with the calculation of normal value based on constructed value (''CV'').

Appropriate market for determining profit: Subparagraph (A) of section 773(e)(2) of the Act sets forth the preferred method for determining the amount of selling, general, and administrative (''SG&A'') expenses and profit to be included in constructed value. Subparagraph (B) of that section sets forth three alternative methods. In proposed § 351.405(b), the Department defined the term ''foreign country'' differently for purposes of subparagraphs (A) and (B).

With respect to these definitions, one commenter argued that well-established rules of statutory construction preclude the Department from defining the term ''foreign country'' differently in different subparagraphs of the same statutory provision. This commenter observed that section 773(e)(2) provides that for both the preferred method under subparagraph (A) and the alternative methods under subparagraph (B), the Department must determine SG&A expenses and profit on the basis of sales of the foreign like product ''for consumption in the foreign country.'' The commenter further noted that the phrase ''for consumption in the foreign country'' appears in the statute with respect to each of the four methods for computing SG&A and profit. Thus, according to the commenter, there is no basis for the Department to construe the phrase ''foreign country'' to mean either the home market or a third country for purposes of subparagraph (A), while at the same time interpreting the identical phrase to mean only the home market for purposes of subparagraph (B). The commenter believed that the Department should compute SG&A and profit for CV exclusively by reference to home market sales.

Another commenter also argued that the Department should not interpret the term ''foreign country'' differently for purposes of subparagraphs (A) and (B). However, unlike the prior commenter, this commenter believed that the correct interpretation allows the Department to compute SG&A and profit on the basis of either home market or third country sales, as appropriate, under any of the methods listed in section 773(e)(2). In this commenter's view, to limit the alternative SG&A and profit methods to home market experience, as the Department proposed, would be inconsistent with the intent of the drafters of the URAA and the AD Agreement. Moreover, this commenter noted, such an interpretation would be logically inconsistent in circumstances where, because the Department has found the home market to be non-viable, the Department uses third country data for normal value. Accordingly, the commenter suggested, the Department should revise proposed paragraph (b) in order to retain flexibility to use third country profit and SG&A experience in computing CV under the alternative methods of subparagraph (B), as well as under the preferred method of subparagraph (A).

The Department has not adopted the suggestions of either commenter. With respect to the three alternative methods, the SAA and the AD Agreement expressly indicate that profit and SG&A are to be based on home market sales. Thus, the Department cannot adopt the proposal to use third country profit and SG&A under the alternative methods. By contrast, with respect to the preferred method, the SAA and the AD Agreement are silent as to the market on which SG&A and profit should be based. The absence of any express intent in the SAA or other legislative history with respect to the preferred method—in contrast to the express intent set forth in these same documents regarding the alternative methods—indicates that, in the case of this particular issue, the drafters did not intend that the preferred and alternative methods be identical.

The Department believes that in situations where an exporter's third country sales form the basis for normal value, but the Department resorts to CV (because, for example, third country sales are below cost), third country sales constitute the most reasonable and accurate basis for calculating profit and SG&A. In such situations, because the Department already has rejected a respondent's home market sales as a basis for normal value, the Department also must reject SG&A and profit based on those sales. Further, where a respondent reports third country COP data, use of third country sales is the most practical basis for deriving profit and SG&A for both the Department and the respondent, because the respondent already will have reported the necessary data.

Determination of product categories for calculation of SG&A and profit: In the AD Proposed Regulations, 61 FR at 7335, the Department stated that it would calculate SG&A and profit on the

basis of aggregate figures for all covered foreign like products. A number of commenters disagreed with this approach. Although differing somewhat in their respective statutory interpretations and suggestions, all of the commenters generally agreed that the Act requires the Department to compute SG&A and profit on a basis narrower than that contemplated by the Department. In this regard, some of the commenters recommended that the regulations provide for the calculation of SG&A and profit on the basis of different product groupings, and that such groupings be limited to those models of the foreign like products capable of comparison to each model of the subject merchandise. Other commenters suggested an even narrower, model-specific basis for computing SG&A and profit; *i.e.*, when the Department disregards all home market sales of a particular model of the foreign like product, it would select the next most similar model as the basis for computing SG&A and profit.

The Department recognizes that there are other methods available for computing SG&A and profit for CV under section 773(e)(2)(A) of the Act, including those suggested by the commenters. We continue to believe, however, that an aggregate calculation that encompasses all foreign like products under consideration for normal value represents a reasonable interpretation of the statute. This approach is consistent with the Department's method of computing SG&A and profit under the pre-URAA version of the statute, and, while the URAA revised certain aspects of the SG&A and profit calculation, we do not believe that Congress intended to change this particular aspect of our practice.

Moreover, the Department believes that in applying the preferred method for computing SG&A and profit under section 773(e)(2)(A), the use of aggregate data results in a reasonable and practical measure of profit that the Department can apply consistently in each case. By contrast, a method based on varied groupings of foreign like products, each defined by a minimum set of matching criteria shared with a particular model of the subject merchandise, would add an additional layer of complexity and uncertainty to AD proceedings without generating more accurate results.

Inclusion of below-cost sales in the calculation of profit: One commenter argued that, in calculating CV profit, the Department should exclude all below-cost sales, whether or not the Department disregarded such sales as being outside the ordinary course of trade under section 773(b) of the Act. This commenter believed that the SAA at 840 supports this position in that it provides for the use of profitable sales as the basis for calculating CV profit in most cases. In the commenter's view, the Department's regulations should implement the legislative and administrative intent by providing that the loss resulting from *any* below-cost sale will not enter into the profit calculation for CV.

Another commenter disagreed with the proposal that the Department automatically exclude all below-cost sales from the profit calculation, arguing that the statutory directive for computing CV profit (as well as SG&A expenses) requires that the Department use sales ''in the ordinary course of trade'' in making its profit calculations. This commenter contended that if, under its below-cost test, the Department does not disregard below-cost sales of a foreign like product, those sales are in the ordinary course of trade, notwithstanding that they are at below-cost prices. Thus, according to the commenter, the Department should account for such sales in the CV profit calculation. The commenter further noted that the statute provides no restriction on using home market sales in the ordinary course of trade in the first and third alternative profit methods under section 773(e)(2)(B) of the Act. Accordingly, the commenter maintained, the Department must use *all* home market sales to compute profit under these alternative profit methods.

The Department believes that, in computing profit for CV, the automatic exclusion of below-cost sales would be contrary to the statute. In computing profit under the preferred and second alternative methods, the statute allows for the exclusion of sales outside the ordinary course of trade. The statutory definition of ordinary course of trade, in turn, provides that only those below-cost sales that are ''disregarded under section 773(b)(1)'' of the Act are automatically considered to be outside the ordinary course of trade. In other words, the fact that sales of the foreign like product are below cost does not automatically trigger their exclusion. Instead, such sales must have been disregarded under the cost test before the Department will exclude from the calculation of CV profit.

In addition, we believe that the SAA at 840 supports this position. The SAA states that unlike the Department's old law practice (under which the Department accounted for all sales, including sales disregarded as being below-cost, in the computation of profit), the new statute precludes the Department from including in its calculation of profit any below-cost sales that the Department disregards under section 773(b)(1) of the Act. Consequently, under the new law and as described in the SAA, profitable sales would constitute the majority of the transactions used to compute profit for CV under the preferred and second alternative methods.

With respect to the other alternative profit methods authorized by section 773(e)(2)(B), the Department believes that the absence of any ordinary course of trade restrictions under the first alternative is a clear indication that the Department normally should calculate profit under this method on the basis of all home market sales, without regard to whether such sales were made at below-cost prices. However, the same cannot be said of the third alternative method, which provides for the use of ''any other reasonable method'' in determining CV profit. The SAA at 841 makes it clear that, given the absence of any comparable standard under the prior statute, it would be inappropriate to establish methods and benchmarks for applying this alternative. Thus, depending on the circumstances and the availability of data, there may be instances in which the Department would consider it necessary to exclude certain home market sales that are outside the ordinary course of trade in order to compute a reasonable measure of profit for CV under the third alternative method.

Abnormally high profits: One commenter recommended that the regulations state that above-cost sales are not ''in the ordinary course of trade'' for purposes of determining CV profit when the use of those sales would lead to irrational or unrepresentative results. This commenter noted that the SAA at 834 and 840 refers to sales with ''abnormally high profits'' and merchandise sold at ''aberrational prices'' as examples of transactions that the Department may consider as being ''outside the ordinary course of trade'' for purposes of determining CV profit. Based on these examples, the commenter posited that if the Department excluded the vast majority of a respondent's sales from the profit calculation because they were below cost, the few remaining above-cost sales, by definition, would be sold at aberrational prices. As such, the Department also would have to exclude those sale from the CV profit calculation.

Another commenter suggested that the regulations stringently define the phrase ''abnormally high profits.'' This

commenter argued that the fact that profit margins are relatively high is an insufficient basis for determining that profits are ''abnormal.'' Instead, the commenter argued, the burden of establishing that a given profit amount is ''abnormal'' should be very high, and should be based on express economic assumptions.

The Department agrees that the sales used as the basis for CV profit should not lead to irrational or unrepresentative results. However, we have not adopted the first commenter's recommendation, because there may be instances in which it would be appropriate to base profit on a small number of above-cost sales. Specifically, where the Department finds a majority of sales of a foreign like product to be at below-cost prices (and, thus, excludes those sales from the calculation of profit), the fact that only a few sales remain at above-cost prices does not, by itself, render such sales outside the ordinary course of trade. Rather, it is the below-cost sales that are outside the ordinary course of trade. Whether the few remaining above-cost sales are also outside the ordinary course of trade is a separate issue that depends on the facts and circumstances surrounding these transactions.

In this regard, the Department believes that the burden of showing that profits earned from above-cost sales are ''abnormal'' (or otherwise unusable as the basis for CV profit) rests with the party making the claim. We do not consider it appropriate, however, to establish a stringent evidentiary burden in the regulations, as suggested by the second commenter. In most instances, proof that the profits earned by respondent on specific sales are abnormal will depend on a number of factors, including the type of merchandise under investigation or review and the normal business practices of the respondent and of the industry in which the merchandise is sold. Thus, the Department believes it appropriate to make such ordinary course of trade determinations on a case-by-case basis.

Profit ceiling: One commenter proposed that the regulations impose a ceiling on the amount of profit to be used in those cases where no or too few foreign market sales are found to be made ''in the ordinary course of trade.'' For such a ceiling, the commenter suggested that the Department use the average profit rate for the industry that produces/sells the subject merchandise.

The Department does not believe that there is a statutory basis for imposing a profit ceiling. Consistent with our position in the preceding comment, where there are only a few sales made by a respondent in the ordinary course of trade, such sales would form the basis for CV profit, because they would fulfill the requirement for actual profits under section 773(e)(2)(A) of the Act. It would contradict the plain language of the statute (which calls for the use of respondent's actual profits for a foreign like product) were the Department to impose an industry-wide ceiling on the profit used for CV.

Moreover, in instances where there are no sales in the ordinary course of trade from which to compute profit, section 773(e)(2)(B) of the Act does not provide that a profit ceiling be imposed for each of the alternative methodologies. Instead, only the third alternative method (*i.e.*, amounts realized under any other reasonable method) requires that the Department consider a ''ceiling'' on the amount calculated for CV profit. Here too, however, the Department believes that the commenter's recommended industry-wide average profit ceiling does not conform to the statutory requirement. Section 773(e)(2)(B)(iii) of the Act provides that the so-called ''profit cap'' be determined based on amounts realized by *other* exporters or producers in the *foreign country* in connection with sales of merchandise that is the *same general category* as the subject merchandise. This differs from the commenter's suggestion in two important respects. First, the statutory profit cap is to be derived from sales in the general category of products and, thus, encompasses a group of products that is broader than the subject merchandise. Second, where it relies on the third alternative method, the Department is required to determine the profit cap figure based on sales in the foreign country exclusive of profits realized by the exporter or producer under investigation or review. By contrast, the proposed average industry-wide profit figure presumably would include sales by all exporters and producers in all markets, including sales by the exporter and producer in question and sales to the United States. In our view, the statute prohibits the use of such sales for this purpose.

Finally, it is important to note that the SAA at 841 anticipates situations in which the Department will be unable to determine a profit cap due to an absence of the appropriate data. In these instances, the Department may apply the third alternative profit method on the basis of facts available. However, the Department will not make adverse inferences in applying facts available, unless the respondent did not cooperate to the best of its ability during the course of the investigation or review.

Use of other producer's profit data: One commenter suggested that the regulations state that, when calculating a respondent's profit for CV under section 773(e)(2)(B) of the Act, the Department will resort to the second alternative method (other producers' profits for the foreign like product) only in exceptional circumstances. The commenter contended that the adoption of this principle will help to ensure fairness and predictability in AD proceedings.

In our view, the SAA at 840 makes clear that there is no hierarchy or preference among the three alternative methods for calculating profit under section 773(e)(2)(B). Rather, the SAA provides that the Department's selection of an alternative profit calculation method will be made on a case-by-case basis, and will depend, to an extent, on the data available with regard to profits earned in the foreign market. For this reason, we have not adopted the commenter's recommendation to limit the use of the second alternative method to exceptional circumstances, because such an approach would impose a preference in favor of the first and third alternative methods.

Section 351.406

Section 351.406 deals with the analysis of whether to disregard certain sales as below the cost of production under section 773(b) of the Act.

Extended period of time: Several commenters made suggestions regarding the ''extended period of time'' criterion for below-cost sales under section 773(b)(1)(A) of the Act. Two of these commenters disagreed with the statement in the AD Proposed Regulations, 61 FR at 7336, that the Department would exclude below-cost sales made during only one month of the period of investigation or review. These commenters maintained that because one-month's worth of sales do not represent the pricing practices of a company over a full investigation or review period, the Department should not consider such sales to have been made within an extended period of time. Similarly, another commenter recommended that the Department establish criteria for determining when sales of ''custom'' products (products not manufactured continuously throughout the period of investigation or review) have been made ''within an extended period of time in substantial quantities.''

The Department has not adopted these suggestions, because we believe that the SAA is clear as to when below-

cost sales have occurred ''within an extended period of time.'' The SAA at 831–832 states that ''below-cost sales need occur only within (rather than over) an extended period of time.'' According to the SAA, this means that the Department ''no longer must find that below-cost sales occurred in a minimum number of months before excluding such sales from its analysis.'' Thus, for example, where a particular model is sold at prices below the cost of production during one month of the period of investigation or review (and where such sales are in substantial quantities and are not at prices that would permit cost recovery), the Department may disregard these sales in its determination of normal value.

Another commenter made two recommendations regarding the language in proposed paragraph (b) that an extended period of time ''normally will coincide with the period in which the sales under consideration for the determination of normal value were made.'' First, the commenter cited the statutory requirement that the substantial quantity of below-cost sales occur ''within'' the extended period of time, and not ''over'' that period. Based on this requirement, the commenter argued, paragraph (b) should not state that the period required to satisfy the ''extended period of time'' criterion must be as long as, or ''coincide'' with, the period of investigation or review. Second, this commenter noted that under proposed paragraph (b), the period in which ''sales under consideration'' are made could vary by model or part number. For example, according to this commenter, if a model was discontinued only a few months into the period of review, paragraph (b), as drafted, would limit the ''extended period of time'' to the duration of sales of that model. The commenter suggested that if the Department intends that the entire period of investigation or review constitute the ''extended period of time,'' it should make this clear in the final regulations.

It was not the Department's intention (nor do we believe it to be the case) that the use of the word ''coincide'' in proposed paragraph (b) changes the clear language of section 773(b)(1)(A) from ''within an extended period of time'' to ''over'' such a period. Instead, proposed paragraph (b) merely establishes the duration of that interval which the Department normally will consider as being ''an extended period of time'' for purposes of determining whether below-cost sales were made in substantial quantities under section 773(b)(1) of the Act. Below-cost sales need only occur *within* that period in order to be counted toward the substantial quantities threshold.

The Department does not believe it appropriate to redraft paragraph (b) to refer to sales within the period of investigation or review. The commenter making this suggestion presented a scenario in which a firm sells a particular model of a foreign like product only during the first few months of a review period. This commenter argued that paragraph (b) could be construed in such a way as to limit the extended period of time to the duration of sales of that model. We do not believe this to be the case, however, because the extended period of time is based on the period during which *all* foreign market sales were made, not merely sales of individual models. In other words, although it has been the Department's practice to conduct the sales below cost analysis on a model-specific basis, the extended period of time interval is generally the same for all models of the foreign like product that are under consideration for normal value. The fact that a firm makes sales of a particular model in only a few months does not alter the defined ''extended period of time.''

This being the case, it is important to note that paragraph (b) allows the Department to adhere to the statutory requirement that an extended period of time normally be one year. At the same time, however, it recognizes that the foreign market sales used as the basis for determining normal value (and that may become the subject of a sales below cost analysis) can occur over a period that is longer or shorter than one year. For example, in an administrative review, because of our practice of looking to ''contemporaneous'' sales in months other than the month in which the sale of the subject merchandise took place, the Department often requests a respondent to submit data regarding contemporaneous sales of foreign like products for specific months prior to and after the normal one-year period of review. In this instance, the extended period of time would be longer than twelve months. Likewise, the extended period of time could be shorter than one year if, for example, the subject merchandise consisted of highly perishable agricultural products with growing and selling seasons that are shorter than one year.

Section 351.407

Section 351.407 contains rules regarding the allocation of costs, the application of the major input rule under section 773(f)(3) of the Act, and the application of the startup adjustment to CV and COP under section 773(f)(1)(C) of the Act.

Affiliated party transactions/major input rule: In response to a number of comments, the Department has added a new paragraph (b) to § 351.407 that clarifies the Department's practice with respect to the determination of the value of major inputs purchased from affiliated suppliers in cases involving cost of production and/or CV. (We have redesignated proposed paragraphs (b) and (c) as paragraphs (c) and (d), respectively.) The new paragraph provides that, when the Department applies the major input rule, the Department normally will use the transfer price paid by the producer for a major input so long as that price is not below the input's market price or the supplier's cost of production for the input. In addition, if both the transfer price and the market price for a major input are less than the supplier's cost of production for the input, the Department normally will use production costs as the appropriate value for the major input under section 773(f)(3) of the Act.

Several commenters made recommendations regarding the Department's treatment of production inputs purchased from affiliated parties under section 773(f)(2) and (3) of the Act (affiliated party transactions disregarded and the major input rule). In general, these commenters suggested that, in determining the value of production inputs, the Department should place greater reliance on transfer prices between producers and their affiliated suppliers, especially where the reporting burden on respondents outweighs the value of conducting an arm's length test for every input. More specifically, two commenters suggested that the regulations establish an arm's-length test for inputs obtained from affiliated parties. One commenter believed that only significant differences—for instance, plus or minus 10 percent—between the average price charged to affiliated parties and the average price charged to unaffiliated parties should cause the Department to reject the affiliated party transactions as not being at arm's-length prices. As an alternative, this commenter suggested that the regulations provide that affiliated party prices are at arm's length if they do not deviate from the average non-affiliated party prices by substantially more than the deviation of non-affiliated party prices from that average. The other commenter suggested that if record evidence demonstrates that a producer cannot manipulate the price of inputs purchased from an affiliated party, the Department should

conclude that the producer purchased the input at arm's length.

We have not adopted the proposal to include in the regulations an arm's-length test for inputs sourced from affiliated suppliers. Although a test along these lines may be appropriate in some instances, it may not be in others. For instance, where a particular input represents a significant portion of the cost of the merchandise under investigation, a 10 percent difference between the price charged to the affiliated producer and the price charged to unaffiliated producers could have a significant effect on the results of the Department's AD analysis. In other instances, where inputs sourced from an affiliated party represent an immaterial part of the overall manufacturing costs of the merchandise, the Department may find it appropriate to accept a producer's transfer prices (or to test those prices on a sample basis) without conducting a full-blown arm's-length test based on the prices paid for all such inputs. Thus, instead of implementing a single arm's-length test applicable to all situations involving affiliated party inputs, we think it is important that the Department consider the facts of each case in order to determine the appropriate level of scrutiny it should give to affiliated party transactions.

With respect to the recommendation that the Department consider the ability of a producer to manipulate the price of inputs purchased from an affiliated party, we do not think that the potential price manipulation standard described by the commenter is appropriate for purposes of examining the arm's-length nature of input transfer prices. The indeterminate nature of such a standard would make it unadministrable and impractical. Instead, the Department believes that the appropriate standard for determining whether input prices are at arm's length is its normal practice of comparing actual affiliated party prices with prices to or from unaffiliated parties. This practice is the most reasonable and objective basis for testing the arm's length nature of input sales between affiliated parties, and is consistent with section 773(f)(2) of the Act.

With respect to the major input rule, two of the commenters recommended that the regulations establish a threshold for determining when an input will be considered ''major.'' These commenters suggested that normally the Department should not consider affiliated party inputs to be ''major'' if they represent less than 20 percent of the cost of production. Two commenters added that where a producer cannot obtain cost data from an affiliated supplier, the Department should allow the producer to report transfer prices.

Another commenter opposed these suggestions, noting that the only substantive change made by the URAA with respect to the issue of input dumping was to clarify that section 773(f) applies to the calculation of both cost of production and CV. Thus, the commenter argued, the Department should reject as inappropriate the suggestions of the other commenters.

The Department has not adopted the suggested definitions of ''major input.'' We continue to believe that the determination of whether an affiliated party input constitutes a ''major input'' in a particular case depends on several factors, including the nature of the input and the product under investigation. The determination also may depend on the nature of the transactions and operations between the producer and its affiliated supplier. For example, a producer could purchase a number of significant inputs from an affiliated supplier that individually account for a small percentage of the total cost of production for the subject merchandise, but, when considered in the aggregate, comprise a substantial portion of the total cost of production. In this instance, it may be appropriate for the Department to consider the inputs to be major inputs for purposes of examining the affiliated supplier's production costs under section 773(f)(3) of the Act. Similarly, the Department may find it necessary to analyze, on a sample basis, the production costs incurred for affiliated party inputs where a large number of such inputs are purchased from various affiliated suppliers and the combined value of the inputs purchased represents a significant portion of the total manufacturing cost of the subject merchandise.

These examples illustrate the difficulties inherent in relying on a single, all-encompassing definition of ''major input.'' There also is an additional problem associated with using a single numerical standard. In identifying ''major input,'' the Department generally must rely on the transfer price charged by the affiliated supplier. However, because the transfer price itself may be below cost, it may not constitute an appropriate basis on which to measure the significance of the input. Because of this problem, we do not believe that the Department would have sufficient flexibility to examine affiliated party transactions were we to adopt the 20 percent-of-cost definition or any other specific threshold for major inputs suggested by the commenters.

Nonrecurring costs: One commenter suggested that the Department add a new paragraph to its regulations to clarify the treatment of nonrecurring costs under section 773(f)(1)(B) of the Act. Specifically, this commenter recommended that the regulations establish a rebuttable presumption that all nonrecurring costs benefit current and/or future production, and that the Department either will (1) expense such costs to current production, or (2) allocate the costs over current and future production, as appropriate.

As the Department stated in the AD Proposed Regulations, 61 FR at 7342, the allocation of nonrecurring costs, such as research and development costs, for purposes of computing COP and CV is dependent on case-specific factors. Section 773(f)(1)(B) recognizes the fact-specific nature of these allocation issues by providing only that the Department adjust costs appropriately to take account of any benefit that may accrue to a respondent's current and/or future production as a result of incurring such costs. Thus, in these final regulations, we have not elaborated on the allocation of nonrecurring costs. Instead, the Department will continue to determine the appropriate allocation of non-recurring costs on a case-by-case basis.

Reliance on generally accepted accounting principles: With respect to the allocation of costs, one commenter recommended that the regulations provide that the Department normally will allocate costs in accordance with the generally accepted accounting principles (GAAP) of the country of exportation.

The Department has not adopted this suggestion, because it would establish a standard for computing COP and CV different from the standard contemplated by the Act. Section 773(f)(1)(A) provides that the Department normally will calculate costs ''based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.'' Thus, the statute expresses a preference for computing costs on the basis of foreign country GAAP only when those practices measure costs in a reasonable manner. In addition, where a producer does not keep its normal accounting records in accordance with foreign country GAAP, the statute does not require that such records be made to conform with foreign GAAP.

We do not mean to suggest that the Department would not look to the

GAAP of the foreign country (or to U.S. or international accounting principles) in establishing whether the normal accounting practices of the producer reasonably reflect the costs associated with the production of the merchandise in question. Instead, we mean only that, for AD purposes, the fact that a producer does not follow its national accounting principles does not automatically mean that the producer's accounting practices do not reasonably reflect costs.

Startup adjustment: We received several comments concerning various aspects of proposed paragraph (c) (now paragraph (d)) and the new startup adjustment.

Definition of startup: One commenter, stating that the definition of terms in proposed paragraph (c) seemed to conform to the statute and the AD Agreement, urged the Department to apply paragraph (c) in a manner consistent with the SAA and the URAA. Specifically, this commenter maintained that the Department should allow for a startup adjustment in those instances where a semiconductor producer can demonstrate that a substantial investment was required to change a design, significantly reduce wafer size, or produce other new types of products that fall within a current chip generation.

Another commenter contended that the definitions of ''new products'' and ''new production facilities'' in proposed paragraph (c)(1) were exceedingly narrow. This commenter asked the Department to confirm that improvements to products or production facilities that entail substantial costs and that involve significant decreases in productivity will qualify for the startup adjustment.

Two commenters oppose the suggestions described above. One commenter argued that the startup adjustment does not apply to the semiconductor design changes described. In support, this commenter cited the SAA at 836, which states that ''a 16 megabyte Dynamic Random Access Memory (DRAM) chip, for example, would be considered a new product if the latest version of the product had been a 4 megabyte chip. However, an improved version of a 16 megabyte chip (*e.g.*, a physically smaller version) would not be considered a new product.''

The other commenter opposing the suggestions argued that the definition of ''new products'' in proposed paragraph (c)(1)(ii) was too broad, and suggested that the regulations provide examples that would limit the circumstances under which the ''complete revamping or redesign'' of products would be eligible for a startup cost adjustment. This commenter noted that in many industries, firms continually revamp or redesign products in order to obtain incremental improvements in performance or to reduce production costs, or both. In the commenter's view, however, such process or performance improvements that do not change the dimensions and construction of an article are not sufficient to result in a ''new product.'' The commenter recognized that in proposed paragraph (c)(1)(ii), the Department sought to distinguish ''mere improvements'' to products from the ''complete revamping or redesign'' of such products. However, the commenter believed that this paragraph was unduly vague and that the Department should clarify it by means of specific, narrowly defined examples of ''new products.''

The Department has not incorporated the suggestions made by these commenters in the regulations. Nor do we consider this explanatory preamble an appropriate vehicle for making determinations as to whether situations specific to the semiconductor industry would warrant a startup adjustment under section 773(f)(1)(C). Instead, paragraph (d)(1) continues to set forth the definitions contained in the SAA at 836. Given the variety of products and industries with which the Department deals and the fact that the startup provision is new to the statute, we believe that these examples are well-suited to the task of providing guidance to parties without unintentionally expanding or limiting the availability of a startup adjustment.

Standard for granting a startup adjustment: One commenter noted that proposed paragraph (c) correctly recognized that the standard for granting a startup adjustment is no more or less stringent than those applicable to other types of adjustments under the Act. This commenter added that because there are numerous situations that may call for some form of startup adjustment, proposed paragraph (c) properly left the Department wide latitude in analyzing and granting startup adjustments.

Another commenter, however, argued that the Department should strengthen paragraph (c) to ensure that respondents are not encouraged to file meritless claims for startup adjustments. To achieve this, the commenter recommended that the regulations provide that a respondent must submit substantial evidence demonstrating that the expenses for which a startup adjustment is sought can be directly tied to a startup phase of production.

A third commenter suggested that, because respondents bear the burden of proof in demonstrating they are entitled to a startup adjustment, the regulations should clarify the information necessary to obtain the adjustment. This commenter asked that the Department give specific examples of the types of documentation that will be sufficient to meet its requirements.

With respect to these suggestions, the Department notes that the SAA at 838 provides that the burden of establishing entitlement to a startup adjustment rests with the party seeking the adjustment. Among other things, the claimant must demonstrate that the costs for which an adjustment is claimed are directly associated with the startup phase of operations. Having said this, however, we have not adopted the suggestion that we establish a special burden of proof for startup adjustments, because we believe that the burden of establishing eligibility for a startup adjustment is the same as that applicable to any other AD adjustment. However, as in the case of any other adjustment, the Department intends to seek the case-specific information and documentation necessary to establish whether a startup adjustment is appropriate.

We also have chosen not to implement the suggestion that the Department provide specific examples of the documentation required in order to qualify for a startup adjustment. The SAA indicates that startup inquiries will be based on the specific facts of each case. For example, the SAA at 838 states that ''companies must demonstrate that, for the period of investigation or review, production levels were limited by technical factors associated with the initial phase of commercial production and not by factors unrelated to startup, such as marketing difficulties or chronic production problems. In addition, to receive a startup adjustment, companies will be required to explain their production situation and identify those technical difficulties associated with startup that resulted in the underutilization of facilities.'' Here, the SAA clearly contemplates a fact-based inquiry that includes consideration of a respondent's specific production situation and the unique technical difficulties that led to decreases in its normal production output. Moreover, other portions of the SAA further support the conclusion that the Department must conduct a fact-based examination of claims for a startup adjustment. Thus, it would be inappropriate, as well as impractical, for the Department to impose a mandatory set of information requirements that would apply to all cases.

Duration of startup period: One commenter recommended that the regulations refer expressly to the quality of merchandise produced as a criterion to be considered in determining the length of the startup period. The commenter argued that where merchandise, although in production, is not yet of a quality sufficient for sale, some startup adjustment would be appropriate. Another commenter, however, opposed this proposal, arguing that the ''quality of a product'' is an amorphous concept that respondents could manipulate.

The Department has not adopted the suggestion to make product quality a criterion in determining the length of the startup period, because we believe that this suggestion is inconsistent with the statute and the SAA. Section 773(f)(1)(C)(ii) of the Act provides that the Department will consider startup as having ended as of the time the producer achieves a level of commercial production that is characteristic of the merchandise, producer, or industry concerned. The SAA at 836 states that in making a determination as to when a producer reaches commercial production levels, the Department will measure the producer's actual production levels based on the number of units processed. The SAA also provides that, to the extent necessary, the Department will examine other factors (such as historical data reflecting the same producer's or other producer's experiences in producing the same or similar products) in determining the end of the startup period.

We note also that the SAA does not refer to quality of merchandise as a criterion for measuring the length of the startup period, but instead relies strictly on the number of units processed as a primary indicator of the end of the startup period. In fact, the SAA at 836 states that the Department will not extend the startup period in a manner that would cover product improvements and cost reductions that may occur over the life cycle of a product. The Department believes this to be a clear reference to product quality and yield improvements that may continue to exist long after startup has ended and, if taken into consideration, could result in extending the startup period beyond the point at which commercial production is achieved.

Startup costs: One commenter suggested revisions to proposed paragraph (c)(4) (now paragraph (d)(4)) regarding the types of costs that are eligible for a startup adjustment under the Act. According to this commenter, these revisions would help to clarify the legislative intent that, in making a startup adjustment, the Department may consider only those costs that are tied directly to manufacturing of the merchandise.

We have adopted the revisions suggested by the commenter. These changes provide additional clarification regarding the types of non-production costs that the Department will consider as ineligible for a startup adjustment. These costs include general and administrative (''G&A'') expenses and general research and development costs that the Department normally considers to be part of G&A.

Amortization of startup costs: One commenter disagreed with the Department's position that it should amortize over a reasonable period of time any excess between a respondent's actual costs and the costs adjusted and calculated for startup costs. In this commenter's view, there is no basis under the AD Agreement for such an approach. In addition, the commenter maintained that any adjustments for startup costs are isolated adjustments that the Department reasonably can take into account during the period of investigation or review.

Another commenter recommended that the Department provide that amortized expenses related to prior startup operations be included as part of respondent's startup costs during the period under investigation or review. This commenter maintained that its recommendation was consistent with sound accounting principles and would preclude a respondent from receiving an unintended and improper benefit as a result of a startup adjustment.

The Department believes that its position concerning the amortization of unrecognized startup costs is fully consistent with the URAA and the AD Agreement. As a result of making a startup adjustment under section 773(f)(1)(C), the difference between actual production costs during the startup phase and costs at the end of the startup phase are not accounted for during the startup phase. Because this difference represents actual costs incurred by the producer, it is reasonable to expect that the producer recoup these costs over an appropriate time period. Failing to consider these costs would mean ignoring a portion of the actual costs incurred by the producer in manufacturing subject merchandise.

Moreover, as described in the SAA at 837, the difference between actual and adjusted startup costs is recouped through amortization over a reasonable period of time (subsequent to the startup phase) based on the life of the product or production machinery, as appropriate. Because the amortization period is based on the estimated life cycle of a product or machinery, this period may extend beyond the period of investigation or review. Therefore, it is not possible for the Department, in all instances, to account for startup costs within the investigation or review period.

The Department also has not adopted the recommendation that respondents be required to account for startup operations that may have taken place prior to the period of investigation. The Department believes that only where respondents have adjusted for startup costs in an investigation or review period would they be required to account for (through amortization in periods subsequent to the startup phase) the difference between actual costs and costs computed for startup. As noted above, this practice ensures that respondents account for all actual costs incurred to produce the merchandise. Where merchandise was produced, or production facilities have been in place, prior to the period of investigation, the Department considers it unnecessarily burdensome to require that respondents account for previously incurred startup costs in the same manner as for startup operations that occurred during the investigation or review period. Nor is such a requirement contemplated under the statute as a condition for granting a startup adjustment.

Section 351.408

Section 351.408 implements section 773(c) of the Act, which creates a special methodology for calculating normal value in AD proceedings involving a nonmarket economy (''NME'') country. We received numerous comments on this section.

Market-oriented industry test: Section 773(c)(1) of the Act permits the Department, in certain circumstances, to use the ''market economy'' methodology set forth in section 773(a) to determine normal value in an NME case. To identify those situations where we would apply the market economy methodology and calculate normal value based on domestic prices or costs in the NME, we developed our so-called ''market oriented industry'' or ''MOI'' test. However, we elected not to codify the MOI test in the AD Proposed Regulations because of our concern that the test did not succeed in ''identifying situations where it would be appropriate to use domestic prices or cost in an NME as the basis for normal value * * *.'' 61 FR at 7343.

Several comments were filed concerning the MOI test and whether the Department should codify its

current test or an amended version of the MOI test. One commenter put forward numerous arguments against the current MOI test. First, this commenter argued that the third leg of the MOI test is unrealistic. (The third leg of the test requires that market-determined prices must be paid for virtually all inputs before the Department will find a particular industry to be an MOI.) In this commenter's view, this third leg extends the Department's inquiry beyond the pricing of the input itself to factors that only remotely impact the price of the input, such as land use and energy policies. Because of the breadth of this inquiry, this commenter believed that the Department effectively requires an examination of the entire NME economy, an approach that contravenes the stated purpose of the MOI test; *i.e.*, to determine whether a particular input or sector in the NME is sufficiently subject to market forces.

According to this commenter, another indication that the MOI test is unreasonable is that few, if any, market economy countries have industries in which every single input is 100 percent subject to market forces. To make the MOI test more reasonable, this commenter suggested amending the third leg of the test to require only that a reasonable portion of inputs be subject to market forces.

This commenter also questioned the Department's all-or-nothing approach under the third leg of the MOI test. Specifically, this commenter contended that the Department's requirement that all inputs sourced in the NME be obtained at market-determined prices overlooks the fact that certain inputs may be purchased at market prices. Where certain inputs are purchased at market prices, this commenter argued, the Department should use those prices. Moreover, in this commenter's view, doing so would be consistent with the Department's policy of using the actual input prices paid by an NME producer when the producer purchases the input from a market economy supplier and pays for the input in a market economy currency. The all-or-nothing approach also leads to anomalous results, in this commenter's view. When an NME industry is unable to meet the burden of showing that virtually all of its inputs are purchased at market-determined prices, the Department uses the NME methodology and values the NME producers' inputs in a surrogate market economy country that, according to this commenter, would itself fail the MOI test.

This same commenter also questioned the second leg of the MOI test, particularly as it applies to the People's Republic of China (''PRC''). (In order to qualify under the second leg of the test, the industry producing the merchandise should be characterized by private or collective ownership.) In this commenter's view, government ownership should not be dispositive of whether an industry is subject to market forces. The Department investigates many state-owned companies in market economy countries, and government ownership of those companies does not lead the Department to apply a different AD methodology. Moreover, based on its experience in administering the separate rates test (*see* § 351.102(b)), the Department has found on numerous occasions that PRC companies ''owned by the people'' operate independently of the government. Hence, in this commenter's view, ownership by the people should not preclude a PRC industry from achieving MOI status.

On a more general level, this commenter urged the Department to apply the MOI test on a company-specific basis rather than to all companies within a given industry. The failure of particular companies to provide evidence that market forces are at work should not, in this commenter's view, work unfairly against those companies that are able to satisfy the test. Similarly, according to this commenter, the regional nature of certain economic reforms in the PRC argues for a company-specific approach.

Two commenters raised various policy arguments against the rigidity of the MOI test. In their view, the MOI test should be applied in such a way as to encourage market reforms in NMEs. Instead, they claimed that the current MOI test sends a signal to NMEs that the Department will not recognize their reforms. Additionally, in the view of one commenter, NME producers and exporters would be more willing to cooperate in AD proceedings if the Department changed the MOI test, because they would have an opportunity to avoid the unfairly high margins generated by the NME methodology.

Two commenters suggested amendments to the current MOI test to make it meaningful and fair for ''economies in transition'' to market economies. Specifically, they urged the Department to adopt a presumption that when the first two legs of the current MOI test are met (*i.e.*, there is no government involvement in setting the prices or production quantities of the product, and the industry is characterized by private and collective ownership), the Department will perform a market economy AD analysis. Under their proposal, the presumption could be rebutted by evidence showing that the central government set the prices paid for inputs constituting a substantial value of the final product.

One commenter urged the Department either to (1) retain the current MOI test (on the grounds that it does succeed in identifying those situations where it would be appropriate to use prices or costs in the NME), or (2) abandon the notion of MOIs altogether. In this commenter's view, it is not possible to reconcile the notion that a country is an NME with the notion that the prices or costs of some participants in that economy are immune from that economy's influences.

We have not codified the current MOI test in our final regulations. Nor have we adopted a modified version of the MOI test. Given the changing conditions in NMEs, we believe that we should continue to develop our policy in this area through the resolution of individual cases, and the comments that were submitted will help us in that process. This area of the law continues to be extremely important to the agency and will receive the Department's careful attention.

Surrogate selection: In applying the NME AD methodology, the first step is to identify the so-called ''surrogate country'' to be used for valuing the NME producers' factors of production. Under section 773(c)(4) of the Act, the surrogate should be a country (or countries) at a level of economic development comparable to the NME and a significant producer of merchandise comparable to the merchandise being investigated. In proposed paragraph (b), we stated that we would place primary emphasis on per capita GDP as the measure of economic comparability. More generally with respect to surrogate selection, we explained that the relative weights we would place on the two selection criteria (*i.e.*, economic comparability and significant production of comparable merchandise) would vary based on the specific facts presented by individual cases.

We received two comments on the issue of surrogate selection. One commenter suggested that where other economic indicators (*e.g.*, growth rates, distribution of labor between the manufacturing, agricultural and service sectors) reflect disparities in economic comparability, the Department should take this into account. The second commenter agreed with the Department's position that surrogate selection should be made on the basis of the particular circumstances presented by each case.

Regarding the comment on economic comparability, we believe that paragraph (b) provides the Department with adequate flexibility to take into account economic indicators other than per capita GDP. While similar levels of per capita GDP would always be considered the primary indicator of comparability, other measures of comparability could outweigh it where the circumstances so warranted.

Valuation of the factors of production: Once the Department identifies an appropriate surrogate country, the next step in an AD proceeding involving an NME is to value the NME producers' factors of production. Proposed paragraph (c) contained rules for determining these values. In general, under proposed paragraph (c), we would value inputs using publicly available information regarding prices in a single surrogate country. However, we articulated certain exceptions to this general rule. First, where the NME producer purchases inputs from a market economy producer and these inputs are paid for in a market economy currency, we would use the price paid by the NME producer to value that input. Second, we proposed valuing the NME producer's labor input by reference to a regression-derived calculation that effectively includes wage information from a number of countries, rather than a single country.

We received several comments on the proposed factor valuation rules. One commenter called for the Department to seek internal coherence among the factor values by obtaining them from a single source. In this commenter's view, the goals espoused by the Department (*i.e.*, to achieve accuracy, fairness and predictability) would be better served if where there were a tight interrelationship among the surrogate values. Moreover, because the Department calculates certain values (such as manufacturing overhead, general expenses, and profit) relative to labor and material costs, this commenter believed the Department should derive all of these amounts from the same source.

We have not adopted this suggestion. In order to derive ''internally consistent'' values, as the commenter used the term, it would be necessary to obtain valuation data from a single producer in the surrogate country. We have tried this approach in the past and it has not worked well. Frequently, we have been unable to obtain a surrogate producer willing to share this type of information with the Department. Moreover, even when we have been able to obtain data, this approach is much less transparent than use of publicly available input values, because while a surrogate producer might share data with the U.S. government, it would be less likely to make it available to a U.S. petitioner or an NME producer. Finally, we question the accuracy of this approach as it applies to individual input prices. When compared to a publicly available price that reflects numerous transactions between many buyers and sellers, a single input price reported by a surrogate producer may be less representative of the cost of that input in the surrogate country. For these reasons, we have continued the general schema put forward in the proposed paragraph (c) of relying on publicly available data (which will not normally be producer-specific) for material inputs, while relying on producer- or industry-specific data for manufacturing overhead, general expenses, and profit.

Two commenters discussed the proposal in paragraph (c)(1) regarding the use of prices paid by NME producers when they import the input from a market economy and pay for the input in a market economy currency. One commenter objected to the Department's approach on the grounds that (1) such prices are not publicly available, and (2) they are not internally coherent with other values included in the calculation (see discussion above). In this commenter's view, if the Department does use the prices paid by NME producers, it should ensure that those prices are free of any distorting effects attributable to barter transactions or savings achieved through centralized purchasing. Moreover, this commenter continued, the Department should not use those input values except for the specific transactions to which they pertain. Thus, if an NME producer sourced some of the input from market economy suppliers and the remainder from domestic sources, then the value for the domestically-sourced inputs should be based on surrogate values and not on the price paid by the NME producers to the market economy suppliers. In support, this commenter stated that: (1) relying solely on the price paid to the market economy supplier to value the input is inappropriate because it assumes that the NME producer could purchase all of its needs at this price, and (2) it ignores the statutory requirement that the NME producer's factors of production be valued in a surrogate market economy country to the extent possible. The second commenter supported the Department's proposal to use the price paid by the NME producer to a market economy supplier in these situations, because that price is a more reasonable and accurate indicator of the value of the input than a surrogate price would be.

We have not adopted the suggestions put forward by the first commenter. While we acknowledge that prices paid by the NME producer to a market economy supplier will not be publicly available, we have weighed this consideration against the increased accuracy achieved by our proposal. We note that the Federal Circuit has upheld our practice of using prices paid for inputs imported from market economies instead of surrogate values. *Lasko Metal Products, Inc.* v. *United States*, 43 F.3d. 1442 (1994) (''*Lasko*''). While we certainly do not view this decision as permitting us to use distorted (*i.e.*, non-arm's length) prices, we believe that the Court's emphasis on ''accuracy, fairness and predictability'' does provide us with the ability to rely on prices paid by the NME producer to market economy suppliers, in lieu of surrogate values, for the portion of the input that is sourced domestically in the NME. Moreover, as noted in the AD Proposed Regulations, 61 FR at 7345, we would not rely on the price paid by an NME producer to a market economy supplier if the quantity of the input purchased was insignificant. Because the amounts purchased from the market economy supplier must be meaningful, this requirement goes some way in addressing the commenter's concern that the NME producer may not be able to fulfill all its needs at that price.

Another commenter suggested that the Department should ''test'' surrogate values for reasonableness. For example, if the Department has two values for a particular input that are very different, but one is closer to the price paid by the NME producer in the NME, the Department should select the price that is closer to the price paid by the NME producer. More generally, this commenter urged the Department to apply the law as fairly as possible by closely matching the characteristics of the input used by the NME producer with the input selected in the surrogate country for valuation purposes.

We agree that ''aberrational'' surrogate input values should be disregarded (*see, e.g., Certain Cased Pencils from the People's Republic of China,* 59 FR 55625, 55630 (1994)). However, we have not accepted this commenter's benchmark for determining whether a particular surrogate value is reasonable. Use of an NME price as a benchmark is inappropriate because it is the unreliability of NME prices that drives us to use the special NME methodology in the first place. The Department does attempt to match the surrogate product

used for valuation purposes closely with the input used by the NME producer. This practice is reflected in paragraph (c), wherein the Department elected to codify a preference for publicly available information rather than publicly available published information. This approach allows us to use input-specific data instead of the aggregated data that frequently appear in published statistics. *See* AD Proposed Regulations, 61 FR at 7344.

Finally, we received a comment regarding factor valuation in general. This commenter urged the Department to add to the regulations an illustrative list of the factors of production that are included in calculating the normal value of an import from an NME. The commenter believed that including such a list will increase the likelihood that all the appropriate factors of production will be identified. We have not adopted this proposal, because, in our view, the statute is sufficiently clear regarding the identify of the factors of production to be valued. If a party to a particular proceeding believes that certain factors are not being reported, it should raise its concerns with the Department in the context of that proceeding.

Valuation of the labor input: Proposed paragraph (c)(3) included a proposal for valuing the labor input in NME cases. Rather than relying on the wage rate in the selected surrogate country, under this proposal the Department would have valued the labor input using a wage rate developed through a regression analysis of wages and per capita GDP. After a further review of paragraph (c)(3) and the comments relating thereto, we have left paragraph (c)(3) unchanged.

Three commenters submitted views on the Department's proposal. One commenter noted that the proposal did not provide different wage levels for skilled and unskilled labor. The second commenter urged the Department to allow itself the flexibility to use other types of wage data if the record indicated that the other data would be better. Also, to value NME labor inputs, this commenter urged the Department to include full labor costs rather than simply wages, and to use industry-specific data because wages can vary dramatically from industry to industry within a single surrogate country.

We agree with the first commenter that the regression-based calculation fails to provide differentiated wage rates for skilled and unskilled labor. However, this results from limitations on the available data, not from the proposed approach. Even using a single country as a surrogate, it has been rare for the Department to find different wage rates for skilled and unskilled labor. Limitations on available data also prevent us from considering whether we should be using full labor costs or industry-specific wages, as suggested by the second commenter.

The third commenter also urged the Department not to adopt the regression-based wage rate. First, in this commenter's view, the proposal ignored the statutory requirement that factors be valued in a country that is economically comparable to the NME and is a significant producer of comparable merchandise. More specifically, this commenter pointed out that because the regression was based on wage rates and per capita GDP, the Department would have calculated NME wage values without regard to the significant production criterion. In a related argument, this commenter stated that the regression-based wage value was inconsistent with the intent of Congress that the Department select a surrogate country where input prices allow significant production to occur. Third, this commenter claimed that the proposal was contrary to standard and accepted economic theory on the grounds that when a producer locates in a country, that producer will choose the appropriate mix of capital and labor based on their relative prices. By applying a theoretical wage rate, the Department's proposal would have upset that relative price structure with the result that NME calculations would be less accurate and less related to real economic conditions. Finally, this commenter contended that the premise underlying the Department's proposal was unsound. In this commenter's view, because many potential factor valuations vary significantly between and among eligible surrogate countries, there is no reason for singling out labor as a factor to be valued under a regression approach while using single values for other inputs.

Addressing these comments in reverse order, we do not share the commenter's concern that the premise underlying our wage rate proposal was unsound because values for other factors of production are not similarly averaged. In general, we believe that more data is better than less data, and that averaging of multiple data points (or regression analysis) should lead to more accurate results in valuing any factor of production. However, it is only for labor that we have a relatively consistent and complete database covering many countries. To employ a parallel approach for other factors of production, the Department would have to develop a comparable database. Even if we were to limit our search for data to those countries that meet both the economic comparability criterion and the significant production criterion, the burden imposed on the Department in compiling such a database normally would outweigh any gains in accuracy.

Regarding the commenter's point that the proposed approach violates standard economic theory, we do not dispute that the relative prices of labor and capital are important and that relatively cheap labor usually will be substituted for relatively expensive capital. However, in order to capture the precise tradeoff between labor and capital that this commenter is seeking, we would have to value all factors using information from a single surrogate producer. As discussed above, we have not adopted that general approach to factor valuation.

Finally, regarding the argument that proposed paragraph (c)(3) ignores the significant manufacturer criterion for surrogate selection, we believe that the regression-based wage rate significantly enhances the accuracy, fairness, and predictability of our AD calculations in NME cases, all of which were attributes highlighted by the Court in *Lasko*. As we stated in the AD Proposed Regulations, for some inputs there is no direct correspondence between significant levels of production and input price or availability. When looking at a surrogate country to obtain labor rates, we believe it is appropriate to place less weight on the significant producer criterion, because economic comparability is more indicative of appropriate labor rates. As discussed above in connection with the calculation of average values for other factors, by combining data from more than one country, the regression-based approach will yield a more accurate result. It also is fairer, because the valuation of labor will not vary depending on which country the Department selects as the economically comparable surrogate economy. Finally, the results of the regression are available to all parties, thus making the labor value in all NME cases entirely predictable. Given these attributes of the regression-based wage rate, we believe that paragraph (c)(3) is fully consistent with the statute.

Manufacturing overhead, general expenses, and profit: Regarding these factors of production, proposed paragraph (c)(4) stated that the Department normally will use information from producers of identical or comparable merchandise in the surrogate country.

One commenter suggested that the Department should rigorously check the information it uses to value

manufacturing overhead, general expense and profit. Specifically, the Department should make sure the data are reliable and that they do not double-count items such as electricity and water. In this commenter's view, the Department could check the reasonableness of these values against the experience of the NME producers under investigation.

For the reasons explained above, we do not believe it is appropriate to check surrogate values against the NME respondents' experience. Regarding the reliability of the surrogate values for manufacturing overhead, general expenses and profit, we do attempt to obtain good data and avoid double-counting where possible. Parties to the proceeding are encouraged to submit data on these factor values and to identify areas where the data are questionable.

Section 351.409

Section 351.409 sets forth the guidelines for making adjustments to normal value for differences in quantities. We have made a few revisions in light of the comments received.

One commenter proposed that the Department liberalize its policy regarding quantity adjustments, noting that the Department typically ignores the requirement in former 19 CFR 353.55(a) that the Secretary normally will use sales of comparable quantities of merchandise. Because the statute itself does not require that the Department use sales of comparable quantities, but instead merely authorizes an adjustment when the Department compares sales in different quantities, we have decided to delete this requirement from paragraph (a).

In addition, we also have deleted the last sentence of proposed paragraph (a), which refers to the consideration of industry practice in determining whether to make a quantity adjustment. Upon further consideration, the Department believes that the granting of an adjustment should depend more on the pricing behavior of the individual firm in question, and not on whether other firms in the industry engage in similar behavior.

As a matter of calculation mechanics, the Secretary may adjust for differences in quantities by deducting from all prices used to calculate normal value quantity discounts even if all sales did not receive the quantity discount. Paragraph (b) contains standards that must be satisfied before the Secretary will calculate normal value in this manner.

One commenter stated that under paragraph (b), the two situations in which the Department will make a quantity adjustment are so narrow that it is virtually impossible for a respondent to meet the applicable standards. The commenter argued that the 20 percent threshold is excessively high, that it is not required by section 773(a)(6)(C)(i) of the Act, and that there is no rationale to support it. Moreover, according to the commenter, the requirement that the discounts be ''of at least the same magnitude'' violates the statutory directive that the adjustment be made whether the price difference is ''wholly or *partly* due to differences in quantities.'' The commenter suggested that the Department provide for additional situations where it will make quantity-based adjustments, such as when the exporter or producer can correlate quantity levels and prices.

While the Department does not agree with all of the arguments made by the commenter, we agree that former 19 CFR § 353.55(b), which formed the basis of paragraph (b), should be modified so as to allow other methods of establishing entitlement to a quantity adjustment. Therefore, in proposed paragraph (b), the Department added the word ''normally'' to indicate that the two methods described in paragraph (b) are not exclusive.

Under proposed paragraph (e), the Department stated that it will not make both a quantity adjustment and a level of trade adjustment unless it is established that the difference in quantities has an effect on price comparability that is separate from the difference in level of trade. One commenter argued that paragraph (e) was superfluous in light of § 351.401(b)(2), which contains a general prohibition against the double-counting of adjustments. In addition, this commenter contended that the proposed paragraph (e) did not provide any guidance (beyond what normally would be required for any claimed adjustment) as to the kind of showing necessary to establish the difference in the effects of each type of adjustment on price comparability. Third, the commenter argued that because the Department will identify level of trade differences by focusing primarily on the selling functions, to the extent that the quantity sold is one factor in a claimed level of trade difference, the Department can determine on a case-by-case basis whether an additional claimed quantity adjustment would be duplicative.

The Department recognizes that the prohibition against double-counting adjustments in § 351.401(b)(2) applies to situations in which a party claims a level of trade adjustment and an adjustment for differences in quantities. However, the Department believes that it is appropriate to emphasize that, in this specific area, it is particularly concerned about the possibility of double-counting. Based on our experience, firms tend to sell in different quantities to different levels of trade, thereby increasing the possibility of double-counting where both adjustments are claimed. This concern is expressed in the SAA at 830, where, in discussing the effect on price comparability necessary for a level of trade adjustment, the Administration stated: ''Commerce will ensure that a percentage difference in price is not more appropriately attributable to differences in the quantities purchased in individual sales.''

With respect to the commenter's suggestion that the Department provide additional guidance as to the showing necessary to establish the individual effect of each adjustment, the Department does not have enough experience to provide additional guidance at this time. Essentially, we agree with the commenter that the Department, at least initially, will have to resolve these issues on a case-by-case basis.

Section 351.410

Section 351.410 clarifies aspects of the Department's practice concerning adjustments to normal value for differences in the circumstances of sale (''COS'').

One commenter, noting that proposed § 351.410 did not indicate the types of expenses eligible for a COS adjustment, suggested that the final regulation clarify, in accordance with the SAA, that the Department will make a COS adjustment only for direct selling expenses and assumed expenses, as opposed to indirect selling expenses.

We agree with the commenter that in proposed § 351.410, we failed to connect the definitions of ''direct selling expenses'' and ''assumed expenses'' in paragraphs (b) and (c) to the COS adjustment itself. Therefore, we have revised this section by (1) redesignating proposed paragraphs (b) and (c) as paragraphs (c) and (d), respectively; (2) redesignating proposed paragraph (d) as paragraph (f); and (3) adding a new paragraph (b) that indicates the expenses eligible for a COS adjustment. In this regard, however, in paragraph (e) we have maintained the special ''commission offset'' rule, previously codified in 19 CFR § 353.56(b)(1).

Another commenter suggested that the Department clarify that it may treat allocated expenses as direct selling

expenses eligible for a COS adjustment. We have not revised § 351.410 in light of this comment. However, as stated above in connection with § 351.401(g), the Department will accept the allocation of direct selling expenses, subject to certain conditions.

One commenter noted that under proposed § 351.412, the Department would establish the level of trade for CEP sales only after having made the adjustments required under 772(d) of the Act; *i.e.*, after having converted the CEP sale to the equivalent of an export price sale. However, this commenter argued, because U.S. resale prices are the starting point for calculating CEP, and because such prices may differ substantially from one distribution channel to another, some sales cannot be compared logically to home market sales at the relevant level of trade, absent some appropriate adjustment. Accordingly, this commenter maintained, if the Department retains proposed § 351.412, the Department should clarify in § 351.410 that it normally will compare sales made in the same distribution channels. In this regard, the commenter asserted that the new law ''requires Commerce to make fair comparisons of price, 19 U.S.C. 1677b(a), and Commerce has traditionally used COS to achieve this all-important objective.''

The Department has not adopted this suggestion. First, as discussed below, section 773(a) of the Act specifies the adjustments that are required in order to achieve a ''fair comparison.'' Moreover, under the statute, the COS adjustment is not a vehicle for identifying sales matches. Instead, the Department makes a COS adjustment only after it first has identified appropriate sales matches. Finally, the commenter's proposal would require the Department to match sales on the basis of a level of trade other than the level of trade of the CEP. However, section 773(a)(1)(B)(i) of the Act requires the Department to identify the level of trade of the CEP (which the SAA at 829 defines as a starting price to which the Department has made adjustments), and to determine normal value at the same level as the CEP, if possible. If the Department must rely on sales in the foreign market that are at a level of trade different from the level of trade of the CEP sale, and if the level of trade difference is reflected in different selling functions and a pattern of consistent price differences, then the Department must make an adjustment for the different levels of trade.

Nevertheless, as discussed in connection with § 351.412, the Department has modified the methodology it will use to identify different levels of trade. Under § 351.412, as revised, the Department will not rely solely on selling activities to identify levels of trade, but instead will evaluate differences in selling activities in the context of a seller's whole scheme of marketing. This new methodology will deal with the problem identified by the commenter.

One commenter argued that the Department should provide for a COS adjustment to normal value for resale profit in situations where the Department makes a profit deduction to CEP. The commenter stated that ''[t]he Department rightly notes in its explanations that the statute does not 'provide for an adjustment to normal value' '' for resale profit. However, the commenter argued that this is a ''grossly inadequate rationale'' for refusing to make such an adjustment, because neither the statute nor the SAA prohibits such an adjustment, and because such an adjustment is necessary ''for proceedings to be fair.'' The commenter contended that because the CEP profit deduction will be based on profit earned in both the United States and the home market, the deduction amounts to double-counting. According to the commenter, this is unfair, and it will have the perverse effect of discouraging foreign investment in the United States and adding value to imported products in the United States.

Another commenter argued that any time a home market producer sells the foreign like product through an affiliated reseller, either in the home market or in the third country, a reseller profit will exist. However, under the proposed regulations, the Department will deduct profit only from CEP sales, and not from sales used to calculate normal value. To achieve a fair comparison, the Department should add a new provision to § 351.402(d) (special rule for determining profit) and deduct this affiliated reseller profit from normal value whenever it compares normal value to CEP.

The Department has not adopted these suggestions. First, with respect to the argument concerning a double-deduction of profit, we disagree. Under section 772(f), the Department does not deduct the CEP profit earned in both the United States and the home market from the price in the United States. Instead, because transfer prices cannot be relied upon for this purpose, section 772(f) provides for the allocation of total profit in the United States and the home market to CEP sales based upon the proportion of expenses incurred in the U.S. market vis-a-vis total expenses.

In addition, the statute specifies the adjustments that the Department may make to normal value in order to achieve a fair comparison between normal value and export price or CEP. Therefore, adjustments beyond those called for by the statute (such as an adjustment for resale profit) are not appropriate. Finally, the courts have made it clear that where, as here, Congress has provided for an adjustment to sales made in one market, but not for an adjustment to sales made in the other, the Department must comply with the scheme established by Congress. *Ad Hoc Committee of AZ–NM–TX–FL Producers of Gray Portland Cement* v. *United States*, 13 F.3d 398, 401–02 (Fed. Cir. 1994).

One commenter stated that the Department should clarify that if prices are reported net of any rebated or uncollected taxes, no adjustment to normal value under this provision is required. We have not adopted this suggestion, because the Department believes that section 773(a)(6)(B)(iii) of the Act clearly provides that the Department need adjust for taxes only where such taxes are included in the price of the foreign like product that is reported to the Department. While the topic of taxes has been fertile ground for misinterpretation and litigation, Congress has now established conclusively that dumping comparisons are to be tax-neutral in all cases. SAA at 827.

Regarding the definition of direct selling expense contained in proposed paragraph (b), one commenter suggested that the Department specifically state that the allocation of expenses, even over non-scope merchandise, does not automatically relieve that expense of its direct nature. Again, the Department has addressed this and similar comments above in connection with § 351.401(g).

Section 351.411

Section 351.411 deals with adjustments for differences in physical characteristics (also known as ''differences in merchandise'' or ''DIFMER'' adjustments).

One commenter suggested that the Department amend § 351.411 to provide that the Department will not make DIFMER adjustments when it compares merchandise with identical control numbers, or (in the case of comparisons involving ''identical'' or ''similar'' merchandise) for characteristics that the Department did not select as product-matching criteria. In addition, this commenter suggested that the regulations state that, in reviews, the Department will use the same product matching criteria as it used in the initial investigation, unless revised by the Department. Another commenter agreed

with this commenter, and added that the Department never should base DIFMER adjustments upon differences in the ''market value'' of products, but instead should base such adjustments only upon differences in variable costs. This commenter cited the SAA at 828, which states that ''Commerce will continue its current practice of limiting this adjustment to differences in variable costs associated with physical differences.''

The Department has not modified § 351.411 in light of these suggestions. The final regulation follows the proposed regulation and prior regulations in providing that ''the Secretary will not consider differences in cost of production when compared merchandise has identical physical characteristics.'' By comparing merchandise considered identical, the Department can avoid the need to make DIFMER adjustments entirely.

Regarding the proposal that the Department not alter its matching criteria after the initial investigation, the Department agrees that continuity and consistency from one segment of a proceeding to another is desirable. However, the Department must have the flexibility to revise these criteria where the facts so warrant.

Finally, the Department has retained the language concerning the use of effect on market value in measuring the amount of a DIFMER adjustment. This provision has been in the Department's prior regulations, although the Department rarely has quantified a DIFMER adjustment on the basis of value. Moreover, the Federal Circuit has held that while the Department may maintain a methodological preference for cost over value in making adjustments, the Department may not rely on cost to the exclusion of value. *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1577 (1983). In addition, although the SAA discusses the Department's practice of making DIFMER adjustments based on variable costs, which is the usual basis for such adjustments, it is silent on the issue of market value. Therefore, the Department believes it is necessary to retain the discretion to use market value in appropriate circumstances.

Another commenter noted that under proposed § 351.411, the Department would disregard fixed costs, SG&A, and profit that are allocable to the physical differences. This commenter argued that this approach is illogical, because the purpose of the DIFMER adjustment is to put the price of the similar home market merchandise on the same basis as the price of the comparison U.S. merchandise. The commenter noted that, in the context of constructed value, the Department includes all fixed and variable costs attributable to production of the merchandise, plus amounts for general expenses and profit. We have not adopted this suggestion, because the SAA at 828 is clear that when the Department uses cost to measure the amount of a DIFMER adjustment, it is to consider only differences in variable costs associated with physical differences in the merchandise.

Section 351.412

Section 351.412 addresses the Department's methodology for identifying differences in LOT and adjusting for such differences, where appropriate. It also addresses how and when the Department will apply the CEP offset. There have been several changes from the proposed regulation.

First, a number of commenters suggested that the Department abandon its efforts to regulate in this area because of the Department's lack of experience in making LOT adjustments under new statute. They proposed instead that § 351.412 merely track section 773(a)(7)(A) of the Act, and provide that an LOT adjustment is allowed only when the claimant demonstrates entitlement ''to the satisfaction of Commerce.''

The Department believes that it is necessary to provide as much guidance in this area as it can at this time. The LOT adjustment is one of the most significant issues under the new statute and is an area in which parties are in need of guidance. It is also an area in which there has been considerable debate concerning the requirements of the statute and the SAA. Therefore, while we have avoided regulating some areas in which the Department needs more experience, such as the definition of a ''pattern of consistent price differences,'' discussed below, we have clarified our interpretations of the legal requirements, and have given as much indication as possible as to how we intend to identify, and adjust for, differences in levels of trade.

One commenter proposed that the regulations make clear that the burden of proof is on the respondent to prove entitlement to an LOT adjustment to its advantage, just as the burden is on a respondent to prove any other adjustment in its favor. The commenter also suggested that the regulations make clear that neither adjustments for LOT differences nor the CEP offset are automatic, but may be made only where the statutory requirements are satisfied.

While the Department generally agrees with these concepts, we do not believe that it is necessary to incorporate them in the regulations. The statute provides clear guidelines regarding the conditions that must be satisfied before the Department may grant an LOT adjustment. In addition, § 351.401(b) makes clear that all adjustments, including LOT adjustments, must be demonstrated to the satisfaction of the Secretary. New § 351.412(f) also clarifies that the Department will grant a CEP offset only where a respondent has succeeded in establishing that there is a difference in the levels of trade, but, although the respondent has cooperated to the best of its ability, the available data do not permit the Department to determine whether that difference affects price comparability.

Section 351.412(b) generally tracks the statute in explaining the general conditions precedent to making an LOT adjustment. Although, for organizational clarity, we have transposed paragraphs (b) and (c), we do not intend this modification to have any substantive impact.

Section 351.412(c) explains the basis on which the Department will determine whether there are differences in the levels of trade of the EP or CEP and normal value. Paragraph (c) is substantively the same as the proposed regulation. Paragraph (c)(1) explains the basis on which the Department will determine the LOT of sales and CV. Paragraph (c)(1)(i) provides that the Department will determine the LOT of EP sales on the basis of the starting prices of sales to the United States, before any adjustments under section 772(c) of the Act. Paragraph (c)(1)(ii) provides that the Department will base the LOT of CEP on the U.S. affiliate's starting price in the United States, after the CEP deductions under section 772(d) of the Act, but before the deductions under section 772(c). Paragraph (c)(1)(iii) provides that the Department will base the LOT of a price-based normal value on the starting prices in the market in which normal value is determined, before any deductions under section 773(a)(6) of the Act. The Department will base the LOT of CV on the LOT of the sales from which the Department derives SG&A and profit under section 773(e) of the Act.

Section 773(a)(1)(B) of the Act requires that, to the extent practicable, the Department base normal value on sales at the same LOT as EP or CEP. Sections 772(a) and (b) define EP and CEP, respectively, as the starting price in the United States as adjusted under sections 772(c) and (d). The adjustments under subsection (d) normally change the LOT, so that the Department must

determine the LOT of CEP sales after any deductions under subsection (d). The adjustments under subsection (c), however, are made to both EP and CEP. Therefore, determining the LOT on the basis of EP or CEP before any deductions under subsection (c) yields the LOT of the EP or CEP. Similarly, we will not make the adjustments under section 773(a)(6) before determining the LOT of normal value.

Several commenters contended that the Department's proposed regulation, which identified the LOT of CEP sales based on the price after adjustments under section 772(d), was contrary to the statute and ignored commercial reality. According to these commenters, the Department's proposed analysis would make CEP offsets virtually automatic, contrary to the intent of Congress. These commenters suggested that the Department revise its proposed regulation to state that, in all situations, it will identify LOT on the basis of the starting price.

Other commenters contended that there is no basis for identifying the LOT of CEP any differently than the LOT of EP and normal value. They argued that such an approach would result in comparing a CEP that, in reality, had been reduced to a ''factory door'' price with a normal value at a more advanced stage of distribution, thereby necessitating an LOT adjustment in virtually every instance. However, other commenters argued that the Department's identification of the LOT of CEP after adjustments was in accordance with the statute and SAA.

As discussed above, we have maintained the methodology of the proposed regulation. The statute directs the Department to determine normal value at the LOT of the CEP, which includes any CEP deductions under section 772(d). We note that many of the commenters opposed to the use of adjusted CEP appear to believe that the deductions under section 772(d) involve all direct and indirect expenses. However, as discussed above in connection with § 351.402, the deduction under section 772(d) removes only expenses associated with economic activities in the United States. Thus, CEP is not a price exclusive of all selling expenses, because it contains the same type of selling expenses as a directly observed export price.

Paragraph (c)(2) describes how the Department will determine whether two sales were made at different levels of trade. We have modified the proposed regulation to provide that the Department will not identify levels of trade based solely on selling activities. We have made this change in order to avoid any implication that every substantial difference in selling functions or activities constitutes a difference in the levels of trade.

Numerous commenters stated that the proposed regulation appeared to be inconsistent with the statute because it based the identification of levels of trade on the identification of different selling activities. These commenters argued that the statute requires that the Department identify levels of trade first, and that it consider selling activities only to determine whether an LOT adjustment is authorized.

Other commenters asserted that the proposed regulation appropriately made differences in selling activities the test for identifying levels of trade. These commenters argued, however, that the Department should not merely count the number of different selling activities, but instead should take a qualitative approach, weighing the extent and importance of each selling activity.

In the Department's view, while neither the statute nor SAA defines level of trade, section 773(a)(7)(A)(i) of the Act provides for LOT adjustments where there is a difference in levels of trade and the difference ''involves'' the performance of different selling activities. Thus, the statute uses the term ''level of trade'' as a concept distinct from selling activities. The SAA at 829 reinforces this point by explaining that the Department must analyze the functions performed by the sellers, but need not find that two levels involve no common selling activities before finding two levels of trade. In other words, the statute indicates that two sales with substantial differences in selling activities nevertheless may be at the same level of trade, and the SAA adds that two sales with some common selling activities nevertheless may be at different levels of trade. Taken together, the two points establish that an analysis of selling activities alone is insufficient to establish the LOT. Rather, the Department must analyze selling functions to determine if levels of trade identified by a party are meaningful. In situations where some differences in selling activities are associated with different sales, whether that difference amounts to a difference in the levels of trade will have to be evaluated in the context of the seller's whole scheme of marketing.

If the Department treated every substantial difference in selling activities as a separate LOT, the Department potentially would be required to address dozens of levels of trade—many of which would be artificial creations. In addition to being extremely burdensome, this would make the Department less likely to find ''patterns of consistent price differences'' between the apparently different levels of trade. This would result either in denial of LOT adjustments altogether or routine use of the CEP offset. Neither of these results was intended by the URAA.

Section 351.412(c)(2) states that an LOT is a marketing stage ''or the equivalent'' (which means that the merchandise does not necessarily have to change hands twice in order to reach the more remote LOT). It is sufficient that, at the more remote level, the seller takes on a role comparable to that of a reseller if the merchandise had changed hands twice. For example, a producer that normally sells to distributors (that, in turn, resell to industrial consumers) could make some sales directly, taking over the functions normally performed by the distributors. Such sales would be at the same LOT as the sales through the distributors. Each more remote level must be characterized by an additional layer of selling activities, amounting in the aggregate to a substantially different selling function. Substantial differences in the amount of selling expenses associated with two groups of sales also may indicate that the two groups are at different levels of trade.

Although the type of customer will be an important indicator in identifying differences in levels of trade, the existence of different classes of customers is not sufficient to establish a difference in the levels of trade. Similarly, while titles, such as ''original equipment manufacturer,'' ''distributor,'' ''wholesaler,'' and ''retailer'' may actually describe levels of trade, the fact that two sales were made by entities with titles indicating different stages of the marketing process is not sufficient to establish that the two sales were made at different levels of trade.

Section 351.412(d) provides that the Department will grant an LOT adjustment only if it is demonstrated to the satisfaction of the Secretary that the difference between the LOT of the sales in the United States and normal value affects price comparability, based on a pattern of consistent price differences between sales at those two levels of trade in the market in which normal value is determined. The Department will develop its practice in this area in the course of administrative proceedings, and intends to issue a policy bulletin once its methodology is more fully developed.

Section 351.412(e) provides that the Department will calculate LOT adjustments by determining the weighted average of the adjusted prices

at the two relevant levels of trade in the market in which normal value is determined. These two levels are the level corresponding to EP or CEP and the level at which normal value is determined. The Department will apply the average percentage difference between these weighted averages to normal value, as otherwise adjusted.

Several commenters contended that the Department should base the amount of any adjustment on the pattern of consistent price differences, rather than on a weighted average. The Department has not adopted this proposal. The SAA at 830 clearly states that ''any adjustment * * * will be calculated as the percentage by which the weighted-average prices at each of the two levels of trade differ in the market used to establish normal value.''

Several commenters proposed that the Department make clear that LOT adjustments, or the CEP offset, can be applied when normal value is based on CV, as well as when normal value is based on prices. The Department agrees, and has revised the proposed regulation to remove any suggestion that LOT adjustments will be made only to prices. Section 773(a)(8) of the Act provides that the Department may adjust CV, as appropriate, under subsection 773(a). Section 773(a)(7)(B) provides that the CEP offset is made to ''normal value.'' There is no limitation confining the adjustment to home market prices, or precluding its application to CV. Therefore, it is clear that LOT adjustments are appropriate regardless of the basis on which normal value is determined.

Where there are sales of the foreign like product at the LOT in the home market corresponding to the LOT of the EP or CEP, the Department will determine normal value on the basis of those sales, and the Department will not make an LOT adjustment. In situations where the Department seeks to make an LOT adjustment, there may be no usable sales of the foreign like product in the market in which normal value is determined at the LOT of the EP or CEP. In order to calculate LOT adjustments in such situations, the Department will examine price differences in the home market either for sales of broader or different product lines or for sales made by other companies.

The regulation also makes clear that the Department will make the LOT adjustment on the basis of adjusted prices. Although neither the statute nor the SAA stipulates whether the average prices compared to determine the amount of the LOT adjustment should be adjusted prices, the adjustment can accomplish its purpose only if calculated on the basis of adjusted prices. This is because the adjustment is intended to eliminate only differences that are: (1) attributable to a difference in levels of trade; and (2) not otherwise adjusted for. In order to avoid having the LOT adjustment duplicate other adjustments, the LOT adjustment must be calculated on the basis of prices to which those adjustments have already been made. To achieve this, the Department will adjust prices at each level of trade in the foreign market as appropriate under section 773(a)(6) before it determines the amount of the LOT adjustment.

One commenter asked the Department to specify that an LOT adjustment can have any value, positive, negative, or zero. We have not adopted this proposal because the statute and SAA make clear that LOT adjustments can be upwards or downwards. SAA at 830.

Section 351.412(f) describes the situations in which the Department will grant a CEP offset. Some commenters suggested that the CEP offset is ''automatic.'' This is not the case. The Department will calculate CEP by deducting only selling expenses and profit associated with selling activities in the United States. Thus, the resulting CEP will retain an element of selling expenses and an element of profit, as do directly observed export prices. We do not agree that there never will be comparable sales in the foreign market.

The Department will not make a CEP offset where the sales to the United States are EP sales or where the Department bases normal value on home market sales at the same LOT as the CEP. The Department will grant a CEP offset only where: (1) normal value is determined at a more remote level of trade than CEP sales; and (2) despite the fact that a respondent cooperated to the best of its ability, the data available do not provide an appropriate basis to determine whether the difference in levels of trade affects price comparability.

One commenter contended that the Department should make the CEP offset in addition to any adjustment for differences in levels of trade. The Department has not adopted this proposal. Section 773(a)(7)(B) of the Act authorizes the Department to make the CEP offset only where the data available do not provide an appropriate basis to determine an LOT adjustment. Therefore, whenever an LOT adjustment can be calculated, the Department cannot also make the CEP offset.

Section 351.413

Section 351.413 deals with the Department's authority to disregard insignificant adjustments under section 777A(a)(2) of the Act. More specifically, § 351.413 defines the term ''insignificant'' with respect to an individual adjustment and a group of adjustments.

Two commenters observed that proposed § 351.413 provided that the Department may ignore *any* ''group of adjustments'' with an *ad valorem* effect of less than one percent. Because the proposed regulations identify three separate ''groups of adjustments,'' it is possible that the Department could ignore three separate groups of ''insignificant'' adjustments for which the combined *ad valorem* effect could be nearly three percent. To prevent this, one commenter suggested that the Department delete the final sentence of proposed § 351.413 dealing with groups of adjustments. The other commenter suggested that the Department make clear that the total *ad valorem* effect of all disregarded adjustments can be no more than one percent.

The Department has not adopted these suggestions. In § 351.413, the percentages used and the definition of groups of adjustments reflects the legislative history of section 777A(a)(2) of the Act, the statutory provision on which the regulation is based. *See, e.g.,* S. Rep No. 249, 96th Cong., 2d Sess. 96 (1979). Moreover, with the exception of changes in terminology (*e.g.,* from ''foreign market value'' to ''normal value'') a revision to render this provision applicable to the calculation of export price and constructed export price, § 351.413 is unchanged from former 19 CFR § 353.59(a).

We believe that part of the commenters' concerns may arise from a misperception that the references to ''an *ad valorem* effect'' in § 351.413 relate to the *ad valorem* dumping margin, so that if the Department ignored groups of adjustments with a total *ad valorem* effect of three percent, the Department, for example, might transform a dumping margin of 4 percent *ad valorem* to 1 percent *ad valorem*. However, this is not what is contemplated by § 351.413, because that section clearly states that the *ad valorem* effect in question is the percentage change to ''export price, constructed export price, or normal value, as the case may be,'' and not the percentage change in the dumping margin.

Finally, we should note that both section 777A(a)(2) and § 351.413 give the Department the flexibility to determine, on a case-by-case basis, whether it should disregard a particular insignificant adjustment. Given this flexibility, and given that § 351.413 is taken almost *verbatim* from the

legislative history, we do not believe there is a reason to eliminate the guidance provided by the last sentence defining ''groups of adjustments.''

Section 351.414

Section 351.414 implements section 777A(d) of the Act and sets forth the three statutory methods for establishing and measuring dumping margins. Section 351.414(c) sets forth the preference for comparisons of average U.S. prices to average comparison market prices in investigations, and for comparison of transaction-specific U.S. prices to average comparison market prices in administrative reviews.

Averaging groups: In establishing the particular averaging groups to be used for price comparisons, § 351.414(d)(2) of the proposed rule stated that an averaging group will consist of subject merchandise that is identical or virtually identical in all physical characteristics and that is sold to the United States at the same level of trade. The Secretary also will take into account, where appropriate, the region of the United States in which the merchandise is sold and such other factors as are considered relevant.

One commenter objected to the Department's interpretation of the statutory provision, and suggested that the true purpose of averaging groups, as reflected in the SAA, is to identify potential targeted dumping to certain U.S. customers or certain U.S. regions, not to invite a similar division of the home market into such groups as a means of thwarting the AD law. The commenter concluded that the regulations should make clear that price averaging pertains solely to U.S. sales and that no product averaging groups will be undertaken with respect to normal value sales.

We disagree with the comment. The SAA provides that in an investigation Commerce will normally establish and measure dumping margins on the basis of a comparison of weighted-average normal values and weighted-average export or constructed export prices. The SAA specifically states:

> To ensure that these averages are meaningful, Commerce will calculate averages for comparable sales of subject merchandise to the U.S. *and sales of foreign like products.* In determining the comparability of sales for purposes of inclusion in a particular average, Commerce will consider factors it deems appropriate, such as the physical characteristics of the merchandise, *the region of the country* in which the merchandise is sold, *the time period,* and *the class of customer* involved. (Emphasis added.)

SAA at 842.

In the Department's view, the language of the SAA makes clear that Congress and the Administration contemplated the use of averaging groups for both U.S. and normal value sales. Nothing in the statute or SAA supports the view that normal value sales should not be averaged, or that normal value sales should not be averaged on the same basis as U.S. sales. Moreover, the purpose of establishing particular price averaging groups is to make accurate and meaningful price comparisons, not to identify (and address) potential targeted dumping.

Time period over which weighted-average is calculated: Under § 351.414(d)(3) of the proposed rule, the Department normally will calculate averages for the entire period of investigation or review when the average-to-average method is applied. However, the Secretary may calculate weighted-averages for shorter periods when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation or review.

One commenter pointed out that there is no reason to default to the entire period given the complete reporting requirements of the law and the capability for analysis of prices through computer support. For perishable products, the commenter noted that the Department should average prices over the shortest period necessary to take account of the perishable nature of the products, but should not average prices over a period that would mask price trends unrelated to the perishable nature of the product.

For products such as manufactured goods, the commenter contended that the Department should adopt a one-month average as the standard time period over which prices would be averaged when the Department employs the average-to-average method. According to the commenter, use of a one-month average time period results in a more precise comparison of normal values and export/constructed export prices than would a single period-wide average comparison. With a one-month standard, the Department may allow averaging over longer periods only where it is shown that a longer period does not distort the price-to-price comparison.

Another commenter supported the Department's proposed rule that the Department will rely on shorter periods in appropriate circumstances and urges the Department to give full consideration to all relevant circumstances in applying the rule.

In the Department's view, price averaging means establishing an average price for all comparable sales. In general, we believe it is appropriate to average prices across the period of investigation, though we recognize that there are circumstances in which other averaging periods are more appropriate. Accordingly, the proposed rule is designed to ensure that the time periods over which price averages and comparisons are made comports with the circumstances of the case, while maintaining a preference for period-wide averaging. Where perishable products are concerned, the Department has not fashioned a rule with respect to a particular type of product because such an approach may limit the agency's ability to address, for example, price trends unrelated to the perishable nature of the product.

Use of the average-to-average method in administrative reviews: Section 351.414(c)(2) of the proposed regulations states that in a review the Secretary normally will use the transaction-to-average method. One commenter urged the Department to expand the application of the average-to-average price comparison method to administrative reviews. In contrast, another commenter contended that such an expansion is clearly impermissible. Citing the SAA, the opposing commenter argued that both Congress and the Administration recognized that the transaction-to-average method would continue to be used in administrative reviews. Another commenter agreed and advocated adoption of a final rule that would preclude application of the average-to-average methodology in reviews, other than in exceptional circumstances.

The Department specifically addressed these divergent positions in the preamble to the proposed regulation. The final rule reflects the SAA, which expressly states that the transaction-to-average method is the preferred approach for administrative reviews. SAA at 843. However, these regulations do not preclude the use of average-to-average price comparisons in every review. Circumstances may exist that warrant application of the average-to-average method and the final rule reflects the Department's authority to apply this method where necessary.

On the subject of the transaction-to-transaction method of price comparisons, one commenter suggested that the final rule state that this method be applied ''in appropriate situations,'' rather than ''only in unusual situations'' as contemplated in the proposed regulation, § 351.414(c)(1). In the commenter's view, the language of the proposed rule establishes a strong presumption that the transaction-to-

transaction method should not be used. The commenter believed that anyone who advocates use of this alternative method should bear the burden of providing good reason for its application, but that the final rule should not discourage this option.

In the Department's view, the SAA makes clear that Congress did not contemplate broad application of the transaction-to-transaction method. SAA at 842. Specifically, the SAA recognizes the difficulties the agency has encountered in the past with respect to this methodology and suggests that even in situations where there are very few sales, the merchandise in both markets should also be identical or very similar before the agency would make transaction-to-transaction comparisons. Accordingly, we continue to maintain that the transaction-to-transaction methodology should only be applied in unusual situations.

Targeted dumping: Paragraph (f) of § 351.414 of the proposed regulation implemented the ''targeted dumping'' provision of section 777A(d)(1)(B) of the Act. Several parties commented that the final rule should provide more specific guidelines as to what constitutes targeted dumping. One commenter suggested the Department provide guidance by establishing more specific criteria for making targeted dumping determinations. Another commenter suggested that the Department needs to gain more experience in order to develop the proper standard for making such determinations, and should establish guidelines through policy bulletins as it develops its practice in this area.

More specifically, several commenters suggested that the Department recognize in its final rule that certain ''common commercial patterns of pricing'' do not constitute targeted dumping, such as (1) different pricing for larger or smaller orders, (2) seasonal pricing, and (3) price changes associated with industry practices, such as downward price changes pursuant to lower costs as are typical for semiconductors, personal computers, and other technical products. In contrast, other commenters contended that common commercial practices in an industry can constitute targeted dumping and that such behavior should not be excused or ignored simply because it is considered to be a common commercial practice.

Other commenters proposed additional substantive guidance. For example, one party suggested that targeted dumping should not be found to exist where the pattern of prices exists in both the U.S. and the comparison market. Another commenter suggested that the Department not obligate itself to use ''standard statistical techniques'' in all of its determinations. Several commenters suggested that the Department define in the final regulations the evidentiary threshold for initiating a targeted dumping inquiry. One commenter, in particular, contended that the final rule establish a low threshold for an allegation to be accepted, similar to allegations of sales below cost. Another commenter expressed concern that the Department's brief practice in this area already has established an arbitrarily high initiation standard.

In the preamble to the proposed regulations, the Department specifically avoided the adoption of any *per se* rules on targeted dumping due to the Department's limited experience administering this provision of the Act. However, the Department recognizes the need to establish guidance in this area and thus will issue policy bulletins setting forth more specific criteria as the Department develops its practice in this area. Moreover, the Department plans to employ common statistical methods in its targeted dumping determinations in order to ensure that the test is applied on a consistent basis and in a manner that ensures transparency and predictability to all parties concerned. In addition, the Department will ensure that parties have an opportunity to explain whether a particular pattern of export prices or constructed export prices constitutes targeted dumping. A policy bulletin setting forth some basic guidelines for applying statistical techniques to targeted dumping questions will be issued in the near future. As we gain more experience in this area, the bulletins will be supplemented or replaced.

Allegation requirement: In proposed § 351.414(f)(3), the Department stated that ''the Secretary will not consider targeted dumping absent an allegation.'' Many commenters opposed the allegation requirement on several grounds. First, they claimed that the burden imposed on interested domestic parties is substantial in that these parties would have to examine multiple respondents, and then reexamine revised responses, sometimes submitted subsequent to verification. Second, the commenters added that the Department's proposed rule effectively precluded self-initiation of a targeted dumping examination by the Department. One commenter contended that the Department should place the burden of proof on respondents to demonstrate that they did not engage in targeted dumping, thereby removing the improper burden placed on domestic interested parties. The commenter went on to state that, contrary to the Department's reasoning in the preamble to the AD Proposed Regulations, it is the Department, and not domestic interested parties, that is in the best position to find targeted dumping. According to the commenter, a domestic interested party's knowledge of the market in question offers no special insight into whether a foreign company has engaged in targeted dumping. While a domestic company may recognize that it is losing sales to foreign competitors, it surely can have no way of knowing the reasons behind, or pattern emanating from, such dumping. According to the commenter, the Department, through its power to assess margins based on facts available, is in the best position to obtain the information necessary to make a targeted dumping determination.

It is the Department's view that normally any targeted dumping examination should begin with domestic interested parties. It is the domestic industry that possesses intimate knowledge of regional markets, types of customers, and the effect of specific time periods on pricing in the U.S. market in general. Without the assistance of the domestic industry, the Department would be unable to focus appropriately any analysis of targeted dumping. For example, the Department would not know what regions may be targeted for a particular product, or what time periods are most significant and can impact prices in the U.S. market. Ultimately, the domestic industry possesses the expertise and knowledge of the product and the U.S. market. Information on these factors are significant for both the burden aspect and the determination itself. If the Department were required to explore the contours of the U.S. market for every product subject to an investigation, absent the knowledge as to how the market functions, the Department would be compelled to conduct countless comparisons of prices between customers, possible regions, and possibly significant time periods in every case. Absent any guiding insight as to how the market truly functions, such a requirement would be an enormous undertaking. Fundamentally, the Department needs the assistance of the domestic industry to focus the inquiry and to properly investigate the possibility of targeted dumping.

Nevertheless, there may be instances in which the Department recognizes targeted dumping on its own, without an allegation from domestic interested parties. In such cases, the Department must be able to address the targeted

dumping behavior regardless of whether any domestic interested party filed a timely and sufficient allegation. Accordingly, the Department has modified the proposed rule in order to ensure that the regulation properly reflects the Department's authority to address instances of targeted dumping absent an allegation. However, the final rule anticipates that targeted dumping examinations normally will flow from allegations of targeted dumping.

With respect to the availability of information, the Department recognizes that parties' access to relevant information on the record is crucial for making targeted dumping allegations of merit and will continue to take steps to ensure that public summaries provide the parties with adequate information. For example, the authority to determine margins based on facts available should continue to enable the Department to obtain the information necessary for domestic interested parties to make targeted dumping allegations. For example, the Department intends to calculate dumping margins using the transaction-to-average method as facts available for any respondent who refuses to supply the necessary data for a targeted dumping determination.

Time in which to file targeted dumping allegations: Section 351.301(d)(4) sets forth the time in which targeted dumping allegations must be filed. Although we received comments on the proposed regulatory deadline for filing targeted dumping allegations, for the final rule we have adopted the time requirement set forth in the proposed rule for the reasons discussed below.

Under proposed § 351.301(d)(4), the Department stated that an allegation of targeted dumping must be filed ''no later than 30 days before the scheduled date of the preliminary determination.'' Commenters pointed out that there is no reason to impose such a deadline for submitting an allegation given that the Department will receive the necessary information on targeted dumping in the normal course of every investigation. Thus, unlike cost investigations, the Department need not request additional information to conduct its examination. Accordingly, commenters contended, the Department need not require the stringent deadlines set forth in the proposed rule. Commenters also contended that the proposed deadline imposed a substantial burden in that for many cases the Department has limited, unusable information on the record 30 days prior to the preliminary determination. Commenters also noted that the proposed early and inflexible time limit would impose the added burden on petitioners at a time when the domestic industry must examine questionnaire responses for identification of deficiencies and for potential below-cost allegations. These commenters proposed that the final rule permit domestic interested parties to file allegations at any time until the deadline for the case briefs, which would allow allegations to include information uncovered at verification.

The Department has adopted the proposed regulation relating to the time in which to file targeted dumping allegations. To extend the deadline would make it impossible for the Department to consider the allegation for the preliminary determination. Furthermore, it would make any verification of issues relative to the allegation extremly difficult. However, the Department recognizes the burden such a deadline may place on domestic interested parties in some situations and intends to be flexible with respect to the deadline. For example, if the timing of the responses does not permit adequate time for analysis, the Department may consider that to be ''good cause'' and extend the deadline under section 351.302.

Limited application of average-to-transaction method: Under proposed paragraph (f)(2), the Secretary will normally limit the application of average-to-transaction comparisons exclusively to those sales in which the criteria for determining targeted dumping are satisfied. The preamble to the proposed regulations states that it would be ''unreasonable and unduly punitive'' to apply the transaction-to-average approach to all sales where, for example, targeted dumping accounted for only one percent of a firm's total sales. The preamble also states that the approach would not always be limited in application ''because there may be situations in which targeted dumping by a firm is so pervasive that the average-to-transaction method becomes the benchmark for gauging the fairness of that firm's pricing practices.''

Several commenters argued that neither the AD Agreement, statute, nor the SAA supports limited application, and advocated broad application of the transaction-to-average approach to all of a firm's sales once targeted dumping is found. In general, these commenters also were concerned that limiting the application exclusively to those sales in which the targeting criteria are met would have significant implications for submitting allegations. One commenter, in particular, noted that the ''hybrid approach'' proposed by the Department would require an exhaustive recitation, rather than a representative allegation, if all instances of targeted dumping are to be addressed. The commenter also rejected the view that broad application would be ''punitive'' and claimed that the average-to-average method was designed to simplify the dumping calculations, not to provide more accurate means of calculating dumping margins. In the commenter's view, the transaction-to-average method should be viewed as a more accurate, not more punitive, measure of dumping. Another commenter suggested that the targeted dumping provision is intended to prevent foreign producers from unduly and inappropriately benefitting from an averaging of U.S. sales. The commenter reasoned that once a party engages in targeted dumping, it has violated the spirit of the average-to-average method and forfeits entirely the privilege of receiving an average-to-average calculation. In the alternative, one commenter suggested that the Department consider application of the transaction-to-average method for all of a firm's sales where it is established that targeted dumping exists for 10 percent or more of that firm's sales.

The Department has considered the scope of application of the average-to-transaction methodology raised in the comments on this issue. Based upon our examination, the Department is adopting the proposed regulation without modification. In the Department's view, section 777A(d)(1) of the Act establishes a preference for average-to-average price comparisons in investigations. The statute contemplates a divergence from the normal average-to-average (or transaction-to-transaction) price comparison out of concern that such a methodology could conceal ''targeted dumping.'' SAA at 842. Accordingly, the Department will apply the average-to-transaction approach solely to address the practice of targeted dumping. Nevertheless, the Department contemplates that in some instances it may be necessary to apply the average-to-transaction method to all sales to the targeted area, such as a region or a customer, or even all sales of a particular respondent. For example, where the targeted dumping practice is so widespread it may be administratively impractical to segregate targeted dumping pricing from the normal pricing behavior of a company. Moreover, the Department recognizes that where a firm engages extensively in the practice of targeted dumping, the only adequate yardstick available to measure such pricing behavior may be the average-to-transaction methodology.

With respect to the contention that limiting the application of the transaction-to-average method solely to

targeted sales would require an extensive allegation, as opposed to a representative one, we disagree. The proposed regulation speaks to limited application of the transaction-to-average method once targeted dumping is found to exist. It does not address the scope of the targeted dumping examination itself. Interested parties may make representative targeted dumping allegations based upon prices to purchasers, regions, or periods of time, provided they explain how the evidence examined in the allegations is relevant to prices of other products or models, or other companies.

Section 351.415

Section 351.415 implements section 773A of the Act, which deals with the selection of the exchange rate used to convert foreign currencies to U.S. dollars. For the reasons set forth below, we have not revised § 351.415.

Forward sales of currency: Section 351.415(b) creates an exception to the general rule that the Department will use the actual exchange rate on the date of sale to convert foreign currencies to U.S. dollars. Under paragraph (b), if a currency transaction on forward markets is directly linked to an export sale under consideration, the Department will use the exchange rate specified in the forward sales agreement instead of the actual exchange rate on the date of sale.

Two commenters made suggestions regarding the application of the ''directly linked'' standard. One commenter suggested that if an exporter actually applies forward exchange rates to its export sales, then the Department should use those forward exchange rates (whether they be daily, quarterly, or quarterly averages). The second commenter proposed that in order for the Department to use a forward exchange rate, the forward sale of currency must relate specifically to the export sale, *i.e.*, the forward rate should not be allocated. According to the second commenter, this would prevent an exporter from claiming that its general hedging operations are directly linked to particular export sales. This same commenter also argued that where the forward sale agreement spans a period of time, the Department should use the exchange rate specified in the agreement only if the date of sale of the export transaction falls within that period.

With respect to these suggestions, while the Department believes that it might be desirable to have more detailed rules concerning the ''directly linked'' standard, we do not have enough experience with this standard to provide such rules at this time. Therefore, we intend to develop our practice in the context of future investigations and reviews.

Another commenter, noting that forward currency transactions usually involve a fee, suggested that the Department either should include this fee as part of the forward exchange rate or should make a COS adjustment under § 351.410 to account for the fee. We agree that the Department should account for these types of fees, but we do not believe that an additional regulation is necessary. In the case of § 351.410, for example, we believe that the provision is sufficiently flexible to encompass a COS adjustment for forward exchange rate fees.

Model for identifying and addressing fluctuations and sustained movements in exchange rates: Several commenters made suggestions to amend the model proposed by the Department for identifying and addressing fluctuations and sustained movements in exchange rates. (We described this model briefly in the AD Proposed Regulations, 61 FR at 7351, and then published a more detailed description in *Policy Bulletin (96–1): Currency Conversions*, 61 FR 9434 (March 8, 1996) (''Policy Bulletin 96–1'')). Regarding fluctuations in exchange rates, two commenters suggested that the Department replace the 8-week rolling average benchmark for determining fluctuations with a 17-week (120-day) rolling average. They also suggested that the benchmark should not include exchange rates that the Department has determined to be fluctuations, because section 773A of the Act requires the Department to ignore fluctuations.

Regarding sustained movements in an exchange rate, certain commenters claimed that the Department's model is overly rigid in identifying such movements, as evidenced by the fact that the model only identifies one sustained movement for one currency in the period since 1992. These commenters suggested several amendments to the model to ensure that it would serve the purpose of protecting exporters when the value of their currency changes faster than they can raise prices. These suggestions included: changing the so-called ''recognition period'' for sustained movements from 8 weeks to 13 weeks (90 days); requiring fewer than 8 consecutive weeks of changes before recognizing a sustained movement, or using monthly rather than weekly averages to determine whether a sustained movement has occurred; applying an historic rate (such as the rate from the quarter preceding the recognition period) during the recognition period; and, using the official exchange rate from the first day of the recognition period during the 60-day adjustment period.

One commenter argued against the latter two suggestions on the grounds that the purpose of section 773A(b) is to allow exporters an adjustment period after a sustained movement in exchange rates has occurred. Therefore, in this commenter's view, it makes no sense to use an exchange rate that predates the sustained movement, nor would section 773A(b) permit the use of an historic rate occurring during the recognition period. Finally, one commenter requested that the Department provide additional guidance on the exchange rate that it intends to apply when a foreign currency is depreciating, as opposed to appreciating, against the U.S. dollar.

The Department welcomes the numerous comments submitted on the model for identifying and addressing fluctuations and sustained movements in exchange rates. As we stated in the AD Proposed Regulations, we intend to use the model for one year and then evaluate its performance based on public comment. As part of that evaluation, we will consider the comments we have received in connection with the instant rulemaking. Moreover, as indicated in Policy Bulletin 96–1, we will consider comments we received on the model through December 31, 1996.

At this time, however, we would like to make two points. First, based on a preliminary review of the comments, we do not believe that using a benchmark rate that includes past fluctuations contravenes section 773A(a). The fluctuations identified under the model are fluctuations that are relative to a particular number calculated at a particular point in time; *i.e.*, the average of the actual exchange rates on each of the prior 40 days. The fact that a particular daily rate fluctuates vis-a-vis that number is sufficient to disqualify that daily rate for purposes of conversion on that date. However, the designation of a particular daily rate as a fluctuation does not render that rate unusable for all purposes. In particular, we believe that actual exchange rates provide the best gauge of whether a particular daily rate should be viewed as a fluctuation. Therefore, we consider it appropriate to include past fluctuations in the rolling average benchmark.

Moreover, when the Department deems a particular daily rate to be a fluctuation, we believe we should use the benchmark (which includes past fluctuations) *in lieu of* the daily rate. For

example, the fact that a daily rate three weeks ago is considered to be a fluctuation means only that the daily rate varied from the historic average as of that time. It does not mean that one should continue to view that daily rate as a fluctuation three weeks later. Because the designation of fluctuations is time-sensitive in this sense, the commenters appear to be reading too much into the statutory prohibition against the use of fluctuating exchange rates.

Second, regarding the comment on our treatment of depreciating currencies, we note that the Department addressed this issue in *Certain Pasta from Turkey,* 61 FR 30309, 30325 (June 14, 1996). In that case, which involved a situation where the foreign currency was depreciating against the U.S. dollar, we used actual daily exchange rates rather than the benchmark rates generated by the model. We agree with the commenter that we should address depreciating currencies more fully in a final model, and we welcome further suggestions on this point.

Sustained movements: While the model discussed above identifies and addresses sustained movements in exchange rates, paragraph (d) sets forth a general rule that where there is a sustained movement ''increasing the value of the foreign currency relative to the U.S. dollar,'' exporters will be given 60 days in which to adjust their prices. Two commenters claimed that paragraph (d) is ''one-sided.'' Specifically, one commenter objected to the fact that paragraph (d) only addresses sustained appreciations in a foreign currency relative to the U.S. dollar. In this commenter's view, section 773A(b) does not specify whether the sustained movement must be upward or downward. The second commenter (presumably referring to the fact that paragraph (d) does not address sustained depreciations in a foreign currency) pointed out that under paragraph (d), respondents can take advantage of favorable exchange rates when a foreign currency appreciates, but domestic industries do not receive a comparable benefit when the currency depreciates. The commenter suggested that the Department should address this by establishing a special rule for situations where exporters should be raising their U.S. prices in response to exchange rate changes, but, instead, are lowering them.

We are not adopting the proposals put forward by these commenters. The language contained in paragraph (d) regarding upward sustained movements reflects the legislative intent expressed in the SAA, which specifically discusses the granting of an adjustment period following ''a sustained increase in the value of a foreign currency relative to the U.S. dollar.'' SAA at 842. Moreover, we do not believe that the statute provides any authority for the Department to deny an adjustment period when a sustained increase in the value of a foreign currency relative to the U.S. dollar has occurred, even in the event that an exporter is lowering U.S. prices.

Another commenter pointed out that paragraph (d) would provide an adjustment period for sustained movements in exchange rates only in investigations, and not in reviews. This commenter questioned whether such a limitation was consistent with the AD Agreement. In the Department's view, paragraph (d) is consistent with the AD Agreement, because Article 2.4.1 specifies that the 60-day period for adjusting prices applies ''in an investigation.''

Finally, one commenter urged the Department to use the exchange rate in effect on the date that the price and quantity terms of a sale are first established, rather than under the methodology used to identify the date of sale for other purposes. We have not adopted this suggestion because section 773A(a) of the Act directs the Department to use the exchange rate in effect on the ''date of sale of the subject merchandise.'' We have clarified how we will identify the date of sale in section 351.401(i) of these regulations. The Department cannot establish a different date of sale for currency conversion purposes from that which is used for all other purposes. This issue is discussed further with respect to that provision, above.

Other Comments

In addition to the comments discussed above, the Department also received several comments that did not relate to a particular provision in the AD Proposed Regulations. A common theme of these comments, however, was the extent to which the Department should rely on data as recorded in a firm's books and records.

One commenter criticized the Department's practice of requiring that respondents submit data in the specific format established by the Department. According to the commenter, this requirement was unnecessary, it rendered the cost of complying with Department information requests excessively high, and, when combined with the Department's tight deadlines, it made the entire process extremely onerous for a firm attempting to comply with a request for data. Another commenter, citing the increasing convergence of accounting standards as companies compete with one another for capital on an international level, proposed that the Department accept data responses in a format that conforms to the generally accepted accounting principles of the company's home country. Another commenter supported these proposals.

With respect to these comments, we first must note that in enforcing the AD law, the Department must balance two different objectives. On the one hand, the Department has a responsibility to identify and measure dumping accurately and in accordance with the standards set forth in the AD law. In some instances, this may mean that the Department must seek information of a type that is not readily retrievable from a company's accounting or financial records or that is in a format different from the format in which a company maintains its records. On the other hand, the Department is cognizant of the need to avoid imposing, in the words of section 782(c) of the Act, ''an unreasonable burden'' on respondents.

In implementing the URAA, we have reviewed our practices and regulations in light of the two objectives described above. As a result, we have taken several steps that we believe will make the AD process less onerous for parties, but that, at the same time, preserve the Department's ability to apply the standards of the AD law. For example, the Department has revised its standard AD questionnaire to clarify that the Department will be flexible in accepting responses that reflect different accounting standards and systems. In addition, as discussed above, in the final regulations relating to allocations, date of sale, and CEP profit, we also have taken steps to accommodate different accounting standards and systems. In our view, in addition to making the AD process less onerous for parties, these changes will make the Department's verifications more efficient and effective, thereby enhancing the Department's ability to enforce the AD law.

On a somewhat related topic, one commenter stated that the regulations should address the matter of ''model-matching'' methodology.[3] According to

[3] ''Model-matching'' is a shorthand expression for the process the Department uses to identify identical or similar home market or third-country merchandise. In order to identify and measure dumping, the Department must compare a U.S. sale of a particular type or model of merchandise to a home market or third-country sale of identical or similar merchandise. Typically, in an AD proceeding, the Department will develop ''model-

Continued

the commenter, the Department currently instructs respondents as to the relative importance of physical characteristics of the subject merchandise and the foreign like product, rather than permitting respondents to make that determination, as under traditional practice. The commenter also alleged that there were two principal problems with the Department's current approach: (1) the Department's manner of identifying product characteristics, and the relative importance assigned to those characteristics, bears no necessary relation to the product coding system used by a respondent for commercial purposes; and (2) the use of the product coding system formulated by the Department in individual cases often results in inappropriate comparisons. Therefore, the commenter argued, the Department should make clear in the preamble to its regulations that the Department generally will use a respondent's existing product coding system as the starting point for identifying identical and similar merchandise. The Department then can make modifications and additions to those codes to the extent necessary to reflect desired model-match criteria.

We have not adopted the suggestion. Under section 771(16) of the Act, the starting point for model-matching is always the physical characteristics of the product. Based on our experience, a company's internal product coding system often does not provide sufficient information to allow the Department to match products in accordance with their physical characteristics. Therefore, we do not believe that it would be appropriate to establish what, in effect, would be a rebuttable presumption that a company's internal product coding system should be used for purposes of model-matching.

On the other hand, however, we do not intend to suggest that a company's product coding system is irrelevant to the model-matching exercise. We agree that the model-matching methodology used by the Department in a particular case should reflect the most significant physical characteristics of a product. We also agree that it often is the case that a company's product coding system is informative, if not dispositive, as to what those characteristics are. For example, the fact that the product coding systems of every respondent involved in an AD proceeding capture a particular physical characteristic usually is a good indication that the characteristic is significant. Therefore, the Department will continue to consider producer coding systems in developing model-match methodologies in particular cases, and will use these codes where such use is consistent with the standards set forth in section 771(16).

Subpart G—Effective Dates

Subpart G consists of a single § 351.701 which (1) establishes the dates on which the new regulations contained in Part 351 will become effective, and (2) explains the extent to which the Department's prior regulations will govern segments of proceedings to which the new regulations do not apply. Section 351.701 also explains the limited role of these new regulations in proceedings to which they do not apply.

The new regulations will apply to all investigations and other segments of proceedings (such as scope requests), other than administrative reviews, initiated on the basis of petitions filed or requests made more than thirty days after the date on which the new regulations are published. The new regulations also will apply to all investigations or other segments of proceedings that the Department self-initiates more than thirty days after the date on which the new regulations are published. In addition, the new regulations will apply to all administrative reviews initiated on the basis of requests filed in the month following the month in which the date 30 days after publication of this notice falls. The slight difference in effective date for administrative reviews is to avoid confusion over whether the new regulations apply to administrative reviews requested by different parties on different days during the month in which the new regulations become effective for investigations and other segments of proceedings (in other words, during the month that includes the day thirty days after the date on which these regulations are published).

Investigations, reviews, and other segments of proceedings to which these regulations do not apply will continue to be governed by the old regulations, except to the extent that those regulations were invalidated by the URAA or were replaced by the interim final regulations published on May 11, 1995 (60 FR 25130 (1995)).

For segments of proceedings to which these regulations do not apply, but which are subject to the Act as amended by the URAA because they were initiated on the basis of petitions filed or requests made after January 1, 1995 (the effective date of the URAA), the new regulations will serve as a restatement of the Department's interpretation of the amended Act. In other words, the new regulations describe the administrative practice that the Department will follow, unless there is a reason consistent with the amended Act to depart from that practice. The AD Proposed Regulations no longer will serve that purpose.

Annexes to Part 351

We have revised Annexes I through V to reflect changes made in these final regulations, as well as to correct typographical errors identified in the annexes attached to the AD Proposed Regulations. In addition, we have revised the charts to include certain deadlines that were not included in the AD Proposed Regulations.

One commenter suggested that the Department should refrain from adopting the ''inflexible deadlines'' outlined in the annexes, and instead should adapt the timetable to the complexity of each investigation or review. With respect to this suggestion, we must emphasize that the tables and charts contained in Annexes I through VII are intended to serve only as a guide to potential petitioners and respondents, as well as other persons potentially interested or involved in an AD/CVD proceeding. The tables themselves are not ''rules,'' and they do not represent the timetables that the Department will follow in all proceedings. In fact, they may not represent the timetables that the Department will follow in a majority of proceedings. The tables and charts simply cross-reference relevant provisions of the regulations so that parties and other persons will be aware of when such things as extensions or postponements might occur. As stated previously, under § 351.302(b), the Secretary may, for good cause, extend any time limit established by Part 351 unless such an extension is expressly precluded by statute.

Classification

E.O. 12866

This final rule has been determined to be significant under E.O. 12866.

Regulatory Flexibility Act

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule will not have a significant economic impact on a substantial number of small entities. The Department does not believe that there will be any substantive effect on the outcome of AD and CVD proceedings as a result of the streamlining and

matching'' criteria for identifying identical or similar merchandise in that particular case.

simplification of their administration. With respect to the substantive amendments implementing the Uruguay Round Agreements Act, the Department believes that these regulations benefit both petitioners and respondents without favoring either, and, therefore, would not have a significant economic effects. As such, a regulatory flexibility analysis was not prepared.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. This final rule does not contain any new reporting or recording requirements subject to the Paperwork Reduction Act. The collections of information contained in this rule are currently approved by the Office of Management and Budget under OMB Control Numbers 0625–0105, 0625–0148, and 0625–0200. The public reporting burdens for these collections of information are estimated to average 40 hours for the AD and CVD petition requirements, and 15 hours for the initiation of downstream product monitoring. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to OMB Desk Officer, New Executive Office Building, Washington, D.C. 20503.

E.O. 12612

This final rule does not contain federalism implications warranting the preparation of a Federalism Assessment.

List of Subjects

19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Cheese, Confidential business information, Countervailing duties, Investigations, Reporting and recordkeeping requirements.

19 CFR Part 353

Administrative practice and procedure, Antidumping, Business and industry, Confidential business information, Investigations, Reporting and recordkeeping requirements.

19 CFR Part 355

Administrative practice and procedure, Business and industry, Cheese, Confidential business information, Countervailing duties, Freedom of Information, Investigations, Reporting and recordkeeping requirements.

Dated: May 2, 1997.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

For the reasons stated, 19 CFR chapter III is amended as follows:

Parts 353 and 355 [Removed]

1. Parts 353 and 355 are removed.
2. A new Part 351 is added to read as follows:

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

Subpart A—Scope and Definitions

Sec.
351.101 Scope.
351.102 Definitions.
351.103 Central Records Unit.
351.104 Record of proceedings.
351.105 Public, business proprietary, privileged, and classified information.
351.106 *De minimis* net countervailable subsidies and weighted-average dumping margins disregarded.
351.107 Deposit rates for nonproducing exporters; rates in antidumping proceedings involving a nonmarket economy country.

Subpart B—Antidumping and Countervailing Duty Procedures 351.201 Self-initiation.

351.202 Petition requirements.
351.203 Determination of sufficiency of petition.
351.204 Transactions and persons examined; voluntary respondents; exclusions.
351.205 Preliminary determination.
351.206 Critical circumstances.
351.207 Termination of investigation.
351.208 Suspension of investigation.
351.209 Violation of suspension agreement.
351.210 Final determination.
351.211 Antidumping order and countervailing duty order.
351.212 Assessment of antidumping and countervailing duties; provisional measures deposit cap; interest on certain overpayments and underpayments
351.213 Administrative review of orders and suspension agreements under section 751(a)(1) of the Act.
351.214 New shipper reviews under section 751(a)(2)(B) of the Act.
351.215 Expedited antidumping review and security in lieu of estimated duty under section 736(c) of the Act.
351.216 Changed circumstances review under section 751(b) of the Act.
351.217 Reviews to implement results of subsidies enforcement proceeding under section 751(g) of the Act.
351.218 Sunset reviews under section 751(c) of the Act.
351.219 Reviews of countervailing duty orders in connection with an investigation under section 753 of the Act.
351.220 Countervailing duty review at the direction of the President under section 762 of the Act.
351.221 Review procedures.
351.222 Revocation of orders; termination of suspended investigations.
351.223 Procedures for initiation of downstream product monitoring.
351.224 Disclosure of calculations and procedures for the correction of ministerial errors.
351.225 Scope rulings.

Subpart C—Information and Argument

351.301 Time limits for submission of factual information.
351.302 Extension of time limits; return of untimely filed or unsolicited material.
351.303 Filing, format, translation, service, and certification of documents.
351.304 Establishing business proprietary treatment of information [Reserved].
351.305 Access to business proprietary information [Reserved].
351.306 Use of business proprietary information [Reserved].
351.307 Verification of information.
351.308 Determinations on the basis of the facts available.
351.309 Written argument.
351.310 Hearings.
351.311 Countervailable subsidy practice discovered during investigation or review.
351.312 Industrial users and consumer organizations.

Subpart D—Calculation of Export Price, Constructed Export Price, Fair Value, and Normal Value

351.401 In general.
351.402 Calculation of export price and constructed export price; reimbursement of antidumping and countervailing duties.
351.403 Sales used in calculating normal value; transactions between affiliated parties.
351.404 Selection of the market to be used as the basis for normal value.
351.405 Calculation of normal value based on constructed value.
351.406 Calculation of normal value if sales are made at less than the cost of production.
351.407 Calculation of constructed value and cost of production.
351.408 Calculation of normal value of merchandise from nonmarket economy countries.
351.409 Differences in quantities.
351.410 Differences in circumstances of sale.
351.411 Differences in physical characteristics.
351.412 Levels of trade; adjustment for difference in level of trade; constructed export price offset.
351.413 Disregarding insignificant adjustments.

351.414 Comparison of normal value with export price (constructed export price).
351.415 Conversion of currency.

Subpart E—[Reserved]

Subpart F—Subsidy Determinations Regarding Cheese Subject to an In-Quota Rate of Duty

351.601 Annual list and quarterly update of subsidies.
351.602 Determination upon request.
351.603 Complaint of price-undercutting by subsidized imports.
351.604 Access to information.

Subpart G—Applicability Dates

351.701 Applicability dates.
Annex I—Deadlines for Parties in Countervailing Investigations
Annex II—Deadlines for Parties in Countervailing Administrative Reviews
Annex III—Deadlines for Parties in Antidumping Investigations
Annex IV—Deadlines for Parties in Antidumping Administrative Reviews
Annex V—Comparison of Prior and New Regulations
Annex VI—Countervailing Investigations Timeline
Annex VII—Antidumping Investigations Timeline

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.*; and 19 U.S.C. 3538.

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

Subpart A—Scope and Definitions

§ 351.101 Scope.

(a) *In general.* This part contains procedures and rules applicable to antidumping and countervailing duty proceedings under title VII of the Act (19 U.S.C. 1671 *et seq.*), and also determinations regarding cheese subject to an in-quota rate of duty under section 702 of the Trade Agreements Act of 1979 (19 U.S.C. 1202 note). This part reflects statutory amendments made by titles I, II, and IV of the Uruguay Round Agreements Act, Pub. L. 103–465, which, in turn, implement into United States law the provisions of the following agreements annexed to the Agreement Establishing the World Trade Organization: Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; Agreement on Subsidies and Countervailing Measures; and Agreement on Agriculture.

(b) *Countervailing duty investigations involving imports not entitled to a material injury determination.* Under section 701(c) of the Act, certain provisions of the Act do not apply to countervailing duty proceedings involving imports from a country that is not a Subsidies Agreement country and is not entitled to a material injury determination by the Commission. Accordingly, certain provisions of this part referring to the Commission may not apply to such proceedings.

(c) *Application to governmental importations.* To the extent authorized by section 771(20) of the Act, merchandise imported by, or for the use of, a department or agency of the United States Government is subject to the imposition of countervailing duties or antidumping duties under this part.

§ 351.102 Definitions.

(a) *Introduction.* The Act contains many technical terms applicable to antidumping and countervailing duty proceedings. In the case of terms that are not defined in this section or other sections of this part, readers should refer to the relevant provisions of the Act. This section:

(1) Defines terms that appear in the Act but are not defined in the Act;

(2) Defines terms that appear in this Part but do not appear in the Act; and

(3) Elaborates on the meaning of certain terms that are defined in the Act.

(b) *Definitions.*

Act. ''Act'' means the Tariff Act of 1930, as amended.

Administrative review. ''Administrative review'' means a review under section 751(a)(1) of the Act.

Affiliated persons; affiliated parties. ''Affiliated persons'' and ''affiliated parties'' have the same meaning as in section 771(33) of the Act. In determining whether control over another person exists, within the meaning of section 771(33) of the Act, the Secretary will consider the following factors, among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. The Secretary will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control.

Aggregate basis. ''Aggregate basis'' means the calculation of a country-wide subsidy rate based principally on information provided by the foreign government.

Anniversary month. ''Anniversary month'' means the calendar month in which the anniversary of the date of publication of an order or suspension of investigation occurs.

APO. ''APO'' means an administrative protective order described in section 777(c)(1) of the Act.

Applicant. ''Applicant'' means a representative of an interested party that has applied for access to business proprietary information under an administrative protective order.

Article 4/Article 7 Review. ''Article 4/Article 7 review'' means a review under section 751(g)(2) of the Act.

Article 8 violation review. ''Article 8 violation review'' means a review under section 751(g)(1) of the Act.

Authorized applicant. ''Authorized applicant'' means an applicant that the Secretary has authorized to receive business proprietary information under an APO under section 777(c)(1) of the Act.

Changed circumstances review. ''Changed circumstances review'' means a review under section 751(b) of the Act.

Customs Service. ''Customs Service'' means the United States Customs Service of the United States Department of the Treasury.

Department. ''Department'' means the United States Department of Commerce.

Domestic interested party. ''Domestic interested party'' means an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 771(9) of the Act.

Expedited antidumping review. ''Expedited antidumping review'' means a review under section 736(c) of the Act.

Factual information. ''Factual information'' means:

(1) Initial and supplemental questionnaire responses;

(2) Data or statements of fact in support of allegations;

(3) Other data or statements of facts; and

(4) Documentary evidence.

Fair value. ''Fair value'' is a term used during an antidumping investigation, and is an estimate of normal value.

Importer. ''Importer'' means the person by whom, or for whose account, subject merchandise is imported.

Investigation. Under the Act and this Part, there is a distinction between an antidumping or countervailing duty *investigation* and a *proceeding.* An ''investigation'' is that segment of a proceeding that begins on the date of publication of notice of initiation of investigation and ends on the date of publication of the earliest of:

(1) Notice of termination of investigation,

(2) Notice of rescission of investigation,

(3) Notice of a negative determination that has the effect of terminating the proceeding, or

(4) An order.

New shipper review. ''New shipper review'' means a review under section 751(a)(2) of the Act.

Order. An ''order'' is an order issued by the Secretary under section 303, section 706, or section 736 of the Act or a finding under the Antidumping Act, 1921.

Ordinary course of trade. ''Ordinary course of trade'' has the same meaning as in section 771(15) of the Act. The Secretary may consider sales or transactions to be outside the ordinary course of trade if the Secretary determines, based on an evaluation of all of the circumstances particular to the sales in question, that such sales or transactions have characteristics that are extraordinary for the market in question. Examples of sales that the Secretary might consider as being outside the ordinary course of trade are sales or transactions involving off-quality merchandise or merchandise produced according to unusual product specifications, merchandise sold at aberrational prices or with abnormally high profits, merchandise sold pursuant to unusual terms of sale, or merchandise sold to an affiliated party at a non-arm's length price.

Party to the proceeding. ''Party to the proceeding'' means any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding. Participation in a prior segment of a proceeding will not confer on any interested party ''party to the proceeding'' status in a subsequent segment.

Person. ''Person'' includes any interested party as well as any other individual, enterprise, or entity, as appropriate.

Price adjustment. ''Price adjustment'' means any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments, that are reflected in the purchaser's net outlay.

Proceeding. A ''proceeding'' begins on the date of the filing of a petition under section 702(b) or section 732(b) of the Act or the publication of a notice of initiation in a self-initiated investigation under section 702(a) or section 732(a) of the Act, and ends on the date of publication of the earliest notice of:

(1) Dismissal of petition,

(2) Rescission of initiation,

(3) Termination of investigation,

(4) A negative determination that has the effect of terminating the proceeding,

(5) Revocation of an order, or

(6) Termination of a suspended investigation.

Rates. ''Rates'' means the individual weighted-average dumping margins, the individual countervailable subsidy rates, the country-wide subsidy rate, or the all-others rate, as applicable.

Respondent interested party. ''Respondent interested party'' means an interested party described in subparagraph (A) or (B) of section 771(9) of the Act.

Sale. A ''sale'' includes a contract to sell and a lease that is equivalent to a sale.

Secretary. ''Secretary'' means the Secretary of Commerce or a designee. The Secretary has delegated to the Assistant Secretary for Import Administration the authority to make determinations under title VII of the Act and this Part.

Section 753 review. ''Section 753 review'' means a review under section 753 of the Act.

Section 762 review. ''Section 762 review'' means a review under section 762 of the Act.

Segment of proceeding.

(1) *In general*. An antidumping or countervailing duty proceeding consists of one or more *segments*. ''Segment of a proceeding'' or ''segment of the proceeding'' refers to a portion of the proceeding that is reviewable under section 516A of the Act.

(2) *Examples*. An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

Sunset review. ''Sunset review'' means a review under section 751(c) of the Act.

Suspension of liquidation. ''Suspension of liquidation'' refers to a suspension of liquidation ordered by the Secretary under the authority of title VII of the Act, the provisions of this Part, or section 516a(g)(5)(C) of the Act, or by a court of the United States in a lawsuit involving action taken, or not taken, by the Secretary under title VII of the Act or the provisions of this Part.

Third country. For purposes of subpart D, ''third country'' means a country other than the exporting country and the United States. Under section 773(a) of the Act and subpart D, in certain circumstances the Secretary may determine normal value on the basis of sales to a third country.

URAA. ''URAA'' means the Uruguay Round Agreements Act.

§ 351.103 Central Records Unit.

(a) *In general*. Import Administration's Central Records Unit is located at Room B–099, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW., Washington, D.C. 20230. The office hours of the Central Records Unit are between 8:30 A.M. and 5:00 P.M. on business days. Among other things, the Central Records Unit is responsible for maintaining an official and public record for each antidumping and countervailing duty proceeding (*see* § 351.104), the Subsidies Library (*see* section 775(2) and section 777(a)(1) of the Act), and the service list for each proceeding (*see* paragraph (c) of this section).

(b) *Filing of documents with the Department*. While persons are free to provide Department officials with courtesy copies of documents, no document will be considered as having been received by the Secretary unless it is submitted to the Central Records Unit and is stamped by the Central Records Unit with the date and time of receipt.

(c) *Service list*. The Central Records Unit will maintain and make available a service list for each segment of a proceeding. Each interested party that asks to be included on the service list for a segment of a proceeding must designate a person to receive service of documents filed in that segment. The service list for an application for a scope ruling is described in § 351.225(n).

§ 351.104 Record of proceedings.

(a) *Official record*. (1) *In general*. The Secretary will maintain in the Central Records Unit an official record of each antidumping and countervailing duty proceeding. The Secretary will include in the official record all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding. The official record will include government memoranda pertaining to the proceeding, memoranda of *ex parte* meetings, determinations, notices published in the **Federal Register**, and transcripts of hearings. The official record will contain material that is public, business proprietary, privileged, and classified. For purposes of section 516A(b)(2) of the Act, the record is the official record of each segment of the proceeding.

(2) *Material returned*. (i) The Secretary, in making any determination under this part, will not use factual information, written argument, or other material that the Secretary returns to the submitter.

(ii) The official record will include a copy of a returned document, solely for purposes of establishing and documenting the basis for returning the document to the submitter, if the document was returned because:

(A) The document, although otherwise timely, contains untimely

filed new factual information (*see* § 351.301(b));

(B) The submitter made a nonconforming request for business proprietary treatment of factual information (*see* § 351.304);

(C) The Secretary denied a request for business proprietary treatment of factual information (*see* § 351.304);

(D) The submitter is unwilling to permit the disclosure of business proprietary information under APO (*see* § 351.304).

(iii) In no case will the official record include any document that the Secretary returns to the submitter as untimely filed, or any unsolicited questionnaire response unless the response is a voluntary response accepted under § 351.204(d) (*see* § 351.302(d)).

(b) *Public record*. The Secretary will maintain in the Central Records Unit a public record of each proceeding. The record will consist of all material contained in the official record (*see* paragraph (a) of this section) that the Secretary decides is public information under § 351.105(b), government memoranda or portions of memoranda that the Secretary decides may be disclosed to the general public, and public versions of all determinations, notices, and transcripts. The public record will be available to the public for inspection and copying in the Central Records Unit (*see* § 351.103). The Secretary will charge an appropriate fee for providing copies of documents.

(c) *Protection of records*. Unless ordered by the Secretary or required by law, no record or portion of a record will be removed from the Department.

§ 351.105 Public, business proprietary, privileged, and classified information.

(a) *Introduction*. There are four categories of information in an antidumping or countervailing duty proceeding: public, business proprietary, privileged, and classified. In general, public information is information that may be made available to the public, whereas business proprietary information may be disclosed (if at all) only to authorized applicants under an APO. Privileged and classified information may not be disclosed at all, even under an APO. This section describes the four categories of information.

(b) *Public information*. The Secretary normally will consider the following to be public information:

(1) Factual information of a type that has been published or otherwise made available to the public by the person submitting it;

(2) Factual information that is not designated as business proprietary by the person submitting it;

(3) Factual information that, although designated as business proprietary by the person submitting it, is in a form that cannot be associated with or otherwise used to identify activities of a particular person or that the Secretary determines is not properly designated as business proprietary;

(4) Publicly available laws, regulations, decrees, orders, and other official documents of a country, including English translations; and

(5) Written argument relating to the proceeding that is not designated as business proprietary.

(c) *Business proprietary information*. The Secretary normally will consider the following factual information to be business proprietary information, if so designated by the submitter:

(1) Business or trade secrets concerning the nature of a product or production process;

(2) Production costs (but not the identity of the production components unless a particular component is a trade secret);

(3) Distribution costs (but not channels of distribution);

(4) Terms of sale (but not terms of sale offered to the public);

(5) Prices of individual sales, likely sales, or other offers (but not components of prices, such as transportation, if based on published schedules, dates of sale, product descriptions (other than business or trade secrets described in paragraph (c)(1) of this section), or order numbers);

(6) Names of particular customers, distributors, or suppliers (but not destination of sale or designation of type of customer, distributor, or supplier, unless the destination or designation would reveal the name);

(7) In an antidumping proceeding, the exact amount of the dumping margin on individual sales;

(8) In a countervailing duty proceeding, the exact amount of the benefit applied for or received by a person from each of the programs under investigation or review (but not descriptions of the operations of the programs, or the amount if included in official public statements or documents or publications, or the *ad valorem* countervailable subsidy rate calculated for each person under a program);

(9) The names of particular persons from whom business proprietary information was obtained;

(10) The position of a domestic producer or workers regarding a petition; and

(11) Any other specific business information the release of which to the public would cause substantial harm to the competitive position of the submitter.

(d) *Privileged information*. The Secretary will consider information privileged if, based on principles of law concerning privileged information, the Secretary decides that the information should not be released to the public or to parties to the proceeding. Privileged information is exempt from disclosure to the public or to representatives of interested parties.

(e) *Classified information*. Classified information is information that is classified under Executive Order No. 12356 of April 2, 1982 (47 FR 14874 and 15557, 3 CFR 1982 Comp. p. 166) or successor executive order, if applicable. Classified information is exempt from disclosure to the public or to representatives of interested parties.

§ 351.106 De minimis net countervailable subsidies and weighted-average dumping margins disregarded.

(a) *Introduction*. Prior to the enactment of the URAA, the Department had a well-established and judicially sanctioned practice of disregarding net countervailable subsidies or weighted-average dumping margins that were *de minimis*. The URAA codified in the Act the particular *de minimis* standards to be used in antidumping and countervailing duty investigations. This section discussed the application of the *de minimis* standards in antidumping or countervailing duty proceedings.

(b) *Investigations*. (1) *In general*. In making a preliminary or final antidumping or countervailing duty determination in an investigation (*see* sections 703(b), 733(b), 705(a), and 735(a) of the Act), the Secretary will apply the *de minimis* standard set forth in section 703(b)(4) or section 733(b)(3) of the Act (whichever is applicable).

(2) *Transition rule*. (i) If:

(A) the Secretary resumes an investigation that has been suspended (*see* section 704(i)(1)(B) or section 734(i)(1)(B) of the Act); and

(B) the investigation was initiated before January 1, 1995, then

(ii) The Secretary will apply the *de minimis* standard in effect at the time that the investigation was initiated.

(c) *Reviews and other determinations*. (1) *In general*. In making any determination other than a preliminary or final antidumping or countervailing duty determination in an investigation (*see* paragraph (b) of this section), the Secretary will treat as *de minimis* any weighted-average dumping margin or countervailable subsidy rate that is less

than 0.5 percent *ad valorem*, or the equivalent specific rate.

(2) *Assessment of antidumping duties.* The Secretary will instruct the Customs Service to liquidate without regard to antidumping duties all entries of subject merchandise during the relevant period of review made by any person for which the Secretary calculates an assessment rate under § 351.212(b)(1) that is less than 0.5 percent *ad valorem*, or the equivalent specific rate.

§ 351.107 Cash deposit rates for nonproducing exporters; rates in antidumping proceedings involving a nonmarket economy country.

(a) *Introduction.* This section deals with the establishment of cash deposit rates in situations where the exporter is not the producer of subject merchandise, the selection of the appropriate cash deposit rate in situations where entry documents do not indicate the producer of subject merchandise, and the calculation of dumping margins in antidumping proceedings involving imports from a nonmarket economy country.

(b) *Cash deposit rates for nonproducing exporters.* (1) *Use of combination rates.* (i) *In general.* In the case of subject merchandise that is exported to the United States by a company that is not the producer of the merchandise, the Secretary may establish a ''combination'' cash deposit rate for each combination of the exporter and its supplying producer(s).

(ii) *Example.* A nonproducing exporter (Exporter A) exports to the United States subject merchandise produced by Producers X, Y, and Z. In such a situation, the Secretary may establish cash deposit rates for Exporter A/Producer X, Exporter A/Producer Y, and Exporter A/Producer Z.

(2) *New supplier.* In the case of subject merchandise that is exported to the United States by a company that is not the producer of the merchandise, if the Secretary has not established previously a combination cash deposit rate under paragraph (b)(1)(i) of this section for the exporter and producer in question or a noncombination rate for the exporter in question, the Secretary will apply the cash deposit rate established for the producer. If the Secretary has not previously established a cash deposit rate for the producer, the Secretary will apply the ''all-others rate'' described in section 705(c)(5) or section 735(c)(5) of the Act, as the case may be.

(c) *Producer not identified.* (1) *In general.* In situations where entry documents do not identify the producer of subject merchandise, if the Secretary has not established previously a noncombination rate for the exporter, the Secretary may instruct the Customs Service to apply as the cash deposit rate the higher of:

(i) the highest of any combination cash deposit rate established for the exporter under paragraph (b)(1)(i) of this section;

(ii) the highest cash deposit rate established for any producer other than a producer for which the Secretary established a combination rate involving the exporter in question under paragraph (b)(1)(i) of this section; or

(iii) the ''all-others rate'' described in section 705(c)(5) or section 735(c)(5) of the Act, as the case may be.

(d) *Rates in antidumping proceedings involving nonmarket economy countries.* In an antidumping proceeding involving imports from a nonmarket economy country, ''rates'' may consist of a single dumping margin applicable to all exporters and producers.

Subpart B—Antidumping and Countervailing Duty Procedures

§ 351.201 Self-initiation.

(a) *Introduction.* Antidumping and countervailing duty investigations may be initiated as the result of a petition filed by a domestic interested party or at the Secretary's own initiative. This section contains rules regarding the actions the Secretary will take when the Secretary self-initiates an investigation.

(b) *In general.* When the Secretary self-initiates an investigation under section 702(a) or section 732(a) of the Act, the Secretary will publish in the **Federal Register** notice of ''Initiation of Antidumping (Countervailing Duty) Investigation.'' In addition, the Secretary will notify the Commission at the time of initiation of the investigation, and will make available to employees of the Commission directly involved in the proceeding the information upon which the Secretary based the initiation and which the Commission may consider relevant to its injury determination.

(c) *Persistent dumping monitoring.* To the extent practicable, the Secretary will expedite any antidumping investigation initiated as the result of a monitoring program established under section 732(a)(2) of the Act.

§ 351.202 Petition requirements.

(a) *Introduction.* The Secretary normally initiates antidumping and countervailing duty investigations based on petitions filed by a domestic interested party. This section contains rules concerning the contents of a petition, filing requirements, notification of foreign governments, pre-initiation communications with the Secretary, and assistance to small businesses in preparing petitions. Petitioners are also advised to refer to the Commission's regulations concerning the contents of petitions, currently 19 CFR 207.11.

(b) *Contents of petition.* A petition requesting the imposition of antidumping or countervailing duties must contain the following, to the extent reasonably available to the petitioner:

(1) The name, address, and telephone number of the petitioner and any person the petitioner represents;

(2) The identity of the industry on behalf of which the petitioner is filing, including the names, addresses, and telephone numbers of all other known persons in the industry;

(3) Information relating to the degree of industry support for the petition, including:

(i) The total volume and value of U.S. production of the domestic like product; and

(ii) The volume and value of the domestic like product produced by the petitioner and each domestic producer identified;

(4) A statement indicating whether the petitioner has filed for relief from imports of the subject merchandise under section 337 of the Act (19 U.S.C. 1337, 1671a), sections 201 or 301 of the Trade Act of 1974 (19 U.S.C. 2251 or 2411), or section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862);

(5) A detailed description of the subject merchandise that defines the requested scope of the investigation, including the technical characteristics and uses of the merchandise and its current U.S. tariff classification number;

(6) The name of the country in which the subject merchandise is manufactured or produced and, if the merchandise is imported from a country other than the country of manufacture or production, the name of any intermediate country from which the merchandise is imported;

(7) (i) In the case of an antidumping proceeding:

(A) The names and addresses of each person the petitioner believes sells the subject merchandise at less than fair value and the proportion of total exports to the United States that each person accounted for during the most recent 12-month period (if numerous, provide information at least for persons that, based on publicly available information, individually accounted for two percent or more of the exports);

(B) All factual information (particularly documentary evidence)

relevant to the calculation of the export price and the constructed export price of the subject merchandise and the normal value of the foreign like product (if unable to furnish information on foreign sales or costs, provide information on production costs in the United States, adjusted to reflect production costs in the country of production of the subject merchandise);

(C) If the merchandise is from a country that the Secretary has found to be a nonmarket economy country, factual information relevant to the calculation of normal value, using a method described in § 351.408; or

(ii) In the case of a countervailing duty proceeding:

(A) The names and addresses of each person the petitioner believes benefits from a countervailable subsidy and exports the subject merchandise to the United States and the proportion of total exports to the United States that each person accounted for during the most recent 12-month period (if numerous, provide information at least for persons that, based on publicly available information, individually accounted for two percent or more of the exports);

(B) The alleged countervailable subsidy and factual information (particularly documentary evidence) relevant to the alleged countervailable subsidy, including any law, regulation, or decree under which it is provided, the manner in which it is paid, and the value of the subsidy to exporters or producers of the subject merchandise;

(C) If the petitioner alleges an upstream subsidy under section 771A of the Act, factual information regarding:

(1) Countervailable subsidies, other than an export subsidy, that an authority of the affected country provides to the upstream supplier;

(2) The competitive benefit the countervailable subsidies bestow on the subject merchandise; and

(3) The significant effect the countervailable subsidies have on the cost of producing the subject merchandise;

(8) The volume and value of the subject merchandise imported during the most recent two-year period and any other recent period that the petitioner believes to be more representative or, if the subject merchandise was not imported during the two-year period, information as to the likelihood of its sale for importation;

(9) The name, address, and telephone number of each person the petitioner believes imports or, if there were no importations, is likely to import the subject merchandise;

(10) Factual information regarding material injury, threat of material injury, or material retardation, and causation;

(11) If the petitioner alleges ''critical circumstances'' under section 703(e)(1) or section 733(e)(1) of the Act and § 351.206, factual information regarding:

(i) Whether imports of the subject merchandise are likely to undermine seriously the remedial effect of any order issued under section 706(a) or section 736(a) of the Act;

(ii) Massive imports of the subject merchandise in a relatively short period; and

(iii) (A) In an antidumping proceeding, either:

(*1*) A history of dumping; or

(*2*) The importer's knowledge that the exporter was selling the subject merchandise at less than its fair value, and that there would be material injury by reason of such sales; or

(B) In a countervailing duty proceeding, whether the countervailable subsidy is inconsistent with the Subsidies Agreement; and

(12) Any other factual information on which the petitioner relies.

(c) *Simultaneous filing and certification*. The petitioner must file a copy of the petition with the Commission and the Secretary on the same day and so certify in submitting the petition to the Secretary. Factual information in the petition must be certified, as provided in § 351.303(g). Other filing requirements are set forth in § 351.303.

(d) *Business proprietary status of information*. The Secretary will treat as business proprietary any factual information for which the petitioner requests business proprietary treatment and which meets the requirements of § 351.304.

(e) *Amendment of petition*. The Secretary may allow timely amendment of the petition. The petitioner must file an amendment with the Commission and the Secretary on the same day and so certify in submitting the amendment to the Secretary. If the amendment consists of new allegations, the timeliness of the new allegations will be governed by § 351.301.

(f) *Notification of representative of the exporting country*. Upon receipt of a petition, the Secretary will deliver a public version of the petition (*see* § 351.304(c)) to a representative in Washington, DC, of the government of any exporting country named in the petition.

(g) *Petition based upon derogation of an international undertaking on official export credits*. In the case of a petition described in section 702(b)(3) of the Act, the petitioner must file a copy of the petition with the Secretary of the Treasury, as well as with the Secretary and the Commission, and must so certify in submitting the petition to the Secretary.

(h) *Assistance to small businesses; additional information*. (1) The Secretary will provide technical assistance to eligible small businesses, as defined in section 339 of the Act, to enable them to prepare and file petitions. The Secretary may deny assistance if the Secretary concludes that the petition, if filed, could not satisfy the requirements of section 702(c)(1)(A) or section 732(c)(1)(A) of the Act (whichever is applicable) (*see* § 351.203).

(2) For additional information concerning petitions, contact the Director for Policy and Analysis, Import Administration, International Trade Administration, Room 3093, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW, Washington, DC 20230; (202) 482–1768.

(i) *Pre-initiation communications*. (1) *In general*. During the period before the Secretary's decision whether to initiate an investigation, the Secretary will not consider the filing of a notice of appearance to constitute a communication for purposes of section 702(b)(4)(B) or section 732(b)(3)(B) of the Act.

(2) *Consultations with foreign governments in countervailing duty proceedings*. In a countervailing duty proceeding, the Secretary will invite the government of any exporting country named in the petition for consultations with respect to the petition. (The information collection requirements in paragraph (a) of this section have been approved by the Office of Management and Budget under control number 0625–0105.)

§ 351.203 Determination of sufficiency of petition.

(a) *Introduction*. When a petition is filed under § 351.202, the Secretary must determine that the petition satisfies the relevant statutory requirements before initiating an antidumping or countervailing duty investigation. This section sets forth rules regarding a determination as to the sufficiency of a petition (including the determination that a petition is supported by the domestic industry), the deadline for making the determination, and the actions to be taken once the Secretary has made the determination.

(b) *Determination of sufficiency*. (1) *In general*. Normally, not later than 20 days after a petition is filed, the Secretary, on the basis of sources readily

available to the Secretary, will examine the accuracy and adequacy of the evidence provided in the petition and determine whether to initiate an investigation under section 702(c)(1)(A) or section 732(c)(1)(A) of the Act (whichever is applicable).

(2) *Extension where polling required*. If the Secretary is required to poll or otherwise determine support for the petition under section 702(c)(4)(D) or section 732(c)(4)(D) of the Act, the Secretary may, in exceptional circumstances, extend the 20-day period by the amount of time necessary to collect and analyze the required information. In no case will the period between the filing of a petition and the determination whether to initiate an investigation exceed 40 days.

(c) *Notice of initiation and distribution of petition*. (1) *Notice of initiation*. If the initiation determination of the Secretary under section 702(c)(1)(A) or section 732(c)(1)(A) of the Act is affirmative, the Secretary will initiate an investigation and publish in the **Federal Register** notice of ''Initiation of Antidumping (Countervailing Duty) Investigation.'' The Secretary will notify the Commission at the time of initiation of the investigation and will make available to employees of the Commission directly involved in the proceeding the information upon which the Secretary based the initiation and which the Commission may consider relevant to its injury determinations.

(2) *Distribution of petition*. As soon as practicable after initiation of an investigation, the Secretary will provide a public version of the petition to all known exporters (including producers who sell for export to the United States) of the subject merchandise. If the Secretary determines that there is a particularly large number of exporters involved, instead of providing the public version to all known exporters, the Secretary may provide the public version to a trade association of the exporters or, alternatively, may consider the requirement of the preceding sentence to have been satisfied by the delivery of a public version of the petition to the government of the exporting country under § 351.202(f).

(d) *Insufficiency of petition*. If an initiation determination of the Secretary under section 702(c)(1)(A) or section 732(c)(1)(A) of the Act is negative, the Secretary will dismiss the petition, terminate the proceeding, notify the petitioner in writing of the reasons for the determination, and publish in the **Federal Register** notice of ''Dismissal of Antidumping (Countervailing Duty) Petition.''

(e) *Determination of industry support*. In determining industry support for a petition under section 702(c)(4) or section 732(c)(4) of the Act, the following rules will apply:

(1) *Measuring production*. The Secretary normally will measure production over a twelve-month period specified by the Secretary, and may measure production based on either value or volume. Where a party to the proceeding establishes that production data for the relevant period, as specified by the Secretary, is unavailable, production levels may be established by reference to alternative data that the Secretary determines to be indicative of production levels.

(2) *Positions treated as business proprietary information*. Upon request, the Secretary may treat the position of a domestic producer or workers regarding the petition and any production information supplied by the producer or workers as business proprietary information under § 351.105(c)(10).

(3) *Positions expressed by workers*. The Secretary will consider the positions of workers and management regarding the petition to be of equal weight. The Secretary will assign a single weight to the positions of both workers and management according to the production of the domestic like product of the firm in which the workers and management are employed. If the management of a firm expresses a position in direct opposition to the position of the workers in that firm, the Secretary will treat the production of that firm as representing neither support for, nor opposition to, the petition.

(4) *Certain positions disregarded*. (i) The Secretary will disregard the position of a domestic producer that opposes the petition if such producer is related to a foreign producer or to a foreign exporter under section 771(4)(B)(ii) of the Act, unless such domestic producer demonstrates to the Secretary's satisfaction that its interests as a domestic producer would be adversely affected by the imposition of an antidumping order or a countervailing duty order, as the case may be; and

(ii) The Secretary may disregard the position of a domestic producer that is an importer of the subject merchandise, or that is related to such an importer, under section 771(4)(B)(ii) of the Act.

(5) *Polling the industry*. In conducting a poll of the industry under section 702(c)(4)(D)(i) or section 732(c)(4)(D)(i) of the Act, the Secretary will include unions, groups of workers, and trade or business associations described in paragraphs (9)(D) and (9)(E) of section 771 of the Act.

(f) *Time limits where petition involves same merchandise as that covered by an order that has been revoked*. Under section 702(c)(1)(C) or section 732(c)(1)(C) of the Act, and in expediting an investigation involving subject merchandise for which a prior order was revoked or a suspended investigation was terminated, the Secretary will consider ''section 751(d)'' as including a predecessor provision.

§ 351.204 Time periods and persons examined; voluntary respondents; exclusions.

(a) *Introduction*. Because the Act does not specify the precise period of time that the Secretary should examine in an antidumping or countervailing duty investigation, this section sets forth rules regarding the period of investigation (''POI''). In addition, this section includes rules regarding the selection of persons to be examined, the treatment of voluntary respondents that are not selected for individual examination, and the exclusion of persons that the Secretary ultimately finds are not dumping or are not receiving countervailable subsidies.

(b) *Period of investigation*. (1) *Antidumping investigation*. In an antidumping investigation, the Secretary normally will examine merchandise sold during the four most recently completed fiscal quarters (or, in an investigation involving merchandise imported from a nonmarket economy country, the two most recently completed fiscal quarters) as of the month preceding the month in which the petition was filed or in which the Secretary self-initiated an investigation. However, the Secretary may examine merchandise sold during any additional or alternate period that the Secretary concludes is appropriate.

(2) *Countervailing duty investigation*. In a countervailing duty investigation, the Secretary normally will rely on information pertaining to the most recently completed fiscal year for the government and exporters or producers in question. If the exporters or producers have different fiscal years, the Secretary normally will rely on information pertaining to the most recently completed calendar year. If the investigation is conducted on an aggregate basis under section 777A(e)(2)(B) of the Act, the Secretary normally will rely on information pertaining to the most recently completed fiscal year for the government in question. However, the Secretary may rely on information for

any additional or alternate period that the Secretary concludes is appropriate.

(c) *Exporters and producers examined.* (1) *In general.* In an investigation, the Secretary will attempt to determine an individual weighted-average dumping margin or individual countervailable subsidy rate for each known exporter or producer of the subject merchandise. However, the Secretary may decline to examine a particular exporter or producer if that exporter or producer and the petitioner agree.

(2) *Limited investigation.* Notwithstanding paragraph (c)(1) of this section, the Secretary may limit the investigation by using a method described in subsection (a), (c), or (e) of section 777A of the Act.

(d) *Voluntary respondents.* (1) *In general.* If the Secretary limits the number of exporters or producers to be individually examined under section 777A(c)(2) or section 777A(e)(2)(A) of the Act, the Secretary will examine voluntary respondents (exporters or producers, other than those initially selected for individual examination) in accordance with section 782(a) of the Act.

(2) *Acceptance of voluntary respondents.* The Secretary will determine, as soon as practicable, whether to examine a voluntary respondent individually. A voluntary respondent accepted for individual examination under subparagraph (d)(1) of this section will be subject to the same requirements as an exporter or producer initially selected by the Secretary for individual examination under section 777A(c)(2) or section 777A(e)(2)(A) of the Act, including the requirements of section 782(a) of the Act and, where applicable, the use of the facts available under section 776 of the Act and § 351.308.

(3) *Exclusion of voluntary respondents' rates from all-others rate.* In calculating an all-others rate under section 705(c)(5) or section 735(c)(5) of the Act, the Secretary will exclude weighted-average dumping margins or countervailable subsidy rates calculated for voluntary respondents.

(e) *Exclusions.* (1) *In general.* The Secretary will exclude from an affirmative final determination under section 705(a) or section 735(a) of the Act or an order under section 706(a) or section 736(a) of the Act, any exporter or producer for which the Secretary determines an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or *de minimis.*

(2) *Preliminary determinations.* In an affirmative preliminary determination under section 703(b) or section 733(b) of the Act, an exporter or producer for which the Secretary preliminarily determines an individual weighted-average dumping margin or individual net countervailable subsidy of zero or *de minimis* will not be excluded from the preliminary determination or the investigation. However, the exporter or producer will not be subject to provisional measures under section 703(d) or section 733(d) of the Act.

(3) *Exclusion of nonproducing exporter.* (i) *In general.* In the case of an exporter that is not the producer of subject merchandise, the Secretary normally will limit an exclusion of the exporter to subject merchandise of those producers that supplied the exporter during the period of investigation.

(ii) *Example.* During the period of investigation, Exporter A exports to the United States subject merchandise produced by Producer X. Based on an examination of Exporter A, the Secretary determines that the dumping margins with respect to these exports are *de minimis*, and the Secretary excludes Exporter A. Normally, the exclusion of Exporter A would be limited to subject merchandise produced by Producer X. If Exporter A began to export subject merchandise produced by Producer Y, this merchandise would be subject to the antidumping duty order, if any.

(4) *Countervailing duty investigations conducted on an aggregate basis and requests for exclusion from countervailing duty order.* Where the Secretary conducts a countervailing duty investigation on an aggregate basis under section 777A(e)(2)(B) of the Act, the Secretary will consider and investigate requests for exclusion to the extent practicable. An exporter or producer that desires exclusion from an order must submit:

(i) A certification by the exporter or producer that it received zero or *de minimis* net countervailable subsidies during the period of investigation;

(ii) If the exporter or producer received a countervailable subsidy, calculations demonstrating that the amount of net countervailable subsidies received was *de minimis* during the period of investigation;

(iii) If the exporter is not the producer of the subject merchandise, certifications from the suppliers and producers of the subject merchandise that those persons received zero or *de minimis* net countervailable subsidies during the period of the investigation; and

(iv) A certification from the government of the affected country that the government did not provide the exporter (or the exporter's supplier) or producer with more than *de minimis* net countervailable subsidies during the period of investigation.

§ 351.205 Preliminary determination.

(a) *Introduction.* A preliminary determination in an antidumping or countervailing duty investigation constitutes the first point at which the Secretary may provide a remedy if the Secretary preliminarily finds that dumping or countervailable subsidization has occurred. The remedy (sometimes referred to as ''provisional measures'') usually takes the form of a bonding requirement to ensure payment if antidumping or countervailing duties ultimately are imposed. Whether the Secretary's preliminary determination is affirmative or negative, the investigation continues. This section contains rules regarding deadlines for preliminary determinations, postponement of preliminary determinations, notices of preliminary determinations, and the effects of affirmative preliminary determinations.

(b) *Deadline for preliminary determination.* The deadline for a preliminary determination under section 703(b) or section 733(b) of the Act will be:

(1) Normally not later than 140 days in an antidumping investigation (65 days in a countervailing duty investigation) after the date on which the Secretary initiated the investigation (*see* section 703(b)(1) or section 733(b)(1)(A) of the Act);

(2) Not later than 190 days in an antidumping investigation (130 days in a countervailing duty investigation) after the date on which the Secretary initiated the investigation if the Secretary postpones the preliminary determination at petitioner's request or because the Secretary determines that the investigation is extraordinarily complicated (*see* section 703(c)(1) or section 733(c)(1) of the Act);

(3) In a countervailing duty investigation, not later than 250 days after the date on which the proceeding began if the Secretary postpones the preliminary determination due to an upstream subsidy allegation (up to 310 days if the Secretary also postponed the preliminary determination at the request of the petitioner or because the Secretary determined that the investigation is extraordinarily complicated) (*see* section 703(c)(1) and section 703(g)(1) of the Act);

(4) Within 90 days after initiation in an antidumping investigation, and on an expedited basis in a countervailing duty investigation, where verification has

been waived (*see* section 703(b)(3) or section 733(b)(2) of the Act);

(5) In a countervailing duty investigation, on an expedited basis and within 65 days after the date on which the Secretary initiated the investigation if the sole subsidy alleged in the petition was the derogation of an international undertaking on official export credits (*see* section 702(b)(3) and section 703(b)(2) of the Act);

(6) In a countervailing duty investigation, not later than 60 days after the date on which the Secretary initiated the investigation if the only subsidy under investigation is a subsidy with respect to which the Secretary received notice from the United States Trade Representative of a violation of Article 8 of the Subsidies Agreement (*see* section 703(b)(5) of the Act); and

(7) In an antidumping investigation, within the deadlines set forth in section 733(b)(1)(B) of the Act if the investigation involves short life cycle merchandise (*see* section 733(b)(1)(B) and section 739 of the Act).

(c) *Contents of preliminary determination and publication of notice.* A preliminary determination will include a preliminary finding on critical circumstances, if appropriate, under section 703(e)(1) or section 733(e)(1) of the Act (whichever is applicable). The Secretary will publish in the **Federal Register** notice of ''Affirmative (Negative) Preliminary Antidumping (Countervailing Duty) Determination,'' including the rates, if any, and an invitation for argument consistent with § 351.309.

(d) *Effect of affirmative preliminary determination.* If the preliminary determination is affirmative, the Secretary will take the actions described in section 703(d) or section 733(d) of the Act (whichever is applicable). In making information available to the Commission under section 703(d)(3) or section 733(d)(3) of the Act, the Secretary will make available to the Commission and to employees of the Commission directly involved in the proceeding the information upon which the Secretary based the preliminary determination and which the Commission may consider relevant to its injury determination.

(e) *Postponement at the request of the petitioner.* A petitioner must submit a request for postponement of the preliminary determination (*see* section 703(c)(1)(A) or section 733(c)(1)(A) of the Act) 25 days or more before the scheduled date of the preliminary determination, and must state the reasons for the request. The Secretary will grant the request, unless the Secretary finds compelling reasons to deny the request.

(f) *Notice of postponement.* (1) If the Secretary decides to postpone the preliminary determination at the request of the petitioner or because the investigation is extraordinarily complicated, the Secretary will notify all parties to the proceeding not later than 20 days before the scheduled date of the preliminary determination, and will publish in the **Federal Register** notice of ''Postponement of Preliminary Antidumping (Countervailing Duty) Determination,'' stating the reasons for the postponement (*see* section 703(c)(2) or section 733(c)(2) of the Act).

(2) If the Secretary decides to postpone the preliminary determination due to an allegation of upstream subsidies, the Secretary will notify all parties to the proceeding not later than the scheduled date of the preliminary determination and will publish in the **Federal Register** notice of ''Postponement of Preliminary Countervailing Duty Determination,'' stating the reasons for the postponement.

§ 351.206 Critical circumstances.

(a) *Introduction.* Generally, antidumping or countervailing duties are imposed on entries of merchandise made on or after the date on which the Secretary first imposes provisional measures (most often the date on which notice of an affirmative preliminary determination is published in the **Federal Register**). However, if the Secretary finds that ''critical circumstances'' exist, duties may be imposed retroactively on merchandise entered up to 90 days before the imposition of provisional measures. This section contains procedural and substantive rules regarding allegations and findings of critical circumstances.

(b) *In general.* If a petitioner submits to the Secretary a written allegation of critical circumstances, with reasonably available factual information supporting the allegation, 21 days or more before the scheduled date of the Secretary's final determination, or on the Secretary's own initiative in a self-initiated investigation, the Secretary will make a finding whether critical circumstances exist, as defined in section 705(a)(2) or section 735(a)(3) of the Act (whichever is applicable).

(c) *Preliminary finding.* (1) If the petitioner submits an allegation of critical circumstances 30 days or more before the scheduled date of the Secretary's final determination, the Secretary, based on the available information, will make a preliminary finding whether there is a reasonable basis to believe or suspect that critical circumstances exist, as defined in section 703(e)(1) or section 733(e)(1) of the Act (whichever is applicable).

(2) The Secretary will issue the preliminary finding:

(i) Not later than the preliminary determination, if the allegation is submitted 20 days or more before the scheduled date of the preliminary determination; or

(ii) Within 30 days after the petitioner submits the allegation, if the allegation is submitted later than 20 days before the scheduled date of the preliminary determination. The Secretary will notify the Commission and publish in the **Federal Register** notice of the preliminary finding.

(d) *Suspension of liquidation.* If the Secretary makes an affirmative preliminary finding of critical circumstances, the provisions of section 703(e)(2) or section 733(e)(2) of the Act (whichever is applicable) regarding the retroactive suspension of liquidation will apply.

(e) *Final finding.* For any allegation of critical circumstances submitted 21 days or more before the scheduled date of the Secretary's final determination, the Secretary will make a final finding on critical circumstances, and will take appropriate action under section 705(c)(4) or section 735(c)(4) of the Act (whichever is applicable).

(f) *Findings in self-initiated investigations.* In a self-initiated investigation, the Secretary will make preliminary and final findings on critical circumstances without regard to the time limits in paragraphs (c) and (e) of this section.

(g) *Information regarding critical circumstances.* The Secretary may request the Commissioner of Customs to compile information on an expedited basis regarding entries of the subject merchandise if, at any time after the initiation of an investigation, the Secretary makes the findings described in section 702(e) or section 732(e) of the Act (whichever is applicable) regarding the possible existence of critical circumstances.

(h) *Massive imports.* (1) In determining whether imports of the subject merchandise have been massive under section 705(a)(2)(B) or section 735(a)(3)(B) of the Act, the Secretary normally will examine:

(i) The volume and value of the imports;

(ii) Seasonal trends; and

(iii) The share of domestic consumption accounted for by the imports.

(2) In general, unless the imports during the ''relatively short period'' (*see*

paragraph (i) of this section) have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports massive.

(i) *Relatively short period.* Under section 705(a)(2)(B) or section 735(a)(3)(B) of the Act, the Secretary normally will consider a ''relatively short period'' as the period beginning on the date the proceeding begins and ending at least three months later. However, if the Secretary finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, then the Secretary may consider a period of not less than three months from that earlier time.

§ 351.207 Termination of investigation.

(a) *Introduction.* ''Termination'' is a term of art that refers to the end of an antidumping or countervailing duty proceeding in which an order has not yet been issued. The Act establishes a variety of mechanisms by which an investigation may be terminated, most of which are dealt with in this section. For rules regarding the termination of a suspended investigation following a review under section 751 of the Act, *see* § 351.222.

(b) *Withdrawal of petition; self-initiated investigations.* (1) *In general.* The Secretary may terminate an investigation under section 704(a)(1)(A) or section 734(a)(1)(A) (withdrawal of petition) or under section 704(k) or section 734(k) (self-initiated investigation) of the Act, provided that the Secretary concludes that termination is in the public interest. If the Secretary terminates an investigation, the Secretary will publish in the **Federal Register** notice of ''Termination of Antidumping (Countervailing Duty) Investigation,'' together with, when appropriate, a copy of any correspondence with the petitioner forming the basis of the withdrawal and the termination. (For the treatment in a subsequent investigation of records compiled in an investigation in which the petition was withdrawn, *see* section 704(a)(1)(B) or section 734(a)(1)(B) of the Act.)

(2) *Withdrawal of petition based on acceptance of quantitative restriction agreements.* In addition to the requirements of paragraph (b)(1) of this section, if a termination is based on the acceptance of an understanding or other kind of agreement to limit the volume of imports into the United States of the subject merchandise, the Secretary will apply the provisions of section 704(a)(2) or section 734(a)(2) of the Act (whichever is applicable) regarding public interest and consultations with consuming industries and producers and workers.

(c) *Lack of interest.* The Secretary may terminate an investigation based upon lack of interest (*see* section 782(h)(1) of the Act). Where the Secretary terminates an investigation under this paragraph, the Secretary will publish the notice described in paragraph (b)(1) of this section.

(d) *Negative determination.* An investigation terminates automatically upon publication in the **Federal Register** of the Secretary's negative final determination or the Commission's negative preliminary or final determination.

(e) *End of suspension of liquidation.* When an investigation terminates, if the Secretary previously ordered suspension of liquidation, the Secretary will order the suspension ended on the date of publication of the notice of termination referred to in paragraph (b) of this section or on the date of publication of a negative determination referred to in paragraph (d) of this section, and will instruct the Customs Service to release any cash deposit or bond.

§ 351.208 Suspension of investigation.

(a) *Introduction.* In addition to the imposition of duties, the Act also permits the Secretary to suspend an antidumping or countervailing duty investigation by accepting a suspension agreement (referred to in the WTO Agreements as an ''undertaking''). Briefly, in a suspension agreement, the exporters and producers or the foreign government agree to modify their behavior so as to eliminate dumping or subsidization or the injury caused thereby. If the Secretary accepts a suspension agreement, the Secretary will ''suspend'' the investigation and thereafter will monitor compliance with the agreement. This section contains rules for entering into suspension agreements and procedures for suspending an investigation.

(b) *In general.* The Secretary may suspend an investigation under section 704 or section 734 of the Act and this section.

(c) *Definition of ''substantially all.''* Under section 704 and section 734 of the Act, exporters that account for ''substantially all'' of the merchandise means exporters and producers that have accounted for not less than 85 percent by value or volume of the subject merchandise during the period for which the Secretary is measuring dumping or countervailable subsidization in the investigation or such other period that the Secretary considers representative.

(d) *Monitoring.* In monitoring a suspension agreement under section 704(c), section 734(c), or section 734(l) of the Act (agreements to eliminate injurious effects or to restrict the volume of imports), the Secretary will not be obliged to ascertain on a continuing basis the prices in the United States of the subject merchandise or of domestic like products.

(e) *Exports not to increase during interim period.* The Secretary will not accept a suspension agreement under section 704(b)(2) or section 734(b)(1) of the Act (the cessation of exports) unless the agreement ensures that the quantity of the subject merchandise exported during the interim period set forth in the agreement does not exceed the quantity of the merchandise exported during a period of comparable duration that the Secretary considers representative.

(f) *Procedure for suspension of investigation.* (1) *Submission of proposed suspension agreement.* (i) *In general.* As appropriate, the exporters and producers or, in an antidumping investigation involving a nonmarket economy country or a countervailing duty investigation, the government, must submit to the Secretary a proposed suspension agreement within:

(A) In an antidumping investigation, 15 days after the date of issuance of the preliminary determination, or

(B) In a countervailing duty investigation, 7 days after the date of issuance of the preliminary determination.

(ii) *Postponement of final determination.* Where a proposed suspension agreement is submitted in an antidumping investigation, an exporter or producer or, in an investigation involving a nonmarket economy country, the government, may request postponement of the final determination under section 735(a)(2) of the Act (*see* § 351.210(e)). Where the final determination in a countervailing duty investigation is postponed under section 703(g)(2) or section 705(a)(1) of the Act (*see* § 351.210(b)(3) and § 351.210(i)), the time limits in paragraphs (f)(1)(i), (f)(2)(i), (f)(3), and (g)(1) of this section applicable to countervailing duty investigations will be extended to coincide with the time limits in such paragraphs applicable to antidumping investigations.

(iii) *Special rule for regional industry determination.* If the Commission makes a regional industry determination in its final affirmative determination under

section 705(b) or section 735(b) of the Act but not in its preliminary affirmative determination under section 703(a) or section 733(a) of the Act, the exporters and producers or, in an antidumping investigation involving a nonmarket economy country or a countervailing duty investigation, the government, must submit to the Secretary any proposed suspension agreement within 15 days of the publication in the **Federal Register** of the antidumping or countervailing duty order.

(2) *Notification and consultation.* In fulfilling the requirements of section 704 or section 734 of the Act (whichever is applicable), the Secretary will take the following actions:

(i) *In general.* The Secretary will notify all parties to the proceeding of the proposed suspension of an investigation and provide to the petitioner a copy of the suspension agreement preliminarily accepted by the Secretary (the agreement must contain the procedures for monitoring compliance and a statement of the compatibility of the agreement with the requirements of section 704 or section 734 of the Act) within:

(A) In an antidumping investigation, 30 days after the date of issuance of the preliminary determination, or

(B) In a countervailing duty investigation, 15 days after the date of issuance of the preliminary determination; or

(ii) *Special rule for regional industry determination.* If the Commission makes a regional industry determination in its final affirmative determination under section 705(b) or section 735(b) of the Act but not in its preliminary affirmative determination under section 703(a) or section 733(a) of the Act, the Secretary, within 15 days of the submission of a proposed suspension agreement under paragraph (f)(1)(iii) of this section, will notify all parties to the proceeding of the proposed suspension agreement and provide to the petitioner a copy of the agreement preliminarily accepted by the Secretary (such agreement must contain the procedures for monitoring compliance and a statement of the compatibility of the agreement with the requirements of section 704 or section 734 of the Act); and

(iii) *Consultation.* The Secretary will consult with the petitioner concerning the proposed suspension of the investigation.

(3) *Opportunity for comment.* The Secretary will provide all interested parties, an industrial user of the subject merchandise or a representative consumer organization, as described in section 777(h) of the Act, and United States government agencies an opportunity to submit written argument and factual information concerning the proposed suspension of the investigation within:

(i) In an antidumping investigation, 50 days after the date of issuance of the preliminary determination,

(ii) In a countervailing duty investigation, 35 days after the date of issuance of the preliminary determination, or

(iii) In a regional industry case described in paragraph (f)(1)(iii) of this section, 35 days after the date of issuance of an order.

(g) *Acceptance of suspension agreement.* (1) The Secretary may accept an agreement to suspend an investigation within:

(i) In an antidumping investigation, 60 days after the date of issuance of the preliminary determination,

(ii) In a countervailing duty investigation, 45 days after the date of issuance of the preliminary determination, or

(iii) In a regional industry case described in paragraph (f)(1)(iii) of this section, 45 days after the date of issuance of an order.

(2) If the Secretary accepts an agreement to suspend an investigation, the Secretary will take the actions described in section 704(f), section 704(m)(3), section 734(f), or section 734(l)(3) of the Act (whichever is applicable), and will publish in the **Federal Register** notice of ''Suspension of Antidumping (Countervailing Duty) Investigation,'' including the text of the agreement. If the Secretary has not already published notice of an affirmative preliminary determination, the Secretary will include that notice. In accepting an agreement, the Secretary may rely on factual or legal conclusions the Secretary reached in or after the affirmative preliminary determination.

(h) *Continuation of investigation.* (1) A request to the Secretary under section 704(g) or section 734(g) of the Act for the continuation of the investigation must be made in writing. In addition, the request must be simultaneously filed with the Commission, and the requester must so certify in submitting the request to the Secretary.

(2) If the Secretary and the Commission make affirmative final determinations in an investigation that has been continued, the suspension agreement will remain in effect in accordance with the factual and legal conclusions in the Secretary's final determination. If either the Secretary or the Commission makes a negative final determination, the agreement will have no force or effect.

(i) *Merchandise imported in excess of allowed quantity.* (1) The Secretary may instruct the Customs Service not to accept entries, or withdrawals from warehouse, for consumption of subject merchandise in excess of any quantity allowed by a suspension agreement under section 704 or section 734 of the Act, including any quantity allowed during the interim period (*see* paragraph (e) of this section).

(2) Imports in excess of the quantity allowed by a suspension agreement, including any quantity allowed during the interim period (*see* paragraph (e) of this section), may be exported or destroyed under Customs Service supervision, except that if the agreement is under section 704(c)(3) or section 734(l) of the Act (restrictions on the volume of imports), the excess merchandise, with the approval of the Secretary, may be held for future opening under the agreement by placing it in a foreign trade zone or by entering it for warehouse.

§ 351.209 Violation of suspension agreement.

(a) *Introduction.* A suspension agreement remains in effect until the underlying investigation is terminated (*see* §§ 351.207 and 351.222). However, if the Secretary finds that a suspension agreement has been violated or no longer meets the requirements of the Act, the Secretary may either cancel or revise the agreement. This section contains rules regarding cancellation and revision of suspension agreements.

(b) *Immediate determination.* If the Secretary determines that a signatory has violated a suspension agreement, the Secretary, without providing interested parties an opportunity to comment, will:

(1) Order the suspension of liquidation in accordance with section 704(i)(1)(A) or section 734(i)(1)(A) of the Act (whichever is applicable) of all entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the later of:

(i) 90 days before the date of publication of the notice of cancellation of the agreement; or

(ii) The date of first entry, or withdrawal from warehouse, for consumption of the merchandise the sale or export of which was in violation of the agreement;

(2) If the investigation was not completed under section 704(g) or section 734(g) of the Act, resume the investigation as if the Secretary had made an affirmative preliminary determination on the date of publication

of the notice of cancellation and impose provisional measures by instructing the Customs Service to require for each entry of the subject merchandise suspended under paragraph (b)(1) of this section a cash deposit or bond at the rates determined in the affirmative preliminary determination;

(3) If the investigation was completed under section 704(g) or section 734(g) of the Act, issue an antidumping order or countervailing duty order (whichever is applicable) and, for all entries subject to suspension of liquidation under paragraph (b)(1) of this section, instruct the Customs Service to require for each entry of the merchandise suspended under this paragraph a cash deposit at the rates determined in the affirmative final determination;

(4) Notify all persons who are or were parties to the proceeding, the Commission, and, if the Secretary determines that the violation was intentional, the Commissioner of Customs; and

(5) Publish in the **Federal Register** notice of ''Antidumping (Countervailing Duty) Order (Resumption of Antidumping (Countervailing Duty) Investigation); Cancellation of Suspension Agreement.''

(c) *Determination after notice and comment.* (1) If the Secretary has reason to believe that a signatory has violated a suspension agreement, or that an agreement no longer meets the requirements of section 704(d)(1) or section 734(d) of the Act, but the Secretary does not have sufficient information to determine that a signatory has violated the agreement (*see* paragraph (b) of this section), the Secretary will publish in the **Federal Register** notice of ''Invitation for Comment on Antidumping (Countervailing Duty) Suspension Agreement.''

(2) After publication of the notice inviting comment and after consideration of comments received the Secretary will:

(i) Determine whether any signatory has violated the suspension agreement; or

(ii) Determine whether the suspension agreement no longer meets the requirements of section 704(d)(1) or section 734(d) of the Act.

(3) If the Secretary determines that a signatory has violated the suspension agreement, the Secretary will take appropriate action as described in paragraphs (b)(1) through (b)(5) of this section.

(4) If the Secretary determines that a suspension agreement no longer meets the requirements of section 704(d)(1) or section 734(d) of the Act, the Secretary will:

(i) Take appropriate action as described in paragraphs (b)(1) through (b)(5) of this section; except that, under paragraph (b)(1)(ii) of this section, the Secretary will order the suspension of liquidation of all entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the later of:

(A) 90 days before the date of publication of the notice of suspension of liquidation; or

(B) The date of first entry, or withdrawal from warehouse, for consumption of the merchandise the sale or export of which does not meet the requirements of section 704(d)(1) of the Act;

(ii) Continue the suspension of investigation by accepting a revised suspension agreement under section 704(b) or section 734(b) of the Act (whether or not the Secretary accepted the original agreement under such section) that, at the time the Secretary accepts the revised agreement, meets the applicable requirements of section 704(d)(1) or section 734(d) of the Act, and publish in the **Federal Register** notice of ''Revision of Agreement Suspending Antidumping (Countervailing Duty) Investigation''; or

(iii) Continue the suspension of investigation by accepting a revised suspension agreement under section 704(c), section 734(c), or section 734(l) of the Act (whether or not the Secretary accepted the original agreement under such section) that, at the time the Secretary accepts the revised agreement, meets the applicable requirements of section 704(d)(1) or section 734(d) of the Act, and publish in the **Federal Register** notice of ''Revision of Agreement Suspending Antidumping (Countervailing Duty) Investigation.'' If the Secretary continues to suspend an investigation based on a revised agreement accepted under section 704(c), section 734(c), or section 734(l) of the Act, the Secretary will order suspension of liquidation to begin. The suspension will not end until the Commission completes any requested review of the revised agreement under section 704(h) or section 734(h) of the Act. If the Commission receives no request for review within 20 days after the date of publication of the notice of the revision, the Secretary will order the suspension of liquidation ended on the 21st day after the date of publication, and will instruct the Customs Service to release any cash deposit or bond. If the Commission undertakes a review under section 704(h) or section 734(h) of the Act, the provisions of sections 704(h)(2) and (3) and sections 734(h)(2) and (3) of the Act will apply.

(5) If the Secretary decides neither to consider the suspension agreement violated nor to revise the agreement, the Secretary will publish in the **Federal Register** notice of the Secretary's decision under paragraph (c)(2) of this section, including a statement of the factual and legal conclusions on which the decision is based.

(d) *Additional signatories.* If the Secretary decides that a suspension agreement no longer will completely eliminate the injurious effect of exports to the United States of subject merchandise under section 704(c)(1) or section 734(c)(1) of the Act, or that the signatory exporters no longer account for substantially all of the subject merchandise, the Secretary may revise the agreement to include additional signatory exporters.

(e) *Definition of ''violation.''* Under this section, ''violation'' means noncompliance with the terms of a suspension agreement caused by an act or omission of a signatory, except, at the discretion of the Secretary, an act or omission which is inadvertent or inconsequential.

§ 351.210 Final determination.

(a) *Introduction.* A ''final determination'' in an antidumping or countervailing duty investigation constitutes a final decision by the Secretary as to whether dumping or countervailable subsidization is occurring. If the Secretary's final determination is affirmative, in most instances the Commission will issue a final injury determination (except in certain countervailing duty investigations). Also, if the Secretary's preliminary determination was negative but the final determination is affirmative, the Secretary will impose provisional measures. If the Secretary's final determination is negative, the proceeding, including the injury investigation conducted by the Commission, terminates. This section contains rules regarding deadlines for, and postponement of, final determinations, contents of final determinations, and the effects of final determinations.

(b) *Deadline for final determination.* The deadline for a final determination under section 705(a)(1) or section 735(a)(1) of the Act will be:

(1) Normally, not later than 75 days after the date of the Secretary's preliminary determination (*see* section 705(a)(1) or section 735(a)(1) of the Act);

(2) In an antidumping investigation, not later than 135 days after the date of publication of the preliminary

determination if the Secretary postpones the final determination at the request of:

(i) The petitioner, if the preliminary determination was negative (*see* section 735(a)(2)(B) of the Act); or

(ii) Exporters or producers who account for a significant proportion of exports of the subject merchandise, if the preliminary determination was affirmative (*see* section 735(a)(2)(A) of the Act);

(3) In a countervailing duty investigation, not later than 165 days after the preliminary determination, if, after the preliminary determination, the Secretary decides to investigate an upstream subsidy allegation and concludes that additional time is needed to investigate the allegation (*see* section 703(g)(2) of the Act); or

(4) In a countervailing duty investigation, the same date as the date of the final antidumping determination, if:

(i) In a situation where the Secretary simultaneously initiated antidumping and countervailing duty investigations on the subject merchandise (from the same or other countries), the petitioner requests that the final countervailing duty determination be postponed to the date of the final antidumping determination; and

(ii) If the final countervailing duty determination is not due on a later date because of postponement due to an allegation of upstream subsidies under section 703(g) of the Act (*see* section 705(a)(1) of the Act).

(c) *Contents of final determination and publication of notice.* The final determination will include, if appropriate, a final finding on critical circumstances under section 705(a)(2) or section 735(a)(3) of the Act (whichever is applicable). The Secretary will publish in the **Federal Register** notice of ''Affirmative (Negative) Final Antidumping (Countervailing Duty) Determination,'' including the rates, if any.

(d) *Effect of affirmative final determination.* If the final determination is affirmative, the Secretary will take the actions described in section 705(c)(1) or section 735(c)(1) of the Act (whichever is applicable). In addition, in the case of a countervailing duty investigation involving subject merchandise from a country that is not a Subsidies Agreement country, the Secretary will instruct the Customs Service to require a cash deposit, as provided in section 706(a)(3) of the Act, for each entry of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the order under section 706(a) of the Act.

(e) *Request for postponement of final antidumping determination.* (1) *In general.* A request to postpone a final antidumping determination under section 735(a)(2) of the Act (*see* paragraph (b)(2) of this section) must be submitted in writing within the scheduled date of the final determination. The Secretary may grant the request, unless the Secretary finds compelling reasons to deny the request.

(2) *Requests by exporters.* In the case of a request submitted under paragraph (e)(1) of this section by exporters who account for a significant proportion of exports of subject merchandise (*see* section 735(a)(2)(A) of the Act), the Secretary will not grant the request unless those exporters also submit a request described in the last sentence of section 733(d) of the Act (extension of provisional measures from a 4-month period to not more than 6 months).

(f) *Deferral of decision concerning upstream subsidization to review.* Notwithstanding paragraph (b)(3) of this section, if the petitioner so requests in writing and the preliminary countervailing duty determination was affirmative, the Secretary, instead of postponing the final determination, may defer a decision concerning upstream subsidization until the conclusion of the first administrative review of a countervailing duty order, if any (*see* section 703(g)(2)(B)(i) of the Act).

(g) *Notification of postponement.* If the Secretary postpones a final determination under paragraph (b)(2), (b)(3), or (b)(4) of this section, the Secretary will notify promptly all parties to the proceeding of the postponement, and will publish in the **Federal Register** notice of ''Postponement of Final Antidumping (Countervailing Duty) Determination,'' stating the reasons for the postponement.

(h) *Termination of suspension of liquidation in a countervailing duty investigation.* If the Secretary postpones a final countervailing duty determination, the Secretary will end any suspension of liquidation ordered in the preliminary determination not later than 120 days after the date of publication of the preliminary determination, and will not resume it unless and until the Secretary publishes a countervailing duty order.

(i) *Postponement of final countervailing duty determination for simultaneous investigations.* A request by the petitioner to postpone a final countervailing duty determination to the date of the final antidumping determination must be submitted in writing within five days of the date of publication of the preliminary countervailing duty determination (*see* section 705(a)(1) and paragraph (b)(4) of this section).

(j) *Commission access to information.* If the final determination is affirmative, the Secretary will make available to the Commission and to employees of the Commission directly involved in the proceeding the information upon which the Secretary based the final determination and that the Commission may consider relevant to its injury determination (*see* section 705(c)(1)(A) or section 735(c)(1)(A) of the Act).

(k) *Effect of negative final determination.* An investigation terminates upon publication in the **Federal Register** of the Secretary's or the Commission's negative final determination, and the Secretary will take the relevant actions described in section 705(c)(2) or section 735(c)(2) of the Act (whichever is applicable).

§ 351.211 Antidumping order and countervailing duty order.

(a) *Introduction.* The Secretary issues an order when both the Secretary and the Commission (except in certain countervailing duty investigations) have made final affirmative determinations. The issuance of an order ends the investigative phase of a proceeding. Generally, upon the issuance of an order, importers no longer may post bonds as security for antidumping or countervailing duties, but instead must make a cash deposit of estimated duties. An order remains in effect until it is revoked. This section contains rules regarding the issuance of orders in general, as well as special rules for orders where the Commission has found a regional industry to exist.

(b) *In general.* Not later than seven days after receipt of notice of an affirmative final injury determination by the Commission under section 705(b) or section 735(b) of the Act, or, in a countervailing duty proceeding involving subject merchandise from a country not entitled to an injury test (*see* § 351.101(b)), simultaneously with publication of an affirmative final countervailing duty determination by the Secretary, the Secretary will publish in the **Federal Register** an ''Antidumping Order'' or ''Countervailing Duty Order'' that:

(1) Instructs the Customs Service to assess antidumping duties or countervailing duties (whichever is applicable) on the subject merchandise, in accordance with the Secretary's instructions at the completion of each review requested under § 351.213(b) (administrative review), § 351.214(b) (new shipper review), or § 351.215(b) (expedited antidumping review), or if a

review is not requested, in accordance with the Secretary's assessment instructions under § 351.212(c);

(2) Instructs the Customs Service to require a cash deposit of estimated antidumping or countervailing duties at the rates included in the Secretary's final determination; and

(3) Orders the suspension of liquidation ended for all entries of the subject merchandise entered, or withdrawn from warehouse, for consumption before the date of publication of the Commission's final determination, and instructs the Customs Service to release the cash deposit or bond on those entries, if in its final determination, the Commission found a threat of material injury or material retardation of the establishment of an industry, unless the Commission in its final determination also found that, absent the suspension of liquidation ordered under section 703(d)(2) or section 733(d)(2) of the Act, it would have found material injury (*see* section 706(b) or section 736(b) of the Act).

§ 351.212 Assessment of antidumping and countervailing duties; provisional measures deposit cap; interest on certain overpayments and underpayments.

(a) *Introduction.* Unlike the systems of some other countries, the United States uses a ''retrospective'' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported. Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time. If a review is not requested, duties are assessed at the rate established in the completed review covering the most recent prior period or, if no review has been completed, the cash deposit rate applicable at the time merchandise was entered. This section contains rules regarding the assessment of duties, the provisional measures deposit cap, and interest on over- or undercollections of estimated duties.

(b) *Assessment of antidumping and countervailing duties as the result of a review.* (1) *Antidumping duties.* If the Secretary has conducted a review of an antidumping order under § 351.213 (administrative review), § 351.214 (new shipper review), or § 351.215 (expedited antidumping review), the Secretary normally will calculate an assessment rate for each importer of subject merchandise covered by the review. The Secretary normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes. The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.

(2) *Countervailing duties.* If the Secretary has conducted a review of a countervailing duty order under § 351.213 (administrative review) or § 351.214 (new shipper review), the Secretary normally will instruct the Customs Service to assess countervailing duties by applying the rates included in the final results of the review to the entered value of the merchandise.

(c) *Automatic assessment of antidumping and countervailing duties if no review is requested.* (1) If the Secretary does not receive a timely request for an administrative review of an order (*see* paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary, without additional notice, will instruct the Customs Service to:

(i) Assess antidumping duties or countervailing duties, as the case may be, on the subject merchandise described in § 351.213(e) at rates equal to the cash deposit of, or bond for, estimated antidumping duties or countervailing duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption; and

(ii) To continue to collect the cash deposits previously ordered.

(2) If the Secretary receives a timely request for an administrative review of an order (*see* paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary will instruct the Customs Service to assess antidumping duties or countervailing duties, and to continue to collect cash deposits, on the merchandise not covered by the request in accordance with paragraph (c)(1) of this section.

(3) The automatic assessment provisions of paragraphs (c)(1) and (c)(2) of this section will not apply to subject merchandise that is the subject of a new shipper review (*see* § 351.214) or an expedited antidumping review (*see* § 351.215).

(d) *Provisional measures deposit cap.* This paragraph applies to subject merchandise entered, or withdrawn from warehouse, for consumption before the date of publication of the Commission's notice of an affirmative final injury determination or, in a countervailing duty proceeding that involves merchandise from a country that is not entitled to an injury test, the date of the Secretary's notice of an affirmative final countervailing duty determination. If the amount of duties that would be assessed by applying the rates included in the Secretary's affirmative preliminary or affirmative final antidumping or countervailing duty determination (''provisional duties'') is different from the amount of duties that would be assessed by applying the assessment rate under paragraphs (b)(1) and (b)(2) of this section (''final duties''), the Secretary will instruct the Customs Service to disregard the difference to the extent that the provisional duties are less than the final duties, and to assess antidumping or countervailing duties at the assessment rate if the provisional duties exceed the final duties.

(e) *Interest on certain overpayments and underpayments.* Under section 778 of the Act, the Secretary will instruct the Customs Service to calculate interest for each entry on or after the publication of the order from the date that a cash deposit is required to be deposited for the entry through the date of liquidation of the entry.

(f) *Special rule for regional industry cases.* (1) *In general.* If the Commission, in its final injury determination, found a regional industry under section 771(4)(C) of the Act, the Secretary may direct that duties not be assessed on subject merchandise of a particular exporter or producer if the Secretary determines that:

(i) The exporter or producer did not export subject merchandise for sale in the region concerned during or after the Department's period of investigation;

(ii) The exporter or producer has certified that it will not export subject merchandise for sale in the region concerned in the future so long as the antidumping or countervailing duty order is in effect; and

(iii) No subject merchandise of the exporter or producer was entered into the United States outside of the region and then sold into the region during or after the Department's period of investigation.

(2) *Procedures for obtaining an exception from the assessment of duties.* (i) *Request for exception.* An exporter or producer seeking an exception from the assessment of duties under paragraph (f)(1) of this section must request, subject to the provisions of § 351.213 or § 351.214, an administrative review or a new shipper review to determine whether subject merchandise of the exporter or producer in question should be excepted from the assessment of duties under paragraph (f)(1) of this section. The exporter or producer making the request may request that the review be limited to a determination as to whether the requirements of paragraph (f)(1) of this section are satisfied. The request for a review must be accompanied by:

(A) A certification by the exporter or producer that it did not export subject merchandise for sale in the region concerned during or after the Department's period of investigation, and that it will not do so in the future so long as the antidumping or countervailing duty order is in effect; and

(B) A certification from each of the exporter's or producer's U.S. importers of the subject merchandise that no subject merchandise of that exporter or producer was entered into the United States outside such region and then sold into the region during or after the Department's period of investigation.

(ii) *Limited review.* If the Secretary initiates an administrative review or a new shipper review based on a request for review that includes a request for an exception from the assessment of duties under paragraph (f)(2)(i) of this section, the Secretary, if requested, may limit the review to a determination as to whether an exception from the assessment of duties should be granted under paragraph (f)(1) of this section.

(3) *Exception granted.* If, in the final results of the administrative review or the new shipper review, the Secretary determines that the requirements of paragraph (f)(1) of this section are satisfied, the Secretary will instruct the Customs Service to liquidate, without regard to antidumping or countervailing duties (whichever is appropriate), entries of subject merchandise of the exporter or producer concerned.

(4) *Exception not granted.* If, in the final results of the administrative review or the new shipper review, the Secretary determines that the requirements of paragraph (f)(1) are not satisfied, the Secretary:

(i) Will issue assessment instructions to the Customs Service in accordance with paragraph (b) of this section; or

(ii) If the review was limited to a determination as to whether an exception from the assessment of duties should be granted, the Secretary will instruct the Customs Service to assess duties in accordance with paragraph (f)(1) or (f)(2) of this section, whichever is appropriate (automatic assessment if no review is requested).

§ 351.213 Administrative review of orders and suspension agreements under section 751(a)(1) of the Act.

(a) *Introduction.* As noted in § 351.212(a), the United States has a ''retrospective'' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported. Although duty liability may be determined in the context of other types of reviews, the most frequently used procedure for determining final duty liability is the administrative review procedure under section 751(a)(1) of the Act. This section contains rules regarding requests for administrative reviews and the conduct of such reviews.

(b) *Request for administrative review.* (1) Each year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party or an interested party described in section 771(9)(B) of the Act (foreign government) may request in writing that the Secretary conduct an administrative review under section 751(a)(1) of the Act of specified individual exporters or producers covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis), if the requesting person states why the person desires the Secretary to review those particular exporters or producers.

(2) During the same month, an exporter or producer covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis) may request in writing that the Secretary conduct an administrative review of only that person.

(3) During the same month, an importer of the merchandise may request in writing that the Secretary conduct an administrative review of only an exporter or producer (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis) of the subject merchandise imported by that importer.

(4) Each year during the anniversary month of the publication of a suspension of investigation, an interested party may request in writing that the Secretary conduct an administrative review of all producers or exporters covered by an agreement on which the suspension of investigation was based.

(c) *Deferral of administrative review.* (1) *In general.* The Secretary may defer the initiation of an administrative review, in whole or in part, for one year if:

(i) The request for administrative review is accompanied by a request that the Secretary defer the review, in whole or in part; and

(ii) None of the following persons objects to the deferral: the exporter or producer for which deferral is requested, an importer of subject merchandise of that exporter or producer, a domestic interested party and, in a countervailing duty proceeding, the foreign government.

(2) *Timeliness of objection to deferral.* An objection to a deferral of the initiation of administrative review under paragraph (c)(1)(ii) of this section must be submitted within 15 days after the end of the anniversary month in which the administrative review is requested.

(3) *Procedures and deadlines.* If the Secretary defers the initiation of an administrative review, the Secretary will publish notice of the deferral in the **Federal Register**. The Secretary will initiate the administrative review in the month immediately following the next anniversary month, and the deadline for issuing preliminary results of review (*see* paragraph (h)(1) of this section) and submitting factual information (*see* § 351.302(b)(2)) will run from the last day of the next anniversary month.

(d) *Rescission of administrative review.* (1) *Withdrawal of request for review.* The Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so.

(2) *Self-initiated review.* The Secretary may rescind an administrative review that was self-initiated by the Secretary.

(3) *No shipments.* The Secretary may rescind an administrative review, in whole or only with respect to a particular exporter or producer, if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be.

(4) *Notice of rescission.* If the Secretary rescinds an administrative review (in whole or in part), the Secretary will publish in the **Federal Register** notice of ''Rescission of Antidumping (Countervailing Duty) Administrative Review'' or, if appropriate, ''Partial Rescission of Antidumping (Countervailing Duty) Administrative Review.''

(e) *Period of review.* (1) *Antidumping proceedings.* (i) Except as provided in paragraph (e)(1)(ii) of this section, an administrative review under this section normally will cover, as appropriate, entries, exports, or sales of the subject merchandise during the 12 months immediately preceding the most recent anniversary month.

(ii) For requests received during the first anniversary month after publication of an order or suspension of investigation, an administrative review

under this section will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part or suspension of investigation to the end of the month immediately preceding the first anniversary month.

(2) *Countervailing duty proceedings.* (i) Except as provided in paragraph (e)(2)(ii) of this section, an administrative review under this section normally will cover entries or exports of the subject merchandise during the most recently completed calendar year. If the review is conducted on an aggregate basis, the Secretary normally will cover entries or exports of the subject merchandise during the most recently completed fiscal year for the government in question.

(ii) For requests received during the first anniversary month after publication of an order or suspension of investigation, an administrative review under this section will cover entries or exports, as appropriate, during the period from the date of suspension of liquidation under this part or suspension of investigation to the end of the most recently completed calendar or fiscal year as described in paragraph (e)(2)(i) of this section.

(f) *Voluntary respondents.* In an administrative review, the Secretary will examine voluntary respondents in accordance with section 782(a) of the Act and § 351.204(d).

(g) *Procedures.* The Secretary will conduct an administrative review under this section in accordance with § 351.221.

(h) *Time limits.* (1) *In general.* The Secretary will issue preliminary results of review (*see* § 351.221(b)(4)) within 245 days after the last day of the anniversary month of the order or suspension agreement for which the administrative review was requested, and final results of review (*see* § 351.221(b)(5)) within 120 days after the date on which notice of the preliminary results was published in the **Federal Register**.

(2) *Exception.* If the Secretary determines that it is not practicable to complete the review within the time specified in paragraph (h)(1) of this section, the Secretary may extend the 245-day period to 365 days and may extend the 120-day period to 180 days. If the Secretary does not extend the time for issuing preliminary results, the Secretary may extend the time for issuing final results from 120 days to 300 days.

(i) *Possible cancellation or revision of suspension agreement.* If during an administrative review the Secretary determines or has reason to believe that a signatory has violated a suspension agreement or that the agreement no longer meets the requirements of section 704 or section 734 of the Act (whichever is applicable), the Secretary will take appropriate action under section 704(i) or section 734(i) of the Act and § 351.209. The Secretary may suspend the time limit in paragraph (h) of this section while taking action under § 351.209.

(j) *Absorption of antidumping duties.* (1) During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping order under § 351.211, or a determination under § 351.218(d) (sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

(2) For transition orders defined in section 751(c)(6) of the Act, the Secretary will apply paragraph (j)(1) of this section to any administrative review initiated in 1996 or 1998.

(3) In determining under paragraph (j)(1) of this section whether antidumping duties have been absorbed, the Secretary will examine the antidumping duties calculated in the administrative review in which the absorption inquiry is requested.

(4) The Secretary will notify the Commission of the Secretary's determination if:

(i) In the case of an administrative review other than one to which paragraph (j)(2) of this section applies, the administrative review covers all or part of a time period falling between the third and fourth anniversary month of an order; or

(ii) In the case of an administrative review to which paragraph (j)(2) of this section applies, the Secretary initiated the administrative review in 1998.

(k) *Administrative reviews of countervailing duty orders conducted on an aggregate basis.* (1) *Request for zero rate.* Where the Secretary conducts an administrative review of a countervailing duty on an aggregate basis under section 777A(e)(2)(B) of the Act, the Secretary will consider and review requests for individual assessment and cash deposit rates of zero to the extent practicable. An exporter or producer that desires a zero rate must submit:

(i) A certification by the exporter or producer that it received zero or *de minimis* net countervailable subsidies during the period of review;

(ii) If the exporter or producer received a countervailable subsidy, calculations demonstrating that the amount of net countervailable subsidies received was *de minimis* during the period of review;

(iii) If the exporter is not the producer of the subject merchandise, certifications from the suppliers and producers of the subject merchandise that those persons received zero or *de minimis* net countervailable subsidies during the period of the review; and

(iv) A certification from the government of the affected country that the government did not provide the exporter (or the exporter's supplier) or producer with more than *de minimis* net countervailable subsidies during the period of review.

(2) *Application of country-wide subsidy rate.* With the exception of assessment and cash deposit rates of zero determined under paragraph (k)(1) of this section, if, in the final results of an administrative review under this section of a countervailing duty order, the Secretary calculates a single country-wide subsidy rate under section 777A(e)(2)(B) of the Act, that rate will supersede, for cash deposit purposes, all rates previously determined in the countervailing duty proceeding in question.

(l) *Exception from assessment in regional industry cases.* For procedures relating to a request for the exception from the assessment of antidumping or countervailing duties in a regional industry case, see § 351.212(f).

§ 351.214 New shipper reviews under section 751(a)(2)(B) of the Act.

(a) *Introduction.* The URAA established a new procedure by which so-called ''new shippers'' can obtain their own individual dumping margin or countervailable subsidy rate on an expedited basis. In general, a new shipper is an exporter or producer that did not export, and is not affiliated with an exporter or producer that did export, to the United States during the period of investigation. This section contains rules regarding requests for new shipper reviews and procedures for conducting such reviews. In addition, this section contains rules regarding requests for expedited reviews by noninvestigated exporters in certain countervailing duty proceedings and procedures for conducting such reviews.

(b) *Request for new shipper review.* (1) *Requirement of sale or export.* Subject to the requirements of section 751(a)(2)(B) of the Act and this section, an exporter or producer may request a new shipper review if it has exported, or sold for export, subject merchandise to the United States.

(2) *Contents of request.* A request for a new shipper review must contain the following:

(i) If the person requesting the review is both the exporter and producer of the merchandise, a certification that the person requesting the review did not export subject merchandise to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation;

(ii) If the person requesting the review is the exporter, but not the producer, of the subject merchandise:

(A) The certification described in paragraph (b)(2)(i) of this section; and

(B) A certification from the person that produced or supplied the subject merchandise to the person requesting the review that that producer or supplier did not export the subject merchandise to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation;

(iii)(A) A certification that, since the investigation was initiated, such exporter or producer has never been affiliated with any exporter or producer who exported the subject merchandise to the United States (or in the case of a regional industry, who exported the subject merchandise for sale in the region concerned) during the period of investigation, including those not individually examined during the investigation;

(B) In an antidumping proceeding involving imports from a nonmarket economy country, a certification that the export activities of such exporter or producer are not controlled by the central government;

(iv) Documentation establishing:

(A) The date on which subject merchandise of the exporter or producer making the request was first entered, or withdrawn from warehouse, for consumption, or, if the exporter or producer cannot establish the date of first entry, the date on which the exporter or producer first shipped the subject merchandise for export to the United States;

(B) The volume of that and subsequent shipments; and

(C) The date of the first sale to an unaffiliated customer in the United States; and

(v) In the case of a review of a countervailing duty order, a certification that the exporter or producer has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire.

(c) *Deadline for requesting review.* An exporter or producer may request a new shipper review within one year of the date referred to in paragraph (b)(2)(iv)(A) of this section.

(d) *Time for new shipper review.* (1) *In general.* The Secretary will initiate a new shipper review under this section in the calendar month immediately following the anniversary month or the semiannual anniversary month if the request for the review is made during the 6-month period ending with the end of the anniversary month or the semiannual anniversary month (whichever is applicable).

(2) *Semiannual anniversary month.* The semiannual anniversary month is the calendar month which is 6 months after the anniversary month.

(3) *Example.* An order is published in January. The anniversary month would be January, and the semiannual anniversary month would be July. If the Secretary received a request for a new shipper review at any time during the period February-July, the Secretary would initiate a new shipper review in August. If the Secretary received a request for a new shipper review at any time during the period August-January, the Secretary would initiate a new shipper review in February.

(e) *Suspension of liquidation; posting bond or security.* When the Secretary initiates a new shipper review under this section, the Secretary will direct the Customs Service to suspend liquidation of any unliquidated entries of the subject merchandise from the relevant exporter or producer, and to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise.

(f) *Rescission of new shipper review.* (1) *Withdrawal of request for review.* The Secretary may rescind a new shipper review under this section, in whole or in part, if a party that requested a review withdraws its request not later than 60 days after the date of publication of notice of initiation of the requested review.

(2) *Absence of entry and sale to an unaffiliated customer.* The Secretary may rescind a new shipper review, in whole or in part, if the Secretary concludes that:

(i) As of the end of the normal period of review referred to in paragraph (g) of this section, there has not been an entry and sale to an unaffiliated customer in the United States of subject merchandise; and

(ii) An expansion of the normal period of review to include an entry and sale to an unaffiliated customer in the United States of subject merchandise would be likely to prevent the completion of the review within the time limits set forth in paragraph (i) of this section.

(3) *Notice of Rescission.* If the Secretary rescinds a new shipper review (in whole or in part), the Secretary will publish in the **Federal Register** notice of ''Rescission of Antidumping (Countervailing Duty) New Shipper Review'' or, if appropriate, ''Partial Rescission of Antidumping (Countervailing Duty) New Shipper Review.''

(g) *Period of review.* (1) *Antidumping proceeding.* (i) *In general.* Except as provided in paragraph (g)(1)(ii) of this section, in an antidumping proceeding, a new shipper review under this section normally will cover, as appropriate, entries, exports, or sales during the following time periods:

(A) If the new shipper review was initiated in the month immediately following the anniversary month, the twelve-month period immediately preceding the anniversary month; or

(B) If the new shipper review was initiated in the month immediately following the semiannual anniversary month, the period of review will be the six-month period immediately preceding the semiannual anniversary month.

(ii) *Exceptions.* (A) If the Secretary initiates a new shipper review under this section in the month immediately following the first anniversary month, the review normally will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part to the end of the month immediately preceding the first anniversary month.

(B) If the Secretary initiates a new shipper review under this section in the month immediately following the first semiannual anniversary month, the review normally will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part to the end of the month immediately preceding the first semiannual anniversary month.

(2) *Countervailing duty proceeding.* In a countervailing duty proceeding, the period of review for a new shipper review under this section will be the same period as that specified in § 351.213(e)(2) for an administrative review.

(h) *Procedures.* The Secretary will conduct a new shipper review under this section in accordance with § 351.221.

(i) *Time limits.* (1) *In general.* Unless the time limit is waived under paragraph (j)(3) of this section, the Secretary will issue preliminary results of review (*see* § 351.221(b)(4)) within 180 days after the date on which the new shipper review was initiated, and final results of review (*see* § 351.221(b)(5)) within 90 days after the date on which the preliminary results were issued.

(2) *Exception.* If the Secretary concludes that a new shipper review is extraordinarily complicated, the Secretary may extend the 180-day period to 300 days, and may extend the 90-day period to 150 days.

(j) *Multiple reviews.* Notwithstanding any other provision of this subpart, if a review (or a request for a review) under § 351.213 (administrative review), § 351.214 (new shipper review), § 351.215 (expedited antidumping review), or § 351.216 (changed circumstances review) covers merchandise of an exporter or producer subject to a review (or to a request for a review) under this section, the Secretary may, after consulting with the exporter or producer:

(1) Rescind, in whole or in part, a review in progress under this subpart;

(2) Decline to initiate, in whole or in part, a review under this subpart; or

(3) Where the requesting party agrees in writing to waive the time limits of paragraph (i) of this section, conduct concurrent reviews, in which case all other provisions of this section will continue to apply with respect to the exporter or producer.

(k) *Expedited reviews in countervailing duty proceedings for noninvestigated exporters.* (1) *Request for review.* If, in a countervailing duty investigation, the Secretary limited the number of exporters or producers to be individually examined under section 777A(e)(2)(A) of the Act, an exporter that the Secretary did not select for individual examination or that the Secretary did not accept as a voluntary respondent (*see* § 351.204(d)) may request a review under this paragraph (k). An exporter must submit a request for review within 30 days of the date of publication in the **Federal Register** of the countervailing duty order. A request must be accompanied by a certification that:

(i) The requester exported the subject merchandise to the United States during the period of investigation;

(ii) The requester is not affiliated with an exporter or producer that the Secretary individually examined in the investigation; and

(iii) The requester has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire.

(2) *Initiation of review.* (i) *In general.* The Secretary will initiate a review in the month following the month in which a request for review is due under paragraph (k)(1) of this section.

(ii) *Example.* The Secretary publishes a countervailing duty order on January 15. An exporter would have to submit a request for a review by February 14. The Secretary would initiate a review in March.

(3) *Conduct of review.* The Secretary will conduct a review under this paragraph (k) in accordance with the provisions of this section applicable to new shipper reviews, subject to the following exceptions:

(i) The period of review will be the period of investigation used by the Secretary in the investigation that resulted in the publication of the countervailing duty order (*see* § 351.204(b)(2));

(ii) The Secretary will not permit the posting of a bond or security in lieu of a cash deposit under paragraph (e) of this section;

(iii) The final results of a review under this paragraph (k) will not be the basis for the assessment of countervailing duties; and

(iv) The Secretary may exclude from the countervailing duty order in question any exporter for which the Secretary determines an individual net countervailable subsidy rate of zero or *de minimis* (*see* § 351.204(e)(1)), provided that the Secretary has verified the information on which the exclusion is based.

(l) *Exception from assessment in regional industry cases.* For procedures relating to a request for the exception from the assessment of antidumping or countervailing duties in a regional industry case, see § 351.212(f).

§ 351.215 Expedited antidumping review and security in lieu of estimated duty under section 736(c) of the Act.

(a) *Introduction.* Exporters and producers individually examined in an investigation normally cannot obtain a review of entries until an administrative review is requested. In addition, when an antidumping order is published, importers normally must begin to make a cash deposit of estimated antidumping duties upon the entry of subject merchandise. Section 736(c), however, establishes a special procedure under which exporters or producers may request an expedited review, and bonds, rather than cash deposits, may continue to be posted for a limited period of time if several criteria are satisfied. This section contains rules regarding requests for expedited antidumping reviews and the procedures applicable to such reviews.

(b) *In general.* If the Secretary determines that the criteria of section 736(c)(1) of the Act are satisfied, the Secretary:

(1) May permit, for not more than 90 days after the date of publication of an antidumping order, the posting of a bond or other security instead of the deposit of estimated antidumping duties required under section 736(a)(3) of the Act; and

(2) Will initiate an expedited antidumping review. Before making such a determination, the Secretary will make business proprietary information available, and will provide interested parties with an opportunity to file written comments, in accordance with section 736(c)(4) of the Act.

(c) *Procedures.* The Secretary will conduct an expedited antidumping review under this section in accordance with § 351.221.

§ 351.216 Changed circumstances review under section 751(b) of the Act.

(a) *Introduction.* Section 751(b) of the Act provides for what is known as a ''changed circumstances'' review. This section contains rules regarding requests for changed circumstances reviews and procedures for conducting such reviews.

(b) *Requests for changed circumstances review.* At any time, an interested party may request a changed circumstances review, under section 751(b) of the Act, of an order or a suspended investigation. Within 45 days after the date on which a request is filed, the Secretary will determine whether to initiate a changed circumstances review.

(c) *Limitation on changed circumstances review.* Unless the Secretary finds that good cause exists, the Secretary will not review a final determination in an investigation (*see* section 705(a) or section 735(a) of the Act) or a suspended investigation (*see* section 704 or section 734 of the Act) less than 24 months after the date of publication of notice of the final determination or the suspension of the investigation.

(d) *Procedures.* If the Secretary decides that changed circumstances sufficient to warrant a review exist, the Secretary will conduct a changed circumstances review in accordance with § 351.221.

(e) *Time limits.* The Secretary will issue final results of review (*see* § 351.221(b)(5)) within 270 days after the date on which the changed circumstances review is initiated, or within 45 days if all parties to the proceeding agree to the outcome of the review.

§ 351.217 Reviews to implement results of subsidies enforcement proceeding under section 751(g) of the Act.

(a) *Introduction.* Section 751(g) provides a mechanism for incorporating into an ongoing countervailing duty proceeding the results of certain subsidy-related disputes under the WTO Subsidies Agreement. Where the United States, in the WTO, has successfully challenged the ''nonactionable'' (*e.g.,* noncountervailable) status of a foreign subsidy, or where the United States has successfully challenged a prohibited or actionable subsidy, the Secretary may conduct a review to determine the effect, if any, of the successful outcome on an existing countervailing duty order or suspended investigation. This section contains rules regarding the initiation and conduct of reviews under section 751(g).

(b) *Violations of Article 8 of the Subsidies Agreement.* If:

(1) The Secretary receives notice from the Trade Representative of a violation of Article 8 of the Subsidies Agreement;

(2) The Secretary has reason to believe that merchandise subject to an existing countervailing duty order or suspended investigation is benefiting from the subsidy or subsidy program found to have been in violation of Article 8; and

(3) No administrative review is in progress, the Secretary will initiate an Article 8 violation review of the order or suspended investigation to determine whether the subject merchandise benefits from the subsidy or subsidy program found to have been in violation of Article 8 of the Subsidies Agreement.

(c) *Withdrawal of subsidy or imposition of countermeasures.* If the Trade Representative notifies the Secretary that, under Article 4 or Article 7 of the Subsidies Agreement:

(1)(i)(A) The United States has imposed countermeasures; and

(B) Such countermeasures are based on the effects in the United States of imports of merchandise that is the subject of a countervailing duty order; or

(ii) A WTO member country has withdrawn a countervailable subsidy provided with respect to merchandise subject to a countervailing duty order, then

(2) The Secretary will initiate an Article 4/Article 7 review of the order to determine if the amount of estimated duty to be deposited should be adjusted or the order should be revoked.

(d) *Procedures.* The Secretary will conduct an Article 8 violation review or an Article 4/Article 7 review under this section in accordance with § 351.221.

(e) *Expedited reviews.* The Secretary will conduct reviews under this section on an expedited basis.

§ 351.218 Sunset reviews under section 751(c) of the Act.

(a) *Introduction.* The URAA added a new procedure, commonly referred to as ''sunset reviews,'' in section 751(c) of the Act. In general, no later than once every five years, the Secretary must determine whether dumping or countervailable subsidies would be likely to continue or resume if an order were revoked or a suspended investigation were terminated. The Commission must conduct a similar review to determine whether injury would be likely to continue or resume in the absence of an order or suspended investigation. If the determinations under section 751(c) of both the Secretary and the Commission are affirmative, the order (or suspended investigation) remains in place. If either determination is negative, the order will be revoked (or the suspended investigation will be terminated). This section contains rules regarding the procedures for sunset reviews.

(b) *In general.* The Secretary will conduct a sunset review, under section 751(c) of the Act, of each antidumping and countervailing duty order and suspended investigation, and, under section 752(b) or section 752(c) (whichever is applicable), will determine whether revocation of an antidumping or countervailing duty order or termination of a suspended investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy.

(c) *Notice of initiation of review; early initiation.* (1) *Initial sunset review.* No later than 30 days before the fifth anniversary date of an order or suspension of an investigation (*see* section 751(c)(1) of the Act), the Secretary will publish a notice of initiation of a sunset review (*see* section 751(c)(2) of the Act).

(2) *Subsequent sunset reviews.* In the case of an order or suspended investigation that is continued following a sunset review initiated under paragraph (c)(1) of this section, no later than 30 days before the fifth anniversary of the date of the last determination by the Commission to continue the order or suspended investigation, the Secretary will publish a notice of initiation of a sunset review (*see* section 751(c)(2) of the Act).

(3) *Early initiation.* The Secretary may publish a notice of initiation at an earlier date than the dates described in paragraph (c) (1) and (2) of this section if a domestic interested party demonstrates to the Secretary's satisfaction that an early initiation would promote administrative efficiency. However, if the Secretary determines that the domestic interested party that requested early initiation is a related party or an importer under section 771(4)(B) of the Act and § 351.203(e)(4), the Secretary may decline the request for early initiation.

(4) *Transition orders.* The Secretary will initiate sunset reviews of transition orders, as defined in section 751(c)(6)(C) of the Act, in accordance with section 751(c)(6) of the Act.

(d) *Conduct of review.* Upon receipt of responses to the notice of initiation that the Secretary deems adequate to conduct a sunset review, the Secretary will conduct a sunset review in accordance with § 351.221.

(e) *Time limits.* (1) *In general.* Unless the review has been completed under section 751(c)(3) of the Act (no or inadequate response) or, under section 751(c)(4)(B) of the Act, all respondent interested parties waived their participation in the Secretary's sunset review, the Secretary will issue final results of review within 240 days after the date on which the review was initiated. If the Secretary concludes that the sunset review is extraordinarily complicated (*see* section 751(c)(5)(C) of the Act), the Secretary may extend the period for issuing final results by not more than 90 days.

(2) *Transition orders.* The time limits described in paragraph (e)(1) of this section will not apply to a sunset review of a transition order (*see* section 751(c)(6) of the Act).

§ 351.219 Reviews of countervailing duty orders in connection with an investigation under section 753 of the Act.

(a) *Introduction.* Section 753 of the Act is a transition provision for countervailing duty orders that were issued under section 303 of the Act without an injury determination by the Commission. Under the Subsidies Agreement, one country may not impose countervailing duties on imports from another WTO Member without first

making a determination that such imports have caused injury to a domestic industry. Section 753 provides a mechanism for providing an injury test with respect to those ''no-injury'' orders under section 303 that apply to merchandise from WTO Members. This section contains rules regarding requests for section 753 investigations by a domestic interested party; and the procedures that the Department will follow in reviewing a countervailing duty order and providing the Commission with advice regarding the amount and nature of a countervailable subsidy.

(b) *Notification of domestic interested parties.* The Secretary will notify directly domestic interested parties as soon as possible after the opportunity arises for requesting an investigation by the Commission under section 753 of the Act.

(c) *Initiation and conduct of section 753 review.* Where the Secretary deems it necessary in order to provide to the Commission information on the amount or nature of a countervailable subsidy (*see* section 753(b)(2) of the Act), the Secretary may initiate a section 753 review of the countervailing duty order in question. The Secretary will conduct a section 753 review in accordance with § 351.221.

§ 351.220 Countervailing duty review at the direction of the President under section 762 of the Act.

At the direction of the President or a designee, the Secretary will conduct a review under section 762(a)(1) of the Act to determine if a countervailable subsidy is being provided with respect to merchandise subject to an understanding or other kind of quantitative restriction agreement accepted under section 704(a)(2) or section 704(c)(3) of the Act. The Secretary will conduct a review under this section in accordance with § 351.221. If the Secretary's final results of review under this section and the Commission's final results of review under section 762(a)(2) of the Act are both affirmative, the Secretary will issue a countervailing duty order and order suspension of liquidation in accordance with section 762(b) of the Act.

§ 351.221 Review procedures.

(a) *Introduction.* The procedures for reviews are similar to those followed in investigations. This section details the procedures applicable to reviews in general, as well as procedures that are unique to certain types of reviews.

(b) *In general.* After receipt of a timely request for a review, or on the Secretary's own initiative when appropriate, the Secretary will:

(1) Promptly publish in the **Federal Register** notice of initiation of the review;

(2) Before or after publication of notice of initiation of the review, send to appropriate interested parties or other persons (or, if appropriate, a sample of interested parties or other persons) questionnaires requesting factual information for the review;

(3) Conduct, if appropriate, a verification under § 351.307;

(4) Issue preliminary results of review, based on the available information, and publish in the **Federal Register** notice of the preliminary results of review that include:

(i) the rates determined, if the review involved the determination of rates; and

(ii) an invitation for argument consistent with § 351.309;

(5) Issue final results of review and publish in the **Federal Register** notice of the final results of review that include the rates determined, if the review involved the determination of rates;

(6) If the type of review in question involves a determination as to the amount of duties to be assessed, promptly after publication of the notice of final results instruct the Customs Service to assess antidumping duties or countervailing duties (whichever is applicable) on the subject merchandise covered by the review, except as otherwise provided in § 351.106(c) with respect to *de minimis* duties; and

(7) If the review involves a revision to the cash deposit rates for estimated antidumping duties or countervailing duties, instruct the Customs Service to collect cash deposits at the revised rates on future entries.

(c) *Special rules.* (1) *Administrative reviews and new shipper reviews.* In an administrative review under section 751(a)(1) of the Act and § 351.213 and a new shipper review under section 751(a)(2)(B) of the Act and § 351.214 the Secretary:

(i) Will publish the notice of initiation of the review no later than the last day of the month following the anniversary month or the semiannual anniversary month (as the case may be); and

(ii) Normally will send questionnaires no later than 30 days after the date of publication of the notice of initiation.

(2) *Expedited antidumping review.* In an expedited antidumping review under section 736(c) of the Act and § 351.215, the Secretary:

(i) Will include in the notice of initiation of the review an invitation for argument consistent with § 351.309, and a statement that the Secretary is permitting the posting of a bond or other security instead of a cash deposit of estimated antidumping duties;

(ii) Will instruct the Customs Service to accept, instead of the cash deposit of estimated antidumping duties under section 736(a)(3) of the Act, a bond for each entry of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of initiation of the investigation and through the date not later than 90 days after the date of publication of the order; and

(iii) Will not issue preliminary results of review.

(3) *Changed circumstances review.* In a changed circumstances review under section 751(b) of the Act and § 351.216, the Secretary:

(i) Will include in the preliminary results of review and the final results of review a description of any action the Secretary proposed based on the preliminary or final results;

(ii) May combine the notice of initiation of the review and the preliminary results of review in a single notice if the Secretary concludes that expedited action is warranted; and

(iii) May refrain from issuing questionnaires under paragraph (b)(2) of this section.

(4) *Article 8 Violation review and Article 4/Article 7 review.* In an Article 8 Violation review or an Article 4/Article 7 review under section 751(g) of the Act and § 351.217, the Secretary:

(i) Will include in the notice of initiation of the review an invitation for argument consistent with § 351.309 and will notify all parties to the proceeding at the time the Secretary initiates the review;

(ii) Will not issue preliminary results of review; and

(iii) In the final results of review will indicate the amount, if any, by which the estimated duty to be deposited should be adjusted, and, in an Article 4/Article 7 review, any action, including revocation, that the Secretary will take based on the final results.

(5) *Sunset review.* In a sunset review under section 751(c) of the Act and § 351.218:

(i) The notice of initiation of the review will contain a request for the information described in section 751(c)(2) of the Act; and

(ii) The Secretary, without issuing preliminary results of review, may issue final results of review under paragraphs (3) or (4) of subsection 751(c) of the Act if the conditions of those paragraphs are satisfied.

(6) *Section 753 review.* In a section 753 review under section 753 of the Act and § 351.219, the Secretary:

(i) Will include in the notice of initiation of the review an invitation for argument consistent with § 351.309, and will notify all parties to the proceeding at the time the Secretary initiates the review; and

(ii) May decline to issue preliminary results of review.

(7) *Countervailing duty review at the direction of the President.* In a countervailing duty review at the direction of the President under section 762 of the Act and § 351.220, the Secretary will:

(i) Include in the notice of initiation of the review a description of the merchandise, the period under review, and a summary of the available information which, if accurate, would support the imposition of countervailing duties;

(ii) Notify the Commission of the initiation of the review and the preliminary results of review;

(iii) Include in the preliminary results of review the countervailable subsidy, if any, during the period of review and a description of official changes in the subsidy programs made by the government of the affected country that affect the estimated countervailable subsidy; and

(iv) Include in the final results of review the countervailable subsidy, if any, during the period of review and a description of official changes in the subsidy programs, made by the government of the affected country not later than the date of publication of the notice of preliminary results, that affect the estimated countervailable subsidy.

§ 351.222 Revocation of orders; termination of suspended investigations.

(a) *Introduction.* ''Revocation'' is a term of art that refers to the end of an antidumping or countervailing proceeding in which an order has been issued. ''Termination'' is the companion term for the end of a proceeding in which the investigation was suspended due to the acceptance of a suspension agreement. Generally, a revocation or termination may occur only after the Department or the Commission have conducted one or more reviews under section 751 of the Act. This section contains rules regarding requirements for a revocation or termination; and procedures that the Department will follow in determining whether to revoke an order or terminate a suspended investigation.

(b) *Revocation or termination based on absence of dumping.* (1) The Secretary may revoke an antidumping order or terminate a suspended antidumping investigation if the Secretary concludes that:

(i) All exporters and producers covered at the time of revocation by the order or the suspension agreement have sold the subject merchandise at not less than normal value for a period of at least three consecutive years; and

(ii) It is not likely that those persons will in the future sell the subject merchandise at less than normal value.

(2) The Secretary may revoke an antidumping order in part if the Secretary concludes that:

(i) One or more exporters or producers covered by the order have sold the merchandise at not less than normal value for a period of at least three consecutive years;

(ii) It is not likely that those persons will in the future sell the subject merchandise at less than normal value; and

(iii) For any exporter or producer that the Secretary previously has determined to have sold the subject merchandise at less than normal value, the exporter or producer agrees in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value.

(3) *Revocation of nonproducing exporter.* In the case of an exporter that is not the producer of subject merchandise, the Secretary normally will revoke an order in part under paragraph (b)(2) of this section only with respect to subject merchandise produced or supplied by those companies that supplied the exporter during the time period that formed the basis for the revocation.

(c) *Revocation or termination based on absence of countervailable subsidy.* (1) The Secretary may revoke a countervailing duty order or terminate a suspended countervailing duty investigation if the Secretary concludes that:

(i) The government of the affected country has eliminated all countervailable subsidies on the subject merchandise by abolishing for the subject merchandise, for a period of at least three consecutive years, all programs that the Secretary has found countervailable;

(ii) It is not likely that the government of the affected country will in the future reinstate for the subject merchandise those programs or substitute other countervailable programs; and

(iii) Exporters and producers of the subject merchandise are not continuing to receive any net countervailable subsidy from an abolished program referred to in paragraph (c)(1)(i) of this section.

(2) The Secretary may revoke a countervailing duty order or terminate a suspended countervailing duty investigation if the Secretary concludes that:

(i) All exporters and producers covered at the time of revocation by the order or the suspension agreement have not applied for or received any net countervailable subsidy on the subject merchandise for a period of at least five consecutive years; and

(ii) It is not likely that those persons will in the future apply for or receive any net countervailable subsidy on the subject merchandise from those programs the Secretary has found countervailable in any proceeding involving the affected country or from other countervailable programs.

(3) The Secretary may revoke a countervailing duty order in part if the Secretary concludes that:

(i) One or more exporters or producers covered by the order have not applied for or received any net countervailable subsidy on the subject merchandise for a period of at least five consecutive years;

(ii) It is not likely that those persons will in the future apply for or receive any net countervailable subsidy on the subject merchandise from those programs the Secretary has found countervailable in any proceeding involving the affected country or from other countervailable programs; and

(iii) Except for exporters or producers that the Secretary previously has determined have not received any net countervailable subsidy on the subject merchandise, the exporters or producers agree in writing to their immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, has received any net countervailable subsidy on the subject merchandise.

(4) *Revocation of nonproducing exporter.* In the case of an exporter that is not the producer of subject merchandise, the Secretary normally will revoke an order in part under paragraph (c)(3) of this section only with respect to subject merchandise produced or supplied by those companies that supplied the exporter during the time period that formed the basis for the revocation.

(d) *Treatment of unreviewed intervening years.* (1) *In general.* The Secretary will not revoke an order or terminate a suspended investigation under paragraphs (b) or (c) of this section unless the Secretary has

conducted a review under this subpart of the first and third (or fifth) years of the three-and five-year consecutive time periods referred to in those paragraphs. The Secretary need not have conducted a review of an intervening year (*see* paragraph (d)(2) of this section). However, except in the case of a revocation or termination under paragraph (c)(1) of this section (government abolition of countervailable subsidy programs), before revoking an order or terminating a suspended investigation, the Secretary must be satisfied that, during each of the three (or five) years, there were exports to the United States in commercial quantities of the subject merchandise to which a revocation or termination will apply.

(2) *Intervening year.* ''Intervening year'' means any year between the first and final year of the consecutive period on which revocation or termination is conditioned.

(e) *Request for revocation or termination.* (1) *Antidumping proceeding.* During the third and subsequent annual anniversary months of the publication of an antidumping order or suspension of an antidumping investigation, an exporter or producer may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (b) of this section with regard to that person if the person submits with the request:

(i) The person's certification that the person sold the subject merchandise at not less than normal value during the period of review described in § 351.213(e)(1), and that in the future the person will not sell the merchandise at less than normal value;

(ii) the person's certification that, during each of the consecutive years referred to in paragraph (b) of this section, the person sold the subject merchandise to the United States in commercial quantities; and

(iii) If applicable, the agreement regarding reinstatement in the order or suspended investigation described in paragraph (b)(2)(iii) of this section.

(2) *Countervailing duty proceeding.* (i) During the third and subsequent annual anniversary months of the publication of a countervailing duty order or suspension of a countervailing duty investigation, the government of the affected country may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (c)(1) of this section if the government submits with the request its certification that it has satisfied, during the period of review described in § 351.213(e)(2), the requirements of paragraph (c)(1)(i) of this section regarding the abolition of countervailable subsidy programs, and that it will not reinstate for the subject merchandise those programs or substitute other countervailable subsidy programs;

(ii) During the fifth and subsequent annual anniversary months of the publication of a countervailing duty order or suspended countervailing duty investigation, the government of the affected country may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (c)(2) of this section if the government submits with the request:

(A) Certifications for all exporters and producers covered by the order or suspension agreement that they have not applied for or received any net countervailable subsidy on the subject merchandise for a period of at least five consecutive years (*see* paragraph (c)(2)(i) of this section);

(B) Those exporters' and producers' certifications that they will not apply for or receive any net countervailable subsidy on the subject merchandise from any program the Secretary has found countervailable in any proceeding involving the affected country or from other countervailable programs (*see* paragraph (c)(2)(ii) of this section); and

(C) A certification from each exporter or producer that, during each of the consecutive years referred to in paragraph (c)(2) of this section, that person sold the subject merchandise to the United States in commercial quantities; or

(iii) During the fifth and subsequent annual anniversary months of the publication of a countervailing duty order, an exporter or producer may request in writing that the Secretary revoke the order with regard to that person if the person submits with the request:

(A) A certification that the person has not applied for or received any net countervailable subsidy on the subject merchandise for a period of at least five consecutive years (*see* paragraph (c)(3)(i) of this section), including calculations demonstrating the basis for the conclusion that the person received zero or *de minimis* net countervailable subsidies during the review period of the administrative review in connection with which the person has submitted the request for revocation;

(B) A certification that the person will not apply for or receive any net countervailable subsidy on the subject merchandise from any program the Secretary has found countervailable in any proceeding involving the affected country or from other countervailable programs (*see* paragraph (c)(3)(ii) of this section);

(C) The person's certification that, during each of the consecutive years referred to in paragraph (c)(3) of this section, the person sold the subject merchandise to the United States in commercial quantities; and

(D) The agreement described in paragraph (c)(3)(iii) of this section (reinstatement in order).

(f) *Procedures.* (1) Upon receipt of a timely request for revocation or termination under paragraph (e) of this section, the Secretary will consider the request as including a request for an administrative review and will initiate and conduct a review under § 351.213.

(2) In addition to the requirements of § 351.221 regarding the conduct of an administrative review, the Secretary will:

(i) Publish with the notice of initiation under § 351.221(b)(1), notice of ''Request for Revocation of Order (in part)'' or ''Request for Termination of Suspended Investigation'' (whichever is applicable);

(ii) Conduct a verification under § 351.307;

(iii) Include in the preliminary results of review under § 351.221(b)(4) the Secretary's decision whether there is a reasonable basis to believe that the requirements for revocation or termination are met;

(iv) If the Secretary decides that there is a reasonable basis to believe that the requirements for revocation or termination are met, publish with the notice of preliminary results of review under § 351.221(b)(4) notice of ''Intent to Revoke Order (in Part)'' or ''Intent to Terminate Suspended Investigation'' (whichever is applicable);

(v) Include in the final results of review under § 351.221(b)(5) the Secretary's final decision whether the requirements for revocation or termination are met; and

(vi) If the Secretary determines that the requirements for revocation or termination are met, publish with the notice of final results of review under § 351.221(b)(5) notice of ''Revocation of Order (in Part)'' or ''Termination of Suspended Investigation'' (whichever is applicable).

(3) If the Secretary revokes an order in whole or in part, the Secretary will order the suspension of liquidation terminated for the merchandise covered by the revocation on the first day after the period under review, and will instruct the Customs Service to release any cash deposit or bond.

(g) *Revocation or termination based on changed circumstances.* (1) The

Secretary may revoke an order, in whole or in part, or terminate a suspended investigation if the Secretary concludes that:

(i) Producers accounting for substantially all of the production of the domestic like product to which the order (or the part of the order to be revoked) or suspended investigation pertains have expressed a lack of interest in the order, in whole or in part, or suspended investigation (*see* section 782(h) of the Act); or

(ii) Other changed circumstances sufficient to warrant revocation or termination exist.

(2) If at any time the Secretary concludes from the available information that changed circumstances sufficient to warrant revocation or termination may exist, the Secretary will conduct a changed circumstances review under § 351.216.

(3) In addition to the requirements of § 351.221, the Secretary will:

(i) Publish with the notice of initiation (*see* § 353.221(b)(1), notice of ''Consideration of Revocation of Order (in Part)'' or ''Consideration of Termination of Suspended Investigation'' (whichever is applicable);

(ii) If the Secretary's conclusion regarding the possible existence of changed circumstances (*see* paragraph (g)(2) of this section), is not based on a request, the Secretary, not later than the date of publication of the notice of ''Consideration of Revocation of Order (in Part)'' or ''Consideration of Termination of Suspended Investigation'' (whichever is applicable) (*see* paragraph (g)(3)(i) of this section), will serve written notice of the consideration of revocation or termination on each interested party listed on the Department's service list and on any other person that the Secretary has reason to believe is a domestic interested party;

(iii) Conduct a verification, if appropriate, under § 351.307;

(iv) Include in the preliminary results of review, under § 351.221(b)(4), the Secretary's decision whether there is a reasonable basis to believe that changed circumstances warrant revocation or termination;

(v) If the Secretary's preliminary decision is that changed circumstances warrant revocation or termination, publish with the notice of preliminary results of review, under § 351.221(b)(4), notice of ''Intent to Revoke Order (in Part)'' or ''Intent to Terminate Suspended Investigation'' (whichever is applicable);

(vi) Include in the final results of review, under § 351.221(b)(5), the Secretary's final decision whether changed circumstances warrant revocation or termination; and

(vii) If the Secretary's determines that changed circumstances warrant revocation or termination, publish with the notice of final results of review, under § 351.221(b)(5), notice of ''Revocation of Order (in Part)'' or ''Termination of Suspended Investigation'' (whichever is applicable).

(4) If the Secretary revokes an order, in whole or in part, under paragraph (g) of this section, the Secretary will order the suspension of liquidation ended for the merchandise covered by the revocation on the effective date of the notice of revocation, and will instruct the Customs Service to release any cash deposit or bond.

(h) *Revocation or termination based on injury reconsideration.* If the Commission determines in a changed circumstances review under section 751(b)(2) of the Act that the revocation of an order or termination of a suspended investigation is not likely to lead to continuation or recurrence of material injury, the Secretary will revoke, in whole or in part, the order or terminate the suspended investigation, and will publish in the **Federal Register** notice of ''Revocation of Order (in Part)'' or ''Termination of Suspended Investigation'' (whichever is applicable).

(i) *Revocation or termination based on sunset review.* (1) *In general.* In the case of a sunset review under § 351.218, the Secretary will revoke an order or terminate a suspended investigation, unless:

(i) The Secretary makes a determination that revocation or termination would be likely to lead to continuation or recurrence of a countervailable subsidy or dumping (*see* section 752(b) and section 752(c) of the Act); and

(ii) The Commission makes a determination that revocation or termination would be likely to lead to continuation or recurrence of material injury (*see* section 752(a) of the Act).

(2) *Exception for transition orders.* Before January 1, 2000, the Secretary will not revoke a transition order (*see* section 751(c)(6) of the Act) as the result of a sunset review under § 351.218.

(j) *Revocation of countervailing duty order based on Commission negative determination under section 753 of the Act.* The Secretary will revoke a countervailing duty order, and will order the refund, with interest, of any estimated countervailing duties collected during the period liquidation was suspended under section 753(a)(4) of the Act upon being notified by the Commission that:

(1) The Commission has determined that an industry in the United States is not likely to be materially injured if the countervailing duty order in question is revoked (*see* section 753(a)(1) of the Act); or

(2) A domestic interested party did not make a timely request for an investigation under section 753(a) of the Act (*see* section 753(a)(3) of the Act).

(k) *Revocation based on Article 4/Article 7 review.*

(1) *In general.* The Secretary may revoke a countervailing duty order, in whole or in part, following an Article 4/Article 7 review under § 351.217(c), due to the imposition of countermeasures by the United States or the withdrawal of a countervailable subsidy by a WTO member country (*see* section 751(g)(2) of the Act).

(2) *Additional Requirements.* In addition to the requirements of § 351.221, if the Secretary determines to revoke an order as the result of an Article 4/Article 7 review, the Secretary will:

(i) Conduct a verification, if appropriate, under § 351.307;

(ii) Include in the final results of review, under § 351.221(b)(5), the Secretary's final decision whether the order should be revoked;

(iii) If the Secretary's final decision is that the order should be revoked:

(A) Determine the effective date of the revocation;

(B) Publish with the notice of final results of review, under § 351.221(b)(5), a notice of ''Revocation of Order (in Part),'' that will include the effective date of the revocation; and

(C) Order any suspension of liquidation ended for merchandise covered by the revocation that was entered on or after the effective date of the revocation, and instruct the Customs Service to release any cash deposit or bond.

(l) *Revocation under section 129.* The Secretary may revoke an order under section 129 of the URAA (implementation of WTO dispute settlement).

(m) *Transition rule.* In the case of time periods that, under section 291(a)(2) of the URAA, are subject to review under the provisions of the Act prior to its amendment by the URAA, and for purposes of determining whether the three-or five-year requirements of paragraphs (b) and (c) of this section are satisfied, the following rules will apply:

(1) *Antidumping proceedings.* The Secretary will consider sales at not less than foreign market value to be equivalent to sales at not less than normal value.

(2) *Countervailing duty proceedings.* The Secretary will consider the absence of a subsidy, as defined in section 771(5) of the Act prior to its amendment by the URAA, to be equivalent to the absence of a countervailable subsidy, as defined in section 771(5) of the Act, as amended by the URAA.

(n) *Cross-reference.* For the treatment in a subsequent investigation of business proprietary information submitted to the Secretary in connection with a changed circumstances review under § 351.216 or a sunset review under § 351.218 that results in the revocation of an order (or termination of a suspended investigation), see section 777(b)(3) of the Act.

§ 351.223 Procedures for initiation of downstream product monitoring.

(a) *Introduction.* Section 780 of the Act establishes a mechanism for monitoring imports of ''downstream products.'' In general, section 780 is aimed at situations where, following the issuance of an antidumping or countervailing duty order on a product that is used as a component in another product, exports to the United States of that other (or ''downstream'') product increase. Although the Department is responsible for determining whether trade in the downstream product should be monitored, the Commission is responsible for conducting the actual monitoring. The Commission must report the results of its monitoring to the Department, and the Department must consider the reports in determining whether to self-initiate an antidumping or countervailing duty investigation on the downstream product. This section contains rules regarding applications for the initiation of downstream product monitoring and decisions regarding such applications.

(b) *Contents of application.* An application to designate a downstream product for monitoring under section 780 of the Act must contain the following information, to the extent reasonably available to the applicant:

(1) The name and address of the person requesting the monitoring and a description of the article it produces which is the basis for filing its application;

(2) A detailed description of the downstream product in question;

(3) A detailed description of the component product that is incorporated into the downstream product, including the value of the component part in relation to the value of the downstream product, and the extent to which the component part has been substantially transformed as a result of its incorporation into the downstream product;

(4) The name of the country of production of both the downstream and component products and the name of any intermediate country from which the merchandise is imported;

(5) The name and address of all known producers of component parts and downstream products in the relevant countries and a detailed description of any relationship between such producers;

(6) Whether the component part is already subject to monitoring to aid in the enforcement of a bilateral arrangement within the meaning of section 804 of the Trade and Tariff Act of 1984;

(7) A list of all antidumping or countervailing duty investigations that have been suspended, or antidumping or countervailing duty orders that have been issued, on merchandise that is related to the component part and that is manufactured in the same foreign country in which the component part is manufactured;

(8) A list of all antidumping or countervailing duty investigations that have been suspended, or antidumping or countervailing duty orders that have been issued, on merchandise that is manufactured or exported by the manufacturer or exporter of the component part and that is similar in description and use to the component part; and

(9) The reasons for suspecting that the imposition of antidumping or countervailing duties has resulted in a diversion of exports of the component part into increased production and exportation to the United States of the downstream product.

(c) *Determination of sufficiency of application.* Within 14 days after an application is filed under paragraph (b) of this section, the Secretary will rule on the sufficiency of the application by making the determinations described in section 780(a)(2) of the Act.

(d) *Notice of Determination.* The Secretary will publish in the **Federal Register** notice of each affirmative or negative ''monitoring'' determination made under section 780(a)(2) of the Act, and if the determination under section 780(a)(2)(A) of the Act and a determination made under any clause of section 780(a)(2)(B) of the Act are affirmative, will transmit to the Commission a copy of the determination and the application. The Secretary will make available to the Commission, and to its employees directly involved in the monitoring, the information upon which the Secretary based the initiation.

§ 351.224 Disclosure of calculations and procedures for the correction of ministerial errors.

(a) *Introduction.* In the interests of transparency, the Department has long had a practice of providing parties with the details of its antidumping and countervailing duty calculations. This practice has come to be referred to as a ''disclosure.'' This section contains rules relating to requests for disclosure and procedures for correcting ministerial errors.

(b) *Disclosure.* The Secretary will disclose to a party to the proceeding calculations performed, if any, in connection with a preliminary determination under section 703(b) or section 733(b) of the Act, a final determination under section 705(a) or section 735(a) of the Act, and a final results of a review under section 736(c), section 751, or section 753 of the Act, normally within five days after the date of any public announcement or, if there is no public announcement of, within five days after the date of publication of, the preliminary determination, final determination, or final results of review (whichever is applicable). The Secretary will disclose to a party to the proceeding calculations performed, if any, in connection with a preliminary results of review under section 751 or section 753 of the Act, normally not later than ten days after the date of the public announcement of, or, if there is no public announcement, within five days after the date of publication of, the preliminary results of review.

(c) *Comments regarding ministerial errors.* (1) *In general.* A party to the proceeding to whom the Secretary has disclosed calculations performed in connection with a preliminary determination may submit comments concerning a significant ministerial error in such calculations. A party to the proceeding to whom the Secretary has disclosed calculations performed in connection with a final determination or the final results of a review may submit comments concerning any ministerial error in such calculations. Comments concerning ministerial errors made in the preliminary results of a review should be included in a party's case brief.

(2) *Time limits for submitting comments.* A party to the proceeding must file comments concerning ministerial errors within five days after the earlier of:

(i) The date on which the Secretary released disclosure documents to that party; or

(ii) The date on which the Secretary held a disclosure meeting with that party.

(3) *Replies to comments.* Replies to comments submitted under paragraph (c)(1) of this section must be filed within five days after the date on which the comments were filed with the Secretary. The Secretary will not consider replies to comments submitted in connection with a preliminary determination.

(4) *Extensions.* A party to the proceeding may request an extension of the time limit for filing comments concerning a ministerial error in a final determination or final results of review under § 351.302(c) within three days after the date of any public announcement, or, if there is no public announcement, within five days after the date of publication of the final determination or final results of review, as applicable. The Secretary will not extend the time limit for filing comments concerning a significant ministerial error in a preliminary determination.

(d) *Contents of comments and replies.* Comments filed under paragraph (c)(1) of this section must explain the alleged ministerial error by reference to applicable evidence in the official record, and must present what, in the party's view, is the appropriate correction. In addition, comments concerning a preliminary determination must demonstrate how the alleged ministerial error is significant (*see* paragraph (g) of this section) by illustrating the effect on individual weighted-average dumping margin or countervailable subsidy rate, the all-others rate, or the country-wide subsidy rate (whichever is applicable). Replies to any comments must be limited to issues raised in such comments.

(e) *Corrections.* The Secretary will analyze any comments received and, if appropriate, correct any significant ministerial error by amending the preliminary determination, or correct any ministerial error by amending the final determination or the final results of review (whichever is applicable). Where practicable, the Secretary will announce publicly the issuance of a correction notice, and normally will do so within 30 days after the date of public announcement, or, if there is no public announcement, within 30 days after the date of publication, of the preliminary determination, final determination, or final results of review (whichever is applicable). In addition, the Secretary will publish notice of such corrections in the **Federal Register**. A correction notice will not alter the anniversary month of an order or suspended investigation for purposes of requesting an administrative review (*see* § 351.213) or a new shipper review (*see* § 351.214) or initiating a sunset review (*see* § 351.218).

(f) *Definition of ''ministerial error.''* Under this section, *ministerial error* means an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial.

(g) *Definition of ''significant ministerial error.''* Under this section, *significant ministerial error* means a ministerial error (*see* paragraph (f) of this section), the correction of which, either singly or in combination with other errors:

(1) Would result in a change of at least five absolute percentage points in, but not less than 25 percent of, the weighted-average dumping margin or the countervailable subsidy rate (whichever is applicable) calculated in the original (erroneous) preliminary determination; or

(2) Would result in a difference between a weighted-average dumping margin or countervailable subsidy rate (whichever is applicable) of zero (or *de minimis*) and a weighted-average dumping margin or countervailable subsidy rate of greater than *de minimis*, or vice versa.

§ 351.225 Scope rulings.

(a) *Introduction.* Issues arise as to whether a particular product is included within the scope of an antidumping or countervailing duty order or a suspended investigation. Such issues can arise because the descriptions of subject merchandise contained in the Department's determinations must be written in general terms. At other times, a domestic interested party may allege that changes to an imported product or the place where the imported product is assembled constitutes circumvention under section 781 of the Act. When such issues arise, the Department issues ''scope rulings'' that clarify the scope of an order or suspended investigation with respect to particular products. This section contains rules regarding scope rulings, requests for scope rulings, procedures for scope inquiries, and standards used in determining whether a product is within the scope of an order or suspended investigation.

(b) *Self-initiation.* If the Secretary determines from available information that an inquiry is warranted to determine whether a product is included within the scope of an antidumping or countervailing duty order or a suspended investigation, the Secretary will initiate an inquiry, and will notify all parties on the Department's scope service list of its initiation of a scope inquiry.

(c) *By application.* (1) *Contents and service of application.* Any interested party may apply for a ruling as to whether a particular product is within the scope of an order or a suspended investigation. The application must be served upon all parties on the scope service list described in paragraph (n) of this section, and must contain the following, to the extent reasonably available to the interested party:

(i) A detailed description of the product, including its technical characteristics and uses, and its current U.S. Tariff Classification number;

(ii) A statement of the interested party's position as to whether the product is within the scope of an order or a suspended investigation, including:

(A) A summary of the reasons for this conclusion,

(B) Citations to any applicable statutory authority, and

(C) Any factual information supporting this position, including excerpts from portions of the Secretary's or the Commission's investigation, and relevant prior scope rulings.

(2) *Deadline for action on application.* Within 45 days of the date of receipt of an application for a scope ruling, the Secretary will issue a final ruling under paragraph (d) of this section or will initiate a scope inquiry under paragraph (e) of this section.

(d) *Ruling based upon the application.* If the Secretary can determine, based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of this section, whether a product is included within the scope of an order or a suspended investigation, the Secretary will issue a final ruling as to whether the product is included within the order or suspended investigation. The Secretary will notify all persons on the Department's scope service list (*see* paragraph (n) of this section) of the final ruling.

(e) *Ruling where further inquiry is warranted.* If the Secretary finds that the issue of whether a product is included within the scope of an order or a suspended investigation cannot be determined based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of this section, the Secretary will notify by mail all parties on the Department's scope service list of the initiation of a scope inquiry.

(f) *Notice and procedure.* (1) Notice of the initiation of a scope inquiry issued under paragraph (b) or (e) of this section will include:

(i) A description of the product that is the subject of the scope inquiry; and

(ii) An explanation of the reasons for the Secretary's decision to initiate a scope inquiry;

(iii) A schedule for submission of comments that normally will allow interested parties 20 days in which to provide comments on, and supporting factual information relating to, the inquiry, and 10 days in which to provide any rebuttal to such comments.

(2) The Secretary may issue questionnaires and verify submissions received, where appropriate.

(3) Whenever the Secretary finds that a scope inquiry presents an issue of significant difficulty, the Secretary will issue a preliminary scope ruling, based upon the available information at the time, as to whether there is a reasonable basis to believe or suspect that the product subject to a scope inquiry is included within the order or suspended investigation. The Secretary will notify all parties on the Department's scope service list (see paragraph (n) of this section) of the preliminary scope ruling, and will invite comment. Unless otherwise specified, interested parties will have within twenty days from the date of receipt of the notification in which to submit comments, and ten days thereafter in which to submit rebuttal comments.

(4) The Secretary will issue a final ruling as to whether the product which is the subject of the scope inquiry is included within the order or suspended investigation, including an explanation of the factual and legal conclusions on which the final ruling is based. The Secretary will notify all parties on the Department's scope service list (*see* paragraph (n) of this section) of the final scope ruling.

(5) The Secretary will issue a final ruling under paragraph (k) of this section (other scope rulings) normally within 120 days of the initiation of the inquiry under this section. The Secretary will issue a final ruling under paragraph (g), (h), (i), or (j) of this section (circumvention rulings under section 781 of the Act) normally within 300 days from the date of the initiation of the scope inquiry.

(6) When an administrative review under § 351.213, a new shipper review under § 351.214, or an expedited antidumping review under § 351.215 is in progress at the time the Secretary provides notice of the initiation of a scope inquiry (*see* paragraph (e)(1) of this section), the Secretary may conduct the scope inquiry in conjunction with that review.

(7)(i) The Secretary will notify the Commission in writing of the proposed inclusion of products in an order prior to issuing a final ruling under paragraph (f)(4) of this section based on a determination under:

(A) Section 781(a) of the Act with respect to merchandise completed or assembled in the United States (other than minor completion or assembly);

(B) Section 781(b) of the Act with respect to merchandise completed or assembled in other foreign countries; or

(C) Section 781(d) of the Act with respect to later-developed products which incorporate a significant technological advance or significant alteration of an earlier product.

(ii) If the Secretary notifies the Commission under paragraph (f)(7)(i) of this section, upon the written request of the Commission, the Secretary will consult with the Commission regarding the proposed inclusion, and any such consultation will be completed within 15 days after the date of such request. If, after consultation, the Commission believes that a significant injury issue is presented by the proposed inclusion of a product within an order, the Commission may provide written advice to the Secretary as to whether the inclusion would be inconsistent with the affirmative injury determination of the Commission on which the order is based.

(g) *Products completed or assembled in the United States.* Under section 781(a) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order imported parts or components referred to in section 781(a)(1)(B) of the Act that are used in the completion or assembly of the merchandise in the United States at any time such order is in effect. In making this determination, the Secretary will not consider any single factor of section 781(a)(2) of the Act to be controlling. In determining the value of parts or components purchased from an affiliated person under section 781(a)(1)(D) of the Act, or of processing performed by an affiliated person under section 781(a)(2)(E) of the Act, the Secretary may determine the value of the part or component on the basis of the cost of producing the part or component under section 773(f)(3) of the Act.

(h) *Products completed or assembled in other foreign countries.* Under section 781(b) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order, at any time such order is in effect, imported merchandise completed or assembled in a foreign country other than the country to which the order applies. In making this determination, the Secretary will not consider any single factor of section 781(b)(2) of the Act to be controlling. In determining the value of parts or components purchased from an affiliated person under section 781(b)(1)(D) of the Act, or of processing performed by an affiliated person under section 781(b)(2)(E) of the Act, the Secretary may determine the value of the part or component on the basis of the cost of producing the part or component under section 773(f)(3) of the Act.

(i) *Minor alterations of merchandise.* Under section 781(c) of the Act, the Secretary may include within the scope of an antidumping or countervailing duty order articles altered in form or appearance in minor respects.

(j) *Later-developed merchandise.* In determining whether later-developed merchandise is within the scope of an antidumping or countervailing duty order, the Secretary will apply section 781(d) of the Act.

(k) *Other scope determinations.* With respect to those scope determinations that are not covered under paragraphs (g) through (j) of this section, in considering whether a particular product is included within the scope of an order or a suspended investigation, the Secretary will take into account the following:

(1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

(2) When the above criteria are not dispositive, the Secretary will further consider:

(i) The physical characteristics of the product;

(ii) The expectations of the ultimate purchasers;

(iii) The ultimate use of the product;

(iv) The channels of trade in which the product is sold; and

(v) The manner in which the product is advertised and displayed.

(l) *Suspension of liquidation.* (1) When the Secretary conducts a scope inquiry under paragraph (b) or (e) of this section, and the product in question is already subject to suspension of liquidation, that suspension of liquidation will be continued, pending a preliminary or a final scope ruling, at the cash deposit rate that would apply if the product were ruled to be included within the scope of the order.

(2) If the Secretary issues a preliminary scope ruling under paragraph (f)(3) of this section to the effect that the product in question is included within the scope of the order, any suspension of liquidation described in paragraph (l)(1) of this section will

continue. If liquidation has not been suspended, the Secretary will instruct the Customs Service to suspend liquidation and to require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the scope inquiry. If the Secretary issues a preliminary scope ruling to the effect that the product in question is not included within the scope of the order, the Secretary will order any suspension of liquidation on the product ended, and will instruct the Customs Service to refund any cash deposits or release any bonds relating to that product.

(3) If the Secretary issues a final scope ruling, under either paragraph (d) or (f)(4) of this section, to the effect that the product in question is included within the scope of the order, any suspension of liquidation under paragraph (l)(1) or (l)(2) of this section will continue. Where there has been no suspension of liquidation, the Secretary will instruct the Customs Service to suspend liquidation and to require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the scope inquiry. If the Secretary's final scope ruling is to the effect that the product in question is not included within the scope of the order, the Secretary will order any suspension of liquidation on the subject product ended and will instruct the Customs Service to refund any cash deposits or release any bonds relating to this product.

(4) If, within 90 days of the initiation of a review of an order or a suspended investigation under this subpart, the Secretary issues a final ruling that a product is included within the scope of the order or suspended investigation that is the subject of the review, the Secretary, where practicable, will include sales of that product for purposes of the review and will seek information regarding such sales. If the Secretary issues a final ruling after 90 days of the initiation of the review, the Secretary may consider sales of the product for purposes of the review on the basis of non-adverse facts available. However, notwithstanding the pendency of a scope inquiry, if the Secretary considers it appropriate, the Secretary may request information concerning the product that is the subject of the scope inquiry for purposes of a review under this subpart.

(m) *Orders covering identical products.* Except for a scope inquiry and a scope ruling that involves section 781(a) or section 781(b) of the Act (assembly of parts or components in the United States or in a third country), if more than one order or suspended investigation cover the same subject merchandise, and if the Secretary considers it appropriate, the Secretary may conduct a single inquiry and issue a single scope ruling that applies to all such orders or suspended investigations.

(n) *Service of applications; scope service list.* The requirements of § 351.303(f) apply to this section, except that an application for a scope ruling must be served on all persons on the Department's scope service list. For purposes of this section, the ''scope service list'' will include all persons that have participated in any segment of the proceeding. If an application for a scope ruling in one proceeding results in a single inquiry that will apply to another proceeding (*see* paragraph (m) of this section), the Secretary will notify persons on the scope service list of the other proceeding of the application for a scope ruling.

(o) *Publication of list of scope rulings.* On a quarterly basis, the Secretary will publish in the **Federal Register** a list of scope rulings issued within the last three months. This list will include the case name, reference number, and a brief description of the ruling.

Subpart C—Information and Argument

§ 351.301 Time limits for submission of factual information.

(a) *Introduction.* The Department obtains most of its factual information in antidumping and countervailing duty proceedings from submissions made by interested parties during the course of the proceeding. This section sets forth the time limits for submitting such factual information, including information in questionnaire responses, publicly available information to value factors in nonmarket economy cases, allegations concerning market viability, allegations of sales at prices below the cost of production, countervailable subsidy allegations, and upstream subsidy allegations. Section 351.302 sets forth the procedures for requesting an extension of such time limits. Section 351.303 contains the procedural rules regarding filing, format, translation, service, and certification of documents.

(b) *Time limits in general.* Except as provided in paragraphs (c) and (d) of this section and § 351.302, a submission of factual information is due no later than:

(1) For a final determination in a countervailing duty investigation or an antidumping investigation, seven days before the date on which the verification of any person is scheduled to commence, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed;

(2) For the final results of an administrative review, 140 days after the last day of the anniversary month, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed;

(3) For the final results of a changed circumstances review, sunset review, or section 762 review, 140 days after the date of publication of notice of initiation of the review, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed;

(4) For the final results of a new shipper review, 100 days after the date of publication of notice of initiation of the review, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed; and

(5) For the final results of an expedited antidumping review, Article 8 violation review, Article 4/Article 7 review, or section 753 review, a date specified by the Secretary.

(c) *Time limits for certain submissions.* (1) *Rebuttal, clarification, or correction of factual information.* Any interested party may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party at any time prior to the deadline provided in this section for submission of such factual information. If factual information is submitted less than 10 days before, on, or after (normally only with the Department's permission) the applicable deadline for submission of such factual information, an interested party may submit factual information to rebut, clarify, or correct the factual information no later than 10 days after the date such factual information is served on the interested party or, if appropriate, made available under APO to the authorized applicant.

(2) *Questionnaire responses and other submissions on request.* (i) Notwithstanding paragraph (b) of this section, the Secretary may request any person to submit factual information at any time during a proceeding.

(ii) In the Secretary's written request to an interested party for a response to a questionnaire or for other factual information, the Secretary will specify the following: the time limit for the response; the information to be provided; the form and manner in which the interested party must submit the information; and that failure to submit requested information in the requested form and manner by the date specified may result in use of the facts available under section 776 of the Act and § 351.308.

(iii) Interested parties will have at least 30 days from the date of receipt to respond to the full initial questionnaire. The time limit for response to individual sections of the questionnaire, if the Secretary requests a separate response to such sections, may be less than the 30 days allotted for response to the full questionnaire. The date of receipt will be seven days from the date on which the initial questionnaire was transmitted.

(iv) A notification by an interested party, under section 782(c)(1) of the Act, of difficulties in submitting information in response to a questionnaire issued by the Secretary is to be submitted in writing within 14 days after the date of receipt of the initial questionnaire.

(v) A respondent interested party may request in writing that the Secretary conduct a questionnaire presentation. The Secretary may conduct a questionnaire presentation if the Secretary notifies the government of the affected country and that government does not object.

(3) *Submission of publicly available information to value factors under § 351.408(c).* Notwithstanding paragraph (b) of this section, interested parties may submit publicly available information to value factors under § 351.408(c) within:

(i) For a final determination in an antidumping investigation, 40 days after the date of publication of the preliminary determination;

(ii) For the final results of an administrative review, new shipper review, or changed circumstances review, 20 days after the date of publication of the preliminary results of review; and

(iii) For the final results of an expedited antidumping review, a date specified by the Secretary.

(d) *Time limits for certain allegations.* (1) *Market viability and the basis for determining a price-based normal value.* In an antidumping investigation or administrative review, allegations regarding market viability, including the exceptions in § 351.404(c)(2), are due, with all supporting factual information, within 40 days after the date on which the initial questionnaire was transmitted, unless the Secretary alters this time limit.

(2) *Sales at prices below the cost of production.* An allegation of sales at prices below the cost of production made by the petitioner or other domestic interested party is due within:

(i) In an antidumping investigation,

(A) On a country-wide basis, 20 days after the date on which the initial questionnaire was transmitted to any person, unless the Secretary alters this time limit; or

(B) On a company-specific basis, 20 days after a respondent interested party files the response to the relevant section of the questionnaire, unless the relevant questionnaire response is, in the Secretary's view, incomplete, in which case the Secretary will determine the time limit;

(ii) In an administrative review, new shipper review, or changed circumstances review, on a company-specific basis, 20 days after a respondent interested party files the response to the relevant section of the questionnaire, unless the relevant questionnaire response is, in the Secretary's view, incomplete, in which case the Secretary will determine the time limit; or

(iii) In an expedited antidumping review, on a company-specific basis, 10 days after the date of publication of the notice of initiation of the review.

(3) *Purchases of major inputs from an affiliated party at prices below the affiliated party's cost of production.* An allegation of purchases of major inputs from an affiliated party at prices below the affiliated party's cost of production made by the petitioner or other domestic interested party is due within 20 days after a respondent interested party files the response to the relevant section of the questionnaire, unless the relevant questionnaire response is, in the Secretary's view, incomplete, in which case the Secretary will determine the time limits.

(4) *Countervailable subsidy; upstream subsidy.* (i) *In general.* A countervailable subsidy allegation made by the petitioner or other domestic interested party is due no later than:

(A) In a countervailing duty investigation, 40 days before the scheduled date of the preliminary determination; or

(B) In an administrative review, new shipper review, or changed circumstances review, 20 days after all responses to the initial questionnaire are filed with the Department, unless the Secretary alters this time limit.

(ii) *Exception for upstream subsidy allegation in an investigation.* In a countervailing duty investigation, an allegation of upstream subsidies made by the petitioner or other domestic interested party is due no later than:

(A) 10 days before the scheduled date of the preliminary determination; or

(B) 15 days before the scheduled date of the final determination.

(5) *Targeted dumping.* In an antidumping investigation, an allegation of targeted dumping made by the petitioner or other domestic interested party under § 351.414(f)(3) is due no later than 30 days before the scheduled date of the preliminary determination.

§ 351.302 Extension of time limits; return of untimely filed or unsolicited material.

(a) *Introduction.* This section sets forth the procedures for requesting an extension of a time limit. In addition, this section explains that certain untimely filed or unsolicited material will be returned to the submitter together with an explanation of the reasons for the return of such material.

(b) *Extension of time limits.* Unless expressly precluded by statute, the Secretary may, for good cause, extend any time limit established by this part.

(c) *Requests for extension of specific time limit.* Before the applicable time limit specified under § 351.301 expires, a party may request an extension pursuant to paragraph (b) of this section. The request must be in writing and state the reasons for the request. An extension granted to a party must be approved in writing.

(d) *Return of untimely filed or unsolicited material.* (1) Unless the Secretary extends a time limit under paragraph (b) of this section, the Secretary will not consider or retain in the official record of the proceeding:

(i) Untimely filed factual information, written argument, or other material that the Secretary returns to the submitter, except as provided under § 351.104(a)(2); or

(ii) Unsolicited questionnaire responses, except as provided under § 351.204(d)(2).

(2) The Secretary will return such information, argument, or other material, or unsolicited questionnaire response with, to the extent practicable, written notice stating the reasons for return.

§ 351.303 Filing, format, translation, service, and certification of documents.

(a) *Introduction.* This section contains the procedural rules regarding filing, format, service, translation, and certification of documents and applies to all persons submitting documents to the Department for consideration in an antidumping or countervailing duty proceeding.

(b) *Where to file; time of filing.* Persons must address and submit all documents to the Secretary of Commerce, Attention: Import Administration, Central Records Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, between the hours of 8:30 a.m. and 5:00 p.m. on business days (*see* § 351.103(b)). If the applicable time limit expires on a non-business day, the Secretary will accept documents that are filed on the next business day.

(c) *Number of copies; filing of business proprietary and public versions under the one-day lag rule; information in double brackets.* (1) *In general.* Except as provided in paragraphs (c)(2) and (c)(3) of this section, a person must file six copies of each submission with the Department.

(2) *Application of the one-day lag rule.* (i) *Filing the business proprietary version.* A person must file one copy of the business proprietary version of any document with the Department within the applicable time limit. Business proprietary version means the version of a document containing information for which a person claims business proprietary treatment under § 351.304.

(ii) *Filing the final business proprietary version; bracketing corrections.* By the close of business one business day after the date the business proprietary version is filed under paragraph (c)(2)(i) of this section, a person must file six copies of the final business proprietary version of the document with the Department. The final business proprietary version must be identical to the business proprietary version filed on the previous day except for any bracketing corrections. Although a person must file six copies of the *complete* final business proprietary version with the Department, the person may serve other persons with only those pages containing bracketing corrections.

(iii) *Filing the public version.* Simultaneously with the filing of the final business proprietary version under paragraph (c)(2)(ii) of this section, a person also must file three copies of the public version of such document (see § 351.304(c)) with the Department.

(iv) *Information in double brackets.* If a person serves authorized applicants with a business proprietary version of a document that excludes information in double brackets pursuant to § 351.304(b)(2), the person simultaneously must file with the Department one copy of those pages in which information in double brackets has been excluded.

(3) *Computer media and printouts.* The Secretary may require submission of factual information on computer media unless the Secretary modifies such requirements under section 782(c) of the Act (*see* § 351.301(c)(2)(iv)). The computer medium must be accompanied by the number of copies of any computer printout specified by the Secretary. All information on computer media must be releasable under APO (see § 351.305).

(d) *Format of copies.* (1) *In general.* Unless the Secretary alters the requirements of this section, documents filed with the Department must conform to the specification and marking requirements under paragraph (d)(2) of this section or the Secretary may refuse to accept such documents for the official record of the proceeding.

(2) *Specifications and markings.* A person must submit documents on letter-size paper, single-sided and double-spaced, and must securely bind each copy as a single document with any letter of transmittal as the first page of the document. A submitter must mark the first page of each document in the upper right-hand corner with the following information in the following format:

(i) On the first line, except for a petition, indicate the Department case number;

(ii) On the second line, indicate the total number of pages in the document including cover pages, appendices, and any unnumbered pages;

(iii) On the third line, indicate whether the document is for an investigation, scope inquiry, circumvention inquiry, downstream product monitoring application, or review and, if the latter, indicate the inclusive dates of the review, the type of review, and the section number of the Act corresponding to the type of review;

(iv) On the fourth line, indicate the Department office conducting the proceeding;

(v) On the fifth and subsequent lines, indicate whether any portion of the document contains business proprietary information and, if so, list the applicable page numbers and state either ''Document May be Released Under APO'' or ''Document May Not be Released Under APO.'' Indicate ''Business Proprietary Treatment Requested'' on the top of each page containing business proprietary information. In addition, include the warning ''Bracketing of Business Proprietary Information is Not Final for One Business Day After Date of Filing'' on the top of each page containing business proprietary information in the copy of the business proprietary version filed under § 351.303(c)(2)(i) (one-day lag rule). Do not include this warning in the copies of the final business proprietary version filed on the next business day under § 351.303(c)(2)(ii) (*see* § 351.303(c)(2) and § 351.304(c)); and

(vi) For public versions of business proprietary documents required under § 351.304(c), complete the marking as required in paragraphs (d)(2)(i)–(v) of this section for the business proprietary document, but conspicuously mark the first page ''Public Version.''

(e) *Translation to English.* A document submitted in a foreign language must be accompanied by an English translation of the entire document or of only pertinent portions, where appropriate, unless the Secretary waives this requirement for an individual document. A party must obtain the Department's approval for submission of an English translation of only portions of a document prior to submission to the Department.

(f) *Service of copies on other persons.* (1)(i) *In general.* Except as provided in § 351.202(c) (filing of petition), § 351.207(f)(1) (submission of proposed suspension agreement), and paragraph (f)(3) of this section, a person filing a document with the Department simultaneously must serve a copy of the document on all other persons on the service list by personal service or first class mail.

(ii) *Service of public versions or a party's own business proprietary information.* Notwithstanding paragraphs (f)(1)(i) and (f)(3) of this section, service of the public version of a document or of the business proprietary version of a document containing only the server's own business proprietary information, on persons on the service list, may be made by facsimile transmission or other electronic transmission process, with the consent of the person to be served.

(2) *Certificate of service.* Each document filed with the Department must include a certificate of service listing each person served (including agents), the type of document served, and the date and method of service on each person. The Secretary may refuse to accept any document that is not accompanied by a certificate of service.

(3) *Service requirements for certain documents.* (i) *Briefs.* In addition to the certificate of service requirements contained in paragraph (f)(2) of this section, a person filing a case or rebuttal brief with the Department simultaneously must serve a copy of that brief on all persons on the service list and on any U.S. Government agency that has submitted a case or rebuttal brief in the segment of the proceeding. If, under § 351.103(c), a person has

designated an agent to receive service that is located in the United States, service on that person must be either by personal service on the same day the brief is filed or by overnight mail or courier on the next day. If the person has designated an agent to receive service that is located outside the United States, service on that person must be by first class airmail.

(ii) *Request for review.* In addition to the certificate of service requirements under paragraph (f)(2) of this section, an interested party that files with the Department a request for an expedited antidumping review, an administrative review, a new shipper review, or a changed circumstances review must serve a copy of the request by personal service or first class mail on each exporter or producer specified in the request and on the petitioner by the end of the anniversary month or within ten days of filing the request for review, whichever is later. If the interested party that files the request is unable to locate a particular exporter or producer, or the petitioner, the Secretary may accept the request for review if the Secretary is satisfied that the party made a reasonable attempt to serve a copy of the request on such person.

(g) *Certifications.* A person must file with each submission containing factual information the certification in paragraph (g)(1) of this section and, in addition, if the person has legal counsel or another representative, the certification in paragraph (g)(2) of this section:

(1) For the person's officially responsible for presentation of the factual information:

I, (name and title), currently employed by (person), certify that (1) I have read the attached submission, and (2) the information contained in this submission is, to the best of my knowledge, complete and accurate.

(2) For the person's legal counsel or other representative:

I, (name), of (law or other firm), counsel or representative to (person), certify that (1) I have read the attached submission, and (2) based on the information made available to me by (person), I have no reason to believe that this submission contains any material misrepresentation or omission of fact.

§ 351.304 Establishing business proprietary treatment of information [Reserved].

§ 351.305 Access to business proprietary information [Reserved].

§ 351.306 Use of business proprietary information [Reserved].

§ 351.307 Verification of information.

(a) *Introduction.* Prior to making a final determination in an investigation or issuing final results of review, the Secretary may verify relevant factual information. This section clarifies when verification will occur, the contents of a verification report, and the procedures for verification.

(b) *In general.* (1) Subject to paragraph (b)(4) of this section, the Secretary will verify factual information upon which the Secretary relies in:

(i) A final determination in a continuation of a previously suspended countervailing duty investigation (section 704(g) of the Act), countervailing duty investigation, continuation of a previously suspended antidumping investigation (section 705(a) of the Act), or antidumping investigation;

(ii) The final results of an expedited antidumping review;

(iii) A revocation under section 751(d) of the Act;

(iv) The final results of an administrative review, new shipper review, or changed circumstances review, if the Secretary decides that good cause for verification exists; and

(v) The final results of an administrative review if:

(A) A domestic interested party, not later than 100 days after the date of publication of the notice of initiation of review, submits a written request for verification; and

(B) The Secretary conducted no verification under this paragraph during either of the two immediately preceding administrative reviews.

(2) The Secretary may verify factual information upon which the Secretary relies in a proceeding or a segment of a proceeding not specifically provided for in paragraph (b)(1) of this section.

(3) If the Secretary decides that, because of the large number of exporters or producers included in an investigation or administrative review, it is impractical to verify relevant factual information for each person, the Secretary may select and verify a sample.

(4) The Secretary may conduct verification of a person if that person agrees to verification and the Secretary notifies the government of the affected country and that government does not object. If the person or the government objects to verification, the Secretary will not conduct verification and may disregard any or all information submitted by the person in favor of use of the facts available under section 776 of the Act and § 351.308.

(c) *Verification report.* The Secretary will report the methods, procedures, and results of a verification under this section prior to making a final determination in an investigation or issuing final results in a review.

(d) *Procedures for verification.* The Secretary will notify the government of the affected country that employees of the Department will visit with the persons listed below in order to verify the accuracy and completeness of submitted factual information. The notification will, where practicable, identify any member of the verification team who is not an officer of the U.S. Government. As part of the verification, employees of the Department will request access to all files, records, and personnel which the Secretary considers relevant to factual information submitted of:

(1) Producers, exporters, or importers;

(2) Persons affiliated with the persons listed in paragraph (d)(1) of this section, where applicable;

(3) Unaffiliated purchasers, or

(4) The government of the affected country as part of verification in a countervailing duty proceeding.

§ 351.308 Determinations on the basis of the facts available.

(a) *Introduction.* The Secretary may make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information. If the Secretary finds that an interested party ''has failed to cooperate by not acting to the best of its ability to comply with a request for information,'' the Secretary may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. This section lists some of the sources of information upon which the Secretary may base an adverse inference and explains the actions the Secretary will take with respect to corroboration of information.

(b) *In general.* The Secretary may make a determination under the Act and this part based on the facts otherwise available in accordance with section 776(a) of the Act.

(c) *Adverse Inferences.* For purposes of section 776(b) of the Act, an adverse inference may include reliance on:

(1) Secondary information, such as information derived from:

(i) The petition;

(ii) A final determination in a countervailing duty investigation or an antidumping investigation;

(iii) Any previous administrative review, new shipper review, expedited antidumping review, section 753 review, or section 762 review; or

(2) Any other information placed on the record.

(d) *Corroboration of secondary information.* Under section 776(c) of the Act, when the Secretary relies on secondary information, the Secretary will, to the extent practicable, corroborate that information from independent sources that are reasonably at the Secretary's disposal. Independent sources may include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review. Corroborate means that the Secretary will examine whether the secondary information to be used has probative value. The fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.

(e) *Use of certain information.* In reaching a determination under the Act and this part, the Secretary will not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the Secretary if the conditions listed under section 782(e) of the Act are met.

§ 351.309 Written argument.

(a) *Introduction.* Written argument may be submitted during the course of an antidumping or countervailing duty proceeding. This section sets forth the time limits for submission of case and rebuttal briefs and provides guidance on what should be contained in these documents.

(b) *Written argument.* (1) *In general.* In making the final determination in a countervailing duty investigation or antidumping investigation or the final results of an administrative review, new shipper review, expedited antidumping review, section 753 review, or section 762 review, the Secretary will consider written arguments in case or rebuttal briefs filed within the time limits in this section.

(2) *Written argument on request.* Notwithstanding paragraph (b)(1) of this section, the Secretary may request written argument on any issue from any person or U.S. Government agency at any time during a proceeding.

(c) *Case brief.* (1) Any interested party or U.S. Government agency may submit a ''case brief'' within:

(i) For a final determination in a countervailing duty investigation or antidumping investigation, 50 days after the date of publication of the preliminary determination, unless the Secretary alters this time limit;

(ii) For the final results of an administrative review, new shipper review, changed circumstances review, or section 762 review, 30 days after the date of publication of the preliminary results of review, unless the Secretary alters the time limit; or

(iii) For the final results of an expedited antidumping review, sunset review, Article 8 violation review, Article 4/Article 7 review, or section 753 review, a date specified by the Secretary.

(2) The case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results. As part of the case brief, parties are encouraged to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited.

(d) *Rebuttal brief.* (1) Any interested party or U.S. Government agency may submit a ''rebuttal brief'' within five days after the time limit for filing the case brief, unless the Secretary alters this time limit.

(2) The rebuttal brief may respond only to arguments raised in case briefs and should identify the arguments to which it is responding. As part of the rebuttal brief, parties are encouraged to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited.

§ 351.310 Hearings.

(a) *Introduction.* This section sets forth the procedures for requesting a hearing, indicates that the Secretary may consolidate hearings, and explains when the Secretary may hold closed hearing sessions.

(b) *Pre-hearing conference.* The Secretary may conduct a telephone pre-hearing conference with representatives of interested parties to facilitate the conduct of the hearing.

(c) *Request for hearing.* Any interested party may request that the Secretary hold a public hearing on arguments to be raised in case or rebuttal briefs within 30 days after the date of publication of the preliminary determination or preliminary results of review, unless the Secretary alters this time limit, or in a proceeding where the Secretary will not issue a preliminary determination, not later than a date specified by the Secretary. To the extent practicable, a party requesting a hearing must identify arguments to be raised at the hearing. At the hearing, an interested party may make an affirmative presentation only on arguments included in that party's case brief and may make a rebuttal presentation only on arguments included in that party's rebuttal brief.

(d) *Hearings in general.* (1) If an interested party submits a request under paragraph (c) of this section, the Secretary will hold a public hearing on the date stated in the notice of the Secretary's preliminary determination or preliminary results of administrative review (or otherwise specified by the Secretary in an expedited antidumping review), unless the Secretary alters the date. Ordinarily, the hearing will be held two days after the scheduled date for submission of rebuttal briefs.

(2) The hearing is not subject to 5 U.S.C. §§ 551–559, and § 702 (Administrative Procedure Act). Witness testimony, if any, will not be under oath or subject to cross-examination by another interested party or witness. During the hearing, the chair may question any person or witness and may request persons to present additional written argument.

(e) *Consolidated hearings.* At the Secretary's discretion, the Secretary may consolidate hearings in two or more cases.

(f) *Closed hearing sessions.* An interested party may request a closed session of the hearing no later than the date the case briefs are due in order to address limited issues during the course of the hearing. The requesting party must identify the subjects to be discussed, specify the amount of time requested, and justify the need for a closed session with respect to each subject. If the Secretary approves the request for a closed session, only authorized applicants and other persons authorized by the regulations may be present for the closed session (*see* § 351.305).

(g) *Transcript of hearing.* The Secretary will place a verbatim transcript of the hearing in the public and official records of the proceeding and will announce at the hearing how interested parties may obtain copies of the transcript.

§ 351.311 Countervailable subsidy practice discovered during investigation or review.

(a) *Introduction.* During the course of a countervailing duty investigation or review, Department officials may discover or receive notice of a practice that appears to provide a countervailable subsidy. This section explains when the Secretary will examine such a practice.

(b) *Inclusion in proceeding.* If during a countervailing duty investigation or a

countervailing duty administrative review the Secretary discovers a practice that appears to provide a countervailable subsidy with respect to the subject merchandise and the practice was not alleged or examined in the proceeding, or if, pursuant to section 775 of the Act, the Secretary receives notice from the United States Trade Representative that a subsidy or subsidy program is in violation of Article 8 of the Subsidies Agreement, the Secretary will examine the practice, subsidy, or subsidy program if the Secretary concludes that sufficient time remains before the scheduled date for the final determination or final results of review.

(c) *Deferral of examination.* If the Secretary concludes that insufficient time remains before the scheduled date for the final determination or final results of review to examine the practice, subsidy, or subsidy program described in paragraph (b) of this section, the Secretary will:

(1) During an investigation, allow the petitioner to withdraw the petition without prejudice and resubmit it with an allegation with regard to the newly discovered practice, subsidy, or subsidy program; or

(2) During an investigation or review, defer consideration of the newly discovered practice, subsidy, or subsidy program until a subsequent administrative review, if any.

(d) *Notice.* The Secretary will notify the parties to the proceeding of any practice the Secretary discovers, or any subsidy or subsidy program with respect to which the Secretary receives notice from the United States Trade Representative, and whether or not it will be included in the then ongoing proceeding.

§ 351.312 Industrial users and consumer organizations.

(a) *Introduction.* The URAA provides for opportunity for comment by consumer organizations and industrial users on matters relevant to a particular determination of dumping, subsidization, or injury. This section indicates under what circumstances such persons may submit relevant information and argument.

(b) *Opportunity to submit relevant information and argument.* In an antidumping or countervailing duty proceeding under title VII of the Act and this part, an industrial user of the subject merchandise or a representative consumer organization, as described in section 777(h) of the Act, may submit relevant factual information and written argument to the Department under paragraphs (b), (c)(1), and (c)(3) of § 351.301 and paragraphs (c) and (d) of § 351.309 concerning dumping or a countervailable subsidy. All such submissions must be filed in accordance with § 351.303.

(c) *Business proprietary information.* Persons described in paragraph (b) of this section may request business proprietary treatment of information under § 351.304, but will not be granted access under § 351.305 to business proprietary information submitted by other persons.

Subpart D—Calculation of Export Price, Constructed Export Price, Fair Value, and Normal Value

§ 351.401 In general.

(a) *Introduction.* In general terms, an antidumping analysis involves a comparison of export price or constructed export price in the United States with normal value in the foreign market. This section establishes certain general rules that apply to the calculation of export price, constructed export price and normal value. (*See* section 772, section 773, and section 773A of the Act.)

(b) *Adjustments in general.* In making adjustments to export price, constructed export price, or normal value, the Secretary will adhere to the following principles:

(1) The interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment; and

(2) The Secretary will not double-count adjustments.

(c) *Use of price net of price adjustments.* In calculating export price, constructed export price, and normal value (where normal value is based on price), the Secretary will use a price that is net of any price adjustment, as defined in § 351.102(b), that is reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable).

(d) *Delayed payment or pre-payment of expenses.* Where cost is the basis for determining the amount of an adjustment to export price, constructed export price, or normal value, the Secretary will not factor in any delayed payment or pre-payment of expenses by the exporter or producer.

(e) *Adjustments for movement expenses.* (1) *Original place of shipment.* In making adjustments for movement expenses to establish export price or constructed export price under section 772(c)(2)(A) of the Act, or normal value under section 773(a)(6)(B)(ii) of the Act, the Secretary normally will consider the production facility as being the ''original place of shipment. However, where the Secretary bases export price, constructed export price, or normal value on a sale by an unaffiliated reseller, the Secretary may treat the original place from which the reseller shipped the merchandise as the ''original place of shipment.''

(2) *Warehousing.* The Secretary will consider warehousing expenses that are incurred after the subject merchandise or foreign like product leaves the original place of shipment as movement expenses.

(f) *Treatment of affiliated producers in antidumping proceedings.* (1) *In general.* In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.

(2) *Significant potential for manipulation.* In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:

(i) The level of common ownership;

(ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and

(iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

(g) *Allocation of expenses and price adjustments.* (1) *In general.* The Secretary may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied that the allocation method used does not cause inaccuracies or distortions.

(2) *Reporting allocated expenses and price adjustments.* Any party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions.

(3) *Feasibility.* In determining the feasibility of transaction-specific reporting or whether an allocation is calculated on as specific a basis as is

feasible, the Secretary will take into account the records maintained by the party in question in the ordinary course of its business, as well as such factors as the normal accounting practices in the country and industry in question and the number of sales made by the party during the period of investigation or review.

(4) *Expenses and price adjustments relating to merchandise not subject to the proceeding.* The Secretary will not reject an allocation method solely because the method includes expenses incurred, or price adjustments made, with respect to sales of merchandise that does not constitute subject merchandise or a foreign like product (whichever is applicable).

(h) *Treatment of subcontractors (''tolling'' operations).* The Secretary will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product.

(i) *Date of sale.* In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

§ 351.402 Calculation of export price and constructed export price; reimbursement of antidumping and countervailing duties.

(a) *Introduction.* In order to establish export price, constructed export price, and normal value, the Secretary must make certain adjustments to the price to the unaffiliated purchaser (often called the ''starting price'') in both the United States and foreign markets. This regulation clarifies how the Secretary will make certain of the adjustments to the starting price in the United States that are required by section 772 of the Act.

(b) *Additional adjustments to constructed export price.* In establishing constructed export price under section 772(d) of the Act, the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid. The Secretary will not make an adjustment for any expense that is related solely to the sale to an affiliated importer in the United States, although the Secretary may make an adjustment to normal value for such expenses under section 773(a)(6)(C)(iii) of the Act.

(c) *Special rule for merchandise with value added after importation.* (1) *Merchandise imported by affiliated persons.* In applying section 772(e) of the Act, merchandise imported by and value added by a person affiliated with the exporter or producer includes merchandise imported and value added for the account of such an affiliated person.

(2) *Estimation of value added.* The Secretary normally will determine that the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise if the Secretary estimates the value added to be at least 65 percent of the price charged to the first unaffiliated purchaser for the merchandise as sold in the United States. The Secretary normally will estimate the value added based on the difference between the price charged to the first unaffiliated purchaser for the merchandise as sold in the United States and the price paid for the subject merchandise by the affiliated person. The Secretary normally will base this determination on averages of the prices and the value added to the subject merchandise.

(3) *Determining dumping margins.* For purposes of determining dumping margins under paragraphs (1) and (2) of section 772(e) of the Act, the Secretary may use the weighted-average dumping margins calculated on sales of identical or other subject merchandise sold to unaffiliated persons.

(d) *Special rule for determining profit.* This paragraph sets forth rules for calculating profit in establishing constructed export price under section 772(f) of the Act.

(1) *Basis for total expenses and total actual profit.* In calculating total expenses and total actual profit, the Secretary normally will use the aggregate of expenses and profit for all subject merchandise sold in the United States and all foreign like products sold in the exporting country, including sales that have been disregarded as being below the cost of production. (*See* section 773(b) of the Act (sales at less than cost of production).)

(2) *Use of financial reports.* For purposes of determining profit under section 772(d)(3) of the Act, the Secretary may rely on any appropriate financial reports, including public, audited financial statements, or equivalent financial reports, and internal financial reports prepared in the ordinary course of business.

(3) *Voluntary reporting of costs of production.* The Secretary will not require the reporting of costs of production solely for purposes of determining the amount of profit to be deducted from the constructed export price. The Secretary will base the calculation of profit on costs of production if such costs are reported voluntarily by the date established by the Secretary, and provided that it is practicable to do so and the costs of production are verifiable.

(e) *Treatment of payments between affiliated persons.* Where a person affiliated with the exporter or producer incurs any of the expenses deducted from constructed export price under section 772(d) of the Act and is reimbursed for such expenses by the exporter, producer or other affiliate, the Secretary normally will make an adjustment based on the actual cost to the affiliated person. If the Secretary is satisfied that information regarding the actual cost to the affiliated person is unavailable to the exporter or producer, the Secretary may determine the amount of the adjustment on any other reasonable basis, including the amount of the reimbursement to the affiliated person if the Secretary is satisfied that such amount reflects the amount usually paid in the market under consideration.

(f) *Reimbursement of antidumping duties and countervailing duties.* (1) *In general.* (i) In calculating the export price (or the constructed export price), the Secretary will deduct the amount of any antidumping duty or countervailing duty which the exporter or producer:

(A) Paid directly on behalf of the importer; or

(B) Reimbursed to the importer.

(ii) The Secretary will not deduct the amount of any antidumping duty or countervailing duty paid or reimbursed if the exporter or producer granted to the importer before initiation of the antidumping investigation in question a warranty of nonapplicability of antidumping duties or countervailing duties with respect to subject merchandise which was:

(A) Sold before the date of publication of the Secretary's order applicable to the merchandise in question; and

(B) Exported before the date of publication of the Secretary's final antidumping determination.

(iii) Ordinarily, under paragraph (f)(1)(i) of this section, the Secretary will deduct the amount reimbursed only once in the calculation of the export price (or constructed export price).

(2) *Certificate.* The importer must file prior to liquidation a certificate in the

following form with the appropriate District Director of Customs:

I hereby certify that I (have) (have not) entered into any agreement or understanding for the payment or for the refunding to me, by the manufacturer, producer, seller, or exporter, of all or any part of the antidumping duties or countervailing duties assessed upon the following importations of (commodity) from (country): (List entry numbers) which have been purchased on or after (date of publication of antidumping notice suspending liquidation in the **Federal Register**) or purchased before (same date) but exported on or after (date of final determination of sales at less than fair value).

(3) *Presumption.* The Secretary may presume from an importer's failure to file the certificate required in paragraph (f)(2) of this section that the exporter or producer paid or reimbursed the antidumping duties or countervailing duties.

§ 351.403 Sales used in calculating normal value; transactions between affiliated parties.

(a) *Introduction.* This section clarifies when the Secretary may use offers for sale in determining normal value. Additionally, this section clarifies the authority of the Secretary to use sales to or through an affiliated party as a basis for normal value. (*See* section 773(a)(5) of the Act (indirect sales or offers for sale).)

(b) *Sales and offers for sale.* In calculating normal value, the Secretary normally will consider offers for sale only in the absence of sales and only if the Secretary concludes that acceptance of the offer can be reasonably expected.

(c) *Sales to an affiliated party.* If an exporter or producer sold the foreign like product to an affiliated party, the Secretary may calculate normal value based on that sale only if satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller.

(d) *Sales through an affiliated party.* If an exporter or producer sold the foreign like product through an affiliated party, the Secretary may calculate normal value based on the sale by such affiliated party. However, the Secretary normally will not calculate normal value based on the sale by an affiliated party if sales of the foreign like product by an exporter or producer to affiliated parties account for less than five percent of the total value (or quantity) of the exporter's or producer's sales of the foreign like product in the market in question or if sales to the affiliated party are comparable, as defined in paragraph (c) of this section.

§ 351.404 Selection of the market to be used as the basis for normal value.

(a) *Introduction.* Although in most circumstances sales of the foreign like product in the home market are the most appropriate basis for determining normal value, section 773 of the Act also permits use of sales to a third country or constructed value as the basis for normal value. This section clarifies the rules for determining the basis for normal value.

(b) *Determination of viable market.* (1) *In general.* The Secretary will consider the exporting country or a third country as constituting a viable market if the Secretary is satisfied that sales of the foreign like product in that country are of sufficient quantity to form the basis of normal value.

(2) *Sufficient quantity.* ''Sufficient quantity'' normally means that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by an exporter or producer in a country is 5 percent or more of the aggregate quantity (or value) of its sales of the subject merchandise to the United States.

(c) *Calculation of price-based normal value in viable market.* (1) *In general.* Subject to paragraph (c)(2) of this section:

(i) If the exporting country constitutes a viable market, the Secretary will calculate normal value on the basis of price in the exporting country (*see* section 773(a)(1)(B)(i) of the Act (price used for determining normal value)); or

(ii) If the exporting country does not constitute a viable market, but a third country does constitute a viable market, the Secretary may calculate normal value on the basis of price to a third country (*see* section 773(a)(1)(B)(ii) of the Act (use of third country prices in determining normal value)).

(2) *Exception.* The Secretary may decline to calculate normal value in a particular market under paragraph (c)(1) of this section if it is established to the satisfaction of the Secretary that:

(i) In the case of the exporting country or a third country, a particular market situation exists that does not permit a proper comparison with the export price or constructed export price (*see* section 773(a)(1)(B)(ii)(III) or section 773(a)(1)(C)(iii) of the Act); or

(ii) In the case of a third country, the price is not representative (*see* section 773(a)(1)(B)(ii)(I) of the Act).

(d) *Allegations concerning market viability and the basis for determining a price-based normal value.* In an antidumping investigation or review, allegations regarding market viability or the exceptions in paragraph (c)(2) of this section, must be filed, with all supporting factual information, in accordance with § 351.301(d)(1).

(e) *Selection of third country.* For purposes of calculating normal value based on prices in a third country, where prices in more than one third country satisfy the criteria of section 773(a)(1)(B)(ii) of the Act and this section, the Secretary generally will select the third country based on the following criteria:

(1) The foreign like product exported to a particular third country is more similar to the subject merchandise exported to the United States than is the foreign like product exported to other third countries;

(2) The volume of sales to a particular third country is larger than the volume of sales to other third countries;

(3) Such other factors as the Secretary considers appropriate.

(f) *Third country sales and constructed value.* The Secretary normally will calculate normal value based on sales to a third country rather than on constructed value if adequate information is available and verifiable (*see* section 773(a)(4) of the Act (use of constructed value)).

§ 351.405 Calculation of normal value based on constructed value.

(a) *Introduction.* In certain circumstances, the Secretary may determine normal value by constructing a value based on the cost of manufacture, selling general and administrative expenses, and profit. The Secretary may use constructed value as the basis for normal value where: neither the home market nor a third country market is viable; sales below the cost of production are disregarded; sales outside the ordinary course of trade, or sales the prices of which are otherwise unrepresentative, are disregarded; sales used to establish a fictitious market are disregarded; no contemporaneous sales of comparable merchandise are available; or in other circumstances where the Secretary determines that home market or third country prices are inappropriate. (*See* section 773(e) and section 773(f) of the Act.) This section clarifies the meaning of certain terms relating to constructed value.

(b) *Profit and selling, general, and administrative expenses.* In determining the amount to be added to constructed value for profit and for selling, general, and administrative expenses, the following rules will apply:

(1) Under section 773(e)(2)(A) of the Act, ''foreign country'' means the country in which the merchandise is produced or a third country selected by the Secretary under § 351.404(e), as appropriate.

(2) Under section 773(e)(2)(B) of the Act, ''foreign country'' means the country in which the merchandise is produced.

§ 351.406 Calculation of normal value if sales are made at less than cost of production.

(a) *Introduction.* In determining normal value, the Secretary may disregard sales of the foreign like product made at prices that are less than the cost of production of that product. However, such sales will be disregarded only if they are made within an extended period of time, in substantial quantities, and are not at prices which permit recovery of costs within a reasonable period of time. (*See* section 773(b) of the Act.) This section clarifies the meaning of the term ''extended period of time'' as used in the Act.

(b) *Extended period of time.* The ''extended period of time'' under section 773(b)(1)(A) of the Act normally will coincide with the period in which the sales under consideration for the determination of normal value were made.

§ 351.407 Calculation of constructed value and cost of production.

(a) *Introduction.* This section sets forth certain rules that are common to the calculation of constructed value and the cost of production. (*See* section 773(f) of the Act.)

(b) *Determination of value under the major input rule.* For purposes of section 773(f)(3) of the Act, the Secretary normally will determine the value of a major input purchased from an affiliated person based on the higher of:

(1) The price paid by the exporter or producer to the affiliated person for the major input;

(2) The amount usually reflected in sales of the major input in the market under consideration; or

(3) The cost to the affiliated person of producing the major input.

(c) *Allocation of costs.* In determining the appropriate method for allocating costs among products, the Secretary may take into account production quantities, relative sales values, and other quantitative and qualitative factors associated with the manufacture and sale of the subject merchandise and the foreign like product.

(d) *Startup costs.* (1) In identifying startup operations under section 773(f)(1)(C)(ii) of the Act:

(i) ''New production facilities'' includes the substantially complete retooling of an existing plant. Substantially complete retooling involves the replacement of nearly all production machinery or the equivalent rebuilding of existing machinery.

(ii) A ''new product'' is one requiring substantial additional investment, including products which, though sold under an existing nameplate, involve the complete revamping or redesign of the product. Routine model year changes will not be considered a new product.

(iii) Mere improvements to existing products or ongoing improvements to existing facilities will not be considered startup operations.

(iv) An expansion of the capacity of an existing production line will not qualify as a startup operation unless the expansion constitutes such a major undertaking that it requires the construction of a new facility and results in a depression of production levels due to technical factors associated with the initial phase of commercial production of the expanded facilities.

(2) In identifying the end of the startup period under clauses (ii) and (iii) of section 773(f)(1)(C) of the Act:

(i) The attainment of peak production levels will not be the standard for identifying the end of the startup period, because the startup period may end well before a company achieves optimum capacity utilization.

(ii) The startup period will not be extended to cover improvements and cost reductions that may occur over the entire life cycle of a product.

(3) In determining when a producer reaches commercial production levels under section 773(f)(1)(C)(ii) of the Act:

(i) The Secretary will consider the actual production experience of the merchandise in question, measuring production on the basis of units processed.

(ii) To the extent necessary, the Secretary will examine factors in addition to those specified in section 773(f)(1)(C)(ii) of the Act, including historical data reflecting the same producer's or other producers' experiences in producing the same or similar products. A producer's projections of future volume or cost will be accorded little weight.

(4) In making an adjustment for startup operations under section 773(f)(1)(C)(iii) of the Act:

(i) The Secretary will determine the duration of the startup period on a case-by-case basis.

(ii) The difference between actual costs and the costs of production calculated for startup costs will be amortized over a reasonable period of time subsequent to the startup period over the life of the product or machinery, as appropriate.

(iii) The Secretary will consider unit production costs to be items such as depreciation of equipment and plant, labor costs, insurance, rent and lease expenses, material costs, and factory overhead. The Secretary will not consider sales expenses, such as advertising costs, or other general and administrative or non-production costs (such as general research and development costs), as startup costs.

§ 351.408 Calculation of normal value of merchandise from nonmarket economy countries.

(a) *Introduction.* In identifying dumping from a nonmarket economy country, the Secretary normally will calculate normal value by valuing the nonmarket economy producers' factors of production in a market economy country. (*See* section 773(c) of the Act.) This section clarifies when and how this special methodology for nonmarket economies will be applied.

(b) *Economic Comparability.* In determining whether a country is at a level of economic development comparable to the nonmarket economy under section 773(c)(2)(B) or section 773(c)(4)(A) of the Act, the Secretary will place primary emphasis on *per capita* GDP as the measure of economic comparability.

(c) *Valuation of Factors of Production.* For purposes of valuing the factors of production, general expenses, profit, and the cost of containers, coverings, and other expenses (referred to collectively as ''factors'') under section 773(c)(1) of the Act the following rules will apply:

(1) *Information used to value factors.* The Secretary normally will use publicly available information to value factors. However, where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, the Secretary normally will value the factor using the price paid to the market economy supplier.

(2) *Valuation in a single country.* Except for labor, as provided in paragraph (d)(3) of this section, the Secretary normally will value all factors in a single surrogate country.

(3) *Labor.* For labor, the Secretary will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries. The Secretary will calculate the wage rate to

be applied in nonmarket economy proceedings each year. The calculation will be based on current data, and will be made available to the public.

(4) *Manufacturing overhead, general expenses, and profit.* For manufacturing overhead, general expenses, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.

§ 351.409 Differences in quantities.

(a) *Introduction.* Because the quantity of merchandise sold may affect the price, in comparing export price or constructed export price with normal value, the Secretary will make a reasonable allowance for any difference in quantities to the extent the Secretary is satisfied that the amount of any price differential (or lack thereof) is wholly or partly due to that difference in quantities. (*See* section 773(a)(6)(C)(i) of the Act.)

(b) *Sales with quantity discounts in calculating normal value.* The Secretary normally will calculate normal value based on sales with quantity discounts only if:

(1) During the period examined, or during a more representative period, the exporter or producer granted quantity discounts of at least the same magnitude on 20 percent or more of sales of the foreign like product for the relevant country; or

(2) The exporter or producer demonstrates to the Secretary's satisfaction that the discounts reflect savings specifically attributable to the production of the different quantities.

(c) *Sales with quantity discounts in calculating weighted-average normal value.* If the exporter or producer does not satisfy the conditions of paragraph (b) of this section, the Secretary will calculate normal value based on weighted-average prices that include sales at a discount.

(d) *Price lists.* In determining whether a discount has been granted, the existence or lack of a published price list reflecting such a discount will not be controlling. Ordinarily, the Secretary will give weight to a price list only if, in the line of trade and market under consideration, the exporter or producer demonstrates that it has adhered to its price list.

(e) *Relationship to level of trade adjustment.* If adjustments are claimed for both differences in quantities and differences in level of trade, the Secretary will not make an adjustment for differences in quantities unless the Secretary is satisfied that the effect on price comparability of differences in quantities has been identified and established separately from the effect on price comparability of differences in the levels of trade.

§ 351.410 Differences in circumstances of sale

(a) *Introduction.* In calculating normal value the Secretary may make adjustments to account for certain differences in the circumstances of sales in the United States and foreign markets. (*See* section 773(a)(6)(C)(iii) of the Act.) This section clarifies certain terms used in the statute regarding circumstances of sale adjustments and describes the adjustment when commissions are paid only in one market.

(b) *In general.* With the exception of the allowance described in paragraph (e) of this section concerning commissions paid in only one market, the Secretary will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Act only for direct selling expenses and assumed expenses.

(c) *Direct selling expenses.* ''Direct selling expenses'' are expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question.

(d) *Assumed expenses.* Assumed expenses are selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses.

(e) *Commissions paid in one market.* The Secretary normally will make a reasonable allowance for other selling expenses if the Secretary makes a reasonable allowance for commissions in one of the markets under considerations, and no commission is paid in the other market under consideration. The Secretary will limit the amount of such allowance to the amount of the other selling expenses incurred in the one market or the commissions allowed in the other market, whichever is less.

(f) *Reasonable allowance.* In deciding what is a reasonable allowance for any difference in circumstances of sale, the Secretary normally will consider the cost of such difference to the exporter or producer but, if appropriate, may also consider the effect of such difference on the market value of the merchandise.

§ 351.411 Differences in physical characteristics.

(a) *Introduction.* In comparing United States sales with foreign market sales, the Secretary may determine that the merchandise sold in the United States does not have the same physical characteristics as the merchandise sold in the foreign market, and that the difference has an effect on prices. In calculating normal value, the Secretary will make a reasonable allowance for such differences. (*See* section 773(a)(6)(C)(ii) of the Act.)

(b) *Reasonable allowance.* In deciding what is a reasonable allowance for differences in physical characteristics, the Secretary will consider only differences in variable costs associated with the physical differences. Where appropriate, the Secretary may also consider differences in the market value. The Secretary will not consider differences in cost of production when compared merchandise has identical physical characteristics.

§ 351.412 Levels of trade; adjustment for difference in level of trade; constructed export price offset.

(a) *Introduction.* In comparing United States sales with foreign market sales, the Secretary may determine that sales in the two markets were not made at the same level of trade, and that the difference has an effect on the comparability of the prices. The Secretary is authorized to adjust normal value to account for such a difference. (*See* section 773(a)(7) of the Act.)

(b) *Adjustment for difference in level of trade.* The Secretary will adjust normal value for a difference in level of trade if:

(1) The Secretary calculates normal value at a different level of trade from the level of trade of the export price or the constructed export price (whichever is applicable); and

(2) The Secretary determines that the difference in level of trade has an effect on price comparability.

(c) *Identifying levels of trade and differences in levels of trade.* (1) *Basis for identifying levels of trade.* The Secretary will identify the level of trade based on:

(i) In the case of export price, the starting price;

(ii) In the case of constructed export price, the starting price, as adjusted under section 772(d) of the Act; and

(iii) In the case of normal value, the starting price or constructed value.

(2) *Differences in levels of trade.* The Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Some overlap in selling activities will not preclude a determination that two sales are at different stages of marketing.

(d) *Effect on price comparability.* (1) *In general.* The Secretary will determine that a difference in level of trade has an

effect on price comparability only if it is established to the satisfaction of the Secretary that there is a pattern of consistent price differences between sales in the market in which normal value is determined:

(i) At the level of trade of the export price or constructed export price (whichever is appropriate); and

(ii) At the level of trade at which normal value is determined.

(2) *Relevant sales.* Where possible, the Secretary will make the determination under paragraph (d)(1) of this section on the basis of sales of the foreign like product by the producer or exporter. Where this is not possible, the Secretary may use sales of different or broader product lines, sales by other companies, or any other reasonable basis.

(e) *Amount of adjustment.* The Secretary normally will calculate the amount of a level of trade adjustment by:

(1) Calculating the weighted-averages of the prices of sales at the two levels of trade identified in paragraph (d), after making any other adjustments to those prices appropriate under section 773(a)(6) of the Act and this subpart;

(2) Calculating the average of the percentage differences between those weighted-average prices; and

(3) Applying the percentage difference to normal value, where it is at a different level of trade from the export price or constructed export price (whichever is applicable), after making any other adjustments to normal value appropriate under section 773(a)(6) of the Act and this subpart.

(f) *Constructed export price offset.* (1) *In general.* The Secretary will grant a constructed export price offset only where:

(i) Normal value is compared to constructed export price;

(ii) Normal value is determined at a more advanced level of trade than the level of trade of the constructed export price; and

(iii) Despite the fact that a person has cooperated to the best of its ability, the data available do not provide an appropriate basis to determine under paragraph (d) of this section whether the difference in level of trade affects price comparability.

(2) *Amount of the offset.* The amount of the constructed export price offset will be the amount of indirect selling expenses included in normal value, up to the amount of indirect selling expenses deducted in determining constructed export price. In making the constructed export price offset, ''indirect selling expenses'' means selling expenses, other than direct selling expenses or assumed selling expenses (*see* § 351.410), that the seller would incur regardless of whether particular sales were made, but that reasonably may be attributed, in whole or in part, to such sales.

(3) *Where data permit determination of affect on price comparability.* Where available data permit the Secretary to determine under paragraph (d) of this section whether the difference in level of trade affects price comparability, the Secretary will not grant a constructed export price offset. In such cases, if the Secretary determines that price comparability has been affected, the Secretary will make a level of trade adjustment. If the Secretary determines that price comparability has not been affected, the Secretary will not grant either a level of trade adjustment or a constructed export price offset.

§ 351.413 Disregarding insignificant adjustments.

Ordinarily, under section 777A(a)(2) of the Act, an ''insignificant adjustment'' is any individual adjustment having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of the export price, constructed export price, or normal value, as the case may be. Groups of adjustments are adjustments for differences in circumstances of sale under § 351.410, adjustments for differences in the physical characteristics of the merchandise under § 351.411, and adjustments for differences in the levels of trade under § 351.412.

§ 351.414 Comparison of normal value with export price (constructed export price).

(a) *Introduction.* The Secretary normally will average prices used as the basis for normal value and, in an investigation, prices used as the basis for export price or constructed export price as well. This section explains when and how the Secretary will average prices in making comparisons of export price or constructed export price with normal value. (*See* section 777A(d) of the Act.)

(b) *Description of methods of comparison.* (1) *Average-to-average method.* The ''average-to-average'' method involves a comparison of the weighted average of the normal values with the weighted average of the export prices (and constructed export prices) for comparable merchandise.

(2) *Transaction-to-transaction method.* The ''transaction-to-transaction'' method involves a comparison of the normal values of individual transactions with the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(3) *Average-to-transaction method.* The ''average-to-transaction'' method involves a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(c) *Preferences.* (1) In an investigation, the Secretary normally will use the average-to-average method. The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.

(2) In a review, the Secretary normally will use the average-to-transaction method.

(d) *Application of the average-to-average method.* (1) *In general.* In applying the average-to-average method, the Secretary will identify those sales of the subject merchandise to the United States that are comparable, and will include such sales in an ''averaging group.'' The Secretary will calculate a weighted average of the export prices and the constructed export prices of the sales included in the averaging group, and will compare this weighted average to the weighted average of the normal values of such sales.

(2) *Identification of the averaging group.* An averaging group will consist of subject merchandise that is identical or virtually identical in all physical characteristics and that is sold to the United States at the same level of trade. In identifying sales to be included in an averaging group, the Secretary also will take into account, where appropriate, the region of the United States in which the merchandise is sold, and such other factors as the Secretary considers relevant.

(3) *Time period over which weighted average is calculated.* When applying the average-to-average method, the Secretary normally will calculate weighted averages for the entire period of investigation or review, as the case may be. However, when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation or review, the Secretary may calculate weighted averages for such shorter period as the Secretary deems appropriate.

(e) *Application of the average-to-transaction method.* (1) *In general.* In applying the average-to-transaction method in a review, when normal value is based on the weighted average of sales of the foreign like product, the

Secretary will limit the averaging of such prices to sales incurred during the contemporaneous month.

(2) *Contemporaneous month.* Normally, the Secretary will select as the contemporaneous month the first of the following which applies:

(i) The month during which the particular U.S. sale under consideration was made;

(ii) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sale in which there was a sale of the foreign like product.

(iii) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the U.S. sale in which there was a sale of the foreign like product.

(f) *Targeted dumping.* (1) *In general.* Notwithstanding paragraph (c)(1) of this section, the Secretary may apply the average-to-transaction method, as described in paragraph (e) of this section, in an antidumping investigation if:

(i) As determined through the use of, among other things, standard and appropriate statistical techniques, there is targeted dumping in the form of a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time; and

(ii) The Secretary determines that such differences cannot be taken into account using the average-to-average method or the transaction-to-transaction method and explains the basis for that determination.

(2) *Limitation of average-to-transaction method to targeted dumping.* Where the criteria for identifying targeted dumping under paragraph (f)(1) of this section are satisfied, the Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section.

(3) *Allegations concerning targeted dumping.* The Secretary normally will examine only targeted dumping described in an allegation, filed within the time indicated in § 351.301(d)(5). Allegations must include all supporting factual information, and an explanation as to why the average-to-average or transaction-to-transaction method could not take into account any alleged price differences.

(g) *Requests for information.* In an investigation, the Secretary will request information relevant to the identification of averaging groups under paragraph (d)(2) of this section and to the analysis of possible targeted dumping under paragraph (f) of this section. If a response to a request for such information is such as to warrant the application of the facts otherwise available, within the meaning of section 776 of the Act and § 351.308, the Secretary may apply the average-to-transaction method to all the sales of the producer or exporter concerned.

§ 351.415 Conversion of currency.

(a) *In general.* In an antidumping proceeding, the Secretary will convert foreign currencies into United States dollars using the rate of exchange on the date of sale of the subject merchandise.

(b) *Exception.* If the Secretary establishes that a currency transaction on forward markets is directly linked to an export sale under consideration, the Secretary will use the exchange rate specified with respect to such foreign currency in the forward sale agreement to convert the foreign currency.

(c) *Exchange rate fluctuations.* The Secretary will ignore fluctuations in exchange rates.

(d) *Sustained movement in foreign currency value.* In an antidumping investigation, if there is a sustained movement increasing the value of the foreign currency relative to the United States dollar, the Secretary will allow exporters 60 days to adjust their prices to reflect such sustained movement.

Subpart E—[Reserved]

Subpart F—Subsidy Determinations Regarding Cheese Subject to an In-Quota Rate of Duty

§ 351.601 Annual list and quarterly update of subsidies.

The Secretary will make the determinations called for by section 702(a) of the Trade Agreements Act of 1979, as amended (19 U.S.C. 1202 note) based on the available information, and will publish the annual list and quarterly updates described in such section in the **Federal Register**.

§ 351.602 Determination upon request.

(a) *Request for determination.* (1) Any person, including the Secretary of Agriculture, who has reason to believe there have been changes in or additions to the latest annual list published under § 351.601 may request in writing that the Secretary determine under section 702(a)(3) of the Trade Agreements Act of 1979 whether there are any changes or additions. The person must file the request with the Central Records Unit (*see* § 351.103). The request must allege either a change in the type or amount of any subsidy included in the latest annual list or quarterly update or an additional subsidy not included in that list or update provided by a foreign government, and must contain the following, to the extent reasonably available to the requesting person:

(i) The name and address of the person;

(ii) The article of cheese subject to an in-quota rate of duty allegedly benefitting from the changed or additional subsidy;

(iii) The country of origin of the article of cheese subject to an in-quota rate of duty; and

(iv) The alleged subsidy or changed subsidy and relevant factual information (particularly documentary evidence) regarding the alleged changed or additional subsidy including the authority under which it is provided, the manner in which it is paid, and the value of the subsidy to producers or exporters of the article.

(2) The requirements of § 351.303 (c) and (d) apply to this section.

(b) *Determination.* Not later than 30 days after receiving an acceptable request, the Secretary will:

(1) In consultation with the Secretary of Agriculture, determine based on the available information whether there has been any change in the type or amount of any subsidy included in the latest annual list or quarterly update or an additional subsidy not included in that list or update is being provided by a foreign government;

(2) Notify the Secretary of Agriculture and the person making the request of the determination; and

(3) Promptly publish in the **Federal Register** notice of any changes or additions.

§ 351.603 Complaint of price-undercutting by subsidized imports.

Upon receipt of a complaint filed with the Secretary of Agriculture under section 702(b) of the Trade Agreements Act concerning price-undercutting by subsidized imports, the Secretary will promptly determine, under section 702(a)(3) of the Trade Agreements Act of 1979, whether or not the alleged subsidies are included in or should be added to the latest annual list or quarterly update.

§ 351.604 Access to information.

Subpart C of this part applies to factual information submitted in connection with this subpart.

Subpart G—Applicability Dates

§ 351.701 Applicability dates.

The regulations contained in this part 351 apply to all administrative reviews initiated on the basis of requests made

on or after the first day of July, 1997, to all investigations and other segments of proceedings initiated on the basis of petitions filed or requests made after June 18, 1997 and to segments of proceedings self-initiated by the Department after June 18, 1997. Segments of proceedings to which part 351 do not apply will continue to be governed by the regulations in effect on the date the petitions were filed or requests were made for those segments, to the extent that those regulations were not invalidated by the URAA or replaced by the interim final regulations published on May 11, 1995 (60 FR 25130 (1995)). For segments of proceedings initiated on the basis of petitions filed or requests made after January 1, 1995, but before part 351 applies, part 351 will serve as a restatement of the Department's interpretation of the requirements of the Act as amended by the URAA.

ANNEX I.—DEADLINES FOR PARTIES IN COUNTERVAILING INVESTIGATIONS

Day [1]	Event	Regulation
0 days	Initiation	
31 days [2]	Notification of difficulty in responding to questionnaire.	351.301(c)(2)(iv) (14 days after date of receipt of initial questionnaire).
37 days	Application for an administrative protective order.	351.305(b)(3).
40 days	Request for postponement by petitioner	351.205(e) (25 days or more before preliminary determination).
45 days	Allegation of critical circumstances	351.206(c)(2)(i) (20 days before preliminary determination).
47 days	Questionnaire response	351.301(c)(2)(iii) (30 days from date of receipt of initial questionnaire).
55 days	Allegation of upstream subsidies	351.301(d)(4)(ii)(A) (10 days before preliminary determination).
65 days (Can be extended)	Preliminary determination	351.205(b)(1).
72 days	Submission of proposed suspension agreement.	351.208(f)(1)(B) (7 days after preliminary determination).
75 days [3]	Submission of factual information	351.301(b)(1) (7 days before date on which verification is to commence).
75 days	Submission of ministerial error comments	351.224(c)(2) (5 days after release of disclosure documents).
77 days [4]	Request to align a CVD case with a concurrent AD case.	351.210(i) (5 days after date of publication of preliminary determination).
102 days	Request for a hearing	351.310(c) (30 days after date of publication of preliminary determination).
119 days	Critical circumstances allegation	351.206(e) (21 days or more before final determination).
122 days	Requests for closed hearing sessions	351.310(f) (No later than the date the case briefs are due).
122 days	Submission of briefs	351.309(c)(1)(i) (50 days after date of publication of preliminary determination).
125 days	Allegation of upstream subsidies	351.301(d)(4)(ii)(B) (15 days before final determination).
127 days	Submission of rebuttal briefs	351.309(d) (5 days after dead-line for filing case brief).
129 days	Hearing	351.310(d)(1) (2 days after submission of rebuttal briefs).
140 days (Can be extended)	Final determination	351.210(b)(1) (75 days after preliminary determination).
150 days	Submission of ministerial error comments	351.224(c)(2) (5 days after release of disclosure documents).
155 days	Submission of replies to ministerial error comments.	351.224(c)(3) (5 days after filing of comments).
192 days	Order issued	351.211(b).

[1] Indicates the number of days from the date of initiation. Most of the deadlines shown here are approximate. The actual deadline in any particular segment of a proceeding may depend on the date of an earlier event or be established by the Secretary.
[2] Assumes that the Department sends out the questionnaire within 10 days of the initiation and allows 7 days for receipt of the questionnaire from the date on which it was transmitted.
[3] Assumes about 17 days between the preliminary determination and verification.
[4] Assumes that the preliminary determination is published 7 days after issuance (*i.e.,* signature).

ANNEX II.—DEADLINES FOR PARTIES IN COUNTERVAILING ADMINISTRATIVE REVIEWS

Day [1]	Event	Regulation
0 days	Request for review	351.213(b) (Last day of the anniversary month).
30 days	Publication of initiation notice	351.221(c)(1)(i) (End of month following the anniversary month).
66 days [2]	Notification of difficulty in responding to questionnaire.	351.301(c)(2)(iv) (14 days after date of receipt of initial questionnaire).
75 days	Application for an administrative protective order.	351.305(b)(3).

ANNEX II.—DEADLINES FOR PARTIES IN COUNTERVAILING ADMINISTRATIVE REVIEWS—Continued

Day [1]	Event	Regulation
90 days [3]	Questionnaire response	351.301(c)(2)(iii) (At least 30 days after date of receipt of initial questionnaire).
120 days	Withdrawal of request for review	351.213(d)(1) (90 days after date of publication of initiation).
130 days	Request for verification	351.307(b)(1)(v) (100 days after date of publication of initiation).
140 days	Submission of factual information	351.301(b)(2).
245 days (Can be extended)	Preliminary results of review	351.213(h)(1).
282 days [4]	Request for a hearing and/or closed hearing session.	351.310(c); 351.310(f) (30 days after date of publication of preliminary results).
282 days	Submission of briefs	351.309(c)(1)(ii) (30 days after date of publication of preliminary results).
287 days	Submission of rebuttal briefs	351.309(d)(1) (5 days after deadline for filing case briefs).
289 days	Hearing	351.310(d)(1) (2 days after submission of rebuttal briefs).
372 days (Can be extended)	Final results of review	351.213(h)(1) (120 days after date of publication of preliminary results).
382 days	Submission of ministerial error comments	351.224(c)(2) (5 days after release of disclosure documents).
387 days	Replies to ministerial error comments	351.224(c)(3) (5 days after filing of comments).

[1] Indicates the number of days from the end of the anniversary month. Most of the deadlines shown here are approximate. The actual deadline in any particular segment of a proceeding may depend on the date of an earlier event or be established by the Secretary.
[2] Assumes that the Department sends out the questionnaire 45 days after the last day of the anniversary month and allows 7 days for receipt of the questionnaire from the date on which it was transmitted.
[3] Assumes that the Department sends out the questionnaire on day 45 and the response is due 45 days later.
[4] Assumes that the preliminary results are published 7 days after issuance (*i.e.*, signature).

ANNEX III.—DEADLINES FOR PARTIES IN ANTIDUMPING INVESTIGATIONS

Day [1]	Event	Regulation
0 days	Initiation	
37 days	Application for an administrative protective order.	351.305(b)(3).
50 days	Country-wide cost allegation	351.301(d)(2)(i)(A) (20 days after date on which initial questionnaire was transmitted).
51 days [2]	Notification of difficulty in responding to questionnaire.	351.301(c)(2)(iv) (Within 14 days after date of receipt of initial questionnaire).
51 days	Section A response	None.
67 days	Sections B, C, D, E responses	351.301(c)(2)(iii) (At least 30 days after date of receipt of initial questionnaire).
70 days	Viability arguments	351.301(d)(1) (40 days after date on which initial questionnaire was transmitted).
87 days	Company-specific cost allegations	351.301(d)(2)(i)(B).
87 days	Major input cost allegations	351.301(d)(3).
115 days	Request for postponement by petitioner	351.205(e) (25 days or more before preliminary determination).
120 days	Allegation of critical circumstances	351.206(c)(2)(i) (20 days before preliminary determination).
140 days (Can be extended)	Preliminary determination	351.205(b)(1).
150 days	Submission of ministerial error comments	351.224(c)(2) (5 days after release of disclosure documents).
155 days	Submission of proposed suspension agreement.	351.208(f)(1)(A) (15 days after preliminary determination).
161 days [3]	Submission of factual information	351.301(b)(1) (7 days before date on which verification is to commence).
177 days [4]	Request for a hearing	351.310(c) (30 days after date of publication of preliminary determination).
187 days	Submission of publicly available information to value factors (NME's).	351.301(c)(3)(i) (40 days after date of publication of preliminary determination).
194 days	Critical circumstance allegation	351.206(e) (21 days before final determination).
197 days (Can be changed)	Request for closed hearing sessions	351.310(f) (No later than the date the case briefs are due).
197 days (Can be changed)	Submission of briefs	351.309(c)(1)(i) (50 days after date of publication of preliminary determination).
202 days	Submission of rebuttal briefs	351.309(d) (5 days after dealine for filing case briefs).
204 days	Hearing	351.310(d)(1) (2 days after submission of rebuttal briefs).

ANNEX III.—DEADLINES FOR PARTIES IN ANTIDUMPING INVESTIGATIONS—Continued

Day [1]	Event	Regulation
215 days	Request for postponement of the final determination.	351.210(e).
215 days (Can be extended)	Final determination	351.210(b)(1) (75 days after preliminary determination).
225 days	Submission ministerial error comments	351.224(c)(2) (5 days after release of disclosure documents).
230 days	Replies to ministerial error comments	351.224(c)(3) (5 days after filing of comments).
267 days	Order issued	351.211(b).

[1] Indicates the number of days from the date of initiation. Most of the deadlines shown here are approximate. The actual deadline in any particular segment of a proceeding may depend on the date of an earlier event or be established by the Secretary.
[2] Assumes that the Department sends out the questionnaire 5 days after the ITC vote and allows 7 days for receipt of the questionnaire from the date on which it was transmitted.
[3] Assumes about 28 days between the preliminary determination and verification.
[4] Assumes that the preliminary determination is published 7 days after issuance (*i.e.,* signature).

ANNEX IV.—DEADLINES FOR PARTIES IN ANTIDUMPING ADMINISTRATIVE REVIEWS

Day[1]	Event	Regulation
0 days	Request for review	351.213(b) (Last day of the anniversary month).
30 days	Publication of initiation	351.221 (c)(1)(i) (End of month following the anniversary month).
37 days	Application for an administrative protective order.	351.305(b)(3).
60 days	Request to examine absorption of duties (AD)	351.213(j) (30 days after date of publication of initiation).
66 days [2]	Notification of difficulty in responding to questionnaire.	351.301(c)(2)(iv) (14 days after date of receipt of initial questionnaire).
66 days	Section A response	None.
85 days	Viability arguments	351.301(d)(1) (40 days after date of transmittal of initial questionnaire).
90 days[3]	Sections B, C, D, E response	351.301(c)(2)(iii) (At least 30 days after date of receipt of initial questionnaire).
110 days	Company-specific cost allegations	351.301(d)(2)(i)(B) (20 days after relevant section is filed).
110 days	Major input cost allegations	351.301(d)(3) (20 days after relevant section is filed).
120 days	Withdrawal of request for review	351.213(d)(1) (90 days after date of publication of initiation)
130 days	Request for verification	351.307(b)(1)(v) (100 days after date of publication of initiation).
140 days	Submission of factual information	351.301(b)(2).
245 days (Can be extended)	Preliminary results of review	351.213(h)(1).
272 days[4]	Submission of publicly available information to value factors (NME's).	351.301(c)(3)(ii) (20 days after date of publication of preliminary results).
282 days	Request for a hearing and/or closed hearing session.	351.310(c); 351.310(f) (30 days after date of publication of preliminary results).
282 days	Submission of briefs	351.309(c)(1)(ii) (30 days after date of publication of preliminary results).
287 days	Submission of rebuttal briefs	351.309(d)(1) (5 days after deadline for filing case briefs).
289 days	Hearing; closed hearing session	351.310(d)(1) (2 days after submission of rebuttal briefs).
372 days (Can be extended)	Final results of review	351.213(h)(1) (120 days after date of publication of preliminary results).
382 days	Ministerial error comments	351.224(c)(2) (5 days after release of disclosure documents).
387 days	Replies to ministerial error comments	351.224(c)(3) (5 days after filing of comments).

[1] Indicates the number of days from the end of the anniversary month. Most of the deadlines shown here are approximate. The actual deadline in any particular segment of a proceeding may depend on the date of an earlier event or be established by the Secretary.
[2] Assumes that the Department sends out the questionnaire 45 days after the last day of the anniversary month and allows 7 days for receipt of the questionnaire from the date on which it was transmitted.
[3] Assumes that the Department sends out the questionnaire on day 45 and the response is due 45 days later.
[4] Assumes that the preliminary results are published 7 days after issuance (*i.e.,* signature).

ANNEX V.—COMPARISON OF PRIOR AND NEW REGULATIONS

Prior	New	Description
PART 353—ANTIDUMPING DUTIES		
Subpart A—Scope and Definitions		
353.1	351.101	Scope of regulations.
353.2	351.102	Definitions.
353.3	351.104	Record of proceedings.
353.4	351.105	Public, proprietary, privileged & classified.
353.5	Removed	Trade and Tariff Act of 1984 amendments.
353.6	351.106	*De minimis* weighted-average dumping margin.
Subpart B—Antidumping Duty Procedures		
353.11	351.201	Self-initiation.
353.12	351.202	Petition requirements.
353.13	351.203	Determination of sufficiency of petition.
353.14	351.204(e)	Exclusion from antidumping duty order.
353.15	351.205	Preliminary determination.
353.16	351.206	Critical circumstances.
353.17	351.207	Termination of investigation.
353.18	351.208	Suspension of investigation.
353.19	351.209	Violation of suspension agreement.
353.20	351.210	Final determination.
353.21	351.211	Antidumping duty order.
353.21(c)	351.204(e)	Exclusion from antidumping duty order.
1353.22 (a)–(d)	351.213, 351.221	Administrative reviews under 751(a) of the Act.
353.22(e)	351.212(c)	Automatic assessment of duties.
353.22(f)	351.216, 351.221(c)(3)	Changed circumstances reviews.
353.22(g)	351.215, 351.221(c)(2)	Expedited antidumping review.
353.23	351.212(d)	Provisional measures deposit cap.
353.24	351.212(e)	Interest on overpayments and under-payments.
353.25	351.222	Revocation of orders; termination of suspended investigations.
353.26	351.402(f)	Reimbursement of duties.
353.27	351.223	Downstream product monitoring.
353.28	351.224	Correction of ministerial errors.
353.29	351.225	Scope rulings.
Subpart C—Information and Argument		
353.31 (a)–(c)	351.301	Time Limits for submission of factual information.
353.31(a)(3)	351.301(d), 351.104(a)(2)	Return of untimely material.
353.31(b)(3)	351.302(c)	Request for extension of time.
353.31 (d)–(i)	351.303	Filing, format, translation, service and certification.
353.32	351.304	Request for proprietary treatment of information.
353.33	351.104, 351.304(a)(2)	Information exempt from disclosure.
353.34	351.305, 351.306	Disclosure of information under protective order.
353.35	Removed	*Ex parte* meeting.
353.36	351.307	Verification.
353.37	351.308	Determination on the basis of the facts available.
353.38 (a)–(e)	351.309	Written argument.
353.38(f)	351.310	Hearings.
Subpart D—Calculation of Export Price, Constructed Export Price, Fair Value and Normal Value		
353.41	351.402	Calculation of export price.
353.42(a)	351.102	Fair value (definition).
353.42(b)	351.104(c)	Transaction and persons examined.
353.43	351.403(b)	Sales used in calculating normal value.
353.44	Removed	Sales at varying prices.
353.45	351.403	Transactions between affiliated parties.
353.46	351.404	Selection of home market as the basis for normal value.
353.47	Removed	Intermediate countries.
353.48	351.404	Basis for normal value if home market sales are inadequate.
353.49	351.404	Sales to a third country.
353.50	351.405, 351.407	Calculation of normal value based on constructed value.
353.51	351.406, 351.407	Sales at less than the cost of production.
353.52	351.408	Nonmarket economy countries.
353.53	Removed	Multinational corporations.

ANNEX V.—COMPARISON OF PRIOR AND NEW REGULATIONS—Continued

Prior	New	Description
353.54	351.401(b)	Claims for adjustments.
353.55	351.409	Differences in quantities.
353.56	351.410	Differences in circumstances of sale.
353.57	351.411	Differences in physical characteristics.
353.58	351.412	Levels of trade.
353.59(a)	351.413	Insignificant adjustments.
353.59(b)	351.414	Use of averaging.
353.60	351.415	Conversion of currency.
PART 355—COUNTERVAILING DUTIES		
Subpart A—Scope and Definitions		
355.1	351.001	Scope of regulations.
355.2	351.002	Definitions.
355.3	351.004	Record of proceeding.
355.4	351.005	Public, proprietary, privileged & classified.
355.5	351.003(a)	Subsidy library.
355.6	Removed	Trade and Tariff Act of 1984 amendments.
355.7	351.006	*De minimis* net subsidies.
Subpart B—Countervailing Duty Procedures		
355.11	351.101	Delf-initiation.
355.12	351.102	Petition requirements.
355.13	351.103	Determination of sufficiency of petition.
355.14	351.104(e)	Exclusion from countervailing duty order.
355.15	351.105	Preliminary determination.
355.16	351.106	Critical circumstances.
355.17	351.107	Termination of investigation.
355.18	351.108	Suspension of investigation.
355.19	351.109	Violation of agreement.
355.20	351.110	Final determination.
355.21	351.111	Countervailing duty order.
355.21(c)	351.104(e)	Exclusion from countervailing duty order.
355.22 (a)–(c)	351.113, 351.121	Administrative reviews under 751(a) of the Act.
355.22(d)	Removed	Calculation of individual rates.
355.22(e)	351.113(h)	Possible cancellation or revision of suspension agreements.
355.22(f)	Removed	Review of individual producer or exporter.
355.22(g)	351.112(c)	Automatic assessment of duties
355.22(h)	351.116, 351.121(c)(3)	Changed circumstances review
355.22(i)	351.120, 351.221(c)(7)	Review at the direction of the President.
355.23	351.112(d)	Provisional measures deposit cap
355.24	351.112(e)	Interest on overpayments and underpayments.
355.25	351.112	Revocation of orders; termination of suspended investigations.
355.27	351.123	Downstream product monitoring.
355.28	351.124	Correction of ministerial errors.
355.29	351.125	Scope determinations.
Subpart C—Information and Argument		
355.31 (a)–(c)	351.301	Time limits for submission of factual information.
355.31(a)(3)	351.302(d), 351.104(a)(2)	Return of untimely material.
355.31(b)(3)	351.302(c)	Request for extension of time.
355.31 (d)–(i)	351.303	Filing, format, translation, service and certification.
355.32	351.304	Request for proprietary treatment of information.
355.33	351.104, 351.304(a)(2)	Information exempt from disclosure.
355.34	351.305, 351.306	Disclosure of information under protective order.
355.35	Removed	*Ex parte* meeting.
355.36	351.307	Verification.
355.37	351.308	Determinations on the basis of the facts available.
355.38 (a)–(e)	351.309	Written argument.
355.38(f)	351.310	Hearings.
355.39	351.311	Subsidy practice discovered during investigation or review.
Subpart D—Quota Cheese Subsidy Determinations		
355.41	Removed	Definition of subsidy.

ANNEX V.—COMPARISON OF PRIOR AND NEW REGULATIONS—Continued

Prior	New	Description
355.42	351.601	Annual list and quarterly update.
355.43	351.602	Determination upon request.
355.44	351.603	Complaint of price-undercutting.
355.45	351.604	Access to information.

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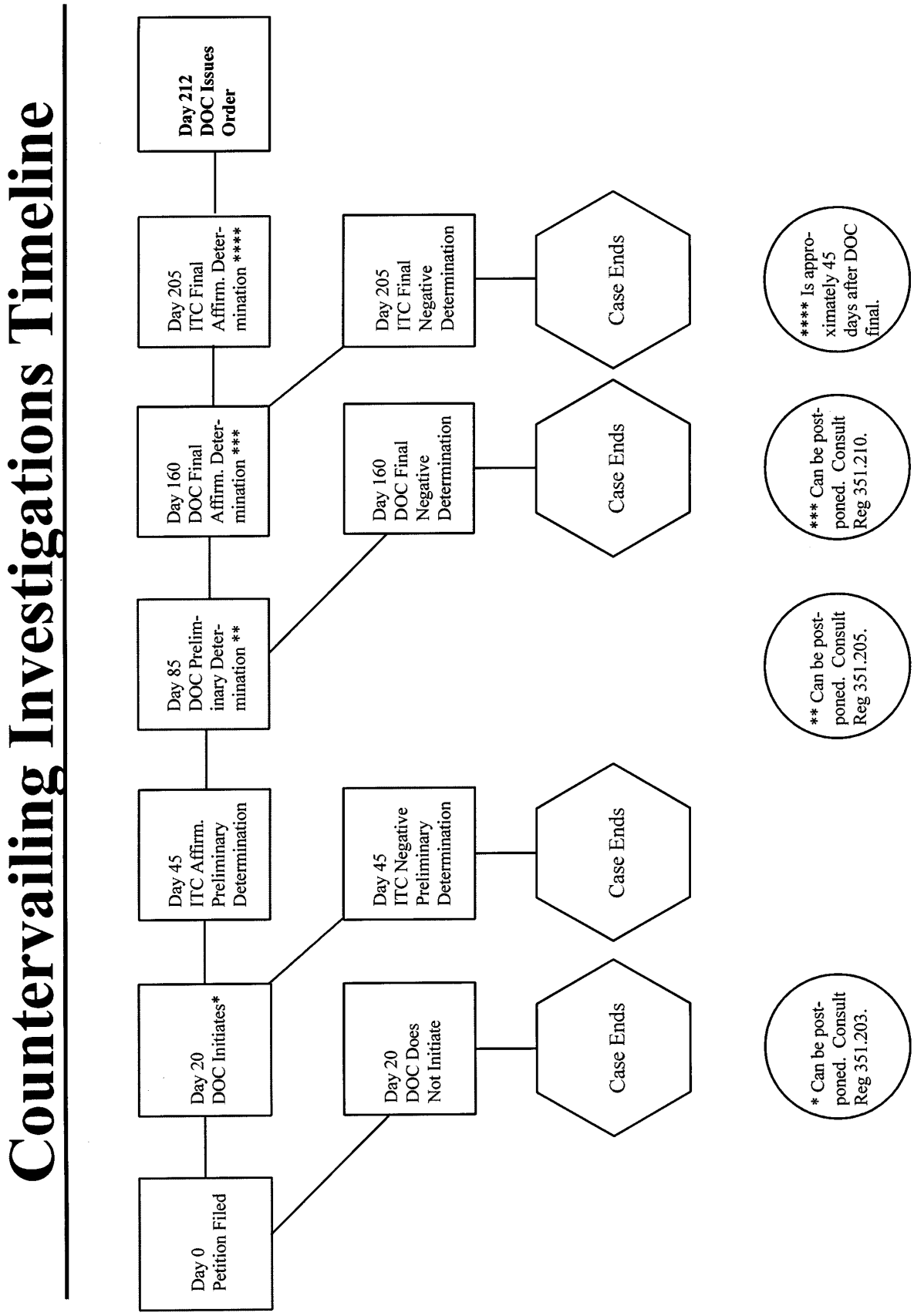
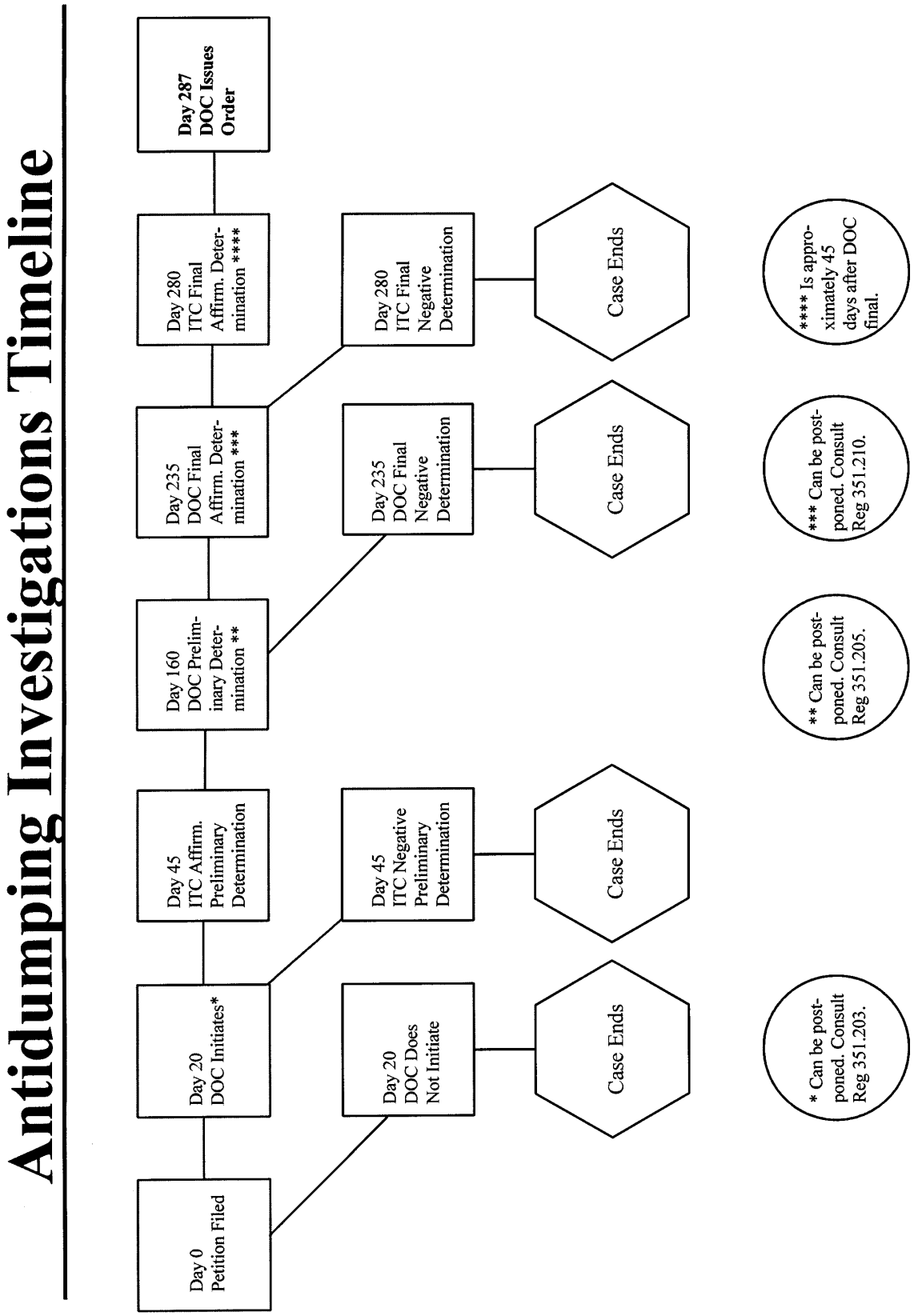
Annex VI—Countervailing Investigations Timeline



Annex VII—Antidumping Investigations Timeline



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