

## DEPARTMENT OF COMMERCE

### International Trade Administration

#### 19 CFR Part 351

[Docket No. 0612243018-8043-01]

RIN 0625-AA73

#### **Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Final rule.

**SUMMARY:** The Department of Commerce (“the Department”) is amending its regulations in antidumping (“AD”) and countervailing duty (“CVD”) proceedings governing information submitted to the Department and administrative protective orders in order to improve the Department’s procedures and provide clarification to some aspects of the Department’s regulations. Specifically, the Department is amending its regulations as follows: To reflect a transfer in the function of receiving submissions filed in AD/CVD proceedings from the Central Records Unit to the Administrative Protective

Order (“APO”) Unit, and to change the name of the APO Unit to APO/Dockets Unit; to reflect the fact that the Central Records Unit has moved to Room 1117 of the Herbert C. Hoover Building; to reflect a transfer in the function of maintaining public service lists from the Central Records Unit to the APO/Dockets Unit; to update the definition of “Customs Service” to reflect the reorganization of the Executive Branch; to clarify that documents filed with the Department will only be time stamped when appropriate, for example, when an interested party submits a request for treatment as a voluntary respondent; to clarify when an APO will be placed on the record with respect to new shipper reviews, applications for scope rulings and changed circumstances reviews; to clarify when a party must serve business proprietary information already on the administrative record to new authorized applicants to the APO; to require parties to file a formal letter of appearance to request placement on the public service list of any segment of an AD/CVD proceeding, either as a cover letter to the APO application or as a separate document; and to clarify when a party is to be considered an “interested party” for the purposes of the APO. Finally, the Department is amending its short form application for access under an APO (Form ITA-367).

**DATES:** *Effective Date:* The effective date of this final rule is February 21, 2008.

The amended regulations will apply to all investigations initiated on the basis of petitions filed on or after February 21, 2008, and other segments of proceedings requested or initiated after this date. The amended APO application form will be effective for all ongoing segments pending before the Department as of the effective date or initiated on or after the effective date, except those segments initiated before June 3, 1998.

**FOR FURTHER INFORMATION CONTACT:** Ann Sebastian at (202) 482-3354, William Kovatch at (202) 482-5052 or Carrie Owens at (202) 482-1353.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Pursuant to section 777(c)(1)(A) of the Tariff Act of 1930, as amended (“the Act”) (19 U.S.C. 1677f(c)(1)(A)), the Department must make available to interested parties, under an APO, business proprietary information submitted to it during the course of an antidumping or countervailing duty proceeding. Section 777(c)(1)(B) of the Act authorizes the Department to issue regulations governing the APO process. The Department’s current regulations are codified at 19 CFR part 351.

On January 8, 2007, the Department published proposed amendments to the rules governing procedures for providing access to business proprietary information submitted to the

Department by other parties in U.S. antidumping (“AD”) and countervailing duty (“CVD”) proceedings, and requested comments from the public. *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures; Proposed Rule*, 72 FR 680 (“January Notice”).

After analyzing and carefully considering all of the comments that the Department received in response to the January Notice and after further review of the provisions of the proposed rule, the Department is publishing final regulations. In an effort to continue to protect business proprietary information from unauthorized disclosure while permitting authorized applicants access to needed information, these regulations improve the Department’s APO process, and clarify some prior regulatory provisions as they relate to that process.

#### Effective Date

The new APO procedures, including the use of the revised application for an APO, form ITA–367 (2.08), will become effective February 21, 2008. The amended regulations will apply to all investigations initiated on the basis of petitions filed on or after February 21, 2008, and other segments of proceedings requested or initiated after this same date. Segments of proceedings to which these regulations do not apply will continue to be governed by the regulations in effect on the date the petitions were filed or other segments were initiated. The amended Form ITA–367 will apply to all ongoing segments pending before the Department as of the effective date and all segments initiated on or after the effective date, unless the segment was initiated before June 3, 1998.

#### Explanation of Particular Provisions

##### *Section 351.102(b). Definitions. Definition of “Customs Service” and “Interested Party”*

Section 351.102(b) is definitional. Substantively, most of the definitions in this section remain unchanged from the prior regulation. The prior regulation, however, listed the terms in alphabetical order, without sequentially numbering the terms. The new regulation sets forth the terms defined in section 351.102(b) in sequentially numbered paragraphs, which will allow the Department to administer the APO function in a more precise manner.

The Department has changed the definition of one of the terms listed in section 351.102(b), and added another. Specifically, in light of the recent reorganization of the Executive Branch, the Department has changed the

definition of the term “Customs Service” to mean United States Customs and Border Protection of the United States Department of Homeland Security.

The Department has also added a definition of the term “interested party” to section 351.105(b) for the purpose of submitting an APO application. Under the prior regulation, “interested party” was not defined, which created some confusion and difficulty in processing APO applications. Specifically, under section 351.305(b)(2), only the representatives of interested parties who are parties to the proceeding may apply for APO access. The Department takes seriously its responsibility to ensure that only persons authorized to have access to the business proprietary information submitted in any segment of a proceeding are granted such access under the APO. The APO application was designed to permit the Department to determine whether the applicant does indeed represent an interested party, and thus qualifies for access under the APO. To that end, Form ITA–367 requires the applicant to identify the interested party status of the party represented by checking “petitioner,” “respondent,” or “other.” If the applicant checks “other,” the form requires the applicant to identify the section of the Department’s regulations that defines the party’s interested party status. Under the prior regulations, this was not possible because the regulations did not provide a definition of the term “interested party.”

This situation caused a problem for the Department in identifying and verifying the interested party status of the party represented by the applicant, when the applicant did not represent a petitioner or a respondent. Specifically, the Department has experienced some problems in verifying when a party who is participating independently from any other party is an importer, as defined by the Act. For this reason, the Department has amended section 351.105(b) to include the definition of “interested party,” and require applicants to indicate the specific section of the regulations that is the basis of the party’s status as an interested party.

This definition does not differ from the definition of “interested party” provided in section 771(9) of the Act, except that an importer of subject merchandise is defined in a different subparagraph from a manufacturer, producer and exporter of the subject merchandise. Defining “importer” in its own subparagraph is necessary to permit Department officials to readily identify when an applicant for APO access represents an importer.

One commentor has expressed concerns that requiring a party to be more precise in identifying its status as an interested party may prove problematic. Specifically, the commentor considered that such a requirement could lead to the filing of a separate APO application for all of a respondent’s affiliates who are interested parties. Often a respondent and its affiliated importer or importers are represented by the same firm, because their interests are aligned. In the commentor’s view, requiring separate APO applications for each of the interested parties in such a situation could become unwieldy and burdensome. This commentor notes that the purpose of the APO application is to permit the representative of an interested party to see the business proprietary information of other parties to the proceeding in order to adequately represent the client’s interest. When one firm already has access to the information under APO, no additional purpose is served by filing an additional APO application for each of the respondent’s affiliates.

In response to this commentor’s concerns, it is not the Department’s intention to alter its practice with respect to the APO application of a respondent and its affiliates who are all represented by the same firm. The commentor is correct that one purpose of the APO application is to permit the representative of a party to the proceeding to see the business proprietary information on the record of that segment of the proceeding to advocate for that party’s interests. Another purpose of the application is to allow the parties submitting business proprietary information to the Department to know who is applying for access to that information, and what parties they represent. Where the same firm represents an interested party and the interested party’s affiliates, there is no need to file separate APO applications for each of the affiliates. An applicant who represents an interested party and the interested party’s affiliates may still file a single APO application, however, the applicant must identify in the application each of the affiliates he or she is representing. If an applicant represents multiple non-affiliated interested parties, the applicant may also include all of the interested parties on the same application. Any necessary clarifications with respect to the interested parties should be provided in the cover letter to the application, or as an attachment to the application.

This amendment to the regulations is aimed at identifying when an applicant represents an importer participating

independently from any other respondent. When the representative of such an importer has applied for APO access, the Department has experienced some difficulty in confirming that the importer imports the subject merchandise from the country that is covered by the specific proceeding in question. Identifying when such an importer is participating in a segment of a proceeding is the first step needed to ensure that there is sufficient evidence to demonstrate that the importer is indeed an interested party, and its representative entitled to access to other parties' business proprietary information under APO. This is necessary for the Department to ensure that it is protecting the business proprietary information submitted to it during any segment from disclosure to any person not authorized to see the information.

*Sections 351.103(a), 351.103(b), 351.103(c), 351.103(d) and 351.303(b). Location and Functions of the Central Records Unit and the APO Unit, Filing Documents, and Service Lists*

The Department is amending section 351.103(a) to reflect that fact that the Central Records Unit has moved to a new location within the Herbert C. Hoover Building. The Central Records Unit is now located in Room 1117.

The Department is further amending sections 351.103(a), 351.103(b), 351.103(c), and 351.103(d) of the regulations to reflect the transfer of the function of receiving submissions in antidumping and countervailing duty proceedings (*i.e.* the docket function) from the Central Records Unit to the APO Unit, and to change the name of the APO Unit formally to the APO/Dockets Unit.

The Department is also amending section 351.103(c) to provide that a document will only be required to be stamped with the time of receipt in order to be considered timely filed, where necessary. Documents submitted to the Department will still be required to be stamped with the date of receipt. However, the Department no longer believes that it is necessary to time stamp every document submitted.

There are a few instances where it will continue to be necessary to time stamp a document to establish timeliness. These instances include when the Department establishes a time other than the close of business as the deadline for the submission, and when the Department exercises its discretion to accept voluntary respondents. With respect to requests to be treated as a voluntary respondent, the time stamp is necessary to establish the order in

which the Department receives such requests. Department officials and the APO/Dockets Unit will continue to coordinate with each other to determine whether it is necessary for a document to be time stamped, and to communicate such necessity with interested parties.

The Department is amending section 351.103(d) to require interested parties who wish to be placed on the public service list to file a letter of appearance to make its request. The letter of appearance should identify the name of the interested party, how that party qualifies as an interested party, and the name of the firm representing that interested party, if appropriate. If an interested party is participating in conjunction with affiliated parties, the letter of appearance must list all of the affiliates. If a single firm is representing multiple interested parties, affiliated or unaffiliated, a single letter of appearance may be filed to cover all of the parties so represented. If the interested party is a coalition or association as defined in sections 771(9)(A), (E), (F) or (G) of the Act, the letter of appearance must identify all members of the coalition or association. Because the letter of appearance includes factual information (*i.e.* the name of the interested party, how the party qualifies as an interested party), the certification requirements of section 351.303(g) apply.

One commentor expressed its support of this requirement. However, the commentor stated that the Department should clarify that this requirement does not apply to petitioners. The commentor contends that the petition already contains the information that would appear on the letter of appearance, which would make the additional formal letter of appearance unnecessary.

Another commentor stated that while it has no objection to formalizing the requirement that a party file an entry of appearance, the Department should not require that this be a separate filing. The commentor contended that this requirement of a separate filing would be inefficient and burdensome on the parties. Specifically, the commentor noted that many parties file their APO applications with a cover letter which also serves as an entry of appearance on behalf of the interested party. Requiring two separate filings would waste resources and increase administrative burdens on the parties unnecessarily. This commentor suggested that the requirement of a separate filing would be more appropriately aimed at parties who do not seek access to business proprietary information under the APO,

but who wish to monitor the proceedings.

This commentor noted that under the Department's amended regulations and the revised Form ITA-367, interested parties will be required to categorize how they qualify as interested parties in the APO application without the requirement of a certification. Requiring a separate entry of appearance, with a certification from the party, would treat identical information inconsistently. It would also be burdensome to require parties to make multiple filings of similar information. Accordingly, this commentor suggested that the Department should simply require parties to file an entry of appearance and APO application together with a single certification of the entire submission.

In response to these comments, the Department's purpose in proposing a requirement to file a letter of appearance as a separate document was to ensure that Department officials update the public service list when a party begins participating in an administrative proceeding. It is also the Department's desire, where possible, to minimize the burden on the parties when submitting documents during any proceeding.

The Department agrees with the point made by both commentors that sometimes it is not necessary to require the letter of appearance to be an entirely new and separate submission. For example, in an investigation, the Department's regulations already require the petition to contain detailed information concerning the petitioner and the domestic industry. *See* 19 CFR 351.202(b). This information in the petition is already subject to certification requirements. *See* 19 CFR 351.202(c).

Similarly, when applying for APO access, Form ITA-367 requires the representatives of an interested party to disclose how the party qualifies as an interested party, and the contact information of the firm representing the interested party. Currently, the APO application requires a certification from the applicant, but not from the party itself. Nonetheless, as one commentor noted, many parties currently do file an entry of appearance as the cover letter to the APO application.

In this regard, the Department agrees with the commentor that it is sufficient to require a party requesting APO access to submit a letter of appearance as a cover letter to the APO application, and thus the Department has revised section 351.305(b)(2) to provide for this clarification. The interested party would be required to certify as to the accuracy

of the information contained in the letter of appearance.

It should be noted, however, that the APO application is not a submission made by the party itself. Rather it is a submission made by the representative of the party to request access to the business proprietary information submitted in that segment. Accordingly, the Department does not believe that it is necessary for the party to certify to the contents of the APO application. Rather, it is sufficient for the representative applying for access under APO to certify to the accuracy of the information contained in the APO application. Such certification is already included in Form ITA-367.

Nonetheless, interested parties are not required to apply for APO access in order to participate in a segment before the Department. Many parties choose not to apply for access to the business proprietary information submitted by other parties, yet still participate by submitting factual information or written argument.<sup>1</sup> The Department considers that it is appropriate to require these parties to submit a separate letter of appearance as a request to be placed on the public service list of the particular segment in which it is participating, and thus the Department has revised section 351.103(d)(1) to include language for this provision.

#### *Section 351.204(d). Requests for Treatment as a Voluntary Respondent*

As provided in section 351.204(d) of the Department's regulations, if the Department limits the number of exporters or producers individually examined under section 777A(c)(2) or section 777A(e)(2)(A) of the Act, the Department will examine voluntary respondents in accordance with section 782(a) of the Act. In order to be able to clearly identify voluntary respondents, and discern the order in which requests for voluntary respondent treatment have been submitted, the Department is amending section 351.204(d) to require an interested party seeking voluntary respondent treatment to indicate its request clearly on the first page of the first submission. This will alert the APO/Dockets Unit to the fact that the submission should be time stamped. This amendment is made in conjunction

<sup>1</sup> Under the Department's regulations, an interested party may not apply for access under APO if that party only intends to "monitor" the proceeding. Rather, only a representative of a party to the proceeding can apply for APO access. 19 CFR 351.305(b)(2). The regulations define a party to the proceeding as "any interested party that actively participates through written submissions of factual information or written argument, in a segment of a proceeding." 19 CFR 351.102.

with the amendment to section 351.103(c) of the regulations. The Department received no comments on this amendment.

#### *Section 351.305(a). Placing APOs on the Record in New Shipper Reviews, Applications for Scope Rulings, and Changed Circumstances Reviews*

The Department is amending section 351.305(a) of the regulations to place an APO on the record within five business days of the filing of a request for new shipper review, an application for a scope ruling, a request for a changed circumstances review or the self-initiation of a changed circumstances review by the Department. The Department is also clarifying that the reference to "days" in this section of the regulations refers to business days.

Under the prior regulations, the Department would place an APO on the record within two days of the filing of a petition, or five days of initiating any other segment of a proceeding. At times, however, when determining whether to initiate a new shipper review, a scope inquiry or a changed circumstances review, the Department is required to consider business proprietary information. Accordingly, the Department finds it appropriate to permit representatives of interested parties to have access under APO to any business proprietary information submitted to the Department initiates these segments.

One commentator expressed support for this change, noting that the change recognizes the problem created when the Department denies access to business proprietary information before these segments are initiated, and attempts to address it.

#### *Section 351.305(b). Service Requirement of Documents Already on the Administrative Record to New Authorized Applicants*

The Department is amending section 351.305(b) of its regulations to require the service of all business proprietary information on the record on the representative of a party filing a timely application for APO access within two business days of the approval of the application. A timely application is one filed before the first questionnaire response has been submitted.

When an application is filed after the day on which the first questionnaire response is submitted, the parties will have five business days from the approval of the application to serve all business proprietary information on the record to the new authorized applicant. When the representative of a party files an application after the submission of

the first questionnaire response, that representative is liable for costs associated with the additional production and service of business proprietary information already on the record.

One commentator proposed that the five day period should continue to apply in all circumstances. According to this commentator, the five day period has not caused any undue delays. Moreover, this commentator noted that imposing a more demanding requirement before responses have been filed would disproportionately affect petitioners. This commentator contends that the two-day requirement is intended to conform with the International Trade Commission's requirement that the petition be served within two days of the establishment of the Commission's APO service list. However, the commentator noted that the Commission issues its preliminary determination within 45 days of the filing of the petition, whereas the Department issues its preliminary determination 140 days after initiation of the investigation.

We have not adopted the commentator's suggestion. The requirement to serve all business proprietary information on the record within two days of the approval of a timely APO application existed prior to the adoption of the 1998 regulations. This requirement was inadvertently deleted from the regulations adopted in 1998.

As the commentator noted, the Commission's regulations already require the petitioner to serve the petition on all parties who apply for APO access within two days of receiving notification of the Commission's approval of an APO application. 19 CFR 207.10(b)(1)(i). Thus, adopting a two-day requirement in the Department's regulations will not be unduly burdensome.

#### *Section 351.305(d). Additional Documentation Required for Importers*

The Department is adding section 351.305(d) to its regulations, requiring the representatives of importers to provide documentary evidence confirming the interested party's status as an importer of the subject merchandise from the country subject to the proceeding. This requirement is necessary to permit the Department to ensure that only those who are authorized to receive access to the business proprietary information submitted to the record (that is, the representatives of interested parties who are also parties to the proceeding) gain access to that information.

One commentator objected to this new requirement. This commentator contends

that there can be no justification for imposing this burden on importers, which it argues is discriminatory. The commentor argues that the statute makes no distinctions among the interested parties when it comes to granting access to business proprietary information. Accordingly, all interested parties must be treated the same way. The commentor argues that the Government may not discriminate against similarly situated persons without a rational basis for the differential treatment. The commentor does not believe that the Department has given sufficient justification for imposing this new burden on importers alone. Rather, the commentor contends that the Department could just as easily have a concern with whether a party claiming to be a domestic manufacturer, a union or an association is a bona fide interested party. The commentor urges the Department to drop its proposal.

We disagree that importers are in a similar situation as other interested parties and that there is no rational reason for this requirement. Therefore, we have not adopted the commentor's suggestion. Specifically, as a matter of evidence, it is often easier for the Department to confirm whether a party claiming to be a domestic interested party or a respondent is in fact an interested party than it is to confirm whether a party is an importer of subject merchandise. That is, evidence demonstrating the interested party status of the domestic interested parties and the respondent is often already on the record in AD and CVD proceedings when such parties apply for APO access. By contrast, when an importer is participating independently from an exporter or manufacturer of subject merchandise, the Department requires evidence to confirm that the party is indeed an importer of subject merchandise before granting APO access.

Given the serious task that has been assigned to the Department, namely the protection of business proprietary information submitted to it during an AD or CVD proceeding (see section 777(b)(1)(A) of the Act), the Department must proceed carefully to ensure that the parties whose representatives are applying for APO access do indeed qualify for such access. That is, the Department must be sure that the business proprietary information is not disclosed to those who are not authorized to see it.

Such evidentiary problems generally do not exist in identifying when the representative seeking APO access represents a petitioner or other domestic producer or a union or an association of

domestic producers. In an investigation, the petitioner must submit its petition, and include detailed information regarding itself and the domestic industry. See 19 CFR 351.202(b). This includes the names, addresses and telephone numbers of all known persons in the industry. 19 CFR 351.202(b)(2). In this regard, section 732(c)(4) of the Act charges the Department with determining whether the petition has sufficient support from the domestic industry. To do this, the Department must be apprised of the identity of those who are members of the domestic industry and examine production data for those members identified. Because this information is placed on the administrative record before the initiation of any AD or CVD investigation, the Department normally does not require additional information to confirm the identity of petitioners in an investigation.

Similarly, in an AD investigation, the petition must identify the names and addresses of all of the persons whom the petitioner believes are selling the subject merchandise at less than fair value. 19 CFR 351.202(b)(7)(i)(A). In a CVD investigation, the petitioner must identify the names and addresses of all of the persons whom the petitioner believes are benefitting from a countervailable subsidy and are exporting to the United States. 19 CFR 351.202(b)(7)(ii)(A). Indeed, as a general rule, the Department calculates an individual weighted-average dumping margin or an individual countervailable subsidy rate for each known exporter or producer. See sections 777a(c)(1) and 777A(e)(1) of the Act; 19 CFR 351.204(b).<sup>2</sup> Thus, as a general matter, AD and CVD investigations are specific to identified exporters and producers. For the Department to accomplish its task, it must have on the administrative record information identifying who the exporters or producers are. Indeed, the Department generally only receives APO applications from representatives of foreign producers and exporters who are asked to provide information pertaining to their sales and production of subject merchandise, or who wish to become voluntary respondents and thus likewise provide the Department with their sales and production information. That information confirms the status of such foreign producers and exporters as interested parties. Thus, when the

<sup>2</sup> Some alternatives exist to calculating individual margins and subsidization rates for each known exporter or producer. They include using statistically valid samples and limiting the number of exporters or producers examined due to practicality. See sections 777A(a)(1), 777A(c)(2) and 777A(e)(2).

representative of a foreign producer or exporter applies for APO access, generally the evidence confirming that the respondent is an interested party is already on the administrative record.

While it is true that the petition must also contain information regarding the known importers or likely importers of the subject merchandise (see 19 CFR 351.202(b)(9)), the Department may not have the same amount of evidence on the administrative record identifying all of the importers of the subject merchandise. Moreover, it is possible that there are other importers, who are not known to the petitioner, who import the subject merchandise and desire to participate as a party to the proceeding.

Moreover, as evidenced by section 351.213(b) of the Act, when the Department conducts an administrative review of an AD or CVD order, as a general matter the Department will review specific exporters or producers. The Department generally only receives APO applications from representatives of foreign producers or exporters in administrative reviews when those parties have requested a review for themselves, or have otherwise been identified in a request for review as producers or exporters of the subject merchandise. Thus, again, the identity of the exporter or producer of the subject merchandise in an administrative review is often not in question.

With regard to coalitions or associations as defined in subparagraph (A), (E), (F) or (G) of section 771(9) of the Act, section 351.103(d)(1) of these amended regulations clearly require that the letter of appearance identify all of the members of the coalition or association. This is meant to permit the Department to confirm that the coalition or association qualifies as an interested party under the Act, and thus qualifies to be a party to the proceeding.

When it is appropriate, such as when there is a new party to the proceeding that has not participated in the investigation, the Department's practice is to request further information from the party to confirm that the party is in fact an interested party. This practice applies not only with respect to coalitions and associations, but also with respect to trade unions and other parties claiming to be domestic interested parties who have not previously participated in any segment of the proceeding.

By contrast, the Department does not always have on the administrative record evidence identifying all of the importers of the subject merchandise when the representatives of such importers apply for access under the

APO. One context in which this problem often arises is where there are companion AD or CVD investigations involving the same merchandise, but exported from different countries. Sometimes, an importer will import the subject merchandise from one of the countries which are the subject of the investigations, but not others. The requirement to provide documentary evidence of the importer's interested party status is meant to ensure that the representatives of such importers are applying for APO access only in those particular proceedings in which the importer qualifies as an interested party.

The burden that the Department is placing on the importer is not great. In most instances, a copy of Customs Forms 7501 will suffice. Indeed, the Department prefers that the Custom Form 7501 serve as the documentary evidence. This is a document that is likely already in the possession of the importer, and not difficult to produce when the representative is applying for APO access. In other instances, the interested party may be able to satisfy the requirement by submitting any other credible documentary evidence demonstrating that it either imports or intends to import the subject merchandise. When it is not practical for an importer to submit a copy of Customs Form 7501, the Department will work with the importer to determine if other documentary evidence exists that will be sufficient to confirm the importer's status as an interested party.

The Department is also correcting the language of section 351.305(d) as published in the January Notice concerning the required documentary evidence demonstrating that a party imports merchandise subject to the antidumping or countervailing duty proceeding. The correction is to clarify that this evidentiary requirement applies with respect to each segment of an antidumping or countervailing duty proceeding, and is not limited to certain specific segments of the proceeding. The language as published in the January Notice does not clearly state that this documentary evidence is required from importers in the investigation stage of a proceeding as well as in subsequent segments of the proceeding as was the Department's intent. Thus the Department has revised section 351.305(d) to require, from a party claiming to be an interested party by virtue of being an importer, documentary evidence demonstrating that the party imports merchandise either subject to the antidumping or countervailing duty proceeding, or subject to a scope inquiry.

One commentor expressed confusion with the Department's explanation of its proposed amendment, specifically as it applies to parties who intend to import a product that is subject to a scope inquiry. This commentor argues that the Department regularly declines to initiate scope inquiries where the product is yet to be imported, and that the Department should not alter this practice.

In response to this comment, the Department's practice is to issue a scope ruling or conduct a scope inquiry when the party requesting the ruling can show that the specific product in question is actually in production. The product need not be imported into the United States so long as the requestor can show evidence that the product is in production. The Department will not issue a scope ruling or conduct a scope inquiry on a purely hypothetical product. In line with this practice, the Department believes that it is appropriate to permit a party who is a potential importer of the product subject to the scope inquiry access to proprietary information under APO.

The Department has clarified section 351.305(d) to conform to its practice. Where the segment in question concerns a specific time period, such as an investigation or an administrative review, the party claiming to be an importer must show documentary evidence, preferably Customs Form 7501, that it imported subject merchandise during the applicable period of investigation or period of review. For a scope inquiry, however, any interested party may participate in the scope inquiry. Thus, an importer may be given APO access during a scope inquiry, provided it can provide documentary evidence, again preferably a Customs Form 7501, that it imported subject merchandise. For those situations where the product subject to the scope inquiry is in production, but has not yet been imported into the United States, a potential importer of such product may be permitted to participate as a party to the proceeding, and be given access to the proprietary information under the APO, provided that the party can demonstrate that it has taken steps towards importing the merchandise in question. Such evidence, for example, can consist of preliminary communications concerning the product between the importer and the manufacturer or supplier.

#### *Form ITA-367, Short Form Application for APO*

The Department is amending Form ITA-367 to require APO applicants in new shipper reviews to specifically

identify the name of the exporter(s)/ producer(s) that is/are covered by the new shipper review. This is necessary because the Department can initiate multiple new shipper reviews on the same date covering different manufacturers or exporters. While it is the Department's practice to issue a single APO for multiple new shipper reviews involving the same subject merchandise if initiated on the same date, the periods of review in question may not always be congruent. That is, the Department at times may exercise its discretion to expand the period of review for one new shipper, but not for another, depending on the circumstances. To accurately identify the APO governing new shipper reviews and to help identify the APO and public service lists for these segments, it is the Department's practice to individually name all of the parties being reviewed within the heading of these documents.

Because the Department may conduct several scope inquiries during the existence of an AD or CVD order, to provide further clarity the Department is amending Form ITA-367 to specifically identify the product in question that is covered by the scope review.

To identify with more clarity when an applicant is applying for APO access in a changed circumstances review, the Department is amending Form ITA-367 to allow applicants to check "changed circumstances review" and identify the date on which the request for a changed circumstances review was filed.

To ensure timely distribution of the APO service list and any amendments thereto, the Department is amending Form ITA-367 to require the identification of the "Lead Applicant," and to request an email address for the receipt of service lists.

The Department is issuing a clarification regarding the effective date of the amended Form ITA-367. The effective date for the amended Form ITA-367 is February 21, 2008. It is the Department's intention to use only this new version of Form ITA-367, in all segments pending before the Department as of the effective date, except those initiated before June 3, 1998. The Department will post this version of Form ITA-367 and remove any prior versions of the form from the Import Administration's Web site. Parties who practice before the Department are advised to update any word processing file they may use to prepare Form ITA-367, to reflect the amendments made to the current version of the form.

To ensure that parties who practice before the Department need not keep track of multiple versions of Form ITA-

367, the Department is amending section 351.305(b)(2) of its regulations, by inserting the words “the current version of” before the word “Form ITA-367” in the first sentence of the regulation. By doing so, the Department is clarifying that should it amend Form ITA-367 again in the future, the new version of the form shall be used in all segments pending before the Department as of the effective date of the new form, and not only in those segments initiated on or after the effective date.

There are currently a few segments of proceedings initiated before June 3, 1998 still pending before the Department, all of which concern suspension agreements. Due to the fact that the rules concerning the authorized use of the business proprietary information submitted in those segments differ from segments initiated under the current version of the Department's APO regulations, the Department believes that it is appropriate for parties who wish to apply for access under APO in segments concerning those suspension agreements to use the version of Form ITA-367 that was in effect before June 3, 1998. However, the Department reserves the right to permit parties to use the current version of Form ITA-367 by including express language in the terms of the suspension agreements, should it renegotiate those terms in the future.

The Department would like to take this opportunity to remind those who practice before it that the entire Form ITA-367 (2.08) must be submitted to the Department in order to gain access to business proprietary information under the APO. If any portion of the form is not applicable, the applicant should so indicate on the form itself, and submit the entire application form to the Department. Form ITA-367 is available on the Department's Web site at <http://ia.ita.doc.gov/apo/index.html> and may be reproduced using the applicant's word processor. The format of the application must be exactly as provided in the printed form, with no deviation. With respect to item 5 of the APO application, when identifying non-attorney applicants, any clarification as to the identity of those applicants must be explained in the cover letter, or as an attachment to the application. Such clarifications should not be added into Form ITA-367 itself.

With respect to items 8 and 9, the exact format may be repeated to include additional applicants, as required (e.g., (2), (3), (4), etc.). Each applicant must *sign and date* the application in their own hand.

The Department would also like to remind authorized applicants that an acknowledgment for support staff is a requirement under item 2 of the APO. Failure by a firm to maintain an acknowledgment for support staff for each segment of each proceeding when APO access has been granted would be a violation of the APO. Support staff do not apply separately for APO access, but they are required to sign the acknowledgment maintained by the firm.

#### Classification

*E.O. 12866*

It has been determined that this notice is not significant for purposes of E.O. 12866.

#### *Regulatory Flexibility Act*

The Chief Counsel for Regulation at the Department certified to the Chief Counsel for Advocacy, Small Business Administration that this rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published in the proposed rule and is not repeated here. No comments were received regarding the economic impact of this rule. As a result, no final regulatory flexibility analysis is required and none has been prepared.

#### *Paperwork Reduction Act*

This rule does not contain a collection of information for purposes of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 et seq.).

*E.O. 12612*

This proposed rule does not contain federalism implications warranting the preparation of a Federalism Assessment.

#### List of Subjects in 19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Cheese, Confidential business information, Countervailing duties, Freedom of information, Investigations, Reporting and recordkeeping requirements.

Dated: January 14, 2008.

**David M. Spooner,**

*Assistant Secretary for Import Administration.*

■ For the reasons stated, 19 CFR Ch. III is amended as follows:

#### **PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES**

■ 1. The authority citation for part 351 continues to read as follows:

**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.

■ 2. Section 351.102 is revised as follows:

#### **§ 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.*

(1) *Act.* “Act” means the Tariff Act of 1930, as amended.

(2) *Administrative review.*

“Administrative review” means a review under section 751(a)(1) of the Act.

(3) *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.

(4) *Aggregate basis.* “Aggregate basis” means the calculation of a country-wide subsidy rate based principally on information provided by the foreign government.

(5) *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.

(6) *APO.* “APO” means an administrative protective order described in section 777(c)(1) of the Act.

(7) *Applicant.* “Applicant” means a representative of an interested party that has applied for access to business proprietary information under an administrative protective order.

(8) *Article 4/Article 7 review*. “Article 4/Article 7 review” means a review under section 751(g)(2) of the Act.

(9) *Article 8 violation review*. “Article 8 violation review” means a review under section 751(g)(1) of the Act.

(10) *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.

(11) *Changed circumstances review*. “Changed circumstances review” means a review under section 751(b) of the Act.

(12) *Consumed in the production process*. Inputs “consumed in the production process” are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the product.

(13) *Cumulative indirect tax*. “Cumulative indirect tax” means a multi-staged tax levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production.

(14) *Customs Service*. “Customs Service” means United States Customs and Border Protection of the United States Department of Homeland Security.

(15) *Department*. “Department” means the United States Department of Commerce.

(16) *Direct tax*. “Direct tax” means a tax on wages, profits, interests, rents, royalties, and all other forms of income, a tax on the ownership of real property, or a social welfare charge.

(17) *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.

(18) *Expedited antidumping review*. “Expedited antidumping review” means a review under section 736(c) of the Act.

(19) *Expedited sunset review*. “Expedited sunset review” means an expedited sunset review conducted by the Department where respondent interested parties provide inadequate responses to a notice of initiation under section 751(c)(3)(B) of the Act and § 351.218(e)(1)(ii).

(20) *Export insurance*. “Export insurance” includes, but is not limited to, insurance against increases in the cost of exported products, nonpayment by the customer, inflation, or exchange rate risks.

(21) *Factual information*. “Factual information” means:

(i) Initial and supplemental questionnaire responses;

(ii) Data or statements of fact in support of allegations;

(iii) Other data or statements of facts; and

(iv) Documentary evidence.

(22) *Fair value*. “Fair value” is a term used during an antidumping investigation, and is an estimate of normal value.

(23) *Firm*. For purposes of subpart E (Identification and Measurement of Countervailable Subsidies), “firm” is used to refer to the recipient of an alleged countervailable subsidy, including any individual, company, partnership, corporation, joint venture, association, organization, or other entity.

(24) *Full sunset review*. “Full sunset review” means a full sunset review conducted by the Department under section 751(c)(5) of the Act where both domestic interested parties and respondent interested parties provide adequate response to a notice of initiation under section 751(c)(3)(B) of the Act and §§ 351.218(e)(1)(i) and 351.218(e)(1)(ii).

(25) *Government-provided*. “Government-provided” is a shorthand expression for an act or practice that is alleged to be a countervailable subsidy. The use of the term “government-provided” is not intended to preclude the possibility that a government may provide a countervailable subsidy indirectly in a manner described in section 771(5)(B)(iii) of the Act (indirect financial contribution).

(26) *Import charge*. “Import charge” means a tariff, duty, or other fiscal charge that is levied on imports, other than an indirect tax.

(27) *Importer*. “Importer” means the person by whom, or for whose account, subject merchandise is imported.

(28) *Indirect tax*. “Indirect tax” means a sales, excise, turnover, value added, franchise, stamp, transfer, inventory, or equipment tax, a border tax, or any other tax other than a direct tax or an import charge.

(29) *Interested party*. For the purpose of submitting an application for APO access (Form ITA-367), “Interested Party” means:

(i) A foreign manufacturer, producer, or exporter of subject merchandise,

(ii) The United States importer of subject merchandise,

(iii) A trade or business association a majority of the members of which are producers, exporters, or importers of subject merchandise,

(iv) The government of a country in which subject merchandise is produced

or manufactured or from which such merchandise is exported,

(v) A manufacturer, producer, or wholesaler in the United States of a domestic like product,

(vi) A certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,

(vii) A trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States,

(viii) An association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) of section 771(9) of the Act with respect to a domestic like product, and

(ix) A coalition or trade association as described in section 771(9)(G) of the Act.

(30) *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:

(i) Notice of termination of investigation,

(ii) Notice of rescission of investigation,

(iii) Notice of a negative determination that has the effect of terminating the proceeding, or

(iv) An order.

(31) *Loan*. “Loan” means a loan or other form of debt financing, such as a bond.

(32) *Long-term loan*. “Long-term loan” means a loan, the terms of repayment for which are greater than one year.

(33) *New shipper review*. “New shipper review” means a review under section 751(a)(2) of the Act.

(34) *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.

(35) *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.

(36) *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.

(37) *Person*. "Person" includes any interested party as well as any other individual, enterprise, or entity, as appropriate.

(38) *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.

(39) *Prior-stage indirect tax*. "Prior-stage indirect tax" means an indirect tax levied on goods or services used directly or indirectly in making a product.

(40) *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:

- (i) Dismissal of petition,
- (ii) Rescission of initiation,
- (iii) Termination of investigation,
- (iv) A negative determination that has the effect of terminating the proceeding,
- (v) Revocation of an order, or
- (vi) Termination of a suspended investigation.

(41) *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.

(42) *Respondent interested party*. "Respondent interested party" means an interested party described in subparagraph (A) or (B) of section 771(9) of the Act.

(43) *Sale*. A "sale" includes a contract to sell and a lease that is equivalent to a sale.

(44) *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.

(45) *Section 753 review*. "Section 753 review" means a review under section 753 of the Act.

(46) *Section 762 review*. "Section 762 review" means a review under section 762 of the Act.

(47) *Segment of proceeding*—(i) *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.

(ii) *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.

(48) *Short-term loan*. "Short-term loan" means a loan, the terms of repayment for which are one year or less.

(49) *Sunset review*. "Sunset review" means a review under section 751(c) of the Act.

(50) *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.

(51) *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.

(52) *URAA*. "URAA" means the Uruguay Round Agreements Act.

■ 3. Section 351.103 is revised as follows:

**§ 351.103 Central Records Unit and Administrative Protective Order and Dockets Unit.**

(a) Import Administration's Central Records Unit maintains a Public File Room in Room 1117, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW., Washington, DC 20230. The office hours of the Public File Room are between 8:30 a.m. and 5 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), and the Subsidies Library (see section 775(2) and section 777(a)(1) of the Act).

(b) Import Administration's Administrative Protective Order and Dockets Unit (APO/Dockets Unit) is located in Room 1870, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW., Washington, DC 20230. The office hours of the APO/Dockets Unit are between 8:30 a.m. and 5 p.m. on business days. Among other things, the APO/Dockets Unit is responsible for receiving submissions from interested parties, issuing administrative protective orders (APOs), maintaining the APO service list and the public service list as provided for in paragraph (d) of this section, releasing business proprietary information under APO, and conducting APO violation investigations. The APO/Dockets Unit also is the contact point for questions and concerns regarding claims for business proprietary treatment of information and proper public versions of submissions under § 351.105 and § 351.304.

(c) *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 Import Administration's APO/Dockets Unit in Room 1870 and is stamped with the date, and, where necessary, the time, of receipt.

(d) *Service list*. The APO/Dockets Unit will maintain and make available a public service list for each segment of a proceeding. The service list for an application for a scope ruling is described in § 351.225(n).

(1) With the exception of a petitioner filing a petition in an investigation, to be included on the public service list for a particular segment, each interested party must file a letter of appearance. The letter of appearance must identify the name of the interested party, how that party qualifies as an interested party, and the name of the firm, if any, representing the interested party in this segment of the proceeding. The letter of appearance may be filed as a cover letter to an application for APO access. If the representative of the party is not requesting access to business proprietary information under APO, the letter of appearance must be filed separately from any other document filed with the Department. If the interested party is a coalition or association as defined in subparagraph (A), (E), (F) or (G) of section 771(9) of the Act, the letter of appearance must

identify all of the members of the coalition or association.

(2) Each interested party that asks to be included on the public service list for a segment of a proceeding must designate a person to receive service of documents filed in that segment.

■ 4. Add paragraph (d)(4) of § 351.204 to read as follows:

**§ 351.204 Time periods and persons examined; voluntary respondents; exclusions.**

\* \* \* \* \*

(d) \* \* \*

(4) *Requests for voluntary respondent treatment.* An interested party seeking treatment as a voluntary respondent must so indicate by including as a title on the first page of the first submission, "Request for Voluntary Respondent Treatment."

\* \* \* \* \*

■ 5. Revise paragraph (b) of § 351.303 to read as follows:

**§ 351.303 Filing, format, translation, service, and certification of documents.**

\* \* \* \* \*

(b) *Where to file; time of filing.*

Persons must address and submit all documents to the Secretary of Commerce, Attention: Import Administration, APO/Dockets 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 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.

\* \* \* \* \*

■ 6. Section 351.305 is amended by revising paragraph (a) introductory text, paragraphs (b)(2) through (b)(4), and adding a new paragraph (d) to read as follows:

**§ 351.305 Access to business proprietary information.**

(a) *The administrative protective order.* The Secretary will place an administrative protective order on the record within two business days after the day on which a petition is filed or

an investigation is self-initiated, within five business days after the day on which a request for a new shipper review is properly filed in accordance with § 351.214 and § 351.303 or an application for a scope ruling is properly filed in accordance with § 351.225 and § 351.303, within five business days after the day on which a request for a changed circumstances review is properly filed in accordance with § 351.216 and § 351.303 or a changed circumstances review is self-initiated, or five business days after initiating any other segment of a proceeding. The administrative protective order will require the authorized applicant to:

\* \* \* \* \*

(b) \* \* \*

(2) A representative of a party to the proceeding may apply for access to business proprietary information under the administrative protective order by submitting the current version of Form ITA-367 to the Secretary.

Form ITA-367 must identify the applicant and the segment of the proceeding involved, state the basis for eligibility of the applicant for access to business proprietary information, and state the agreement of the applicant to be bound by the administrative protective order. Form ITA-367 may be prepared on the applicant's own wordprocessing system, and must be accompanied by a certification that the application is consistent with Form ITA-367 and an acknowledgment that any discrepancies will be interpreted in a manner consistent with Form ITA-367. An applicant must apply to receive all business proprietary information on the record of the segment of a proceeding in question, but may waive service of business proprietary information it does not wish to receive from other parties to the proceeding. An applicant must serve an APO application on the other parties in the same manner and at the same time as it serves the application on the Department.

(3) With respect to proprietary information submitted to the Secretary on or before the date on which the Secretary grants access to a qualified

applicant, except as provided in paragraph (b)(4) of this section, within two business days the submitting party shall serve the party which has been granted access, in accordance with paragraph (c) of this section.

(4) To minimize the disruption caused by late applications, an application should be filed before the first questionnaire response has been submitted. Where justified, however, applications may be filed up to the date on which the case briefs are due, but any applicant filing after the first questionnaire response is submitted will be liable for costs associated with the additional production and service of business proprietary information already on the record. Parties have five business days to serve their business proprietary information already on the record to a party who has filed an application after the submission of the first questionnaire response and is authorized to receive such information after such information has been placed on the record.

\* \* \* \* \*

(d) *Additional filing requirements for importers.* If an applicant represents a party claiming to be an interested party by virtue of being an importer, then the applicant shall submit, along with the Form ITA-367, documentary evidence demonstrating that during the applicable period of investigation or period of review the party imported subject merchandise. For a scope inquiry, the applicant must present documentary evidence that it imported subject merchandise, or that it has taken steps towards importing the merchandise subject to the scope inquiry.

**Note:** The following appendix will not appear in the Code of Federal Regulations: Application for Administrative Protective Order in Antidumping or Countervailing Duty Proceeding.

**Appendix—Application for Administrative Protective Order in Antidumping or Countervailing Duty Proceeding**

BILLING CODE 3510-05-P