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Part II

Department of Commerce

International Trade Administration

19 CFR Part 351 et al.

Antidumping Duties; Countervailing Duties; Final rule

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