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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Other Comments Concerning § 351.401

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

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

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

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

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

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

Section 351.402

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 351.403

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 351.404

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 351.405

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

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

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

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

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

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

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

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

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

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

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

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

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

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

With respect to the other alternative profit methods authorized by section 773(e)(2)(B), the Department believes that the absence of any ordinary course of trade restrictions under the first alternative is a clear indication that the Department normally should calculate profit under this method on the basis of all home market sales, without regard to whether such sales were made at below-cost prices. However, the same cannot be said of the third alternative method, which provides for the use of ''any other reasonable method'' in determining CV profit. The SAA at 841 makes it clear that, given the absence of any comparable standard under the prior statute, it would be inappropriate to establish methods and benchmarks for applying this alternative. Thus, depending on the circumstances and the availability of data, there may be instances in which the Department would consider it necessary to exclude certain home market sales that are outside the ordinary course of trade in order to compute a reasonable measure of profit for CV under the third alternative method.

Abnormally high profits: One commenter recommended that the regulations state that above-cost sales are not ''in the ordinary course of trade'' for purposes of determining CV profit when the use of those sales would lead to irrational or unrepresentative results. This commenter noted that the SAA at 834 and 840 refers to sales with ''abnormally high profits'' and merchandise sold at ''aberrational prices'' as examples of transactions that the Department may consider as being ''outside the ordinary course of trade'' for purposes of determining CV profit. Based on these examples, the commenter posited that if the Department excluded the vast majority of a respondent's sales from the profit calculation because they were below cost, the few remaining above-cost sales, by definition, would be sold at aberrational prices. As such, the Department also would have to exclude those sale from the CV profit calculation.

Another commenter suggested that the regulations stringently define the phrase ''abnormally high profits.'' This

commenter argued that the fact that profit margins are relatively high is an insufficient basis for determining that profits are ''abnormal.'' Instead, the commenter argued, the burden of establishing that a given profit amount is ''abnormal'' should be very high, and should be based on express economic assumptions.

The Department agrees that the sales used as the basis for CV profit should not lead to irrational or unrepresentative results. However, we have not adopted the first commenter's recommendation, because there may be instances in which it would be appropriate to base profit on a small number of above-cost sales. Specifically, where the Department finds a majority of sales of a foreign like product to be at below-cost prices (and, thus, excludes those sales from the calculation of profit), the fact that only a few sales remain at above-cost prices does not, by itself, render such sales outside the ordinary course of trade. Rather, it is the below-cost sales that are outside the ordinary course of trade. Whether the few remaining above-cost sales are also outside the ordinary course of trade is a separate issue that depends on the facts and circumstances surrounding these transactions.

In this regard, the Department believes that the burden of showing that profits earned from above-cost sales are ''abnormal'' (or otherwise unusable as the basis for CV profit) rests with the party making the claim. We do not consider it appropriate, however, to establish a stringent evidentiary burden in the regulations, as suggested by the second commenter. In most instances, proof that the profits earned by respondent on specific sales are abnormal will depend on a number of factors, including the type of merchandise under investigation or review and the normal business practices of the respondent and of the industry in which the merchandise is sold. Thus, the Department believes it appropriate to make such ordinary course of trade determinations on a case-by-case basis.

Profit ceiling: One commenter proposed that the regulations impose a ceiling on the amount of profit to be used in those cases where no or too few foreign market sales are found to be made ''in the ordinary course of trade.'' For such a ceiling, the commenter suggested that the Department use the average profit rate for the industry that produces/sells the subject merchandise.

The Department does not believe that there is a statutory basis for imposing a profit ceiling. Consistent with our position in the preceding comment, where there are only a few sales made by a respondent in the ordinary course of trade, such sales would form the basis for CV profit, because they would fulfill the requirement for actual profits under section 773(e)(2)(A) of the Act. It would contradict the plain language of the statute (which calls for the use of respondent's actual profits for a foreign like product) were the Department to impose an industry-wide ceiling on the profit used for CV.

Moreover, in instances where there are no sales in the ordinary course of trade from which to compute profit, section 773(e)(2)(B) of the Act does not provide that a profit ceiling be imposed for each of the alternative methodologies. Instead, only the third alternative method (*i.e.*, amounts realized under any other reasonable method) requires that the Department consider a ''ceiling'' on the amount calculated for CV profit. Here too, however, the Department believes that the commenter's recommended industry-wide average profit ceiling does not conform to the statutory requirement. Section 773(e)(2)(B)(iii) of the Act provides that the so-called ''profit cap'' be determined based on amounts realized by *other* exporters or producers in the *foreign country* in connection with sales of merchandise that is the *same general category* as the subject merchandise. This differs from the commenter's suggestion in two important respects. First, the statutory profit cap is to be derived from sales in the general category of products and, thus, encompasses a group of products that is broader than the subject merchandise. Second, where it relies on the third alternative method, the Department is required to determine the profit cap figure based on sales in the foreign country exclusive of profits realized by the exporter or producer under investigation or review. By contrast, the proposed average industry-wide profit figure presumably would include sales by all exporters and producers in all markets, including sales by the exporter and producer in question and sales to the United States. In our view, the statute prohibits the use of such sales for this purpose.

Finally, it is important to note that the SAA at 841 anticipates situations in which the Department will be unable to determine a profit cap due to an absence of the appropriate data. In these instances, the Department may apply the third alternative profit method on the basis of facts available. However, the Department will not make adverse inferences in applying facts available, unless the respondent did not cooperate to the best of its ability during the course of the investigation or review.

Use of other producer's profit data: One commenter suggested that the regulations state that, when calculating a respondent's profit for CV under section 773(e)(2)(B) of the Act, the Department will resort to the second alternative method (other producers' profits for the foreign like product) only in exceptional circumstances. The commenter contended that the adoption of this principle will help to ensure fairness and predictability in AD proceedings.

In our view, the SAA at 840 makes clear that there is no hierarchy or preference among the three alternative methods for calculating profit under section 773(e)(2)(B). Rather, the SAA provides that the Department's selection of an alternative profit calculation method will be made on a case-by-case basis, and will depend, to an extent, on the data available with regard to profits earned in the foreign market. For this reason, we have not adopted the commenter's recommendation to limit the use of the second alternative method to exceptional circumstances, because such an approach would impose a preference in favor of the first and third alternative methods.

Section 351.406

Section 351.406 deals with the analysis of whether to disregard certain sales as below the cost of production under section 773(b) of the Act.

Extended period of time: Several commenters made suggestions regarding the ''extended period of time'' criterion for below-cost sales under section 773(b)(1)(A) of the Act. Two of these commenters disagreed with the statement in the AD Proposed Regulations, 61 FR at 7336, that the Department would exclude below-cost sales made during only one month of the period of investigation or review. These commenters maintained that because one-month's worth of sales do not represent the pricing practices of a company over a full investigation or review period, the Department should not consider such sales to have been made within an extended period of time. Similarly, another commenter recommended that the Department establish criteria for determining when sales of ''custom'' products (products not manufactured continuously throughout the period of investigation or review) have been made ''within an extended period of time in substantial quantities.''

The Department has not adopted these suggestions, because we believe that the SAA is clear as to when below-

cost sales have occurred ''within an extended period of time.'' The SAA at 831–832 states that ''below-cost sales need occur only within (rather than over) an extended period of time.'' According to the SAA, this means that the Department ''no longer must find that below-cost sales occurred in a minimum number of months before excluding such sales from its analysis.'' Thus, for example, where a particular model is sold at prices below the cost of production during one month of the period of investigation or review (and where such sales are in substantial quantities and are not at prices that would permit cost recovery), the Department may disregard these sales in its determination of normal value.

Another commenter made two recommendations regarding the language in proposed paragraph (b) that an extended period of time ''normally will coincide with the period in which the sales under consideration for the determination of normal value were made.'' First, the commenter cited the statutory requirement that the substantial quantity of below-cost sales occur ''within'' the extended period of time, and not ''over'' that period. Based on this requirement, the commenter argued, paragraph (b) should not state that the period required to satisfy the ''extended period of time'' criterion must be as long as, or ''coincide'' with, the period of investigation or review. Second, this commenter noted that under proposed paragraph (b), the period in which ''sales under consideration'' are made could vary by model or part number. For example, according to this commenter, if a model was discontinued only a few months into the period of review, paragraph (b), as drafted, would limit the ''extended period of time'' to the duration of sales of that model. The commenter suggested that if the Department intends that the entire period of investigation or review constitute the ''extended period of time,'' it should make this clear in the final regulations.

It was not the Department's intention (nor do we believe it to be the case) that the use of the word ''coincide'' in proposed paragraph (b) changes the clear language of section 773(b)(1)(A) from ''within an extended period of time'' to ''over'' such a period. Instead, proposed paragraph (b) merely establishes the duration of that interval which the Department normally will consider as being ''an extended period of time'' for purposes of determining whether below-cost sales were made in substantial quantities under section 773(b)(1) of the Act. Below-cost sales need only occur *within* that period in order to be counted toward the substantial quantities threshold.

The Department does not believe it appropriate to redraft paragraph (b) to refer to sales within the period of investigation or review. The commenter making this suggestion presented a scenario in which a firm sells a particular model of a foreign like product only during the first few months of a review period. This commenter argued that paragraph (b) could be construed in such a way as to limit the extended period of time to the duration of sales of that model. We do not believe this to be the case, however, because the extended period of time is based on the period during which *all* foreign market sales were made, not merely sales of individual models. In other words, although it has been the Department's practice to conduct the sales below cost analysis on a model-specific basis, the extended period of time interval is generally the same for all models of the foreign like product that are under consideration for normal value. The fact that a firm makes sales of a particular model in only a few months does not alter the defined ''extended period of time.''

This being the case, it is important to note that paragraph (b) allows the Department to adhere to the statutory requirement that an extended period of time normally be one year. At the same time, however, it recognizes that the foreign market sales used as the basis for determining normal value (and that may become the subject of a sales below cost analysis) can occur over a period that is longer or shorter than one year. For example, in an administrative review, because of our practice of looking to ''contemporaneous'' sales in months other than the month in which the sale of the subject merchandise took place, the Department often requests a respondent to submit data regarding contemporaneous sales of foreign like products for specific months prior to and after the normal one-year period of review. In this instance, the extended period of time would be longer than twelve months. Likewise, the extended period of time could be shorter than one year if, for example, the subject merchandise consisted of highly perishable agricultural products with growing and selling seasons that are shorter than one year.

Section 351.407

Section 351.407 contains rules regarding the allocation of costs, the application of the major input rule under section 773(f)(3) of the Act, and the application of the startup adjustment to CV and COP under section 773(f)(1)(C) of the Act.

Affiliated party transactions/major input rule: In response to a number of comments, the Department has added a new paragraph (b) to § 351.407 that clarifies the Department's practice with respect to the determination of the value of major inputs purchased from affiliated suppliers in cases involving cost of production and/or CV. (We have redesignated proposed paragraphs (b) and (c) as paragraphs (c) and (d), respectively.) The new paragraph provides that, when the Department applies the major input rule, the Department normally will use the transfer price paid by the producer for a major input so long as that price is not below the input's market price or the supplier's cost of production for the input. In addition, if both the transfer price and the market price for a major input are less than the supplier's cost of production for the input, the Department normally will use production costs as the appropriate value for the major input under section 773(f)(3) of the Act.

Several commenters made recommendations regarding the Department's treatment of production inputs purchased from affiliated parties under section 773(f)(2) and (3) of the Act (affiliated party transactions disregarded and the major input rule). In general, these commenters suggested that, in determining the value of production inputs, the Department should place greater reliance on transfer prices between producers and their affiliated suppliers, especially where the reporting burden on respondents outweighs the value of conducting an arm's length test for every input. More specifically, two commenters suggested that the regulations establish an arm's-length test for inputs obtained from affiliated parties. One commenter believed that only significant differences—for instance, plus or minus 10 percent—between the average price charged to affiliated parties and the average price charged to unaffiliated parties should cause the Department to reject the affiliated party transactions as not being at arm's-length prices. As an alternative, this commenter suggested that the regulations provide that affiliated party prices are at arm's length if they do not deviate from the average non-affiliated party prices by substantially more than the deviation of non-affiliated party prices from that average. The other commenter suggested that if record evidence demonstrates that a producer cannot manipulate the price of inputs purchased from an affiliated party, the Department should

conclude that the producer purchased the input at arm's length.

We have not adopted the proposal to include in the regulations an arm's-length test for inputs sourced from affiliated suppliers. Although a test along these lines may be appropriate in some instances, it may not be in others. For instance, where a particular input represents a significant portion of the cost of the merchandise under investigation, a 10 percent difference between the price charged to the affiliated producer and the price charged to unaffiliated producers could have a significant effect on the results of the Department's AD analysis. In other instances, where inputs sourced from an affiliated party represent an immaterial part of the overall manufacturing costs of the merchandise, the Department may find it appropriate to accept a producer's transfer prices (or to test those prices on a sample basis) without conducting a full-blown arm's-length test based on the prices paid for all such inputs. Thus, instead of implementing a single arm's-length test applicable to all situations involving affiliated party inputs, we think it is important that the Department consider the facts of each case in order to determine the appropriate level of scrutiny it should give to affiliated party transactions.

With respect to the recommendation that the Department consider the ability of a producer to manipulate the price of inputs purchased from an affiliated party, we do not think that the potential price manipulation standard described by the commenter is appropriate for purposes of examining the arm's-length nature of input transfer prices. The indeterminate nature of such a standard would make it unadministrable and impractical. Instead, the Department believes that the appropriate standard for determining whether input prices are at arm's length is its normal practice of comparing actual affiliated party prices with prices to or from unaffiliated parties. This practice is the most reasonable and objective basis for testing the arm's length nature of input sales between affiliated parties, and is consistent with section 773(f)(2) of the Act.

With respect to the major input rule, two of the commenters recommended that the regulations establish a threshold for determining when an input will be considered ''major.'' These commenters suggested that normally the Department should not consider affiliated party inputs to be ''major'' if they represent less than 20 percent of the cost of production. Two commenters added that where a producer cannot obtain cost data from an affiliated supplier, the Department should allow the producer to report transfer prices.

Another commenter opposed these suggestions, noting that the only substantive change made by the URAA with respect to the issue of input dumping was to clarify that section 773(f) applies to the calculation of both cost of production and CV. Thus, the commenter argued, the Department should reject as inappropriate the suggestions of the other commenters.

The Department has not adopted the suggested definitions of ''major input.'' We continue to believe that the determination of whether an affiliated party input constitutes a ''major input'' in a particular case depends on several factors, including the nature of the input and the product under investigation. The determination also may depend on the nature of the transactions and operations between the producer and its affiliated supplier. For example, a producer could purchase a number of significant inputs from an affiliated supplier that individually account for a small percentage of the total cost of production for the subject merchandise, but, when considered in the aggregate, comprise a substantial portion of the total cost of production. In this instance, it may be appropriate for the Department to consider the inputs to be major inputs for purposes of examining the affiliated supplier's production costs under section 773(f)(3) of the Act. Similarly, the Department may find it necessary to analyze, on a sample basis, the production costs incurred for affiliated party inputs where a large number of such inputs are purchased from various affiliated suppliers and the combined value of the inputs purchased represents a significant portion of the total manufacturing cost of the subject merchandise.

These examples illustrate the difficulties inherent in relying on a single, all-encompassing definition of ''major input.'' There also is an additional problem associated with using a single numerical standard. In identifying ''major input,'' the Department generally must rely on the transfer price charged by the affiliated supplier. However, because the transfer price itself may be below cost, it may not constitute an appropriate basis on which to measure the significance of the input. Because of this problem, we do not believe that the Department would have sufficient flexibility to examine affiliated party transactions were we to adopt the 20 percent-of-cost definition or any other specific threshold for major inputs suggested by the commenters.

Nonrecurring costs: One commenter suggested that the Department add a new paragraph to its regulations to clarify the treatment of nonrecurring costs under section 773(f)(1)(B) of the Act. Specifically, this commenter recommended that the regulations establish a rebuttable presumption that all nonrecurring costs benefit current and/or future production, and that the Department either will (1) expense such costs to current production, or (2) allocate the costs over current and future production, as appropriate.

As the Department stated in the AD Proposed Regulations, 61 FR at 7342, the allocation of nonrecurring costs, such as research and development costs, for purposes of computing COP and CV is dependent on case-specific factors. Section 773(f)(1)(B) recognizes the fact-specific nature of these allocation issues by providing only that the Department adjust costs appropriately to take account of any benefit that may accrue to a respondent's current and/or future production as a result of incurring such costs. Thus, in these final regulations, we have not elaborated on the allocation of nonrecurring costs. Instead, the Department will continue to determine the appropriate allocation of non-recurring costs on a case-by-case basis.

Reliance on generally accepted accounting principles: With respect to the allocation of costs, one commenter recommended that the regulations provide that the Department normally will allocate costs in accordance with the generally accepted accounting principles (GAAP) of the country of exportation.

The Department has not adopted this suggestion, because it would establish a standard for computing COP and CV different from the standard contemplated by the Act. Section 773(f)(1)(A) provides that the Department normally will calculate costs ''based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.'' Thus, the statute expresses a preference for computing costs on the basis of foreign country GAAP only when those practices measure costs in a reasonable manner. In addition, where a producer does not keep its normal accounting records in accordance with foreign country GAAP, the statute does not require that such records be made to conform with foreign GAAP.

We do not mean to suggest that the Department would not look to the

GAAP of the foreign country (or to U.S. or international accounting principles) in establishing whether the normal accounting practices of the producer reasonably reflect the costs associated with the production of the merchandise in question. Instead, we mean only that, for AD purposes, the fact that a producer does not follow its national accounting principles does not automatically mean that the producer's accounting practices do not reasonably reflect costs.

Startup adjustment: We received several comments concerning various aspects of proposed paragraph (c) (now paragraph (d)) and the new startup adjustment.

Definition of startup: One commenter, stating that the definition of terms in proposed paragraph (c) seemed to conform to the statute and the AD Agreement, urged the Department to apply paragraph (c) in a manner consistent with the SAA and the URAA. Specifically, this commenter maintained that the Department should allow for a startup adjustment in those instances where a semiconductor producer can demonstrate that a substantial investment was required to change a design, significantly reduce wafer size, or produce other new types of products that fall within a current chip generation.

Another commenter contended that the definitions of ''new products'' and ''new production facilities'' in proposed paragraph (c)(1) were exceedingly narrow. This commenter asked the Department to confirm that improvements to products or production facilities that entail substantial costs and that involve significant decreases in productivity will qualify for the startup adjustment.

Two commenters oppose the suggestions described above. One commenter argued that the startup adjustment does not apply to the semiconductor design changes described. In support, this commenter cited the SAA at 836, which states that ''a 16 megabyte Dynamic Random Access Memory (DRAM) chip, for example, would be considered a new product if the latest version of the product had been a 4 megabyte chip. However, an improved version of a 16 megabyte chip (*e.g.*, a physically smaller version) would not be considered a new product.''

The other commenter opposing the suggestions argued that the definition of ''new products'' in proposed paragraph (c)(1)(ii) was too broad, and suggested that the regulations provide examples that would limit the circumstances under which the ''complete revamping or redesign'' of products would be eligible for a startup cost adjustment. This commenter noted that in many industries, firms continually revamp or redesign products in order to obtain incremental improvements in performance or to reduce production costs, or both. In the commenter's view, however, such process or performance improvements that do not change the dimensions and construction of an article are not sufficient to result in a ''new product.'' The commenter recognized that in proposed paragraph (c)(1)(ii), the Department sought to distinguish ''mere improvements'' to products from the ''complete revamping or redesign'' of such products. However, the commenter believed that this paragraph was unduly vague and that the Department should clarify it by means of specific, narrowly defined examples of ''new products.''

The Department has not incorporated the suggestions made by these commenters in the regulations. Nor do we consider this explanatory preamble an appropriate vehicle for making determinations as to whether situations specific to the semiconductor industry would warrant a startup adjustment under section 773(f)(1)(C). Instead, paragraph (d)(1) continues to set forth the definitions contained in the SAA at 836. Given the variety of products and industries with which the Department deals and the fact that the startup provision is new to the statute, we believe that these examples are well-suited to the task of providing guidance to parties without unintentionally expanding or limiting the availability of a startup adjustment.

Standard for granting a startup adjustment: One commenter noted that proposed paragraph (c) correctly recognized that the standard for granting a startup adjustment is no more or less stringent than those applicable to other types of adjustments under the Act. This commenter added that because there are numerous situations that may call for some form of startup adjustment, proposed paragraph (c) properly left the Department wide latitude in analyzing and granting startup adjustments.

Another commenter, however, argued that the Department should strengthen paragraph (c) to ensure that respondents are not encouraged to file meritless claims for startup adjustments. To achieve this, the commenter recommended that the regulations provide that a respondent must submit substantial evidence demonstrating that the expenses for which a startup adjustment is sought can be directly tied to a startup phase of production.

A third commenter suggested that, because respondents bear the burden of proof in demonstrating they are entitled to a startup adjustment, the regulations should clarify the information necessary to obtain the adjustment. This commenter asked that the Department give specific examples of the types of documentation that will be sufficient to meet its requirements.

With respect to these suggestions, the Department notes that the SAA at 838 provides that the burden of establishing entitlement to a startup adjustment rests with the party seeking the adjustment. Among other things, the claimant must demonstrate that the costs for which an adjustment is claimed are directly associated with the startup phase of operations. Having said this, however, we have not adopted the suggestion that we establish a special burden of proof for startup adjustments, because we believe that the burden of establishing eligibility for a startup adjustment is the same as that applicable to any other AD adjustment. However, as in the case of any other adjustment, the Department intends to seek the case-specific information and documentation necessary to establish whether a startup adjustment is appropriate.

We also have chosen not to implement the suggestion that the Department provide specific examples of the documentation required in order to qualify for a startup adjustment. The SAA indicates that startup inquiries will be based on the specific facts of each case. For example, the SAA at 838 states that ''companies must demonstrate that, for the period of investigation or review, production levels were limited by technical factors associated with the initial phase of commercial production and not by factors unrelated to startup, such as marketing difficulties or chronic production problems. In addition, to receive a startup adjustment, companies will be required to explain their production situation and identify those technical difficulties associated with startup that resulted in the underutilization of facilities.'' Here, the SAA clearly contemplates a fact-based inquiry that includes consideration of a respondent's specific production situation and the unique technical difficulties that led to decreases in its normal production output. Moreover, other portions of the SAA further support the conclusion that the Department must conduct a fact-based examination of claims for a startup adjustment. Thus, it would be inappropriate, as well as impractical, for the Department to impose a mandatory set of information requirements that would apply to all cases.

Duration of startup period: One commenter recommended that the regulations refer expressly to the quality of merchandise produced as a criterion to be considered in determining the length of the startup period. The commenter argued that where merchandise, although in production, is not yet of a quality sufficient for sale, some startup adjustment would be appropriate. Another commenter, however, opposed this proposal, arguing that the ''quality of a product'' is an amorphous concept that respondents could manipulate.

The Department has not adopted the suggestion to make product quality a criterion in determining the length of the startup period, because we believe that this suggestion is inconsistent with the statute and the SAA. Section 773(f)(1)(C)(ii) of the Act provides that the Department will consider startup as having ended as of the time the producer achieves a level of commercial production that is characteristic of the merchandise, producer, or industry concerned. The SAA at 836 states that in making a determination as to when a producer reaches commercial production levels, the Department will measure the producer's actual production levels based on the number of units processed. The SAA also provides that, to the extent necessary, the Department will examine other factors (such as historical data reflecting the same producer's or other producer's experiences in producing the same or similar products) in determining the end of the startup period.

We note also that the SAA does not refer to quality of merchandise as a criterion for measuring the length of the startup period, but instead relies strictly on the number of units processed as a primary indicator of the end of the startup period. In fact, the SAA at 836 states that the Department will not extend the startup period in a manner that would cover product improvements and cost reductions that may occur over the life cycle of a product. The Department believes this to be a clear reference to product quality and yield improvements that may continue to exist long after startup has ended and, if taken into consideration, could result in extending the startup period beyond the point at which commercial production is achieved.

Startup costs: One commenter suggested revisions to proposed paragraph (c)(4) (now paragraph (d)(4)) regarding the types of costs that are eligible for a startup adjustment under the Act. According to this commenter, these revisions would help to clarify the legislative intent that, in making a startup adjustment, the Department may consider only those costs that are tied directly to manufacturing of the merchandise.

We have adopted the revisions suggested by the commenter. These changes provide additional clarification regarding the types of non-production costs that the Department will consider as ineligible for a startup adjustment. These costs include general and administrative (''G&A'') expenses and general research and development costs that the Department normally considers to be part of G&A.

Amortization of startup costs: One commenter disagreed with the Department's position that it should amortize over a reasonable period of time any excess between a respondent's actual costs and the costs adjusted and calculated for startup costs. In this commenter's view, there is no basis under the AD Agreement for such an approach. In addition, the commenter maintained that any adjustments for startup costs are isolated adjustments that the Department reasonably can take into account during the period of investigation or review.

Another commenter recommended that the Department provide that amortized expenses related to prior startup operations be included as part of respondent's startup costs during the period under investigation or review. This commenter maintained that its recommendation was consistent with sound accounting principles and would preclude a respondent from receiving an unintended and improper benefit as a result of a startup adjustment.

The Department believes that its position concerning the amortization of unrecognized startup costs is fully consistent with the URAA and the AD Agreement. As a result of making a startup adjustment under section 773(f)(1)(C), the difference between actual production costs during the startup phase and costs at the end of the startup phase are not accounted for during the startup phase. Because this difference represents actual costs incurred by the producer, it is reasonable to expect that the producer recoup these costs over an appropriate time period. Failing to consider these costs would mean ignoring a portion of the actual costs incurred by the producer in manufacturing subject merchandise.

Moreover, as described in the SAA at 837, the difference between actual and adjusted startup costs is recouped through amortization over a reasonable period of time (subsequent to the startup phase) based on the life of the product or production machinery, as appropriate. Because the amortization period is based on the estimated life cycle of a product or machinery, this period may extend beyond the period of investigation or review. Therefore, it is not possible for the Department, in all instances, to account for startup costs within the investigation or review period.

The Department also has not adopted the recommendation that respondents be required to account for startup operations that may have taken place prior to the period of investigation. The Department believes that only where respondents have adjusted for startup costs in an investigation or review period would they be required to account for (through amortization in periods subsequent to the startup phase) the difference between actual costs and costs computed for startup. As noted above, this practice ensures that respondents account for all actual costs incurred to produce the merchandise. Where merchandise was produced, or production facilities have been in place, prior to the period of investigation, the Department considers it unnecessarily burdensome to require that respondents account for previously incurred startup costs in the same manner as for startup operations that occurred during the investigation or review period. Nor is such a requirement contemplated under the statute as a condition for granting a startup adjustment.

Section 351.408

Section 351.408 implements section 773(c) of the Act, which creates a special methodology for calculating normal value in AD proceedings involving a nonmarket economy (''NME'') country. We received numerous comments on this section.

Market-oriented industry test: Section 773(c)(1) of the Act permits the Department, in certain circumstances, to use the ''market economy'' methodology set forth in section 773(a) to determine normal value in an NME case. To identify those situations where we would apply the market economy methodology and calculate normal value based on domestic prices or costs in the NME, we developed our so-called ''market oriented industry'' or ''MOI'' test. However, we elected not to codify the MOI test in the AD Proposed Regulations because of our concern that the test did not succeed in ''identifying situations where it would be appropriate to use domestic prices or cost in an NME as the basis for normal value * * *.'' 61 FR at 7343.

Several comments were filed concerning the MOI test and whether the Department should codify its

current test or an amended version of the MOI test. One commenter put forward numerous arguments against the current MOI test. First, this commenter argued that the third leg of the MOI test is unrealistic. (The third leg of the test requires that market-determined prices must be paid for virtually all inputs before the Department will find a particular industry to be an MOI.) In this commenter's view, this third leg extends the Department's inquiry beyond the pricing of the input itself to factors that only remotely impact the price of the input, such as land use and energy policies. Because of the breadth of this inquiry, this commenter believed that the Department effectively requires an examination of the entire NME economy, an approach that contravenes the stated purpose of the MOI test; *i.e.*, to determine whether a particular input or sector in the NME is sufficiently subject to market forces.

According to this commenter, another indication that the MOI test is unreasonable is that few, if any, market economy countries have industries in which every single input is 100 percent subject to market forces. To make the MOI test more reasonable, this commenter suggested amending the third leg of the test to require only that a reasonable portion of inputs be subject to market forces.

This commenter also questioned the Department's all-or-nothing approach under the third leg of the MOI test. Specifically, this commenter contended that the Department's requirement that all inputs sourced in the NME be obtained at market-determined prices overlooks the fact that certain inputs may be purchased at market prices. Where certain inputs are purchased at market prices, this commenter argued, the Department should use those prices. Moreover, in this commenter's view, doing so would be consistent with the Department's policy of using the actual input prices paid by an NME producer when the producer purchases the input from a market economy supplier and pays for the input in a market economy currency. The all-or-nothing approach also leads to anomalous results, in this commenter's view. When an NME industry is unable to meet the burden of showing that virtually all of its inputs are purchased at market-determined prices, the Department uses the NME methodology and values the NME producers' inputs in a surrogate market economy country that, according to this commenter, would itself fail the MOI test.

This same commenter also questioned the second leg of the MOI test, particularly as it applies to the People's Republic of China (''PRC''). (In order to qualify under the second leg of the test, the industry producing the merchandise should be characterized by private or collective ownership.) In this commenter's view, government ownership should not be dispositive of whether an industry is subject to market forces. The Department investigates many state-owned companies in market economy countries, and government ownership of those companies does not lead the Department to apply a different AD methodology. Moreover, based on its experience in administering the separate rates test (*see* § 351.102(b)), the Department has found on numerous occasions that PRC companies ''owned by the people'' operate independently of the government. Hence, in this commenter's view, ownership by the people should not preclude a PRC industry from achieving MOI status.

On a more general level, this commenter urged the Department to apply the MOI test on a company-specific basis rather than to all companies within a given industry. The failure of particular companies to provide evidence that market forces are at work should not, in this commenter's view, work unfairly against those companies that are able to satisfy the test. Similarly, according to this commenter, the regional nature of certain economic reforms in the PRC argues for a company-specific approach.

Two commenters raised various policy arguments against the rigidity of the MOI test. In their view, the MOI test should be applied in such a way as to encourage market reforms in NMEs. Instead, they claimed that the current MOI test sends a signal to NMEs that the Department will not recognize their reforms. Additionally, in the view of one commenter, NME producers and exporters would be more willing to cooperate in AD proceedings if the Department changed the MOI test, because they would have an opportunity to avoid the unfairly high margins generated by the NME methodology.

Two commenters suggested amendments to the current MOI test to make it meaningful and fair for ''economies in transition'' to market economies. Specifically, they urged the Department to adopt a presumption that when the first two legs of the current MOI test are met (*i.e.*, there is no government involvement in setting the prices or production quantities of the product, and the industry is characterized by private and collective ownership), the Department will perform a market economy AD analysis. Under their proposal, the presumption could be rebutted by evidence showing that the central government set the prices paid for inputs constituting a substantial value of the final product.

One commenter urged the Department either to (1) retain the current MOI test (on the grounds that it does succeed in identifying those situations where it would be appropriate to use prices or costs in the NME), or (2) abandon the notion of MOIs altogether. In this commenter's view, it is not possible to reconcile the notion that a country is an NME with the notion that the prices or costs of some participants in that economy are immune from that economy's influences.

We have not codified the current MOI test in our final regulations. Nor have we adopted a modified version of the MOI test. Given the changing conditions in NMEs, we believe that we should continue to develop our policy in this area through the resolution of individual cases, and the comments that were submitted will help us in that process. This area of the law continues to be extremely important to the agency and will receive the Department's careful attention.

Surrogate selection: In applying the NME AD methodology, the first step is to identify the so-called ''surrogate country'' to be used for valuing the NME producers' factors of production. Under section 773(c)(4) of the Act, the surrogate should be a country (or countries) at a level of economic development comparable to the NME and a significant producer of merchandise comparable to the merchandise being investigated. In proposed paragraph (b), we stated that we would place primary emphasis on per capita GDP as the measure of economic comparability. More generally with respect to surrogate selection, we explained that the relative weights we would place on the two selection criteria (*i.e.*, economic comparability and significant production of comparable merchandise) would vary based on the specific facts presented by individual cases.

We received two comments on the issue of surrogate selection. One commenter suggested that where other economic indicators (*e.g.*, growth rates, distribution of labor between the manufacturing, agricultural and service sectors) reflect disparities in economic comparability, the Department should take this into account. The second commenter agreed with the Department's position that surrogate selection should be made on the basis of the particular circumstances presented by each case.

Regarding the comment on economic comparability, we believe that paragraph (b) provides the Department with adequate flexibility to take into account economic indicators other than per capita GDP. While similar levels of per capita GDP would always be considered the primary indicator of comparability, other measures of comparability could outweigh it where the circumstances so warranted.

Valuation of the factors of production: Once the Department identifies an appropriate surrogate country, the next step in an AD proceeding involving an NME is to value the NME producers' factors of production. Proposed paragraph (c) contained rules for determining these values. In general, under proposed paragraph (c), we would value inputs using publicly available information regarding prices in a single surrogate country. However, we articulated certain exceptions to this general rule. First, where the NME producer purchases inputs from a market economy producer and these inputs are paid for in a market economy currency, we would use the price paid by the NME producer to value that input. Second, we proposed valuing the NME producer's labor input by reference to a regression-derived calculation that effectively includes wage information from a number of countries, rather than a single country.

We received several comments on the proposed factor valuation rules. One commenter called for the Department to seek internal coherence among the factor values by obtaining them from a single source. In this commenter's view, the goals espoused by the Department (*i.e.*, to achieve accuracy, fairness and predictability) would be better served if where there were a tight interrelationship among the surrogate values. Moreover, because the Department calculates certain values (such as manufacturing overhead, general expenses, and profit) relative to labor and material costs, this commenter believed the Department should derive all of these amounts from the same source.

We have not adopted this suggestion. In order to derive ''internally consistent'' values, as the commenter used the term, it would be necessary to obtain valuation data from a single producer in the surrogate country. We have tried this approach in the past and it has not worked well. Frequently, we have been unable to obtain a surrogate producer willing to share this type of information with the Department. Moreover, even when we have been able to obtain data, this approach is much less transparent than use of publicly available input values, because while a surrogate producer might share data with the U.S. government, it would be less likely to make it available to a U.S. petitioner or an NME producer. Finally, we question the accuracy of this approach as it applies to individual input prices. When compared to a publicly available price that reflects numerous transactions between many buyers and sellers, a single input price reported by a surrogate producer may be less representative of the cost of that input in the surrogate country. For these reasons, we have continued the general schema put forward in the proposed paragraph (c) of relying on publicly available data (which will not normally be producer-specific) for material inputs, while relying on producer- or industry-specific data for manufacturing overhead, general expenses, and profit.

Two commenters discussed the proposal in paragraph (c)(1) regarding the use of prices paid by NME producers when they import the input from a market economy and pay for the input in a market economy currency. One commenter objected to the Department's approach on the grounds that (1) such prices are not publicly available, and (2) they are not internally coherent with other values included in the calculation (see discussion above). In this commenter's view, if the Department does use the prices paid by NME producers, it should ensure that those prices are free of any distorting effects attributable to barter transactions or savings achieved through centralized purchasing. Moreover, this commenter continued, the Department should not use those input values except for the specific transactions to which they pertain. Thus, if an NME producer sourced some of the input from market economy suppliers and the remainder from domestic sources, then the value for the domestically-sourced inputs should be based on surrogate values and not on the price paid by the NME producers to the market economy suppliers. In support, this commenter stated that: (1) relying solely on the price paid to the market economy supplier to value the input is inappropriate because it assumes that the NME producer could purchase all of its needs at this price, and (2) it ignores the statutory requirement that the NME producer's factors of production be valued in a surrogate market economy country to the extent possible. The second commenter supported the Department's proposal to use the price paid by the NME producer to a market economy supplier in these situations, because that price is a more reasonable and accurate indicator of the value of the input than a surrogate price would be.

We have not adopted the suggestions put forward by the first commenter. While we acknowledge that prices paid by the NME producer to a market economy supplier will not be publicly available, we have weighed this consideration against the increased accuracy achieved by our proposal. We note that the Federal Circuit has upheld our practice of using prices paid for inputs imported from market economies instead of surrogate values. *Lasko Metal Products, Inc.* v. *United States*, 43 F.3d. 1442 (1994) (''*Lasko*''). While we certainly do not view this decision as permitting us to use distorted (*i.e.*, non-arm's length) prices, we believe that the Court's emphasis on ''accuracy, fairness and predictability'' does provide us with the ability to rely on prices paid by the NME producer to market economy suppliers, in lieu of surrogate values, for the portion of the input that is sourced domestically in the NME. Moreover, as noted in the AD Proposed Regulations, 61 FR at 7345, we would not rely on the price paid by an NME producer to a market economy supplier if the quantity of the input purchased was insignificant. Because the amounts purchased from the market economy supplier must be meaningful, this requirement goes some way in addressing the commenter's concern that the NME producer may not be able to fulfill all its needs at that price.

Another commenter suggested that the Department should ''test'' surrogate values for reasonableness. For example, if the Department has two values for a particular input that are very different, but one is closer to the price paid by the NME producer in the NME, the Department should select the price that is closer to the price paid by the NME producer. More generally, this commenter urged the Department to apply the law as fairly as possible by closely matching the characteristics of the input used by the NME producer with the input selected in the surrogate country for valuation purposes.

We agree that ''aberrational'' surrogate input values should be disregarded (*see, e.g., Certain Cased Pencils from the People's Republic of China*, 59 FR 55625, 55630 (1994)). However, we have not accepted this commenter's benchmark for determining whether a particular surrogate value is reasonable. Use of an NME price as a benchmark is inappropriate because it is the unreliability of NME prices that drives us to use the special NME methodology in the first place. The Department does attempt to match the surrogate product

used for valuation purposes closely with the input used by the NME producer. This practice is reflected in paragraph (c), wherein the Department elected to codify a preference for publicly available information rather than publicly available published information. This approach allows us to use input-specific data instead of the aggregated data that frequently appear in published statistics. *See* AD Proposed Regulations, 61 FR at 7344.

Finally, we received a comment regarding factor valuation in general. This commenter urged the Department to add to the regulations an illustrative list of the factors of production that are included in calculating the normal value of an import from an NME. The commenter believed that including such a list will increase the likelihood that all the appropriate factors of production will be identified. We have not adopted this proposal, because, in our view, the statute is sufficiently clear regarding the identify of the factors of production to be valued. If a party to a particular proceeding believes that certain factors are not being reported, it should raise its concerns with the Department in the context of that proceeding.

Valuation of the labor input: Proposed paragraph (c)(3) included a proposal for valuing the labor input in NME cases. Rather than relying on the wage rate in the selected surrogate country, under this proposal the Department would have valued the labor input using a wage rate developed through a regression analysis of wages and per capita GDP. After a further review of paragraph (c)(3) and the comments relating thereto, we have left paragraph (c)(3) unchanged.

Three commenters submitted views on the Department's proposal. One commenter noted that the proposal did not provide different wage levels for skilled and unskilled labor. The second commenter urged the Department to allow itself the flexibility to use other types of wage data if the record indicated that the other data would be better. Also, to value NME labor inputs, this commenter urged the Department to include full labor costs rather than simply wages, and to use industry-specific data because wages can vary dramatically from industry to industry within a single surrogate country.

We agree with the first commenter that the regression-based calculation fails to provide differentiated wage rates for skilled and unskilled labor. However, this results from limitations on the available data, not from the proposed approach. Even using a single country as a surrogate, it has been rare for the Department to find different wage rates for skilled and unskilled labor. Limitations on available data also prevent us from considering whether we should be using full labor costs or industry-specific wages, as suggested by the second commenter.

The third commenter also urged the Department not to adopt the regression-based wage rate. First, in this commenter's view, the proposal ignored the statutory requirement that factors be valued in a country that is economically comparable to the NME and is a significant producer of comparable merchandise. More specifically, this commenter pointed out that because the regression was based on wage rates and per capita GDP, the Department would have calculated NME wage values without regard to the significant production criterion. In a related argument, this commenter stated that the regression-based wage value was inconsistent with the intent of Congress that the Department select a surrogate country where input prices allow significant production to occur. Third, this commenter claimed that the proposal was contrary to standard and accepted economic theory on the grounds that when a producer locates in a country, that producer will choose the appropriate mix of capital and labor based on their relative prices. By applying a theoretical wage rate, the Department's proposal would have upset that relative price structure with the result that NME calculations would be less accurate and less related to real economic conditions. Finally, this commenter contended that the premise underlying the Department's proposal was unsound. In this commenter's view, because many potential factor valuations vary significantly between and among eligible surrogate countries, there is no reason for singling out labor as a factor to be valued under a regression approach while using single values for other inputs.

Addressing these comments in reverse order, we do not share the commenter's concern that the premise underlying our wage rate proposal was unsound because values for other factors of production are not similarly averaged. In general, we believe that more data is better than less data, and that averaging of multiple data points (or regression analysis) should lead to more accurate results in valuing any factor of production. However, it is only for labor that we have a relatively consistent and complete database covering many countries. To employ a parallel approach for other factors of production, the Department would have to develop a comparable database. Even if we were to limit our search for data to those countries that meet both the economic comparability criterion and the significant production criterion, the burden imposed on the Department in compiling such a database normally would outweigh any gains in accuracy.

Regarding the commenter's point that the proposed approach violates standard economic theory, we do not dispute that the relative prices of labor and capital are important and that relatively cheap labor usually will be substituted for relatively expensive capital. However, in order to capture the precise tradeoff between labor and capital that this commenter is seeking, we would have to value all factors using information from a single surrogate producer. As discussed above, we have not adopted that general approach to factor valuation.

Finally, regarding the argument that proposed paragraph (c)(3) ignores the significant manufacturer criterion for surrogate selection, we believe that the regression-based wage rate significantly enhances the accuracy, fairness, and predictability of our AD calculations in NME cases, all of which were attributes highlighted by the Court in *Lasko*. As we stated in the AD Proposed Regulations, for some inputs there is no direct correspondence between significant levels of production and input price or availability. When looking at a surrogate country to obtain labor rates, we believe it is appropriate to place less weight on the significant producer criterion, because economic comparability is more indicative of appropriate labor rates. As discussed above in connection with the calculation of average values for other factors, by combining data from more than one country, the regression-based approach will yield a more accurate result. It also is fairer, because the valuation of labor will not vary depending on which country the Department selects as the economically comparable surrogate economy. Finally, the results of the regression are available to all parties, thus making the labor value in all NME cases entirely predictable. Given these attributes of the regression-based wage rate, we believe that paragraph (c)(3) is fully consistent with the statute.

Manufacturing overhead, general expenses, and profit: Regarding these factors of production, proposed paragraph (c)(4) stated that the Department normally will use information from producers of identical or comparable merchandise in the surrogate country.

One commenter suggested that the Department should rigorously check the information it uses to value

manufacturing overhead, general expense and profit. Specifically, the Department should make sure the data are reliable and that they do not double-count items such as electricity and water. In this commenter's view, the Department could check the reasonableness of these values against the experience of the NME producers under investigation.

For the reasons explained above, we do not believe it is appropriate to check surrogate values against the NME respondents' experience. Regarding the reliability of the surrogate values for manufacturing overhead, general expenses and profit, we do attempt to obtain good data and avoid double-counting where possible. Parties to the proceeding are encouraged to submit data on these factor values and to identify areas where the data are questionable.

Section 351.409

Section 351.409 sets forth the guidelines for making adjustments to normal value for differences in quantities. We have made a few revisions in light of the comments received.

One commenter proposed that the Department liberalize its policy regarding quantity adjustments, noting that the Department typically ignores the requirement in former 19 CFR 353.55(a) that the Secretary normally will use sales of comparable quantities of merchandise. Because the statute itself does not require that the Department use sales of comparable quantities, but instead merely authorizes an adjustment when the Department compares sales in different quantities, we have decided to delete this requirement from paragraph (a).

In addition, we also have deleted the last sentence of proposed paragraph (a), which refers to the consideration of industry practice in determining whether to make a quantity adjustment. Upon further consideration, the Department believes that the granting of an adjustment should depend more on the pricing behavior of the individual firm in question, and not on whether other firms in the industry engage in similar behavior.

As a matter of calculation mechanics, the Secretary may adjust for differences in quantities by deducting from all prices used to calculate normal value quantity discounts even if all sales did not receive the quantity discount. Paragraph (b) contains standards that must be satisfied before the Secretary will calculate normal value in this manner.

One commenter stated that under paragraph (b), the two situations in which the Department will make a quantity adjustment are so narrow that it is virtually impossible for a respondent to meet the applicable standards. The commenter argued that the 20 percent threshold is excessively high, that it is not required by section 773(a)(6)(C)(i) of the Act, and that there is no rationale to support it. Moreover, according to the commenter, the requirement that the discounts be ''of at least the same magnitude'' violates the statutory directive that the adjustment be made whether the price difference is ''wholly or *partly* due to differences in quantities.'' The commenter suggested that the Department provide for additional situations where it will make quantity-based adjustments, such as when the exporter or producer can correlate quantity levels and prices.

While the Department does not agree with all of the arguments made by the commenter, we agree that former 19 CFR § 353.55(b), which formed the basis of paragraph (b), should be modified so as to allow other methods of establishing entitlement to a quantity adjustment. Therefore, in proposed paragraph (b), the Department added the word ''normally'' to indicate that the two methods described in paragraph (b) are not exclusive.

Under proposed paragraph (e), the Department stated that it will not make both a quantity adjustment and a level of trade adjustment unless it is established that the difference in quantities has an effect on price comparability that is separate from the difference in level of trade. One commenter argued that paragraph (e) was superfluous in light of § 351.401(b)(2), which contains a general prohibition against the double-counting of adjustments. In addition, this commenter contended that the proposed paragraph (e) did not provide any guidance (beyond what normally would be required for any claimed adjustment) as to the kind of showing necessary to establish the difference in the effects of each type of adjustment on price comparability. Third, the commenter argued that because the Department will identify level of trade differences by focusing primarily on the selling functions, to the extent that the quantity sold is one factor in a claimed level of trade difference, the Department can determine on a case-by-case basis whether an additional claimed quantity adjustment would be duplicative.

The Department recognizes that the prohibition against double-counting adjustments in § 351.401(b)(2) applies to situations in which a party claims a level of trade adjustment and an adjustment for differences in quantities. However, the Department believes that it is appropriate to emphasize that, in this specific area, it is particularly concerned about the possibility of double-counting. Based on our experience, firms tend to sell in different quantities to different levels of trade, thereby increasing the possibility of double-counting where both adjustments are claimed. This concern is expressed in the SAA at 830, where, in discussing the effect on price comparability necessary for a level of trade adjustment, the Administration stated: ''Commerce will ensure that a percentage difference in price is not more appropriately attributable to differences in the quantities purchased in individual sales.''

With respect to the commenter's suggestion that the Department provide additional guidance as to the showing necessary to establish the individual effect of each adjustment, the Department does not have enough experience to provide additional guidance at this time. Essentially, we agree with the commenter that the Department, at least initially, will have to resolve these issues on a case-by-case basis.

Section 351.410

Section 351.410 clarifies aspects of the Department's practice concerning adjustments to normal value for differences in the circumstances of sale (''COS'').

One commenter, noting that proposed § 351.410 did not indicate the types of expenses eligible for a COS adjustment, suggested that the final regulation clarify, in accordance with the SAA, that the Department will make a COS adjustment only for direct selling expenses and assumed expenses, as opposed to indirect selling expenses.

We agree with the commenter that in proposed § 351.410, we failed to connect the definitions of ''direct selling expenses'' and ''assumed expenses'' in paragraphs (b) and (c) to the COS adjustment itself. Therefore, we have revised this section by (1) redesignating proposed paragraphs (b) and (c) as paragraphs (c) and (d), respectively; (2) redesignating proposed paragraph (d) as paragraph (f); and (3) adding a new paragraph (b) that indicates the expenses eligible for a COS adjustment. In this regard, however, in paragraph (e) we have maintained the special ''commission offset'' rule, previously codified in 19 CFR § 353.56(b)(1).

Another commenter suggested that the Department clarify that it may treat allocated expenses as direct selling

expenses eligible for a COS adjustment. We have not revised § 351.410 in light of this comment. However, as stated above in connection with § 351.401(g), the Department will accept the allocation of direct selling expenses, subject to certain conditions.

One commenter noted that under proposed § 351.412, the Department would establish the level of trade for CEP sales only after having made the adjustments required under 772(d) of the Act; *i.e.*, after having converted the CEP sale to the equivalent of an export price sale. However, this commenter argued, because U.S. resale prices are the starting point for calculating CEP, and because such prices may differ substantially from one distribution channel to another, some sales cannot be compared logically to home market sales at the relevant level of trade, absent some appropriate adjustment. Accordingly, this commenter maintained, if the Department retains proposed § 351.412, the Department should clarify in § 351.410 that it normally will compare sales made in the same distribution channels. In this regard, the commenter asserted that the new law ''requires Commerce to make fair comparisons of price, 19 U.S.C. 1677b(a), and Commerce has traditionally used COS to achieve this all-important objective.''

The Department has not adopted this suggestion. First, as discussed below, section 773(a) of the Act specifies the adjustments that are required in order to achieve a ''fair comparison.'' Moreover, under the statute, the COS adjustment is not a vehicle for identifying sales matches. Instead, the Department makes a COS adjustment only after it first has identified appropriate sales matches. Finally, the commenter's proposal would require the Department to match sales on the basis of a level of trade other than the level of trade of the CEP. However, section 773(a)(1)(B)(i) of the Act requires the Department to identify the level of trade of the CEP (which the SAA at 829 defines as a starting price to which the Department has made adjustments), and to determine normal value at the same level as the CEP, if possible. If the Department must rely on sales in the foreign market that are at a level of trade different from the level of trade of the CEP sale, and if the level of trade difference is reflected in different selling functions and a pattern of consistent price differences, then the Department must make an adjustment for the different levels of trade.

Nevertheless, as discussed in connection with § 351.412, the Department has modified the methodology it will use to identify different levels of trade. Under § 351.412, as revised, the Department will not rely solely on selling activities to identify levels of trade, but instead will evaluate differences in selling activities in the context of a seller's whole scheme of marketing. This new methodology will deal with the problem identified by the commenter.

One commenter argued that the Department should provide for a COS adjustment to normal value for resale profit in situations where the Department makes a profit deduction to CEP. The commenter stated that ''[t]he Department rightly notes in its explanations that the statute does not 'provide for an adjustment to normal value' '' for resale profit. However, the commenter argued that this is a ''grossly inadequate rationale'' for refusing to make such an adjustment, because neither the statute nor the SAA prohibits such an adjustment, and because such an adjustment is necessary ''for proceedings to be fair.'' The commenter contended that because the CEP profit deduction will be based on profit earned in both the United States and the home market, the deduction amounts to double-counting. According to the commenter, this is unfair, and it will have the perverse effect of discouraging foreign investment in the United States and adding value to imported products in the United States.

Another commenter argued that any time a home market producer sells the foreign like product through an affiliated reseller, either in the home market or in the third country, a reseller profit will exist. However, under the proposed regulations, the Department will deduct profit only from CEP sales, and not from sales used to calculate normal value. To achieve a fair comparison, the Department should add a new provision to § 351.402(d) (special rule for determining profit) and deduct this affiliated reseller profit from normal value whenever it compares normal value to CEP.

The Department has not adopted these suggestions. First, with respect to the argument concerning a double-deduction of profit, we disagree. Under section 772(f), the Department does not deduct the CEP profit earned in both the United States and the home market from the price in the United States. Instead, because transfer prices cannot be relied upon for this purpose, section 772(f) provides for the allocation of total profit in the United States and the home market to CEP sales based upon the proportion of expenses incurred in the U.S. market vis-a-vis total expenses.

In addition, the statute specifies the adjustments that the Department may make to normal value in order to achieve a fair comparison between normal value and export price or CEP. Therefore, adjustments beyond those called for by the statute (such as an adjustment for resale profit) are not appropriate. Finally, the courts have made it clear that where, as here, Congress has provided for an adjustment to sales made in one market, but not for an adjustment to sales made in the other, the Department must comply with the scheme established by Congress. *Ad Hoc Committee of AZ–NM–TX–FL Producers of Gray Portland Cement* v. *United States*, 13 F.3d 398, 401–02 (Fed. Cir. 1994).

One commenter stated that the Department should clarify that if prices are reported net of any rebated or uncollected taxes, no adjustment to normal value under this provision is required. We have not adopted this suggestion, because the Department believes that section 773(a)(6)(B)(iii) of the Act clearly provides that the Department need adjust for taxes only where such taxes are included in the price of the foreign like product that is reported to the Department. While the topic of taxes has been fertile ground for misinterpretation and litigation, Congress has now established conclusively that dumping comparisons are to be tax-neutral in all cases. SAA at 827.

Regarding the definition of direct selling expense contained in proposed paragraph (b), one commenter suggested that the Department specifically state that the allocation of expenses, even over non-scope merchandise, does not automatically relieve that expense of its direct nature. Again, the Department has addressed this and similar comments above in connection with § 351.401(g).

Section 351.411

Section 351.411 deals with adjustments for differences in physical characteristics (also known as ''differences in merchandise'' or ''DIFMER'' adjustments).

One commenter suggested that the Department amend § 351.411 to provide that the Department will not make DIFMER adjustments when it compares merchandise with identical control numbers, or (in the case of comparisons involving ''identical'' or ''similar'' merchandise) for characteristics that the Department did not select as product-matching criteria. In addition, this commenter suggested that the regulations state that, in reviews, the Department will use the same product matching criteria as it used in the initial investigation, unless revised by the Department. Another commenter agreed

with this commenter, and added that the Department never should base DIFMER adjustments upon differences in the ''market value'' of products, but instead should base such adjustments only upon differences in variable costs. This commenter cited the SAA at 828, which states that ''Commerce will continue its current practice of limiting this adjustment to differences in variable costs associated with physical differences.''

The Department has not modified § 351.411 in light of these suggestions. The final regulation follows the proposed regulation and prior regulations in providing that ''the Secretary will not consider differences in cost of production when compared merchandise has identical physical characteristics.'' By comparing merchandise considered identical, the Department can avoid the need to make DIFMER adjustments entirely.

Regarding the proposal that the Department not alter its matching criteria after the initial investigation, the Department agrees that continuity and consistency from one segment of a proceeding to another is desirable. However, the Department must have the flexibility to revise these criteria where the facts so warrant.

Finally, the Department has retained the language concerning the use of effect on market value in measuring the amount of a DIFMER adjustment. This provision has been in the Department's prior regulations, although the Department rarely has quantified a DIFMER adjustment on the basis of value. Moreover, the Federal Circuit has held that while the Department may maintain a methodological preference for cost over value in making adjustments, the Department may not rely on cost to the exclusion of value. *Smith-Corona Group* v. *United States*, 713 F.2d 1568, 1577 (1983). In addition, although the SAA discusses the Department's practice of making DIFMER adjustments based on variable costs, which is the usual basis for such adjustments, it is silent on the issue of market value. Therefore, the Department believes it is necessary to retain the discretion to use market value in appropriate circumstances.

Another commenter noted that under proposed § 351.411, the Department would disregard fixed costs, SG&A, and profit that are allocable to the physical differences. This commenter argued that this approach is illogical, because the purpose of the DIFMER adjustment is to put the price of the similar home market merchandise on the same basis as the price of the comparison U.S. merchandise. The commenter noted that, in the context of constructed value, the Department includes all fixed and variable costs attributable to production of the merchandise, plus amounts for general expenses and profit. We have not adopted this suggestion, because the SAA at 828 is clear that when the Department uses cost to measure the amount of a DIFMER adjustment, it is to consider only differences in variable costs associated with physical differences in the merchandise.

Section 351.412

Section 351.412 addresses the Department's methodology for identifying differences in LOT and adjusting for such differences, where appropriate. It also addresses how and when the Department will apply the CEP offset. There have been several changes from the proposed regulation.

First, a number of commenters suggested that the Department abandon its efforts to regulate in this area because of the Department's lack of experience in making LOT adjustments under new statute. They proposed instead that § 351.412 merely track section 773(a)(7)(A) of the Act, and provide that an LOT adjustment is allowed only when the claimant demonstrates entitlement ''to the satisfaction of Commerce.''

The Department believes that it is necessary to provide as much guidance in this area as it can at this time. The LOT adjustment is one of the most significant issues under the new statute and is an area in which parties are in need of guidance. It is also an area in which there has been considerable debate concerning the requirements of the statute and the SAA. Therefore, while we have avoided regulating some areas in which the Department needs more experience, such as the definition of a ''pattern of consistent price differences,'' discussed below, we have clarified our interpretations of the legal requirements, and have given as much indication as possible as to how we intend to identify, and adjust for, differences in levels of trade.

One commenter proposed that the regulations make clear that the burden of proof is on the respondent to prove entitlement to an LOT adjustment to its advantage, just as the burden is on a respondent to prove any other adjustment in its favor. The commenter also suggested that the regulations make clear that neither adjustments for LOT differences nor the CEP offset are automatic, but may be made only where the statutory requirements are satisfied.

While the Department generally agrees with these concepts, we do not believe that it is necessary to incorporate them in the regulations. The statute provides clear guidelines regarding the conditions that must be satisfied before the Department may grant an LOT adjustment. In addition, § 351.401(b) makes clear that all adjustments, including LOT adjustments, must be demonstrated to the satisfaction of the Secretary. New § 351.412(f) also clarifies that the Department will grant a CEP offset only where a respondent has succeeded in establishing that there is a difference in the levels of trade, but, although the respondent has cooperated to the best of its ability, the available data do not permit the Department to determine whether that difference affects price comparability.

Section 351.412(b) generally tracks the statute in explaining the general conditions precedent to making an LOT adjustment. Although, for organizational clarity, we have transposed paragraphs (b) and (c), we do not intend this modification to have any substantive impact.

Section 351.412(c) explains the basis on which the Department will determine whether there are differences in the levels of trade of the EP or CEP and normal value. Paragraph (c) is substantively the same as the proposed regulation. Paragraph (c)(1) explains the basis on which the Department will determine the LOT of sales and CV. Paragraph (c)(1)(i) provides that the Department will determine the LOT of EP sales on the basis of the starting prices of sales to the United States, before any adjustments under section 772(c) of the Act. Paragraph (c)(1)(ii) provides that the Department will base the LOT of CEP on the U.S. affiliate's starting price in the United States, after the CEP deductions under section 772(d) of the Act, but before the deductions under section 772(c). Paragraph (c)(1)(iii) provides that the Department will base the LOT of a price-based normal value on the starting prices in the market in which normal value is determined, before any deductions under section 773(a)(6) of the Act. The Department will base the LOT of CV on the LOT of the sales from which the Department derives SG&A and profit under section 773(e) of the Act.

Section 773(a)(1)(B) of the Act requires that, to the extent practicable, the Department base normal value on sales at the same LOT as EP or CEP. Sections 772(a) and (b) define EP and CEP, respectively, as the starting price in the United States as adjusted under sections 772(c) and (d). The adjustments under subsection (d) normally change the LOT, so that the Department must

determine the LOT of CEP sales after any deductions under subsection (d). The adjustments under subsection (c), however, are made to both EP and CEP. Therefore, determining the LOT on the basis of EP or CEP before any deductions under subsection (c) yields the LOT of the EP or CEP. Similarly, we will not make the adjustments under section 773(a)(6) before determining the LOT of normal value.

Several commenters contended that the Department's proposed regulation, which identified the LOT of CEP sales based on the price after adjustments under section 772(d), was contrary to the statute and ignored commercial reality. According to these commenters, the Department's proposed analysis would make CEP offsets virtually automatic, contrary to the intent of Congress. These commenters suggested that the Department revise its proposed regulation to state that, in all situations, it will identify LOT on the basis of the starting price.

Other commenters contended that there is no basis for identifying the LOT of CEP any differently than the LOT of EP and normal value. They argued that such an approach would result in comparing a CEP that, in reality, had been reduced to a ''factory door'' price with a normal value at a more advanced stage of distribution, thereby necessitating an LOT adjustment in virtually every instance. However, other commenters argued that the Department's identification of the LOT of CEP after adjustments was in accordance with the statute and SAA.

As discussed above, we have maintained the methodology of the proposed regulation. The statute directs the Department to determine normal value at the LOT of the CEP, which includes any CEP deductions under section 772(d). We note that many of the commenters opposed to the use of adjusted CEP appear to believe that the deductions under section 772(d) involve all direct and indirect expenses. However, as discussed above in connection with § 351.402, the deduction under section 772(d) removes only expenses associated with economic activities in the United States. Thus, CEP is not a price exclusive of all selling expenses, because it contains the same type of selling expenses as a directly observed export price.

Paragraph (c)(2) describes how the Department will determine whether two sales were made at different levels of trade. We have modified the proposed regulation to provide that the Department will not identify levels of trade based solely on selling activities. We have made this change in order to avoid any implication that every substantial difference in selling functions or activities constitutes a difference in the levels of trade.

Numerous commenters stated that the proposed regulation appeared to be inconsistent with the statute because it based the identification of levels of trade on the identification of different selling activities. These commenters argued that the statute requires that the Department identify levels of trade first, and that it consider selling activities only to determine whether an LOT adjustment is authorized.

Other commenters asserted that the proposed regulation appropriately made differences in selling activities the test for identifying levels of trade. These commenters argued, however, that the Department should not merely count the number of different selling activities, but instead should take a qualitative approach, weighing the extent and importance of each selling activity.

In the Department's view, while neither the statute nor SAA defines level of trade, section 773(a)(7)(A)(i) of the Act provides for LOT adjustments where there is a difference in levels of trade and the difference ''involves'' the performance of different selling activities. Thus, the statute uses the term ''level of trade'' as a concept distinct from selling activities. The SAA at 829 reinforces this point by explaining that the Department must analyze the functions performed by the sellers, but need not find that two levels involve no common selling activities before finding two levels of trade. In other words, the statute indicates that two sales with substantial differences in selling activities nevertheless may be at the same level of trade, and the SAA adds that two sales with some common selling activities nevertheless may be at different levels of trade. Taken together, the two points establish that an analysis of selling activities alone is insufficient to establish the LOT. Rather, the Department must analyze selling functions to determine if levels of trade identified by a party are meaningful. In situations where some differences in selling activities are associated with different sales, whether that difference amounts to a difference in the levels of trade will have to be evaluated in the context of the seller's whole scheme of marketing.

If the Department treated every substantial difference in selling activities as a separate LOT, the Department potentially would be required to address dozens of levels of trade—many of which would be artificial creations. In addition to being extremely burdensome, this would make the Department less likely to find ''patterns of consistent price differences'' between the apparently different levels of trade. This would result either in denial of LOT adjustments altogether or routine use of the CEP offset. Neither of these results was intended by the URAA.

Section 351.412(c)(2) states that an LOT is a marketing stage ''or the equivalent'' (which means that the merchandise does not necessarily have to change hands twice in order to reach the more remote LOT). It is sufficient that, at the more remote level, the seller takes on a role comparable to that of a reseller if the merchandise had changed hands twice. For example, a producer that normally sells to distributors (that, in turn, resell to industrial consumers) could make some sales directly, taking over the functions normally performed by the distributors. Such sales would be at the same LOT as the sales through the distributors. Each more remote level must be characterized by an additional layer of selling activities, amounting in the aggregate to a substantially different selling function. Substantial differences in the amount of selling expenses associated with two groups of sales also may indicate that the two groups are at different levels of trade.

Although the type of customer will be an important indicator in identifying differences in levels of trade, the existence of different classes of customers is not sufficient to establish a difference in the levels of trade. Similarly, while titles, such as ''original equipment manufacturer,'' ''distributor,'' ''wholesaler,'' and ''retailer'' may actually describe levels of trade, the fact that two sales were made by entities with titles indicating different stages of the marketing process is not sufficient to establish that the two sales were made at different levels of trade.

Section 351.412(d) provides that the Department will grant an LOT adjustment only if it is demonstrated to the satisfaction of the Secretary that the difference between the LOT of the sales in the United States and normal value affects price comparability, based on a pattern of consistent price differences between sales at those two levels of trade in the market in which normal value is determined. The Department will develop its practice in this area in the course of administrative proceedings, and intends to issue a policy bulletin once its methodology is more fully developed.

Section 351.412(e) provides that the Department will calculate LOT adjustments by determining the weighted average of the adjusted prices

at the two relevant levels of trade in the market in which normal value is determined. These two levels are the level corresponding to EP or CEP and the level at which normal value is determined. The Department will apply the average percentage difference between these weighted averages to normal value, as otherwise adjusted.

Several commenters contended that the Department should base the amount of any adjustment on the pattern of consistent price differences, rather than on a weighted average. The Department has not adopted this proposal. The SAA at 830 clearly states that ''any adjustment * * * will be calculated as the percentage by which the weighted-average prices at each of the two levels of trade differ in the market used to establish normal value.''

Several commenters proposed that the Department make clear that LOT adjustments, or the CEP offset, can be applied when normal value is based on CV, as well as when normal value is based on prices. The Department agrees, and has revised the proposed regulation to remove any suggestion that LOT adjustments will be made only to prices. Section 773(a)(8) of the Act provides that the Department may adjust CV, as appropriate, under subsection 773(a). Section 773(a)(7)(B) provides that the CEP offset is made to ''normal value.'' There is no limitation confining the adjustment to home market prices, or precluding its application to CV. Therefore, it is clear that LOT adjustments are appropriate regardless of the basis on which normal value is determined.

Where there are sales of the foreign like product at the LOT in the home market corresponding to the LOT of the EP or CEP, the Department will determine normal value on the basis of those sales, and the Department will not make an LOT adjustment. In situations where the Department seeks to make an LOT adjustment, there may be no usable sales of the foreign like product in the market in which normal value is determined at the LOT of the EP or CEP. In order to calculate LOT adjustments in such situations, the Department will examine price differences in the home market either for sales of broader or different product lines or for sales made by other companies.

The regulation also makes clear that the Department will make the LOT adjustment on the basis of adjusted prices. Although neither the statute nor the SAA stipulates whether the average prices compared to determine the amount of the LOT adjustment should be adjusted prices, the adjustment can accomplish its purpose only if calculated on the basis of adjusted prices. This is because the adjustment is intended to eliminate only differences that are: (1) attributable to a difference in levels of trade; and (2) not otherwise adjusted for. In order to avoid having the LOT adjustment duplicate other adjustments, the LOT adjustment must be calculated on the basis of prices to which those adjustments have already been made. To achieve this, the Department will adjust prices at each level of trade in the foreign market as appropriate under section 773(a)(6) before it determines the amount of the LOT adjustment.

One commenter asked the Department to specify that an LOT adjustment can have any value, positive, negative, or zero. We have not adopted this proposal because the statute and SAA make clear that LOT adjustments can be upwards or downwards. SAA at 830.

Section 351.412(f) describes the situations in which the Department will grant a CEP offset. Some commenters suggested that the CEP offset is ''automatic.'' This is not the case. The Department will calculate CEP by deducting only selling expenses and profit associated with selling activities in the United States. Thus, the resulting CEP will retain an element of selling expenses and an element of profit, as do directly observed export prices. We do not agree that there never will be comparable sales in the foreign market.

The Department will not make a CEP offset where the sales to the United States are EP sales or where the Department bases normal value on home market sales at the same LOT as the CEP. The Department will grant a CEP offset only where: (1) normal value is determined at a more remote level of trade than CEP sales; and (2) despite the fact that a respondent cooperated to the best of its ability, the data available do not provide an appropriate basis to determine whether the difference in levels of trade affects price comparability.

One commenter contended that the Department should make the CEP offset in addition to any adjustment for differences in levels of trade. The Department has not adopted this proposal. Section 773(a)(7)(B) of the Act authorizes the Department to make the CEP offset only where the data available do not provide an appropriate basis to determine an LOT adjustment. Therefore, whenever an LOT adjustment can be calculated, the Department cannot also make the CEP offset.

Section 351.413

Section 351.413 deals with the Department's authority to disregard insignificant adjustments under section 777A(a)(2) of the Act. More specifically, § 351.413 defines the term ''insignificant'' with respect to an individual adjustment and a group of adjustments.

Two commenters observed that proposed § 351.413 provided that the Department may ignore *any* ''group of adjustments'' with an *ad valorem* effect of less than one percent. Because the proposed regulations identify three separate ''groups of adjustments,'' it is possible that the Department could ignore three separate groups of ''insignificant'' adjustments for which the combined *ad valorem* effect could be nearly three percent. To prevent this, one commenter suggested that the Department delete the final sentence of proposed § 351.413 dealing with groups of adjustments. The other commenter suggested that the Department make clear that the total *ad valorem* effect of all disregarded adjustments can be no more than one percent.

The Department has not adopted these suggestions. In § 351.413, the percentages used and the definition of groups of adjustments reflects the legislative history of section 777A(a)(2) of the Act, the statutory provision on which the regulation is based. *See, e.g.,* S. Rep No. 249, 96th Cong., 2d Sess. 96 (1979). Moreover, with the exception of changes in terminology (*e.g.*, from ''foreign market value'' to ''normal value'') a revision to render this provision applicable to the calculation of export price and constructed export price, § 351.413 is unchanged from former 19 CFR § 353.59(a).

We believe that part of the commenters' concerns may arise from a misperception that the references to ''an *ad valorem* effect'' in § 351.413 relate to the *ad valorem* dumping margin, so that if the Department ignored groups of adjustments with a total *ad valorem* effect of three percent, the Department, for example, might transform a dumping margin of 4 percent *ad valorem* to 1 percent *ad valorem*. However, this is not what is contemplated by § 351.413, because that section clearly states that the *ad valorem* effect in question is the percentage change to ''export price, constructed export price, or normal value, as the case may be,'' and not the percentage change in the dumping margin.

Finally, we should note that both section 777A(a)(2) and § 351.413 give the Department the flexibility to determine, on a case-by-case basis, whether it should disregard a particular insignificant adjustment. Given this flexibility, and given that § 351.413 is taken almost *verbatim* from the

legislative history, we do not believe there is a reason to eliminate the guidance provided by the last sentence defining ''groups of adjustments.''

Section 351.414

Section 351.414 implements section 777A(d) of the Act and sets forth the three statutory methods for establishing and measuring dumping margins. Section 351.414(c) sets forth the preference for comparisons of average U.S. prices to average comparison market prices in investigations, and for comparison of transaction-specific U.S. prices to average comparison market prices in administrative reviews.

Averaging groups: In establishing the particular averaging groups to be used for price comparisons, § 351.414(d)(2) of the proposed rule stated that an averaging group will consist of subject merchandise that is identical or virtually identical in all physical characteristics and that is sold to the United States at the same level of trade. The Secretary also will take into account, where appropriate, the region of the United States in which the merchandise is sold and such other factors as are considered relevant.

One commenter objected to the Department's interpretation of the statutory provision, and suggested that the true purpose of averaging groups, as reflected in the SAA, is to identify potential targeted dumping to certain U.S. customers or certain U.S. regions, not to invite a similar division of the home market into such groups as a means of thwarting the AD law. The commenter concluded that the regulations should make clear that price averaging pertains solely to U.S. sales and that no product averaging groups will be undertaken with respect to normal value sales.

We disagree with the comment. The SAA provides that in an investigation Commerce will normally establish and measure dumping margins on the basis of a comparison of weighted-average normal values and weighted-average export or constructed export prices. The SAA specifically states:

> To ensure that these averages are meaningful, Commerce will calculate averages for comparable sales of subject merchandise to the U.S. *and sales of foreign like products.* In determining the comparability of sales for purposes of inclusion in a particular average, Commerce will consider factors it deems appropriate, such as the physical characteristics of the merchandise, *the region of the country* in which the merchandise is sold, *the time period,* and *the class of customer* involved. (Emphasis added.)

SAA at 842.

In the Department's view, the language of the SAA makes clear that Congress and the Administration contemplated the use of averaging groups for both U.S. and normal value sales. Nothing in the statute or SAA supports the view that normal value sales should not be averaged, or that normal value sales should not be averaged on the same basis as U.S. sales. Moreover, the purpose of establishing particular price averaging groups is to make accurate and meaningful price comparisons, not to identify (and address) potential targeted dumping.

Time period over which weighted-average is calculated: Under § 351.414(d)(3) of the proposed rule, the Department normally will calculate averages for the entire period of investigation or review when the average-to-average method is applied. However, the Secretary may calculate weighted-averages for shorter periods when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation or review.

One commenter pointed out that there is no reason to default to the entire period given the complete reporting requirements of the law and the capability for analysis of prices through computer support. For perishable products, the commenter noted that the Department should average prices over the shortest period necessary to take account of the perishable nature of the products, but should not average prices over a period that would mask price trends unrelated to the perishable nature of the product.

For products such as manufactured goods, the commenter contended that the Department should adopt a one-month average as the standard time period over which prices would be averaged when the Department employs the average-to-average method. According to the commenter, use of a one-month average time period results in a more precise comparison of normal values and export/constructed export prices than would a single period-wide average comparison. With a one-month standard, the Department may allow averaging over longer periods only where it is shown that a longer period does not distort the price-to-price comparison.

Another commenter supported the Department's proposed rule that the Department will rely on shorter periods in appropriate circumstances and urges the Department to give full consideration to all relevant circumstances in applying the rule.

In the Department's view, price averaging means establishing an average price for all comparable sales. In general, we believe it is appropriate to average prices across the period of investigation, though we recognize that there are circumstances in which other averaging periods are more appropriate. Accordingly, the proposed rule is designed to ensure that the time periods over which price averages and comparisons are made comports with the circumstances of the case, while maintaining a preference for period-wide averaging. Where perishable products are concerned, the Department has not fashioned a rule with respect to a particular type of product because such an approach may limit the agency's ability to address, for example, price trends unrelated to the perishable nature of the product.

Use of the average-to-average method in administrative reviews: Section 351.414(c)(2) of the proposed regulations states that in a review the Secretary normally will use the transaction-to-average method. One commenter urged the Department to expand the application of the average-to-average price comparison method to administrative reviews. In contrast, another commenter contended that such an expansion is clearly impermissible. Citing the SAA, the opposing commenter argued that both Congress and the Administration recognized that the transaction-to-average method would continue to be used in administrative reviews. Another commenter agreed and advocated adoption of a final rule that would preclude application of the average-to-average methodology in reviews, other than in exceptional circumstances.

The Department specifically addressed these divergent positions in the preamble to the proposed regulation. The final rule reflects the SAA, which expressly states that the transaction-to-average method is the preferred approach for administrative reviews. SAA at 843. However, these regulations do not preclude the use of average-to-average price comparisons in every review. Circumstances may exist that warrant application of the average-to-average method and the final rule reflects the Department's authority to apply this method where necessary.

On the subject of the transaction-to-transaction method of price comparisons, one commenter suggested that the final rule state that this method be applied ''in appropriate situations,'' rather than ''only in unusual situations'' as contemplated in the proposed regulation, § 351.414(c)(1). In the commenter's view, the language of the proposed rule establishes a strong presumption that the transaction-to-

transaction method should not be used. The commenter believed that anyone who advocates use of this alternative method should bear the burden of providing good reason for its application, but that the final rule should not discourage this option.

In the Department's view, the SAA makes clear that Congress did not contemplate broad application of the transaction-to-transaction method. SAA at 842. Specifically, the SAA recognizes the difficulties the agency has encountered in the past with respect to this methodology and suggests that even in situations where there are very few sales, the merchandise in both markets should also be identical or very similar before the agency would make transaction-to-transaction comparisons. Accordingly, we continue to maintain that the transaction-to-transaction methodology should only be applied in unusual situations.

Targeted dumping: Paragraph (f) of § 351.414 of the proposed regulation implemented the ''targeted dumping'' provision of section 777A(d)(1)(B) of the Act. Several parties commented that the final rule should provide more specific guidelines as to what constitutes targeted dumping. One commenter suggested the Department provide guidance by establishing more specific criteria for making targeted dumping determinations. Another commenter suggested that the Department needs to gain more experience in order to develop the proper standard for making such determinations, and should establish guidelines through policy bulletins as it develops its practice in this area.

More specifically, several commenters suggested that the Department recognize in its final rule that certain ''common commercial patterns of pricing'' do not constitute targeted dumping, such as (1) different pricing for larger or smaller orders, (2) seasonal pricing, and (3) price changes associated with industry practices, such as downward price changes pursuant to lower costs as are typical for semiconductors, personal computers, and other technical products. In contrast, other commenters contended that common commercial practices in an industry can constitute targeted dumping and that such behavior should not be excused or ignored simply because it is considered to be a common commercial practice.

Other commenters proposed additional substantive guidance. For example, one party suggested that targeted dumping should not be found to exist where the pattern of prices exists in both the U.S. and the comparison market. Another commenter suggested that the Department not obligate itself to use ''standard statistical techniques'' in all of its determinations. Several commenters suggested that the Department define in the final regulations the evidentiary threshold for initiating a targeted dumping inquiry. One commenter, in particular, contended that the final rule establish a low threshold for an allegation to be accepted, similar to allegations of sales below cost. Another commenter expressed concern that the Department's brief practice in this area already has established an arbitrarily high initiation standard.

In the preamble to the proposed regulations, the Department specifically avoided the adoption of any *per se* rules on targeted dumping due to the Department's limited experience administering this provision of the Act. However, the Department recognizes the need to establish guidance in this area and thus will issue policy bulletins setting forth more specific criteria as the Department develops its practice in this area. Moreover, the Department plans to employ common statistical methods in its targeted dumping determinations in order to ensure that the test is applied on a consistent basis and in a manner that ensures transparency and predictability to all parties concerned. In addition, the Department will ensure that parties have an opportunity to explain whether a particular pattern of export prices or constructed export prices constitutes targeted dumping. A policy bulletin setting forth some basic guidelines for applying statistical techniques to targeted dumping questions will be issued in the near future. As we gain more experience in this area, the bulletins will be supplemented or replaced.

Allegation requirement: In proposed § 351.414(f)(3), the Department stated that ''the Secretary will not consider targeted dumping absent an allegation.'' Many commenters opposed the allegation requirement on several grounds. First, they claimed that the burden imposed on interested domestic parties is substantial in that these parties would have to examine multiple respondents, and then reexamine revised responses, sometimes submitted subsequent to verification. Second, the commenters added that the Department's proposed rule effectively precluded self-initiation of a targeted dumping examination by the Department. One commenter contended that the Department should place the burden of proof on respondents to demonstrate that they did not engage in targeted dumping, thereby removing the improper burden placed on domestic interested parties. The commenter went on to state that, contrary to the Department's reasoning in the preamble to the AD Proposed Regulations, it is the Department, and not domestic interested parties, that is in the best position to find targeted dumping. According to the commenter, a domestic interested party's knowledge of the market in question offers no special insight into whether a foreign company has engaged in targeted dumping. While a domestic company may recognize that it is losing sales to foreign competitors, it surely can have no way of knowing the reasons behind, or pattern emanating from, such dumping. According to the commenter, the Department, through its power to assess margins based on facts available, is in the best position to obtain the information necessary to make a targeted dumping determination.

It is the Department's view that normally any targeted dumping examination should begin with domestic interested parties. It is the domestic industry that possesses intimate knowledge of regional markets, types of customers, and the effect of specific time periods on pricing in the U.S. market in general. Without the assistance of the domestic industry, the Department would be unable to focus appropriately any analysis of targeted dumping. For example, the Department would not know what regions may be targeted for a particular product, or what time periods are most significant and can impact prices in the U.S. market. Ultimately, the domestic industry possesses the expertise and knowledge of the product and the U.S. market. Information on these factors are significant for both the burden aspect and the determination itself. If the Department were required to explore the contours of the U.S. market for every product subject to an investigation, absent the knowledge as to how the market functions, the Department would be compelled to conduct countless comparisons of prices between customers, possible regions, and possibly significant time periods in every case. Absent any guiding insight as to how the market truly functions, such a requirement would be an enormous undertaking. Fundamentally, the Department needs the assistance of the domestic industry to focus the inquiry and to properly investigate the possibility of targeted dumping.

Nevertheless, there may be instances in which the Department recognizes targeted dumping on its own, without an allegation from domestic interested parties. In such cases, the Department must be able to address the targeted

dumping behavior regardless of whether any domestic interested party filed a timely and sufficient allegation. Accordingly, the Department has modified the proposed rule in order to ensure that the regulation properly reflects the Department's authority to address instances of targeted dumping absent an allegation. However, the final rule anticipates that targeted dumping examinations normally will flow from allegations of targeted dumping.

With respect to the availability of information, the Department recognizes that parties' access to relevant information on the record is crucial for making targeted dumping allegations of merit and will continue to take steps to ensure that public summaries provide the parties with adequate information. For example, the authority to determine margins based on facts available should continue to enable the Department to obtain the information necessary for domestic interested parties to make targeted dumping allegations. For example, the Department intends to calculate dumping margins using the transaction-to-average method as facts available for any respondent who refuses to supply the necessary data for a targeted dumping determination.

Time in which to file targeted dumping allegations: Section 351.301(d)(4) sets forth the time in which targeted dumping allegations must be filed. Although we received comments on the proposed regulatory deadline for filing targeted dumping allegations, for the final rule we have adopted the time requirement set forth in the proposed rule for the reasons discussed below.

Under proposed § 351.301(d)(4), the Department stated that an allegation of targeted dumping must be filed ''no later than 30 days before the scheduled date of the preliminary determination.'' Commenters pointed out that there is no reason to impose such a deadline for submitting an allegation given that the Department will receive the necessary information on targeted dumping in the normal course of every investigation. Thus, unlike cost investigations, the Department need not request additional information to conduct its examination. Accordingly, commenters contended, the Department need not require the stringent deadlines set forth in the proposed rule. Commenters also contended that the proposed deadline imposed a substantial burden in that for many cases the Department has limited, unusable information on the record 30 days prior to the preliminary determination. Commenters also noted that the proposed early and inflexible time limit would impose the added burden on petitioners at a time when the domestic industry must examine questionnaire responses for identification of deficiencies and for potential below-cost allegations. These commenters proposed that the final rule permit domestic interested parties to file allegations at any time until the deadline for the case briefs, which would allow allegations to include information uncovered at verification.

The Department has adopted the proposed regulation relating to the time in which to file targeted dumping allegations. To extend the deadline would make it impossible for the Department to consider the allegation for the preliminary determination. Furthermore, it would make any verification of issues relative to the allegation extremly difficult. However, the Department recognizes the burden such a deadline may place on domestic interested parties in some situations and intends to be flexible with respect to the deadline. For example, if the timing of the responses does not permit adequate time for analysis, the Department may consider that to be ''good cause'' and extend the deadline under section 351.302.

Limited application of average-to-transaction method: Under proposed paragraph (f)(2), the Secretary will normally limit the application of average-to-transaction comparisons exclusively to those sales in which the criteria for determining targeted dumping are satisfied. The preamble to the proposed regulations states that it would be ''unreasonable and unduly punitive'' to apply the transaction-to-average approach to all sales where, for example, targeted dumping accounted for only one percent of a firm's total sales. The preamble also states that the approach would not always be limited in application ''because there may be situations in which targeted dumping by a firm is so pervasive that the average-to-transaction method becomes the benchmark for gauging the fairness of that firm's pricing practices.''

Several commenters argued that neither the AD Agreement, statute, nor the SAA supports limited application, and advocated broad application of the transaction-to-average approach to all of a firm's sales once targeted dumping is found. In general, these commenters also were concerned that limiting the application exclusively to those sales in which the targeting criteria are met would have significant implications for submitting allegations. One commenter, in particular, noted that the ''hybrid approach'' proposed by the Department would require an exhaustive recitation, rather than a representative allegation, if all instances of targeted dumping are to be addressed. The commenter also rejected the view that broad application would be ''punitive'' and claimed that the average-to-average method was designed to simplify the dumping calculations, not to provide more accurate means of calculating dumping margins. In the commenter's view, the transaction-to-average method should be viewed as a more accurate, not more punitive, measure of dumping. Another commenter suggested that the targeted dumping provision is intended to prevent foreign producers from unduly and inappropriately benefitting from an averaging of U.S. sales. The commenter reasoned that once a party engages in targeted dumping, it has violated the spirit of the average-to-average method and forfeits entirely the privilege of receiving an average-to-average calculation. In the alternative, one commenter suggested that the Department consider application of the transaction-to-average method for all of a firm's sales where it is established that targeted dumping exists for 10 percent or more of that firm's sales.

The Department has considered the scope of application of the average-to-transaction methodology raised in the comments on this issue. Based upon our examination, the Department is adopting the proposed regulation without modification. In the Department's view, section 777A(d)(1) of the Act establishes a preference for average-to-average price comparisons in investigations. The statute contemplates a divergence from the normal average-to-average (or transaction-to-transaction) price comparison out of concern that such a methodology could conceal ''targeted dumping.'' SAA at 842. Accordingly, the Department will apply the average-to-transaction approach solely to address the practice of targeted dumping. Nevertheless, the Department contemplates that in some instances it may be necessary to apply the average-to-transaction method to all sales to the targeted area, such as a region or a customer, or even all sales of a particular respondent. For example, where the targeted dumping practice is so widespread it may be administratively impractical to segregate targeted dumping pricing from the normal pricing behavior of a company. Moreover, the Department recognizes that where a firm engages extensively in the practice of targeted dumping, the only adequate yardstick available to measure such pricing behavior may be the average-to-transaction methodology.

With respect to the contention that limiting the application of the transaction-to-average method solely to

targeted sales would require an extensive allegation, as opposed to a representative one, we disagree. The proposed regulation speaks to limited application of the transaction-to-average method once targeted dumping is found to exist. It does not address the scope of the targeted dumping examination itself. Interested parties may make representative targeted dumping allegations based upon prices to purchasers, regions, or periods of time, provided they explain how the evidence examined in the allegations is relevant to prices of other products or models, or other companies.

Section 351.415

Section 351.415 implements section 773A of the Act, which deals with the selection of the exchange rate used to convert foreign currencies to U.S. dollars. For the reasons set forth below, we have not revised § 351.415.

Forward sales of currency: Section 351.415(b) creates an exception to the general rule that the Department will use the actual exchange rate on the date of sale to convert foreign currencies to U.S. dollars. Under paragraph (b), if a currency transaction on forward markets is directly linked to an export sale under consideration, the Department will use the exchange rate specified in the forward sales agreement instead of the actual exchange rate on the date of sale.

Two commenters made suggestions regarding the application of the ''directly linked'' standard. One commenter suggested that if an exporter actually applies forward exchange rates to its export sales, then the Department should use those forward exchange rates (whether they be daily, quarterly, or quarterly averages). The second commenter proposed that in order for the Department to use a forward exchange rate, the forward sale of currency must relate specifically to the export sale, *i.e.*, the forward rate should not be allocated. According to the second commenter, this would prevent an exporter from claiming that its general hedging operations are directly linked to particular export sales. This same commenter also argued that where the forward sale agreement spans a period of time, the Department should use the exchange rate specified in the agreement only if the date of sale of the export transaction falls within that period.

With respect to these suggestions, while the Department believes that it might be desirable to have more detailed rules concerning the ''directly linked'' standard, we do not have enough experience with this standard to provide such rules at this time. Therefore, we intend to develop our practice in the context of future investigations and reviews.

Another commenter, noting that forward currency transactions usually involve a fee, suggested that the Department either should include this fee as part of the forward exchange rate or should make a COS adjustment under § 351.410 to account for the fee. We agree that the Department should account for these types of fees, but we do not believe that an additional regulation is necessary. In the case of § 351.410, for example, we believe that the provision is sufficiently flexible to encompass a COS adjustment for forward exchange rate fees.

Model for identifying and addressing fluctuations and sustained movements in exchange rates: Several commenters made suggestions to amend the model proposed by the Department for identifying and addressing fluctuations and sustained movements in exchange rates. (We described this model briefly in the AD Proposed Regulations, 61 FR at 7351, and then published a more detailed description in *Policy Bulletin (96–1): Currency Conversions,* 61 FR 9434 (March 8, 1996) (''Policy Bulletin 96–1'')). Regarding fluctuations in exchange rates, two commenters suggested that the Department replace the 8-week rolling average benchmark for determining fluctuations with a 17-week (120-day) rolling average. They also suggested that the benchmark should not include exchange rates that the Department has determined to be fluctuations, because section 773A of the Act requires the Department to ignore fluctuations.

Regarding sustained movements in an exchange rate, certain commenters claimed that the Department's model is overly rigid in identifying such movements, as evidenced by the fact that the model only identifies one sustained movement for one currency in the period since 1992. These commenters suggested several amendments to the model to ensure that it would serve the purpose of protecting exporters when the value of their currency changes faster than they can raise prices. These suggestions included: changing the so-called ''recognition period'' for sustained movements from 8 weeks to 13 weeks (90 days); requiring fewer than 8 consecutive weeks of changes before recognizing a sustained movement, or using monthly rather than weekly averages to determine whether a sustained movement has occurred; applying an historic rate (such as the rate from the quarter preceding the recognition period) during the recognition period; and, using the official exchange rate from the first day of the recognition period during the 60-day adjustment period.

One commenter argued against the latter two suggestions on the grounds that the purpose of section 773A(b) is to allow exporters an adjustment period after a sustained movement in exchange rates has occurred. Therefore, in this commenter's view, it makes no sense to use an exchange rate that predates the sustained movement, nor would section 773A(b) permit the use of an historic rate occurring during the recognition period. Finally, one commenter requested that the Department provide additional guidance on the exchange rate that it intends to apply when a foreign currency is depreciating, as opposed to appreciating, against the U.S. dollar.

The Department welcomes the numerous comments submitted on the model for identifying and addressing fluctuations and sustained movements in exchange rates. As we stated in the AD Proposed Regulations, we intend to use the model for one year and then evaluate its performance based on public comment. As part of that evaluation, we will consider the comments we have received in connection with the instant rulemaking. Moreover, as indicated in Policy Bulletin 96–1, we will consider comments we received on the model through December 31, 1996.

At this time, however, we would like to make two points. First, based on a preliminary review of the comments, we do not believe that using a benchmark rate that includes past fluctuations contravenes section 773A(a). The fluctuations identified under the model are fluctuations that are relative to a particular number calculated at a particular point in time; *i.e.*, the average of the actual exchange rates on each of the prior 40 days. The fact that a particular daily rate fluctuates vis-a-vis that number is sufficient to disqualify that daily rate for purposes of conversion on that date. However, the designation of a particular daily rate as a fluctuation does not render that rate unusable for all purposes. In particular, we believe that actual exchange rates provide the best gauge of whether a particular daily rate should be viewed as a fluctuation. Therefore, we consider it appropriate to include past fluctuations in the rolling average benchmark.

Moreover, when the Department deems a particular daily rate to be a fluctuation, we believe we should use the benchmark (which includes past fluctuations) *in lieu of* the daily rate. For

example, the fact that a daily rate three weeks ago is considered to be a fluctuation means only that the daily rate varied from the historic average as of that time. It does not mean that one should continue to view that daily rate as a fluctuation three weeks later. Because the designation of fluctuations is time-sensitive in this sense, the commenters appear to be reading too much into the statutory prohibition against the use of fluctuating exchange rates.

Second, regarding the comment on our treatment of depreciating currencies, we note that the Department addressed this issue in *Certain Pasta from Turkey*, 61 FR 30309, 30325 (June 14, 1996). In that case, which involved a situation where the foreign currency was depreciating against the U.S. dollar, we used actual daily exchange rates rather than the benchmark rates generated by the model. We agree with the commenter that we should address depreciating currencies more fully in a final model, and we welcome further suggestions on this point.

Sustained movements: While the model discussed above identifies and addresses sustained movements in exchange rates, paragraph (d) sets forth a general rule that where there is a sustained movement ''increasing the value of the foreign currency relative to the U.S. dollar,'' exporters will be given 60 days in which to adjust their prices. Two commenters claimed that paragraph (d) is ''one-sided.'' Specifically, one commenter objected to the fact that paragraph (d) only addresses sustained appreciations in a foreign currency relative to the U.S. dollar. In this commenter's view, section 773A(b) does not specify whether the sustained movement must be upward or downward. The second commenter (presumably referring to the fact that paragraph (d) does not address sustained depreciations in a foreign currency) pointed out that under paragraph (d), respondents can take advantage of favorable exchange rates when a foreign currency appreciates, but domestic industries do not receive a comparable benefit when the currency depreciates. The commenter suggested that the Department should address this by establishing a special rule for situations where exporters should be raising their U.S. prices in response to exchange rate changes, but, instead, are lowering them.

We are not adopting the proposals put forward by these commenters. The language contained in paragraph (d) regarding upward sustained movements reflects the legislative intent expressed in the SAA, which specifically discusses the granting of an adjustment period following ''a sustained increase in the value of a foreign currency relative to the U.S. dollar.'' SAA at 842. Moreover, we do not believe that the statute provides any authority for the Department to deny an adjustment period when a sustained increase in the value of a foreign currency relative to the U.S. dollar has occurred, even in the event that an exporter is lowering U.S. prices.

Another commenter pointed out that paragraph (d) would provide an adjustment period for sustained movements in exchange rates only in investigations, and not in reviews. This commenter questioned whether such a limitation was consistent with the AD Agreement. In the Department's view, paragraph (d) is consistent with the AD Agreement, because Article 2.4.1 specifies that the 60-day period for adjusting prices applies ''in an investigation.''

Finally, one commenter urged the Department to use the exchange rate in effect on the date that the price and quantity terms of a sale are first established, rather than under the methodology used to identify the date of sale for other purposes. We have not adopted this suggestion because section 773A(a) of the Act directs the Department to use the exchange rate in effect on the ''date of sale of the subject merchandise.'' We have clarified how we will identify the date of sale in section 351.401(i) of these regulations. The Department cannot establish a different date of sale for currency conversion purposes from that which is used for all other purposes. This issue is discussed further with respect to that provision, above.

Other Comments

In addition to the comments discussed above, the Department also received several comments that did not relate to a particular provision in the AD Proposed Regulations. A common theme of these comments, however, was the extent to which the Department should rely on data as recorded in a firm's books and records.

One commenter criticized the Department's practice of requiring that respondents submit data in the specific format established by the Department. According to the commenter, this requirement was unnecessary, it rendered the cost of complying with Department information requests excessively high, and, when combined with the Department's tight deadlines, it made the entire process extremely onerous for a firm attempting to comply with a request for data. Another commenter, citing the increasing convergence of accounting standards as companies compete with one another for capital on an international level, proposed that the Department accept data responses in a format that conforms to the generally accepted accounting principles of the company's home country. Another commenter supported these proposals.

With respect to these comments, we first must note that in enforcing the AD law, the Department must balance two different objectives. On the one hand, the Department has a responsibility to identify and measure dumping accurately and in accordance with the standards set forth in the AD law. In some instances, this may mean that the Department must seek information of a type that is not readily retrievable from a company's accounting or financial records or that is in a format different from the format in which a company maintains its records. On the other hand, the Department is cognizant of the need to avoid imposing, in the words of section 782(c) of the Act, ''an unreasonable burden'' on respondents.

In implementing the URAA, we have reviewed our practices and regulations in light of the two objectives described above. As a result, we have taken several steps that we believe will make the AD process less onerous for parties, but that, at the same time, preserve the Department's ability to apply the standards of the AD law. For example, the Department has revised its standard AD questionnaire to clarify that the Department will be flexible in accepting responses that reflect different accounting standards and systems. In addition, as discussed above, in the final regulations relating to allocations, date of sale, and CEP profit, we also have taken steps to accommodate different accounting standards and systems. In our view, in addition to making the AD process less onerous for parties, these changes will make the Department's verifications more efficient and effective, thereby enhancing the Department's ability to enforce the AD law.

On a somewhat related topic, one commenter stated that the regulations should address the matter of ''model-matching'' methodology.[3] According to

[3] ''Model-matching'' is a shorthand expression for the process the Department uses to identify identical or similar home market or third-country merchandise. In order to identify and measure dumping, the Department must compare a U.S. sale of a particular type or model of merchandise to a home market or third-country sale of identical or similar merchandise. Typically, in an AD proceeding, the Department will develop ''model-

Continued

the commenter, the Department currently instructs respondents as to the relative importance of physical characteristics of the subject merchandise and the foreign like product, rather than permitting respondents to make that determination, as under traditional practice. The commenter also alleged that there were two principal problems with the Department's current approach: (1) the Department's manner of identifying product characteristics, and the relative importance assigned to those characteristics, bears no necessary relation to the product coding system used by a respondent for commercial purposes; and (2) the use of the product coding system formulated by the Department in individual cases often results in inappropriate comparisons. Therefore, the commenter argued, the Department should make clear in the preamble to its regulations that the Department generally will use a respondent's existing product coding system as the starting point for identifying identical and similar merchandise. The Department then can make modifications and additions to those codes to the extent necessary to reflect desired model-match criteria.

We have not adopted the suggestion. Under section 771(16) of the Act, the starting point for model-matching is always the physical characteristics of the product. Based on our experience, a company's internal product coding system often does not provide sufficient information to allow the Department to match products in accordance with their physical characteristics. Therefore, we do not believe that it would be appropriate to establish what, in effect, would be a rebuttable presumption that a company's internal product coding system should be used for purposes of model-matching.

On the other hand, however, we do not intend to suggest that a company's product coding system is irrelevant to the model-matching exercise. We agree that the model-matching methodology used by the Department in a particular case should reflect the most significant physical characteristics of a product. We also agree that it often is the case that a company's product coding system is informative, if not dispositive, as to what those characteristics are. For example, the fact that the product coding systems of every respondent involved in an AD proceeding capture a particular physical characteristic usually is a good indication that the characteristic is significant. Therefore, the Department will continue to consider producer coding systems in developing model-match methodologies in particular cases, and will use these codes where such use is consistent with the standards set forth in section 771(16).

Subpart G—Effective Dates

Subpart G consists of a single § 351.701 which (1) establishes the dates on which the new regulations contained in Part 351 will become effective, and (2) explains the extent to which the Department's prior regulations will govern segments of proceedings to which the new regulations do not apply. Section 351.701 also explains the limited role of these new regulations in proceedings to which they do not apply.

The new regulations will apply to all investigations and other segments of proceedings (such as scope requests), other than administrative reviews, initiated on the basis of petitions filed or requests made more than thirty days after the date on which the new regulations are published. The new regulations also will apply to all investigations or other segments of proceedings that the Department self-initiates more than thirty days after the date on which the new regulations are published. In addition, the new regulations will apply to all administrative reviews initiated on the basis of requests filed in the month following the month in which the date 30 days after publication of this notice falls. The slight difference in effective date for administrative reviews is to avoid confusion over whether the new regulations apply to administrative reviews requested by different parties on different days during the month in which the new regulations become effective for investigations and other segments of proceedings (in other words, during the month that includes the day thirty days after the date on which these regulations are published).

Investigations, reviews, and other segments of proceedings to which these regulations do not apply will continue to be governed by the old regulations, except to the extent that those regulations were invalidated by the URAA or were replaced by the interim final regulations published on May 11, 1995 (60 FR 25130 (1995)).

For segments of proceedings to which these regulations do not apply, but which are subject to the Act as amended by the URAA because they were initiated on the basis of petitions filed or requests made after January 1, 1995 (the effective date of the URAA), the new regulations will serve as a restatement of the Department's interpretation of the amended Act. In other words, the new regulations describe the administrative practice that the Department will follow, unless there is a reason consistent with the amended Act to depart from that practice. The AD Proposed Regulations no longer will serve that purpose.

Annexes to Part 351

We have revised Annexes I through V to reflect changes made in these final regulations, as well as to correct typographical errors identified in the annexes attached to the AD Proposed Regulations. In addition, we have revised the charts to include certain deadlines that were not included in the AD Proposed Regulations.

One commenter suggested that the Department should refrain from adopting the ''inflexible deadlines'' outlined in the annexes, and instead should adapt the timetable to the complexity of each investigation or review. With respect to this suggestion, we must emphasize that the tables and charts contained in Annexes I through VII are intended to serve only as a guide to potential petitioners and respondents, as well as other persons potentially interested or involved in an AD/CVD proceeding. The tables themselves are not ''rules,'' and they do not represent the timetables that the Department will follow in all proceedings. In fact, they may not represent the timetables that the Department will follow in a majority of proceedings. The tables and charts simply cross-reference relevant provisions of the regulations so that parties and other persons will be aware of when such things as extensions or postponements might occur. As stated previously, under § 351.302(b), the Secretary may, for good cause, extend any time limit established by Part 351 unless such an extension is expressly precluded by statute.

Classification

E.O. 12866

This final rule has been determined to be significant under E.O. 12866.

Regulatory Flexibility Act

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule will not have a significant economic impact on a substantial number of small entities. The Department does not believe that there will be any substantive effect on the outcome of AD and CVD proceedings as a result of the streamlining and

matching'' criteria for identifying identical or similar merchandise in that particular case.

simplification of their administration. With respect to the substantive amendments implementing the Uruguay Round Agreements Act, the Department believes that these regulations benefit both petitioners and respondents without favoring either, and, therefore, would not have a significant economic effects. As such, a regulatory flexibility analysis was not prepared.

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. This final rule does not contain any new reporting or recording requirements subject to the Paperwork Reduction Act. The collections of information contained in this rule are currently approved by the Office of Management and Budget under OMB Control Numbers 0625–0105, 0625–0148, and 0625–0200. The public reporting burdens for these collections of information are estimated to average 40 hours for the AD and CVD petition requirements, and 15 hours for the initiation of downstream product monitoring. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to OMB Desk Officer, New Executive Office Building, Washington, D.C. 20503.

E.O. 12612

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

List of Subjects

19 CFR Part 351

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

19 CFR Part 353

Administrative practice and procedure, Antidumping, Business and industry, Confidential business information, Investigations, Reporting and recordkeeping requirements.

19 CFR Part 355

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

Dated: May 2, 1997.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

For the reasons stated, 19 CFR chapter III is amended as follows:

Parts 353 and 355 [Removed]

1. Parts 353 and 355 are removed.

2. A new Part 351 is added to read as follows:

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

Subpart A—Scope and Definitions

Sec.

Subpart B—Antidumping and Countervailing Duty Procedures 351.201 Self-initiation.

Subpart C—Information and Argument

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

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.*; and 19 U.S.C. 3538.

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

Subpart A—Scope and Definitions

§ 351.101 Scope.

(a) *In general.* This part contains procedures and rules applicable to antidumping and countervailing duty proceedings under title VII of the Act (19 U.S.C. 1671 *et seq.*), and also determinations regarding cheese subject to an in-quota rate of duty under section 702 of the Trade Agreements Act of 1979 (19 U.S.C. 1202 note). This part reflects statutory amendments made by titles I, II, and IV of the Uruguay Round Agreements Act, Pub. L. 103–465, which, in turn, implement into United States law the provisions of the following agreements annexed to the Agreement Establishing the World Trade Organization: Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; Agreement on Subsidies and Countervailing Measures; and Agreement on Agriculture.

(b) *Countervailing duty investigations involving imports not entitled to a material injury determination.* Under section 701(c) of the Act, certain provisions of the Act do not apply to countervailing duty proceedings involving imports from a country that is not a Subsidies Agreement country and is not entitled to a material injury determination by the Commission. Accordingly, certain provisions of this part referring to the Commission may not apply to such proceedings.

(c) *Application to governmental importations.* To the extent authorized by section 771(20) of the Act, merchandise imported by, or for the use of, a department or agency of the United States Government is subject to the imposition of countervailing duties or antidumping duties under this part.

§ 351.102 Definitions.

(a) *Introduction.* The Act contains many technical terms applicable to antidumping and countervailing duty proceedings. In the case of terms that are not defined in this section or other sections of this part, readers should refer to the relevant provisions of the Act. This section:

(1) Defines terms that appear in the Act but are not defined in the Act;

(2) Defines terms that appear in this Part but do not appear in the Act; and

(3) Elaborates on the meaning of certain terms that are defined in the Act.

(b) *Definitions.*

Act. ''Act'' means the Tariff Act of 1930, as amended.

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

Affiliated persons; affiliated parties. ''Affiliated persons'' and ''affiliated parties'' have the same meaning as in section 771(33) of the Act. In determining whether control over another person exists, within the meaning of section 771(33) of the Act, the Secretary will consider the following factors, among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. The Secretary will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control.

Aggregate basis. ''Aggregate basis'' means the calculation of a country-wide subsidy rate based principally on information provided by the foreign government.

Anniversary month. ''Anniversary month'' means the calendar month in which the anniversary of the date of publication of an order or suspension of investigation occurs.

APO. ''APO'' means an administrative protective order described in section 777(c)(1) of the Act.

Applicant. ''Applicant'' means a representative of an interested party that has applied for access to business proprietary information under an administrative protective order.

Article 4/Article 7 Review. ''Article 4/Article 7 review'' means a review under section 751(g)(2) of the Act.

Article 8 violation review. ''Article 8 violation review'' means a review under section 751(g)(1) of the Act.

Authorized applicant. ''Authorized applicant'' means an applicant that the Secretary has authorized to receive business proprietary information under an APO under section 777(c)(1) of the Act.

Changed circumstances review. ''Changed circumstances review'' means a review under section 751(b) of the Act.

Customs Service. ''Customs Service'' means the United States Customs Service of the United States Department of the Treasury.

Department. ''Department'' means the United States Department of Commerce.

Domestic interested party. ''Domestic interested party'' means an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 771(9) of the Act.

Expedited antidumping review. ''Expedited antidumping review'' means a review under section 736(c) of the Act.

Factual information. ''Factual information'' means:

(1) Initial and supplemental questionnaire responses;

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

(3) Other data or statements of facts; and

(4) Documentary evidence.

Fair value. ''Fair value'' is a term used during an antidumping investigation, and is an estimate of normal value.

Importer. ''Importer'' means the person by whom, or for whose account, subject merchandise is imported.

Investigation. Under the Act and this Part, there is a distinction between an antidumping or countervailing duty *investigation* and a *proceeding.* An ''investigation'' is that segment of a proceeding that begins on the date of publication of notice of initiation of investigation and ends on the date of publication of the earliest of:

(1) Notice of termination of investigation,

(2) Notice of rescission of investigation,

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

(4) An order.

New shipper review. ''New shipper review'' means a review under section 751(a)(2) of the Act.

Order. An ''order'' is an order issued by the Secretary under section 303, section 706, or section 736 of the Act or a finding under the Antidumping Act, 1921.

Ordinary course of trade. ''Ordinary course of trade'' has the same meaning as in section 771(15) of the Act. The Secretary may consider sales or transactions to be outside the ordinary course of trade if the Secretary determines, based on an evaluation of all of the circumstances particular to the sales in question, that such sales or transactions have characteristics that are extraordinary for the market in question. Examples of sales that the Secretary might consider as being outside the ordinary course of trade are sales or transactions involving off-quality merchandise or merchandise produced according to unusual product specifications, merchandise sold at aberrational prices or with abnormally high profits, merchandise sold pursuant to unusual terms of sale, or merchandise sold to an affiliated party at a non-arm's length price.

Party to the proceeding. ''Party to the proceeding'' means any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding. Participation in a prior segment of a proceeding will not confer on any interested party ''party to the proceeding'' status in a subsequent segment.

Person. ''Person'' includes any interested party as well as any other individual, enterprise, or entity, as appropriate.

Price adjustment. ''Price adjustment'' means any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments, that are reflected in the purchaser's net outlay.

Proceeding. A ''proceeding'' begins on the date of the filing of a petition under section 702(b) or section 732(b) of the Act or the publication of a notice of initiation in a self-initiated investigation under section 702(a) or section 732(a) of the Act, and ends on the date of publication of the earliest notice of:

(1) Dismissal of petition,

(2) Rescission of initiation,

(3) Termination of investigation,

(4) A negative determination that has the effect of terminating the proceeding,

(5) Revocation of an order, or

(6) Termination of a suspended investigation.

Rates. ''Rates'' means the individual weighted-average dumping margins, the individual countervailable subsidy rates, the country-wide subsidy rate, or the all-others rate, as applicable.

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

Sale. A ''sale'' includes a contract to sell and a lease that is equivalent to a sale.

Secretary. ''Secretary'' means the Secretary of Commerce or a designee. The Secretary has delegated to the Assistant Secretary for Import Administration the authority to make determinations under title VII of the Act and this Part.

Section 753 review. ''Section 753 review'' means a review under section 753 of the Act.

Section 762 review. ''Section 762 review'' means a review under section 762 of the Act.

Segment of proceeding.

(1) *In general*. An antidumping or countervailing duty proceeding consists of one or more *segments*. ''Segment of a proceeding'' or ''segment of the proceeding'' refers to a portion of the proceeding that is reviewable under section 516A of the Act.

(2) *Examples*. An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

Sunset review. ''Sunset review'' means a review under section 751(c) of the Act.

Suspension of liquidation. ''Suspension of liquidation'' refers to a suspension of liquidation ordered by the Secretary under the authority of title VII of the Act, the provisions of this Part, or section 516a(g)(5)(C) of the Act, or by a court of the United States in a lawsuit involving action taken, or not taken, by the Secretary under title VII of the Act or the provisions of this Part.

Third country. For purposes of subpart D, ''third country'' means a country other than the exporting country and the United States. Under section 773(a) of the Act and subpart D, in certain circumstances the Secretary may determine normal value on the basis of sales to a third country.

URAA. ''URAA'' means the Uruguay Round Agreements Act.

§ 351.103 Central Records Unit.

(a) *In general*. Import Administration's Central Records Unit is located at Room B–099, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW., Washington, D.C. 20230. The office hours of the Central Records Unit are between 8:30 A.M. and 5:00 P.M. on business days. Among other things, the Central Records Unit is responsible for maintaining an official and public record for each antidumping and countervailing duty proceeding (*see* § 351.104), the Subsidies Library (*see* section 775(2) and section 777(a)(1) of the Act), and the service list for each proceeding (*see* paragraph (c) of this section).

(b) *Filing of documents with the Department*. While persons are free to provide Department officials with courtesy copies of documents, no document will be considered as having been received by the Secretary unless it is submitted to the Central Records Unit and is stamped by the Central Records Unit with the date and time of receipt.

(c) *Service list*. The Central Records Unit will maintain and make available a service list for each segment of a proceeding. Each interested party that asks to be included on the service list for a segment of a proceeding must designate a person to receive service of documents filed in that segment. The service list for an application for a scope ruling is described in § 351.225(n).

§ 351.104 Record of proceedings.

(a) *Official record*. (1) *In general*. The Secretary will maintain in the Central Records Unit an official record of each antidumping and countervailing duty proceeding. The Secretary will include in the official record all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding. The official record will include government memoranda pertaining to the proceeding, memoranda of *ex parte* meetings, determinations, notices published in the **Federal Register**, and transcripts of hearings. The official record will contain material that is public, business proprietary, privileged, and classified. For purposes of section 516A(b)(2) of the Act, the record is the official record of each segment of the proceeding.

(2) *Material returned*. (i) The Secretary, in making any determination under this part, will not use factual information, written argument, or other material that the Secretary returns to the submitter.

(ii) The official record will include a copy of a returned document, solely for purposes of establishing and documenting the basis for returning the document to the submitter, if the document was returned because:

(A) The document, although otherwise timely, contains untimely

filed new factual information (*see* § 351.301(b));

(B) The submitter made a nonconforming request for business proprietary treatment of factual information (*see* § 351.304);

(C) The Secretary denied a request for business proprietary treatment of factual information (*see* § 351.304);

(D) The submitter is unwilling to permit the disclosure of business proprietary information under APO (*see* § 351.304).

(iii) In no case will the official record include any document that the Secretary returns to the submitter as untimely filed, or any unsolicited questionnaire response unless the response is a voluntary response accepted under § 351.204(d) (*see* § 351.302(d)).

(b) *Public record.* The Secretary will maintain in the Central Records Unit a public record of each proceeding. The record will consist of all material contained in the official record (*see* paragraph (a) of this section) that the Secretary decides is public information under § 351.105(b), government memoranda or portions of memoranda that the Secretary decides may be disclosed to the general public, and public versions of all determinations, notices, and transcripts. The public record will be available to the public for inspection and copying in the Central Records Unit (*see* § 351.103). The Secretary will charge an appropriate fee for providing copies of documents.

(c) *Protection of records.* Unless ordered by the Secretary or required by law, no record or portion of a record will be removed from the Department.

§ 351.105 Public, business proprietary, privileged, and classified information.

(a) *Introduction.* There are four categories of information in an antidumping or countervailing duty proceeding: public, business proprietary, privileged, and classified. In general, public information is information that may be made available to the public, whereas business proprietary information may be disclosed (if at all) only to authorized applicants under an APO. Privileged and classified information may not be disclosed at all, even under an APO. This section describes the four categories of information.

(b) *Public information.* The Secretary normally will consider the following to be public information:

(1) Factual information of a type that has been published or otherwise made available to the public by the person submitting it;

(2) Factual information that is not designated as business proprietary by the person submitting it;

(3) Factual information that, although designated as business proprietary by the person submitting it, is in a form that cannot be associated with or otherwise used to identify activities of a particular person or that the Secretary determines is not properly designated as business proprietary;

(4) Publicly available laws, regulations, decrees, orders, and other official documents of a country, including English translations; and

(5) Written argument relating to the proceeding that is not designated as business proprietary.

(c) *Business proprietary information.* The Secretary normally will consider the following factual information to be business proprietary information, if so designated by the submitter:

(1) Business or trade secrets concerning the nature of a product or production process;

(2) Production costs (but not the identity of the production components unless a particular component is a trade secret);

(3) Distribution costs (but not channels of distribution);

(4) Terms of sale (but not terms of sale offered to the public);

(5) Prices of individual sales, likely sales, or other offers (but not components of prices, such as transportation, if based on published schedules, dates of sale, product descriptions (other than business or trade secrets described in paragraph (c)(1) of this section), or order numbers);

(6) Names of particular customers, distributors, or suppliers (but not destination of sale or designation of type of customer, distributor, or supplier, unless the destination or designation would reveal the name);

(7) In an antidumping proceeding, the exact amount of the dumping margin on individual sales;

(8) In a countervailing duty proceeding, the exact amount of the benefit applied for or received by a person from each of the programs under investigation or review (but not descriptions of the operations of the programs, or the amount if included in official public statements or documents or publications, or the *ad valorem* countervailable subsidy rate calculated for each person under a program);

(9) The names of particular persons from whom business proprietary information was obtained;

(10) The position of a domestic producer or workers regarding a petition; and

(11) Any other specific business information the release of which to the public would cause substantial harm to the competitive position of the submitter.

(d) *Privileged information.* The Secretary will consider information privileged if, based on principles of law concerning privileged information, the Secretary decides that the information should not be released to the public or to parties to the proceeding. Privileged information is exempt from disclosure to the public or to representatives of interested parties.

(e) *Classified information.* Classified information is information that is classified under Executive Order No. 12356 of April 2, 1982 (47 FR 14874 and 15557, 3 CFR 1982 Comp. p. 166) or successor executive order, if applicable. Classified information is exempt from disclosure to the public or to representatives of interested parties.

§ 351.106 De minimis net countervailable subsidies and weighted-average dumping margins disregarded.

(a) *Introduction.* Prior to the enactment of the URAA, the Department had a well-established and judicially sanctioned practice of disregarding net countervailable subsidies or weighted-average dumping margins that were *de minimis*. The URAA codified in the Act the particular *de minimis* standards to be used in antidumping and countervailing duty investigations. This section discussed the application of the *de minimis* standards in antidumping or countervailing duty proceedings.

(b) *Investigations.* (1) *In general.* In making a preliminary or final antidumping or countervailing duty determination in an investigation (*see* sections 703(b), 733(b), 705(a), and 735(a) of the Act), the Secretary will apply the *de minimis* standard set forth in section 703(b)(4) or section 733(b)(3) of the Act (whichever is applicable).

(2) *Transition rule.* (i) If:

(A) the Secretary resumes an investigation that has been suspended (*see* section 704(i)(1)(B) or section 734(i)(1)(B) of the Act); and

(B) the investigation was initiated before January 1, 1995, then

(ii) The Secretary will apply the *de minimis* standard in effect at the time that the investigation was initiated.

(c) *Reviews and other determinations.* (1) *In general.* In making any determination other than a preliminary or final antidumping or countervailing duty determination in an investigation (*see* paragraph (b) of this section), the Secretary will treat as *de minimis* any weighted-average dumping margin or countervailable subsidy rate that is less

than 0.5 percent *ad valorem*, or the equivalent specific rate.

(2) *Assessment of antidumping duties.* The Secretary will instruct the Customs Service to liquidate without regard to antidumping duties all entries of subject merchandise during the relevant period of review made by any person for which the Secretary calculates an assessment rate under § 351.212(b)(1) that is less than 0.5 percent *ad valorem*, or the equivalent specific rate.

§ 351.107 Cash deposit rates for nonproducing exporters; rates in antidumping proceedings involving a nonmarket economy country.

(a) *Introduction.* This section deals with the establishment of cash deposit rates in situations where the exporter is not the producer of subject merchandise, the selection of the appropriate cash deposit rate in situations where entry documents do not indicate the producer of subject merchandise, and the calculation of dumping margins in antidumping proceedings involving imports from a nonmarket economy country.

(b) *Cash deposit rates for nonproducing exporters.* (1) *Use of combination rates.* (i) *In general.* In the case of subject merchandise that is exported to the United States by a company that is not the producer of the merchandise, the Secretary may establish a ''combination'' cash deposit rate for each combination of the exporter and its supplying producer(s).

(ii) *Example.* A nonproducing exporter (Exporter A) exports to the United States subject merchandise produced by Producers X, Y, and Z. In such a situation, the Secretary may establish cash deposit rates for Exporter A/Producer X, Exporter A/Producer Y, and Exporter A/Producer Z.

(2) *New supplier.* In the case of subject merchandise that is exported to the United States by a company that is not the producer of the merchandise, if the Secretary has not established previously a combination cash deposit rate under paragraph (b)(1)(i) of this section for the exporter and producer in question or a noncombination rate for the exporter in question, the Secretary will apply the cash deposit rate established for the producer. If the Secretary has not previously established a cash deposit rate for the producer, the Secretary will apply the ''all-others rate'' described in section 705(c)(5) or section 735(c)(5) of the Act, as the case may be.

(c) *Producer not identified.* (1) *In general.* In situations where entry documents do not identify the producer of subject merchandise, if the Secretary has not established previously a noncombination rate for the exporter, the Secretary may instruct the Customs Service to apply as the cash deposit rate the higher of:

(i) the highest of any combination cash deposit rate established for the exporter under paragraph (b)(1)(i) of this section;

(ii) the highest cash deposit rate established for any producer other than a producer for which the Secretary established a combination rate involving the exporter in question under paragraph (b)(1)(i) of this section; or

(iii) the ''all-others rate'' described in section 705(c)(5) or section 735(c)(5) of the Act, as the case may be.

(d) *Rates in antidumping proceedings involving nonmarket economy countries.* In an antidumping proceeding involving imports from a nonmarket economy country, ''rates'' may consist of a single dumping margin applicable to all exporters and producers.

Subpart B—Antidumping and Countervailing Duty Procedures

§ 351.201 Self-initiation.

(a) *Introduction.* Antidumping and countervailing duty investigations may be initiated as the result of a petition filed by a domestic interested party or at the Secretary's own initiative. This section contains rules regarding the actions the Secretary will take when the Secretary self-initiates an investigation.

(b) *In general.* When the Secretary self-initiates an investigation under section 702(a) or section 732(a) of the Act, the Secretary will publish in the **Federal Register** notice of ''Initiation of Antidumping (Countervailing Duty) Investigation.'' In addition, the Secretary will notify the Commission at the time of initiation of the investigation, and will make available to employees of the Commission directly involved in the proceeding the information upon which the Secretary based the initiation and which the Commission may consider relevant to its injury determination.

(c) *Persistent dumping monitoring.* To the extent practicable, the Secretary will expedite any antidumping investigation initiated as the result of a monitoring program established under section 732(a)(2) of the Act.

§ 351.202 Petition requirements.

(a) *Introduction.* The Secretary normally initiates antidumping and countervailing duty investigations based on petitions filed by a domestic interested party. This section contains rules concerning the contents of a petition, filing requirements, notification of foreign governments, pre-initiation communications with the Secretary, and assistance to small businesses in preparing petitions. Petitioners are also advised to refer to the Commission's regulations concerning the contents of petitions, currently 19 CFR 207.11.

(b) *Contents of petition.* A petition requesting the imposition of antidumping or countervailing duties must contain the following, to the extent reasonably available to the petitioner:

(1) The name, address, and telephone number of the petitioner and any person the petitioner represents;

(2) The identity of the industry on behalf of which the petitioner is filing, including the names, addresses, and telephone numbers of all other known persons in the industry;

(3) Information relating to the degree of industry support for the petition, including:

(i) The total volume and value of U.S. production of the domestic like product; and

(ii) The volume and value of the domestic like product produced by the petitioner and each domestic producer identified;

(4) A statement indicating whether the petitioner has filed for relief from imports of the subject merchandise under section 337 of the Act (19 U.S.C. 1337, 1671a), sections 201 or 301 of the Trade Act of 1974 (19 U.S.C. 2251 or 2411), or section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862);

(5) A detailed description of the subject merchandise that defines the requested scope of the investigation, including the technical characteristics and uses of the merchandise and its current U.S. tariff classification number;

(6) The name of the country in which the subject merchandise is manufactured or produced and, if the merchandise is imported from a country other than the country of manufacture or production, the name of any intermediate country from which the merchandise is imported;

(7) (i) In the case of an antidumping proceeding:

(A) The names and addresses of each person the petitioner believes sells the subject merchandise at less than fair value and the proportion of total exports to the United States that each person accounted for during the most recent 12-month period (if numerous, provide information at least for persons that, based on publicly available information, individually accounted for two percent or more of the exports);

(B) All factual information (particularly documentary evidence)

relevant to the calculation of the export price and the constructed export price of the subject merchandise and the normal value of the foreign like product (if unable to furnish information on foreign sales or costs, provide information on production costs in the United States, adjusted to reflect production costs in the country of production of the subject merchandise);

(C) If the merchandise is from a country that the Secretary has found to be a nonmarket economy country, factual information relevant to the calculation of normal value, using a method described in § 351.408; or

(ii) In the case of a countervailing duty proceeding:

(A) The names and addresses of each person the petitioner believes benefits from a countervailable subsidy and exports the subject merchandise to the United States and the proportion of total exports to the United States that each person accounted for during the most recent 12-month period (if numerous, provide information at least for persons that, based on publicly available information, individually accounted for two percent or more of the exports);

(B) The alleged countervailable subsidy and factual information (particularly documentary evidence) relevant to the alleged countervailable subsidy, including any law, regulation, or decree under which it is provided, the manner in which it is paid, and the value of the subsidy to exporters or producers of the subject merchandise;

(C) If the petitioner alleges an upstream subsidy under section 771A of the Act, factual information regarding:

(1) Countervailable subsidies, other than an export subsidy, that an authority of the affected country provides to the upstream supplier;

(2) The competitive benefit the countervailable subsidies bestow on the subject merchandise; and

(3) The significant effect the countervailable subsidies have on the cost of producing the subject merchandise;

(8) The volume and value of the subject merchandise imported during the most recent two-year period and any other recent period that the petitioner believes to be more representative or, if the subject merchandise was not imported during the two-year period, information as to the likelihood of its sale for importation;

(9) The name, address, and telephone number of each person the petitioner believes imports or, if there were no importations, is likely to import the subject merchandise;

(10) Factual information regarding material injury, threat of material injury, or material retardation, and causation;

(11) If the petitioner alleges ''critical circumstances'' under section 703(e)(1) or section 733(e)(1) of the Act and § 351.206, factual information regarding:

(i) Whether imports of the subject merchandise are likely to undermine seriously the remedial effect of any order issued under section 706(a) or section 736(a) of the Act;

(ii) Massive imports of the subject merchandise in a relatively short period; and

(iii) (A) In an antidumping proceeding, either:

(*1*) A history of dumping; or

(*2*) The importer's knowledge that the exporter was selling the subject merchandise at less than its fair value, and that there would be material injury by reason of such sales; or

(B) In a countervailing duty proceeding, whether the countervailable subsidy is inconsistent with the Subsidies Agreement; and

(12) Any other factual information on which the petitioner relies.

(c) *Simultaneous filing and certification*. The petitioner must file a copy of the petition with the Commission and the Secretary on the same day and so certify in submitting the petition to the Secretary. Factual information in the petition must be certified, as provided in § 351.303(g). Other filing requirements are set forth in § 351.303.

(d) *Business proprietary status of information*. The Secretary will treat as business proprietary any factual information for which the petitioner requests business proprietary treatment and which meets the requirements of § 351.304.

(e) *Amendment of petition*. The Secretary may allow timely amendment of the petition. The petitioner must file an amendment with the Commission and the Secretary on the same day and so certify in submitting the amendment to the Secretary. If the amendment consists of new allegations, the timeliness of the new allegations will be governed by § 351.301.

(f) *Notification of representative of the exporting country*. Upon receipt of a petition, the Secretary will deliver a public version of the petition (*see* § 351.304(c)) to a representative in Washington, DC, of the government of any exporting country named in the petition.

(g) *Petition based upon derogation of an international undertaking on official export credits*. In the case of a petition described in section 702(b)(3) of the Act, the petitioner must file a copy of the petition with the Secretary of the Treasury, as well as with the Secretary and the Commission, and must so certify in submitting the petition to the Secretary.

(h) *Assistance to small businesses; additional information*. (1) The Secretary will provide technical assistance to eligible small businesses, as defined in section 339 of the Act, to enable them to prepare and file petitions. The Secretary may deny assistance if the Secretary concludes that the petition, if filed, could not satisfy the requirements of section 702(c)(1)(A) or section 732(c)(1)(A) of the Act (whichever is applicable) (*see* § 351.203).

(2) For additional information concerning petitions, contact the Director for Policy and Analysis, Import Administration, International Trade Administration, Room 3093, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW, Washington, DC 20230; (202) 482–1768.

(i) *Pre-initiation communications*. (1) *In general*. During the period before the Secretary's decision whether to initiate an investigation, the Secretary will not consider the filing of a notice of appearance to constitute a communication for purposes of section 702(b)(4)(B) or section 732(b)(3)(B) of the Act.

(2) *Consultations with foreign governments in countervailing duty proceedings*. In a countervailing duty proceeding, the Secretary will invite the government of any exporting country named in the petition for consultations with respect to the petition. (The information collection requirements in paragraph (a) of this section have been approved by the Office of Management and Budget under control number 0625–0105.)

§ 351.203 Determination of sufficiency of petition.

(a) *Introduction*. When a petition is filed under § 351.202, the Secretary must determine that the petition satisfies the relevant statutory requirements before initiating an antidumping or countervailing duty investigation. This section sets forth rules regarding a determination as to the sufficiency of a petition (including the determination that a petition is supported by the domestic industry), the deadline for making the determination, and the actions to be taken once the Secretary has made the determination.

(b) *Determination of sufficiency*. (1) *In general*. Normally, not later than 20 days after a petition is filed, the Secretary, on the basis of sources readily

available to the Secretary, will examine the accuracy and adequacy of the evidence provided in the petition and determine whether to initiate an investigation under section 702(c)(1)(A) or section 732(c)(1)(A) of the Act (whichever is applicable).

(2) *Extension where polling required.* If the Secretary is required to poll or otherwise determine support for the petition under section 702(c)(4)(D) or section 732(c)(4)(D) of the Act, the Secretary may, in exceptional circumstances, extend the 20-day period by the amount of time necessary to collect and analyze the required information. In no case will the period between the filing of a petition and the determination whether to initiate an investigation exceed 40 days.

(c) *Notice of initiation and distribution of petition.* (1) *Notice of initiation.* If the initiation determination of the Secretary under section 702(c)(1)(A) or section 732(c)(1)(A) of the Act is affirmative, the Secretary will initiate an investigation and publish in the **Federal Register** notice of ''Initiation of Antidumping (Countervailing Duty) Investigation.'' The Secretary will notify the Commission at the time of initiation of the investigation and will make available to employees of the Commission directly involved in the proceeding the information upon which the Secretary based the initiation and which the Commission may consider relevant to its injury determinations.

(2) *Distribution of petition.* As soon as practicable after initiation of an investigation, the Secretary will provide a public version of the petition to all known exporters (including producers who sell for export to the United States) of the subject merchandise. If the Secretary determines that there is a particularly large number of exporters involved, instead of providing the public version to all known exporters, the Secretary may provide the public version to a trade association of the exporters or, alternatively, may consider the requirement of the preceding sentence to have been satisfied by the delivery of a public version of the petition to the government of the exporting country under § 351.202(f).

(d) *Insufficiency of petition.* If an initiation determination of the Secretary under section 702(c)(1)(A) or section 732(c)(1)(A) of the Act is negative, the Secretary will dismiss the petition, terminate the proceeding, notify the petitioner in writing of the reasons for the determination, and publish in the **Federal Register** notice of ''Dismissal of Antidumping (Countervailing Duty) Petition.''

(e) *Determination of industry support.* In determining industry support for a petition under section 702(c)(4) or section 732(c)(4) of the Act, the following rules will apply:

(1) *Measuring production.* The Secretary normally will measure production over a twelve-month period specified by the Secretary, and may measure production based on either value or volume. Where a party to the proceeding establishes that production data for the relevant period, as specified by the Secretary, is unavailable, production levels may be established by reference to alternative data that the Secretary determines to be indicative of production levels.

(2) *Positions treated as business proprietary information.* Upon request, the Secretary may treat the position of a domestic producer or workers regarding the petition and any production information supplied by the producer or workers as business proprietary information under § 351.105(c)(10).

(3) *Positions expressed by workers.* The Secretary will consider the positions of workers and management regarding the petition to be of equal weight. The Secretary will assign a single weight to the positions of both workers and management according to the production of the domestic like product of the firm in which the workers and management are employed. If the management of a firm expresses a position in direct opposition to the position of the workers in that firm, the Secretary will treat the production of that firm as representing neither support for, nor opposition to, the petition.

(4) *Certain positions disregarded.* (i) The Secretary will disregard the position of a domestic producer that opposes the petition if such producer is related to a foreign producer or to a foreign exporter under section 771(4)(B)(ii) of the Act, unless such domestic producer demonstrates to the Secretary's satisfaction that its interests as a domestic producer would be adversely affected by the imposition of an antidumping order or a countervailing duty order, as the case may be; and

(ii) The Secretary may disregard the position of a domestic producer that is an importer of the subject merchandise, or that is related to such an importer, under section 771(4)(B)(ii) of the Act.

(5) *Polling the industry.* In conducting a poll of the industry under section 702(c)(4)(D)(i) or section 732(c)(4)(D)(i) of the Act, the Secretary will include unions, groups of workers, and trade or business associations described in paragraphs (9)(D) and (9)(E) of section 771 of the Act.

(f) *Time limits where petition involves same merchandise as that covered by an order that has been revoked.* Under section 702(c)(1)(C) or section 732(c)(1)(C) of the Act, and in expediting an investigation involving subject merchandise for which a prior order was revoked or a suspended investigation was terminated, the Secretary will consider ''section 751(d)'' as including a predecessor provision.

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

(a) *Introduction.* Because the Act does not specify the precise period of time that the Secretary should examine in an antidumping or countervailing duty investigation, this section sets forth rules regarding the period of investigation (''POI''). In addition, this section includes rules regarding the selection of persons to be examined, the treatment of voluntary respondents that are not selected for individual examination, and the exclusion of persons that the Secretary ultimately finds are not dumping or are not receiving countervailable subsidies.

(b) *Period of investigation.* (1) *Antidumping investigation.* In an antidumping investigation, the Secretary normally will examine merchandise sold during the four most recently completed fiscal quarters (or, in an investigation involving merchandise imported from a nonmarket economy country, the two most recently completed fiscal quarters) as of the month preceding the month in which the petition was filed or in which the Secretary self-initiated an investigation. However, the Secretary may examine merchandise sold during any additional or alternate period that the Secretary concludes is appropriate.

(2) *Countervailing duty investigation.* In a countervailing duty investigation, the Secretary normally will rely on information pertaining to the most recently completed fiscal year for the government and exporters or producers in question. If the exporters or producers have different fiscal years, the Secretary normally will rely on information pertaining to the most recently completed calendar year. If the investigation is conducted on an aggregate basis under section 777A(e)(2)(B) of the Act, the Secretary normally will rely on information pertaining to the most recently completed fiscal year for the government in question. However, the Secretary may rely on information for

any additional or alternate period that the Secretary concludes is appropriate.

(c) *Exporters and producers examined.* (1) *In general.* In an investigation, the Secretary will attempt to determine an individual weighted-average dumping margin or individual countervailable subsidy rate for each known exporter or producer of the subject merchandise. However, the Secretary may decline to examine a particular exporter or producer if that exporter or producer and the petitioner agree.

(2) *Limited investigation.* Notwithstanding paragraph (c)(1) of this section, the Secretary may limit the investigation by using a method described in subsection (a), (c), or (e) of section 777A of the Act.

(d) *Voluntary respondents.* (1) *In general.* If the Secretary limits the number of exporters or producers to be individually examined under section 777A(c)(2) or section 777A(e)(2)(A) of the Act, the Secretary will examine voluntary respondents (exporters or producers, other than those initially selected for individual examination) in accordance with section 782(a) of the Act.

(2) *Acceptance of voluntary respondents.* The Secretary will determine, as soon as practicable, whether to examine a voluntary respondent individually. A voluntary respondent accepted for individual examination under subparagraph (d)(1) of this section will be subject to the same requirements as an exporter or producer initially selected by the Secretary for individual examination under section 777A(c)(2) or section 777A(e)(2)(A) of the Act, including the requirements of section 782(a) of the Act and, where applicable, the use of the facts available under section 776 of the Act and § 351.308.

(3) *Exclusion of voluntary respondents' rates from all-others rate.* In calculating an all-others rate under section 705(c)(5) or section 735(c)(5) of the Act, the Secretary will exclude weighted-average dumping margins or countervailable subsidy rates calculated for voluntary respondents.

(e) *Exclusions.* (1) *In general.* The Secretary will exclude from an affirmative final determination under section 705(a) or section 735(a) of the Act or an order under section 706(a) or section 736(a) of the Act, any exporter or producer for which the Secretary determines an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or *de minimis.*

(2) *Preliminary determinations.* In an affirmative preliminary determination under section 703(b) or section 733(b) of the Act, an exporter or producer for which the Secretary preliminarily determines an individual weighted-average dumping margin or individual net countervailable subsidy of zero or *de minimis* will not be excluded from the preliminary determination or the investigation. However, the exporter or producer will not be subject to provisional measures under section 703(d) or section 733(d) of the Act.

(3) *Exclusion of nonproducing exporter.* (i) *In general.* In the case of an exporter that is not the producer of subject merchandise, the Secretary normally will limit an exclusion of the exporter to subject merchandise of those producers that supplied the exporter during the period of investigation.

(ii) *Example.* During the period of investigation, Exporter A exports to the United States subject merchandise produced by Producer X. Based on an examination of Exporter A, the Secretary determines that the dumping margins with respect to these exports are *de minimis,* and the Secretary excludes Exporter A. Normally, the exclusion of Exporter A would be limited to subject merchandise produced by Producer X. If Exporter A began to export subject merchandise produced by Producer Y, this merchandise would be subject to the antidumping duty order, if any.

(4) *Countervailing duty investigations conducted on an aggregate basis and requests for exclusion from countervailing duty order.* Where the Secretary conducts a countervailing duty investigation on an aggregate basis under section 777A(e)(2)(B) of the Act, the Secretary will consider and investigate requests for exclusion to the extent practicable. An exporter or producer that desires exclusion from an order must submit:

(i) A certification by the exporter or producer that it received zero or *de minimis* net countervailable subsidies during the period of investigation;

(ii) If the exporter or producer received a countervailable subsidy, calculations demonstrating that the amount of net countervailable subsidies received was *de minimis* during the period of investigation;

(iii) If the exporter is not the producer of the subject merchandise, certifications from the suppliers and producers of the subject merchandise that those persons received zero or *de minimis* net countervailable subsidies during the period of the investigation; and

(iv) A certification from the government of the affected country that the government did not provide the exporter (or the exporter's supplier) or producer with more than *de minimis* net countervailable subsidies during the period of investigation.

§ 351.205 Preliminary determination.

(a) *Introduction.* A preliminary determination in an antidumping or countervailing duty investigation constitutes the first point at which the Secretary may provide a remedy if the Secretary preliminarily finds that dumping or countervailable subsidization has occurred. The remedy (sometimes referred to as ''provisional measures'') usually takes the form of a bonding requirement to ensure payment if antidumping or countervailing duties ultimately are imposed. Whether the Secretary's preliminary determination is affirmative or negative, the investigation continues. This section contains rules regarding deadlines for preliminary determinations, postponement of preliminary determinations, notices of preliminary determinations, and the effects of affirmative preliminary determinations.

(b) *Deadline for preliminary determination.* The deadline for a preliminary determination under section 703(b) or section 733(b) of the Act will be:

(1) Normally not later than 140 days in an antidumping investigation (65 days in a countervailing duty investigation) after the date on which the Secretary initiated the investigation (*see* section 703(b)(1) or section 733(b)(1)(A) of the Act);

(2) Not later than 190 days in an antidumping investigation (130 days in a countervailing duty investigation) after the date on which the Secretary initiated the investigation if the Secretary postpones the preliminary determination at petitioner's request or because the Secretary determines that the investigation is extraordinarily complicated (*see* section 703(c)(1) or section 733(c)(1) of the Act);

(3) In a countervailing duty investigation, not later than 250 days after the date on which the proceeding began if the Secretary postpones the preliminary determination due to an upstream subsidy allegation (up to 310 days if the Secretary also postponed the preliminary determination at the request of the petitioner or because the Secretary determined that the investigation is extraordinarily complicated) (*see* section 703(c)(1) and section 703(g)(1) of the Act);

(4) Within 90 days after initiation in an antidumping investigation, and on an expedited basis in a countervailing duty investigation, where verification has

been waived (*see* section 703(b)(3) or section 733(b)(2) of the Act);

(5) In a countervailing duty investigation, on an expedited basis and within 65 days after the date on which the Secretary initiated the investigation if the sole subsidy alleged in the petition was the derogation of an international undertaking on official export credits (*see* section 702(b)(3) and section 703(b)(2) of the Act);

(6) In a countervailing duty investigation, not later than 60 days after the date on which the Secretary initiated the investigation if the only subsidy under investigation is a subsidy with respect to which the Secretary received notice from the United States Trade Representative of a violation of Article 8 of the Subsidies Agreement (*see* section 703(b)(5) of the Act); and

(7) In an antidumping investigation, within the deadlines set forth in section 733(b)(1)(B) of the Act if the investigation involves short life cycle merchandise (*see* section 733(b)(1)(B) and section 739 of the Act).

(c) *Contents of preliminary determination and publication of notice.* A preliminary determination will include a preliminary finding on critical circumstances, if appropriate, under section 703(e)(1) or section 733(e)(1) of the Act (whichever is applicable). The Secretary will publish in the **Federal Register** notice of ''Affirmative (Negative) Preliminary Antidumping (Countervailing Duty) Determination,'' including the rates, if any, and an invitation for argument consistent with § 351.309.

(d) *Effect of affirmative preliminary determination.* If the preliminary determination is affirmative, the Secretary will take the actions described in section 703(d) or section 733(d) of the Act (whichever is applicable). In making information available to the Commission under section 703(d)(3) or section 733(d)(3) of the Act, the Secretary will make available to the Commission and to employees of the Commission directly involved in the proceeding the information upon which the Secretary based the preliminary determination and which the Commission may consider relevant to its injury determination.

(e) *Postponement at the request of the petitioner.* A petitioner must submit a request for postponement of the preliminary determination (*see* section 703(c)(1)(A) or section 733(c)(1)(A) of the Act) 25 days or more before the scheduled date of the preliminary determination, and must state the reasons for the request. The Secretary will grant the request, unless the Secretary finds compelling reasons to deny the request.

(f) *Notice of postponement.* (1) If the Secretary decides to postpone the preliminary determination at the request of the petitioner or because the investigation is extraordinarily complicated, the Secretary will notify all parties to the proceeding not later than 20 days before the scheduled date of the preliminary determination, and will publish in the **Federal Register** notice of ''Postponement of Preliminary Antidumping (Countervailing Duty) Determination,'' stating the reasons for the postponement (*see* section 703(c)(2) or section 733(c)(2) of the Act).

(2) If the Secretary decides to postpone the preliminary determination due to an allegation of upstream subsidies, the Secretary will notify all parties to the proceeding not later than the scheduled date of the preliminary determination and will publish in the **Federal Register** notice of ''Postponement of Preliminary Countervailing Duty Determination,'' stating the reasons for the postponement.

§ 351.206 Critical circumstances.

(a) *Introduction.* Generally, antidumping or countervailing duties are imposed on entries of merchandise made on or after the date on which the Secretary first imposes provisional measures (most often the date on which notice of an affirmative preliminary determination is published in the **Federal Register**). However, if the Secretary finds that ''critical circumstances'' exist, duties may be imposed retroactively on merchandise entered up to 90 days before the imposition of provisional measures. This section contains procedural and substantive rules regarding allegations and findings of critical circumstances.

(b) *In general.* If a petitioner submits to the Secretary a written allegation of critical circumstances, with reasonably available factual information supporting the allegation, 21 days or more before the scheduled date of the Secretary's final determination, or on the Secretary's own initiative in a self-initiated investigation, the Secretary will make a finding whether critical circumstances exist, as defined in section 705(a)(2) or section 735(a)(3) of the Act (whichever is applicable).

(c) *Preliminary finding.* (1) If the petitioner submits an allegation of critical circumstances 30 days or more before the scheduled date of the Secretary's final determination, the Secretary, based on the available information, will make a preliminary finding whether there is a reasonable basis to believe or suspect that critical circumstances exist, as defined in section 703(e)(1) or section 733(e)(1) of the Act (whichever is applicable).

(2) The Secretary will issue the preliminary finding:

(i) Not later than the preliminary determination, if the allegation is submitted 20 days or more before the scheduled date of the preliminary determination; or

(ii) Within 30 days after the petitioner submits the allegation, if the allegation is submitted later than 20 days before the scheduled date of the preliminary determination. The Secretary will notify the Commission and publish in the **Federal Register** notice of the preliminary finding.

(d) *Suspension of liquidation.* If the Secretary makes an affirmative preliminary finding of critical circumstances, the provisions of section 703(e)(2) or section 733(e)(2) of the Act (whichever is applicable) regarding the retroactive suspension of liquidation will apply.

(e) *Final finding.* For any allegation of critical circumstances submitted 21 days or more before the scheduled date of the Secretary's final determination, the Secretary will make a final finding on critical circumstances, and will take appropriate action under section 705(c)(4) or section 735(c)(4) of the Act (whichever is applicable).

(f) *Findings in self-initiated investigations.* In a self-initiated investigation, the Secretary will make preliminary and final findings on critical circumstances without regard to the time limits in paragraphs (c) and (e) of this section.

(g) *Information regarding critical circumstances.* The Secretary may request the Commissioner of Customs to compile information on an expedited basis regarding entries of the subject merchandise if, at any time after the initiation of an investigation, the Secretary makes the findings described in section 702(e) or section 732(e) of the Act (whichever is applicable) regarding the possible existence of critical circumstances.

(h) *Massive imports.* (1) In determining whether imports of the subject merchandise have been massive under section 705(a)(2)(B) or section 735(a)(3)(B) of the Act, the Secretary normally will examine:

(i) The volume and value of the imports;

(ii) Seasonal trends; and

(iii) The share of domestic consumption accounted for by the imports.

(2) In general, unless the imports during the ''relatively short period'' (*see*

paragraph (i) of this section) have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports massive.

(i) *Relatively short period.* Under section 705(a)(2)(B) or section 735(a)(3)(B) of the Act, the Secretary normally will consider a ''relatively short period'' as the period beginning on the date the proceeding begins and ending at least three months later. However, if the Secretary finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, then the Secretary may consider a period of not less than three months from that earlier time.

§ 351.207 Termination of investigation.

(a) *Introduction.* ''Termination'' is a term of art that refers to the end of an antidumping or countervailing duty proceeding in which an order has not yet been issued. The Act establishes a variety of mechanisms by which an investigation may be terminated, most of which are dealt with in this section. For rules regarding the termination of a suspended investigation following a review under section 751 of the Act, *see* § 351.222.

(b) *Withdrawal of petition; self-initiated investigations.* (1) *In general.* The Secretary may terminate an investigation under section 704(a)(1)(A) or section 734(a)(1)(A) (withdrawal of petition) or under section 704(k) or section 734(k) (self-initiated investigation) of the Act, provided that the Secretary concludes that termination is in the public interest. If the Secretary terminates an investigation, the Secretary will publish in the **Federal Register** notice of ''Termination of Antidumping (Countervailing Duty) Investigation,'' together with, when appropriate, a copy of any correspondence with the petitioner forming the basis of the withdrawal and the termination. (For the treatment in a subsequent investigation of records compiled in an investigation in which the petition was withdrawn, *see* section 704(a)(1)(B) or section 734(a)(1)(B) of the Act.)

(2) *Withdrawal of petition based on acceptance of quantitative restriction agreements.* In addition to the requirements of paragraph (b)(1) of this section, if a termination is based on the acceptance of an understanding or other kind of agreement to limit the volume of imports into the United States of the subject merchandise, the Secretary will apply the provisions of section 704(a)(2) or section 734(a)(2) of the Act (whichever is applicable) regarding public interest and consultations with consuming industries and producers and workers.

(c) *Lack of interest.* The Secretary may terminate an investigation based upon lack of interest (*see* section 782(h)(1) of the Act). Where the Secretary terminates an investigation under this paragraph, the Secretary will publish the notice described in paragraph (b)(1) of this section.

(d) *Negative determination.* An investigation terminates automatically upon publication in the **Federal Register** of the Secretary's negative final determination or the Commission's negative preliminary or final determination.

(e) *End of suspension of liquidation.* When an investigation terminates, if the Secretary previously ordered suspension of liquidation, the Secretary will order the suspension ended on the date of publication of the notice of termination referred to in paragraph (b) of this section or on the date of publication of a negative determination referred to in paragraph (d) of this section, and will instruct the Customs Service to release any cash deposit or bond.

§ 351.208 Suspension of investigation.

(a) *Introduction.* In addition to the imposition of duties, the Act also permits the Secretary to suspend an antidumping or countervailing duty investigation by accepting a suspension agreement (referred to in the WTO Agreements as an ''undertaking''). Briefly, in a suspension agreement, the exporters and producers or the foreign government agree to modify their behavior so as to eliminate dumping or subsidization or the injury caused thereby. If the Secretary accepts a suspension agreement, the Secretary will ''suspend'' the investigation and thereafter will monitor compliance with the agreement. This section contains rules for entering into suspension agreements and procedures for suspending an investigation.

(b) *In general.* The Secretary may suspend an investigation under section 704 or section 734 of the Act and this section.

(c) *Definition of ''substantially all.''* Under section 704 and section 734 of the Act, exporters that account for ''substantially all'' of the merchandise means exporters and producers that have accounted for not less than 85 percent by value or volume of the subject merchandise during the period for which the Secretary is measuring dumping or countervailable subsidization in the investigation or such other period that the Secretary considers representative.

(d) *Monitoring.* In monitoring a suspension agreement under section 704(c), section 734(c), or section 734(l) of the Act (agreements to eliminate injurious effects or to restrict the volume of imports), the Secretary will not be obliged to ascertain on a continuing basis the prices in the United States of the subject merchandise or of domestic like products.

(e) *Exports not to increase during interim period.* The Secretary will not accept a suspension agreement under section 704(b)(2) or section 734(b)(1) of the Act (the cessation of exports) unless the agreement ensures that the quantity of the subject merchandise exported during the interim period set forth in the agreement does not exceed the quantity of the merchandise exported during a period of comparable duration that the Secretary considers representative.

(f) *Procedure for suspension of investigation.* (1) *Submission of proposed suspension agreement.* (i) *In general.* As appropriate, the exporters and producers or, in an antidumping investigation involving a nonmarket economy country or a countervailing duty investigation, the government, must submit to the Secretary a proposed suspension agreement within:

(A) In an antidumping investigation, 15 days after the date of issuance of the preliminary determination, or

(B) In a countervailing duty investigation, 7 days after the date of issuance of the preliminary determination.

(ii) *Postponement of final determination.* Where a proposed suspension agreement is submitted in an antidumping investigation, an exporter or producer or, in an investigation involving a nonmarket economy country, the government, may request postponement of the final determination under section 735(a)(2) of the Act (*see* § 351.210(e)). Where the final determination in a countervailing duty investigation is postponed under section 703(g)(2) or section 705(a)(1) of the Act (*see* § 351.210(b)(3) and § 351.210(i)), the time limits in paragraphs (f)(1)(i), (f)(2)(i), (f)(3), and (g)(1) of this section applicable to countervailing duty investigations will be extended to coincide with the time limits in such paragraphs applicable to antidumping investigations.

(iii) *Special rule for regional industry determination.* If the Commission makes a regional industry determination in its final affirmative determination under

section 705(b) or section 735(b) of the Act but not in its preliminary affirmative determination under section 703(a) or section 733(a) of the Act, the exporters and producers or, in an antidumping investigation involving a nonmarket economy country or a countervailing duty investigation, the government, must submit to the Secretary any proposed suspension agreement within 15 days of the publication in the **Federal Register** of the antidumping or countervailing duty order.

(2) *Notification and consultation.* In fulfilling the requirements of section 704 or section 734 of the Act (whichever is applicable), the Secretary will take the following actions:

(i) *In general.* The Secretary will notify all parties to the proceeding of the proposed suspension of an investigation and provide to the petitioner a copy of the suspension agreement preliminarily accepted by the Secretary (the agreement must contain the procedures for monitoring compliance and a statement of the compatibility of the agreement with the requirements of section 704 or section 734 of the Act) within:

(A) In an antidumping investigation, 30 days after the date of issuance of the preliminary determination, or

(B) In a countervailing duty investigation, 15 days after the date of issuance of the preliminary determination; or

(ii) *Special rule for regional industry determination.* If the Commission makes a regional industry determination in its final affirmative determination under section 705(b) or section 735(b) of the Act but not in its preliminary affirmative determination under section 703(a) or section 733(a) of the Act, the Secretary, within 15 days of the submission of a proposed suspension agreement under paragraph (f)(1)(iii) of this section, will notify all parties to the proceeding of the proposed suspension agreement and provide to the petitioner a copy of the agreement preliminarily accepted by the Secretary (such agreement must contain the procedures for monitoring compliance and a statement of the compatibility of the agreement with the requirements of section 704 or section 734 of the Act); and

(iii) *Consultation.* The Secretary will consult with the petitioner concerning the proposed suspension of the investigation.

(3) *Opportunity for comment.* The Secretary will provide all interested parties, an industrial user of the subject merchandise or a representative consumer organization, as described in section 777(h) of the Act, and United States government agencies an opportunity to submit written argument and factual information concerning the proposed suspension of the investigation within:

(i) In an antidumping investigation, 50 days after the date of issuance of the preliminary determination,

(ii) In a countervailing duty investigation, 35 days after the date of issuance of the preliminary determination, or

(iii) In a regional industry case described in paragraph (f)(1)(iii) of this section, 35 days after the date of issuance of an order.

(g) *Acceptance of suspension agreement.* (1) The Secretary may accept an agreement to suspend an investigation within:

(i) In an antidumping investigation, 60 days after the date of issuance of the preliminary determination,

(ii) In a countervailing duty investigation, 45 days after the date of issuance of the preliminary determination, or

(iii) In a regional industry case described in paragraph (f)(1)(iii) of this section, 45 days after the date of issuance of an order.

(2) If the Secretary accepts an agreement to suspend an investigation, the Secretary will take the actions described in section 704(f), section 704(m)(3), section 734(f), or section 734(l)(3) of the Act (whichever is applicable), and will publish in the **Federal Register** notice of ''Suspension of Antidumping (Countervailing Duty) Investigation,'' including the text of the agreement. If the Secretary has not already published notice of an affirmative preliminary determination, the Secretary will include that notice. In accepting an agreement, the Secretary may rely on factual or legal conclusions the Secretary reached in or after the affirmative preliminary determination.

(h) *Continuation of investigation.* (1) A request to the Secretary under section 704(g) or section 734(g) of the Act for the continuation of the investigation must be made in writing. In addition, the request must be simultaneously filed with the Commission, and the requester must so certify in submitting the request to the Secretary.

(2) If the Secretary and the Commission make affirmative final determinations in an investigation that has been continued, the suspension agreement will remain in effect in accordance with the factual and legal conclusions in the Secretary's final determination. If either the Secretary or the Commission makes a negative final determination, the agreement will have no force or effect.

(i) *Merchandise imported in excess of allowed quantity.* (1) The Secretary may instruct the Customs Service not to accept entries, or withdrawals from warehouse, for consumption of subject merchandise in excess of any quantity allowed by a suspension agreement under section 704 or section 734 of the Act, including any quantity allowed during the interim period (*see* paragraph (e) of this section).

(2) Imports in excess of the quantity allowed by a suspension agreement, including any quantity allowed during the interim period (*see* paragraph (e) of this section), may be exported or destroyed under Customs Service supervision, except that if the agreement is under section 704(c)(3) or section 734(l) of the Act (restrictions on the volume of imports), the excess merchandise, with the approval of the Secretary, may be held for future opening under the agreement by placing it in a foreign trade zone or by entering it for warehouse.

§ 351.209 Violation of suspension agreement.

(a) *Introduction.* A suspension agreement remains in effect until the underlying investigation is terminated (*see* §§ 351.207 and 351.222). However, if the Secretary finds that a suspension agreement has been violated or no longer meets the requirements of the Act, the Secretary may either cancel or revise the agreement. This section contains rules regarding cancellation and revision of suspension agreements.

(b) *Immediate determination.* If the Secretary determines that a signatory has violated a suspension agreement, the Secretary, without providing interested parties an opportunity to comment, will:

(1) Order the suspension of liquidation in accordance with section 704(i)(1)(A) or section 734(i)(1)(A) of the Act (whichever is applicable) of all entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the later of:

(i) 90 days before the date of publication of the notice of cancellation of the agreement; or

(ii) The date of first entry, or withdrawal from warehouse, for consumption of the merchandise the sale or export of which was in violation of the agreement;

(2) If the investigation was not completed under section 704(g) or section 734(g) of the Act, resume the investigation as if the Secretary had made an affirmative preliminary determination on the date of publication

of the notice of cancellation and impose provisional measures by instructing the Customs Service to require for each entry of the subject merchandise suspended under paragraph (b)(1) of this section a cash deposit or bond at the rates determined in the affirmative preliminary determination;

(3) If the investigation was completed under section 704(g) or section 734(g) of the Act, issue an antidumping order or countervailing duty order (whichever is applicable) and, for all entries subject to suspension of liquidation under paragraph (b)(1) of this section, instruct the Customs Service to require for each entry of the merchandise suspended under this paragraph a cash deposit at the rates determined in the affirmative final determination;

(4) Notify all persons who are or were parties to the proceeding, the Commission, and, if the Secretary determines that the violation was intentional, the Commissioner of Customs; and

(5) Publish in the **Federal Register** notice of ''Antidumping (Countervailing Duty) Order (Resumption of Antidumping (Countervailing Duty) Investigation); Cancellation of Suspension Agreement.''

(c) *Determination after notice and comment.* (1) If the Secretary has reason to believe that a signatory has violated a suspension agreement, or that an agreement no longer meets the requirements of section 704(d)(1) or section 734(d) of the Act, but the Secretary does not have sufficient information to determine that a signatory has violated the agreement (*see* paragraph (b) of this section), the Secretary will publish in the **Federal Register** notice of ''Invitation for Comment on Antidumping (Countervailing Duty) Suspension Agreement.''

(2) After publication of the notice inviting comment and after consideration of comments received the Secretary will:

(i) Determine whether any signatory has violated the suspension agreement; or

(ii) Determine whether the suspension agreement no longer meets the requirements of section 704(d)(1) or section 734(d) of the Act.

(3) If the Secretary determines that a signatory has violated the suspension agreement, the Secretary will take appropriate action as described in paragraphs (b)(1) through (b)(5) of this section.

(4) If the Secretary determines that a suspension agreement no longer meets the requirements of section 704(d)(1) or section 734(d) of the Act, the Secretary will:

(i) Take appropriate action as described in paragraphs (b)(1) through (b)(5) of this section; except that, under paragraph (b)(1)(ii) of this section, the Secretary will order the suspension of liquidation of all entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the later of:

(A) 90 days before the date of publication of the notice of suspension of liquidation; or

(B) The date of first entry, or withdrawal from warehouse, for consumption of the merchandise the sale or export of which does not meet the requirements of section 704(d)(1) of the Act;

(ii) Continue the suspension of investigation by accepting a revised suspension agreement under section 704(b) or section 734(b) of the Act (whether or not the Secretary accepted the original agreement under such section) that, at the time the Secretary accepts the revised agreement, meets the applicable requirements of section 704(d)(1) or section 734(d) of the Act, and publish in the **Federal Register** notice of ''Revision of Agreement Suspending Antidumping (Countervailing Duty) Investigation''; or

(iii) Continue the suspension of investigation by accepting a revised suspension agreement under section 704(c), section 734(c), or section 734(l) of the Act (whether or not the Secretary accepted the original agreement under such section) that, at the time the Secretary accepts the revised agreement, meets the applicable requirements of section 704(d)(1) or section 734(d) of the Act, and publish in the **Federal Register** notice of ''Revision of Agreement Suspending Antidumping (Countervailing Duty) Investigation.'' If the Secretary continues to suspend an investigation based on a revised agreement accepted under section 704(c), section 734(c), or section 734(l) of the Act, the Secretary will order suspension of liquidation to begin. The suspension will not end until the Commission completes any requested review of the revised agreement under section 704(h) or section 734(h) of the Act. If the Commission receives no request for review within 20 days after the date of publication of the notice of the revision, the Secretary will order the suspension of liquidation ended on the 21st day after the date of publication, and will instruct the Customs Service to release any cash deposit or bond. If the Commission undertakes a review under section 704(h) or section 734(h) of the Act, the provisions of sections 704(h)(2) and (3) and sections 734(h)(2) and (3) of the Act will apply.

(5) If the Secretary decides neither to consider the suspension agreement violated nor to revise the agreement, the Secretary will publish in the **Federal Register** notice of the Secretary's decision under paragraph (c)(2) of this section, including a statement of the factual and legal conclusions on which the decision is based.

(d) *Additional signatories.* If the Secretary decides that a suspension agreement no longer will completely eliminate the injurious effect of exports to the United States of subject merchandise under section 704(c)(1) or section 734(c)(1) of the Act, or that the signatory exporters no longer account for substantially all of the subject merchandise, the Secretary may revise the agreement to include additional signatory exporters.

(e) *Definition of ''violation.''* Under this section, ''violation'' means noncompliance with the terms of a suspension agreement caused by an act or omission of a signatory, except, at the discretion of the Secretary, an act or omission which is inadvertent or inconsequential.

§ 351.210 Final determination.

(a) *Introduction.* A ''final determination'' in an antidumping or countervailing duty investigation constitutes a final decision by the Secretary as to whether dumping or countervailable subsidization is occurring. If the Secretary's final determination is affirmative, in most instances the Commission will issue a final injury determination (except in certain countervailing duty investigations). Also, if the Secretary's preliminary determination was negative but the final determination is affirmative, the Secretary will impose provisional measures. If the Secretary's final determination is negative, the proceeding, including the injury investigation conducted by the Commission, terminates. This section contains rules regarding deadlines for, and postponement of, final determinations, contents of final determinations, and the effects of final determinations.

(b) *Deadline for final determination.* The deadline for a final determination under section 705(a)(1) or section 735(a)(1) of the Act will be:

(1) Normally, not later than 75 days after the date of the Secretary's preliminary determination (*see* section 705(a)(1) or section 735(a)(1) of the Act);

(2) In an antidumping investigation, not later than 135 days after the date of publication of the preliminary

determination if the Secretary postpones the final determination at the request of:

(i) The petitioner, if the preliminary determination was negative (*see* section 735(a)(2)(B) of the Act); or

(ii) Exporters or producers who account for a significant proportion of exports of the subject merchandise, if the preliminary determination was affirmative (*see* section 735(a)(2)(A) of the Act);

(3) In a countervailing duty investigation, not later than 165 days after the preliminary determination, if, after the preliminary determination, the Secretary decides to investigate an upstream subsidy allegation and concludes that additional time is needed to investigate the allegation (*see* section 703(g)(2) of the Act); or

(4) In a countervailing duty investigation, the same date as the date of the final antidumping determination, if:

(i) In a situation where the Secretary simultaneously initiated antidumping and countervailing duty investigations on the subject merchandise (from the same or other countries), the petitioner requests that the final countervailing duty determination be postponed to the date of the final antidumping determination; and

(ii) If the final countervailing duty determination is not due on a later date because of postponement due to an allegation of upstream subsidies under section 703(g) of the Act (*see* section 705(a)(1) of the Act).

(c) *Contents of final determination and publication of notice.* The final determination will include, if appropriate, a final finding on critical circumstances under section 705(a)(2) or section 735(a)(3) of the Act (whichever is applicable). The Secretary will publish in the **Federal Register** notice of ''Affirmative (Negative) Final Antidumping (Countervailing Duty) Determination,'' including the rates, if any.

(d) *Effect of affirmative final determination.* If the final determination is affirmative, the Secretary will take the actions described in section 705(c)(1) or section 735(c)(1) of the Act (whichever is applicable). In addition, in the case of a countervailing duty investigation involving subject merchandise from a country that is not a Subsidies Agreement country, the Secretary will instruct the Customs Service to require a cash deposit, as provided in section 706(a)(3) of the Act, for each entry of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the order under section 706(a) of the Act.

(e) *Request for postponement of final antidumping determination.* (1) *In general.* A request to postpone a final antidumping determination under section 735(a)(2) of the Act (*see* paragraph (b)(2) of this section) must be submitted in writing within the scheduled date of the final determination. The Secretary may grant the request, unless the Secretary finds compelling reasons to deny the request.

(2) *Requests by exporters.* In the case of a request submitted under paragraph (e)(1) of this section by exporters who account for a significant proportion of exports of subject merchandise (*see* section 735(a)(2)(A) of the Act), the Secretary will not grant the request unless those exporters also submit a request described in the last sentence of section 733(d) of the Act (extension of provisional measures from a 4-month period to not more than 6 months).

(f) *Deferral of decision concerning upstream subsidization to review.* Notwithstanding paragraph (b)(3) of this section, if the petitioner so requests in writing and the preliminary countervailing duty determination was affirmative, the Secretary, instead of postponing the final determination, may defer a decision concerning upstream subsidization until the conclusion of the first administrative review of a countervailing duty order, if any (*see* section 703(g)(2)(B)(i) of the Act).

(g) *Notification of postponement.* If the Secretary postpones a final determination under paragraph (b)(2), (b)(3), or (b)(4) of this section, the Secretary will notify promptly all parties to the proceeding of the postponement, and will publish in the **Federal Register** notice of ''Postponement of Final Antidumping (Countervailing Duty) Determination,'' stating the reasons for the postponement.

(h) *Termination of suspension of liquidation in a countervailing duty investigation.* If the Secretary postpones a final countervailing duty determination, the Secretary will end any suspension of liquidation ordered in the preliminary determination not later than 120 days after the date of publication of the preliminary determination, and will not resume it unless and until the Secretary publishes a countervailing duty order.

(i) *Postponement of final countervailing duty determination for simultaneous investigations.* A request by the petitioner to postpone a final countervailing duty determination to the date of the final antidumping determination must be submitted in writing within five days of the date of publication of the preliminary countervailing duty determination (*see* section 705(a)(1) and paragraph (b)(4) of this section).

(j) *Commission access to information.* If the final determination is affirmative, the Secretary will make available to the Commission and to employees of the Commission directly involved in the proceeding the information upon which the Secretary based the final determination and that the Commission may consider relevant to its injury determination (*see* section 705(c)(1)(A) or section 735(c)(1)(A) of the Act).

(k) *Effect of negative final determination.* An investigation terminates upon publication in the **Federal Register** of the Secretary's or the Commission's negative final determination, and the Secretary will take the relevant actions described in section 705(c)(2) or section 735(c)(2) of the Act (whichever is applicable).

§ 351.211 Antidumping order and countervailing duty order.

(a) *Introduction.* The Secretary issues an order when both the Secretary and the Commission (except in certain countervailing duty investigations) have made final affirmative determinations. The issuance of an order ends the investigative phase of a proceeding. Generally, upon the issuance of an order, importers no longer may post bonds as security for antidumping or countervailing duties, but instead must make a cash deposit of estimated duties. An order remains in effect until it is revoked. This section contains rules regarding the issuance of orders in general, as well as special rules for orders where the Commission has found a regional industry to exist.

(b) *In general.* Not later than seven days after receipt of notice of an affirmative final injury determination by the Commission under section 705(b) or section 735(b) of the Act, or, in a countervailing duty proceeding involving subject merchandise from a country not entitled to an injury test (*see* § 351.101(b)), simultaneously with publication of an affirmative final countervailing duty determination by the Secretary, the Secretary will publish in the **Federal Register** an ''Antidumping Order'' or ''Countervailing Duty Order'' that:

(1) Instructs the Customs Service to assess antidumping duties or countervailing duties (whichever is applicable) on the subject merchandise, in accordance with the Secretary's instructions at the completion of each review requested under § 351.213(b) (administrative review), § 351.214(b) (new shipper review), or § 351.215(b) (expedited antidumping review), or if a

review is not requested, in accordance with the Secretary's assessment instructions under § 351.212(c);

(2) Instructs the Customs Service to require a cash deposit of estimated antidumping or countervailing duties at the rates included in the Secretary's final determination; and

(3) Orders the suspension of liquidation ended for all entries of the subject merchandise entered, or withdrawn from warehouse, for consumption before the date of publication of the Commission's final determination, and instructs the Customs Service to release the cash deposit or bond on those entries, if in its final determination, the Commission found a threat of material injury or material retardation of the establishment of an industry, unless the Commission in its final determination also found that, absent the suspension of liquidation ordered under section 703(d)(2) or section 733(d)(2) of the Act, it would have found material injury (*see* section 706(b) or section 736(b) of the Act).

§ 351.212 Assessment of antidumping and countervailing duties; provisional measures deposit cap; interest on certain overpayments and underpayments.

(a) *Introduction.* Unlike the systems of some other countries, the United States uses a ''retrospective'' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported. Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time. If a review is not requested, duties are assessed at the rate established in the completed review covering the most recent prior period or, if no review has been completed, the cash deposit rate applicable at the time merchandise was entered. This section contains rules regarding the assessment of duties, the provisional measures deposit cap, and interest on over- or undercollections of estimated duties.

(b) *Assessment of antidumping and countervailing duties as the result of a review.* (1) *Antidumping duties.* If the Secretary has conducted a review of an antidumping order under § 351.213 (administrative review), § 351.214 (new shipper review), or § 351.215 (expedited antidumping review), the Secretary normally will calculate an assessment rate for each importer of subject merchandise covered by the review. The Secretary normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes. The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.

(2) *Countervailing duties.* If the Secretary has conducted a review of a countervailing duty order under § 351.213 (administrative review) or § 351.214 (new shipper review), the Secretary normally will instruct the Customs Service to assess countervailing duties by applying the rates included in the final results of the review to the entered value of the merchandise.

(c) *Automatic assessment of antidumping and countervailing duties if no review is requested.* (1) If the Secretary does not receive a timely request for an administrative review of an order (*see* paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary, without additional notice, will instruct the Customs Service to:

(i) Assess antidumping duties or countervailing duties, as the case may be, on the subject merchandise described in § 351.213(e) at rates equal to the cash deposit of, or bond for, estimated antidumping duties or countervailing duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption; and

(ii) To continue to collect the cash deposits previously ordered.

(2) If the Secretary receives a timely request for an administrative review of an order (*see* paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary will instruct the Customs Service to assess antidumping duties or countervailing duties, and to continue to collect cash deposits, on the merchandise not covered by the request in accordance with paragraph (c)(1) of this section.

(3) The automatic assessment provisions of paragraphs (c)(1) and (c)(2) of this section will not apply to subject merchandise that is the subject of a new shipper review (*see* § 351.214) or an expedited antidumping review (*see* § 351.215).

(d) *Provisional measures deposit cap.* This paragraph applies to subject merchandise entered, or withdrawn from warehouse, for consumption before the date of publication of the Commission's notice of an affirmative final injury determination or, in a countervailing duty proceeding that involves merchandise from a country that is not entitled to an injury test, the date of the Secretary's notice of an affirmative final countervailing duty determination. If the amount of duties that would be assessed by applying the rates included in the Secretary's affirmative preliminary or affirmative final antidumping or countervailing duty determination (''provisional duties'') is different from the amount of duties that would be assessed by applying the assessment rate under paragraphs (b)(1) and (b)(2) of this section (''final duties''), the Secretary will instruct the Customs Service to disregard the difference to the extent that the provisional duties are less than the final duties, and to assess antidumping or countervailing duties at the assessment rate if the provisional duties exceed the final duties.

(e) *Interest on certain overpayments and underpayments.* Under section 778 of the Act, the Secretary will instruct the Customs Service to calculate interest for each entry on or after the publication of the order from the date that a cash deposit is required to be deposited for the entry through the date of liquidation of the entry.

(f) *Special rule for regional industry cases.* (1) *In general.* If the Commission, in its final injury determination, found a regional industry under section 771(4)(C) of the Act, the Secretary may direct that duties not be assessed on subject merchandise of a particular exporter or producer if the Secretary determines that:

(i) The exporter or producer did not export subject merchandise for sale in the region concerned during or after the Department's period of investigation;

(ii) The exporter or producer has certified that it will not export subject merchandise for sale in the region concerned in the future so long as the antidumping or countervailing duty order is in effect; and

(iii) No subject merchandise of the exporter or producer was entered into the United States outside of the region and then sold into the region during or after the Department's period of investigation.

(2) *Procedures for obtaining an exception from the assessment of duties.* (i) *Request for exception.* An exporter or producer seeking an exception from the assessment of duties under paragraph (f)(1) of this section must request, subject to the provisions of § 351.213 or § 351.214, an administrative review or a new shipper review to determine whether subject merchandise of the exporter or producer in question should be excepted from the assessment of duties under paragraph (f)(1) of this section. The exporter or producer making the request may request that the review be limited to a determination as to whether the requirements of paragraph (f)(1) of this section are satisfied. The request for a review must be accompanied by:

(A) A certification by the exporter or producer that it did not export subject merchandise for sale in the region concerned during or after the Department's period of investigation, and that it will not do so in the future so long as the antidumping or countervailing duty order is in effect; and

(B) A certification from each of the exporter's or producer's U.S. importers of the subject merchandise that no subject merchandise of that exporter or producer was entered into the United States outside such region and then sold into the region during or after the Department's period of investigation.

(ii) *Limited review.* If the Secretary initiates an administrative review or a new shipper review based on a request for review that includes a request for an exception from the assessment of duties under paragraph (f)(2)(i) of this section, the Secretary, if requested, may limit the review to a determination as to whether an exception from the assessment of duties should be granted under paragraph (f)(1) of this section.

(3) *Exception granted.* If, in the final results of the administrative review or the new shipper review, the Secretary determines that the requirements of paragraph (f)(1) of this section are satisfied, the Secretary will instruct the Customs Service to liquidate, without regard to antidumping or countervailing duties (whichever is appropriate), entries of subject merchandise of the exporter or producer concerned.

(4) *Exception not granted.* If, in the final results of the administrative review or the new shipper review, the Secretary determines that the requirements of paragraph (f)(1) are not satisfied, the Secretary:

(i) Will issue assessment instructions to the Customs Service in accordance with paragraph (b) of this section; or

(ii) If the review was limited to a determination as to whether an exception from the assessment of duties should be granted, the Secretary will instruct the Customs Service to assess duties in accordance with paragraph (f)(1) or (f)(2) of this section, whichever is appropriate (automatic assessment if no review is requested).

§ 351.213 Administrative review of orders and suspension agreements under section 751(a)(1) of the Act.

(a) *Introduction.* As noted in § 351.212(a), the United States has a ''retrospective'' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported. Although duty liability may be determined in the context of other types of reviews, the most frequently used procedure for determining final duty liability is the administrative review procedure under section 751(a)(1) of the Act. This section contains rules regarding requests for administrative reviews and the conduct of such reviews.

(b) *Request for administrative review.* (1) Each year during the anniversary month of the publication of an antidumping or countervailing duty order, a domestic interested party or an interested party described in section 771(9)(B) of the Act (foreign government) may request in writing that the Secretary conduct an administrative review under section 751(a)(1) of the Act of specified individual exporters or producers covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis), if the requesting person states why the person desires the Secretary to review those particular exporters or producers.

(2) During the same month, an exporter or producer covered by an order (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis) may request in writing that the Secretary conduct an administrative review of only that person.

(3) During the same month, an importer of the merchandise may request in writing that the Secretary conduct an administrative review of only an exporter or producer (except for a countervailing duty order in which the investigation or prior administrative review was conducted on an aggregate basis) of the subject merchandise imported by that importer.

(4) Each year during the anniversary month of the publication of a suspension of investigation, an interested party may request in writing that the Secretary conduct an administrative review of all producers or exporters covered by an agreement on which the suspension of investigation was based.

(c) *Deferral of administrative review.* (1) *In general.* The Secretary may defer the initiation of an administrative review, in whole or in part, for one year if:

(i) The request for administrative review is accompanied by a request that the Secretary defer the review, in whole or in part; and

(ii) None of the following persons objects to the deferral: the exporter or producer for which deferral is requested, an importer of subject merchandise of that exporter or producer, a domestic interested party and, in a countervailing duty proceeding, the foreign government.

(2) *Timeliness of objection to deferral.* An objection to a deferral of the initiation of administrative review under paragraph (c)(1)(ii) of this section must be submitted within 15 days after the end of the anniversary month in which the administrative review is requested.

(3) *Procedures and deadlines.* If the Secretary defers the initiation of an administrative review, the Secretary will publish notice of the deferral in the **Federal Register**. The Secretary will initiate the administrative review in the month immediately following the next anniversary month, and the deadline for issuing preliminary results of review (*see* paragraph (h)(1) of this section) and submitting factual information (*see* § 351.302(b)(2)) will run from the last day of the next anniversary month.

(d) *Rescission of administrative review.* (1) *Withdrawal of request for review.* The Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so.

(2) *Self-initiated review.* The Secretary may rescind an administrative review that was self-initiated by the Secretary.

(3) *No shipments.* The Secretary may rescind an administrative review, in whole or only with respect to a particular exporter or producer, if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be.

(4) *Notice of rescission.* If the Secretary rescinds an administrative review (in whole or in part), the Secretary will publish in the **Federal Register** notice of ''Rescission of Antidumping (Countervailing Duty) Administrative Review'' or, if appropriate, ''Partial Rescission of Antidumping (Countervailing Duty) Administrative Review.''

(e) *Period of review.* (1) *Antidumping proceedings.* (i) Except as provided in paragraph (e)(1)(ii) of this section, an administrative review under this section normally will cover, as appropriate, entries, exports, or sales of the subject merchandise during the 12 months immediately preceding the most recent anniversary month.

(ii) For requests received during the first anniversary month after publication of an order or suspension of investigation, an administrative review

under this section will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part or suspension of investigation to the end of the month immediately preceding the first anniversary month.

(2) *Countervailing duty proceedings.* (i) Except as provided in paragraph (e)(2)(ii) of this section, an administrative review under this section normally will cover entries or exports of the subject merchandise during the most recently completed calendar year. If the review is conducted on an aggregate basis, the Secretary normally will cover entries or exports of the subject merchandise during the most recently completed fiscal year for the government in question.

(ii) For requests received during the first anniversary month after publication of an order or suspension of investigation, an administrative review under this section will cover entries or exports, as appropriate, during the period from the date of suspension of liquidation under this part or suspension of investigation to the end of the most recently completed calendar or fiscal year as described in paragraph (e)(2)(i) of this section.

(f) *Voluntary respondents.* In an administrative review, the Secretary will examine voluntary respondents in accordance with section 782(a) of the Act and § 351.204(d).

(g) *Procedures.* The Secretary will conduct an administrative review under this section in accordance with § 351.221.

(h) *Time limits.* (1) *In general.* The Secretary will issue preliminary results of review (*see* § 351.221(b)(4)) within 245 days after the last day of the anniversary month of the order or suspension agreement for which the administrative review was requested, and final results of review (*see* § 351.221(b)(5)) within 120 days after the date on which notice of the preliminary results was published in the **Federal Register**.

(2) *Exception.* If the Secretary determines that it is not practicable to complete the review within the time specified in paragraph (h)(1) of this section, the Secretary may extend the 245-day period to 365 days and may extend the 120-day period to 180 days. If the Secretary does not extend the time for issuing preliminary results, the Secretary may extend the time for issuing final results from 120 days to 300 days.

(i) *Possible cancellation or revision of suspension agreement.* If during an administrative review the Secretary determines or has reason to believe that a signatory has violated a suspension agreement or that the agreement no longer meets the requirements of section 704 or section 734 of the Act (whichever is applicable), the Secretary will take appropriate action under section 704(i) or section 734(i) of the Act and § 351.209. The Secretary may suspend the time limit in paragraph (h) of this section while taking action under § 351.209.

(j) *Absorption of antidumping duties.* (1) During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping order under § 351.211, or a determination under § 351.218(d) (sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

(2) For transition orders defined in section 751(c)(6) of the Act, the Secretary will apply paragraph (j)(1) of this section to any administrative review initiated in 1996 or 1998.

(3) In determining under paragraph (j)(1) of this section whether antidumping duties have been absorbed, the Secretary will examine the antidumping duties calculated in the administrative review in which the absorption inquiry is requested.

(4) The Secretary will notify the Commission of the Secretary's determination if:

(i) In the case of an administrative review other than one to which paragraph (j)(2) of this section applies, the administrative review covers all or part of a time period falling between the third and fourth anniversary month of an order; or

(ii) In the case of an administrative review to which paragraph (j)(2) of this section applies, the Secretary initiated the administrative review in 1998.

(k) *Administrative reviews of countervailing duty orders conducted on an aggregate basis.* (1) *Request for zero rate.* Where the Secretary conducts an administrative review of a countervailing duty on an aggregate basis under section 777A(e)(2)(B) of the Act, the Secretary will consider and review requests for individual assessment and cash deposit rates of zero to the extent practicable. An exporter or producer that desires a zero rate must submit:

(i) A certification by the exporter or producer that it received zero or *de minimis* net countervailable subsidies during the period of review;

(ii) If the exporter or producer received a countervailable subsidy, calculations demonstrating that the amount of net countervailable subsidies received was *de minimis* during the period of review;

(iii) If the exporter is not the producer of the subject merchandise, certifications from the suppliers and producers of the subject merchandise that those persons received zero or *de minimis* net countervailable subsidies during the period of the review; and

(iv) A certification from the government of the affected country that the government did not provide the exporter (or the exporter's supplier) or producer with more than *de minimis* net countervailable subsidies during the period of review.

(2) *Application of country-wide subsidy rate.* With the exception of assessment and cash deposit rates of zero determined under paragraph (k)(1) of this section, if, in the final results of an administrative review under this section of a countervailing duty order, the Secretary calculates a single country-wide subsidy rate under section 777A(e)(2)(B) of the Act, that rate will supersede, for cash deposit purposes, all rates previously determined in the countervailing duty proceeding in question.

(l) *Exception from assessment in regional industry cases.* For procedures relating to a request for the exception from the assessment of antidumping or countervailing duties in a regional industry case, see § 351.212(f).

§ 351.214 New shipper reviews under section 751(a)(2)(B) of the Act.

(a) *Introduction.* The URAA established a new procedure by which so-called ''new shippers'' can obtain their own individual dumping margin or countervailable subsidy rate on an expedited basis. In general, a new shipper is an exporter or producer that did not export, and is not affiliated with an exporter or producer that did export, to the United States during the period of investigation. This section contains rules regarding requests for new shipper reviews and procedures for conducting such reviews. In addition, this section contains rules regarding requests for expedited reviews by noninvestigated exporters in certain countervailing duty proceedings and procedures for conducting such reviews.

(b) *Request for new shipper review.* (1) *Requirement of sale or export.* Subject to the requirements of section 751(a)(2)(B) of the Act and this section, an exporter or producer may request a new shipper review if it has exported, or sold for export, subject merchandise to the United States.

(2) *Contents of request.* A request for a new shipper review must contain the following:

(i) If the person requesting the review is both the exporter and producer of the merchandise, a certification that the person requesting the review did not export subject merchandise to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation;

(ii) If the person requesting the review is the exporter, but not the producer, of the subject merchandise:

(A) The certification described in paragraph (b)(2)(i) of this section; and

(B) A certification from the person that produced or supplied the subject merchandise to the person requesting the review that that producer or supplier did not export the subject merchandise to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation;

(iii)(A) A certification that, since the investigation was initiated, such exporter or producer has never been affiliated with any exporter or producer who exported the subject merchandise to the United States (or in the case of a regional industry, who exported the subject merchandise for sale in the region concerned) during the period of investigation, including those not individually examined during the investigation;

(B) In an antidumping proceeding involving imports from a nonmarket economy country, a certification that the export activities of such exporter or producer are not controlled by the central government;

(iv) Documentation establishing:

(A) The date on which subject merchandise of the exporter or producer making the request was first entered, or withdrawn from warehouse, for consumption, or, if the exporter or producer cannot establish the date of first entry, the date on which the exporter or producer first shipped the subject merchandise for export to the United States;

(B) The volume of that and subsequent shipments; and

(C) The date of the first sale to an unaffiliated customer in the United States; and

(v) In the case of a review of a countervailing duty order, a certification that the exporter or producer has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire.

(c) *Deadline for requesting review.* An exporter or producer may request a new shipper review within one year of the date referred to in paragraph (b)(2)(iv)(A) of this section.

(d) *Time for new shipper review.* (1) *In general.* The Secretary will initiate a new shipper review under this section in the calendar month immediately following the anniversary month or the semiannual anniversary month if the request for the review is made during the 6-month period ending with the end of the anniversary month or the semiannual anniversary month (whichever is applicable).

(2) *Semiannual anniversary month.* The semiannual anniversary month is the calendar month which is 6 months after the anniversary month.

(3) *Example.* An order is published in January. The anniversary month would be January, and the semiannual anniversary month would be July. If the Secretary received a request for a new shipper review at any time during the period February-July, the Secretary would initiate a new shipper review in August. If the Secretary received a request for a new shipper review at any time during the period August-January, the Secretary would initiate a new shipper review in February.

(e) *Suspension of liquidation; posting bond or security.* When the Secretary initiates a new shipper review under this section, the Secretary will direct the Customs Service to suspend liquidation of any unliquidated entries of the subject merchandise from the relevant exporter or producer, and to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise.

(f) *Rescission of new shipper review.* (1) *Withdrawal of request for review.* The Secretary may rescind a new shipper review under this section, in whole or in part, if a party that requested a review withdraws its request not later than 60 days after the date of publication of notice of initiation of the requested review.

(2) *Absence of entry and sale to an unaffiliated customer.* The Secretary may rescind a new shipper review, in whole or in part, if the Secretary concludes that:

(i) As of the end of the normal period of review referred to in paragraph (g) of this section, there has not been an entry and sale to an unaffiliated customer in the United States of subject merchandise; and

(ii) An expansion of the normal period of review to include an entry and sale to an unaffiliated customer in the United States of subject merchandise would be likely to prevent the completion of the review within the time limits set forth in paragraph (i) of this section.

(3) *Notice of Rescission.* If the Secretary rescinds a new shipper review (in whole or in part), the Secretary will publish in the **Federal Register** notice of ''Rescission of Antidumping (Countervailing Duty) New Shipper Review'' or, if appropriate, ''Partial Rescission of Antidumping (Countervailing Duty) New Shipper Review.''

(g) *Period of review.* (1) *Antidumping proceeding.* (i) *In general.* Except as provided in paragraph (g)(1)(ii) of this section, in an antidumping proceeding, a new shipper review under this section normally will cover, as appropriate, entries, exports, or sales during the following time periods:

(A) If the new shipper review was initiated in the month immediately following the anniversary month, the twelve-month period immediately preceding the anniversary month; or

(B) If the new shipper review was initiated in the month immediately following the semiannual anniversary month, the period of review will be the six-month period immediately preceding the semiannual anniversary month.

(ii) *Exceptions.* (A) If the Secretary initiates a new shipper review under this section in the month immediately following the first anniversary month, the review normally will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part to the end of the month immediately preceding the first anniversary month.

(B) If the Secretary initiates a new shipper review under this section in the month immediately following the first semiannual anniversary month, the review normally will cover, as appropriate, entries, exports, or sales during the period from the date of suspension of liquidation under this part to the end of the month immediately preceding the first semiannual anniversary month.

(2) *Countervailing duty proceeding.* In a countervailing duty proceeding, the period of review for a new shipper review under this section will be the same period as that specified in § 351.213(e)(2) for an administrative review.

(h) *Procedures.* The Secretary will conduct a new shipper review under this section in accordance with § 351.221.

(i) *Time limits.* (1) *In general.* Unless the time limit is waived under paragraph (j)(3) of this section, the Secretary will issue preliminary results of review (*see* § 351.221(b)(4)) within 180 days after the date on which the new shipper review was initiated, and final results of review (*see* § 351.221(b)(5)) within 90 days after the date on which the preliminary results were issued.

(2) *Exception.* If the Secretary concludes that a new shipper review is extraordinarily complicated, the Secretary may extend the 180-day period to 300 days, and may extend the 90-day period to 150 days.

(j) *Multiple reviews.* Notwithstanding any other provision of this subpart, if a review (or a request for a review) under § 351.213 (administrative review), § 351.214 (new shipper review), § 351.215 (expedited antidumping review), or § 351.216 (changed circumstances review) covers merchandise of an exporter or producer subject to a review (or to a request for a review) under this section, the Secretary may, after consulting with the exporter or producer:

(1) Rescind, in whole or in part, a review in progress under this subpart;

(2) Decline to initiate, in whole or in part, a review under this subpart; or

(3) Where the requesting party agrees in writing to waive the time limits of paragraph (i) of this section, conduct concurrent reviews, in which case all other provisions of this section will continue to apply with respect to the exporter or producer.

(k) *Expedited reviews in countervailing duty proceedings for noninvestigated exporters.* (1) *Request for review.* If, in a countervailing duty investigation, the Secretary limited the number of exporters or producers to be individually examined under section 777A(e)(2)(A) of the Act, an exporter that the Secretary did not select for individual examination or that the Secretary did not accept as a voluntary respondent (*see* § 351.204(d)) may request a review under this paragraph (k). An exporter must submit a request for review within 30 days of the date of publication in the **Federal Register** of the countervailing duty order. A request must be accompanied by a certification that:

(i) The requester exported the subject merchandise to the United States during the period of investigation;

(ii) The requester is not affiliated with an exporter or producer that the Secretary individually examined in the investigation; and

(iii) The requester has informed the government of the exporting country that the government will be required to provide a full response to the Department's questionnaire.

(2) *Initiation of review.* (i) *In general.* The Secretary will initiate a review in the month following the month in which a request for review is due under paragraph (k)(1) of this section.

(ii) *Example.* The Secretary publishes a countervailing duty order on January 15. An exporter would have to submit a request for a review by February 14. The Secretary would initiate a review in March.

(3) *Conduct of review.* The Secretary will conduct a review under this paragraph (k) in accordance with the provisions of this section applicable to new shipper reviews, subject to the following exceptions:

(i) The period of review will be the period of investigation used by the Secretary in the investigation that resulted in the publication of the countervailing duty order (*see* § 351.204(b)(2));

(ii) The Secretary will not permit the posting of a bond or security in lieu of a cash deposit under paragraph (e) of this section;

(iii) The final results of a review under this paragraph (k) will not be the basis for the assessment of countervailing duties; and

(iv) The Secretary may exclude from the countervailing duty order in question any exporter for which the Secretary determines an individual net countervailable subsidy rate of zero or *de minimis* (*see* § 351.204(e)(1)), provided that the Secretary has verified the information on which the exclusion is based.

(l) *Exception from assessment in regional industry cases.* For procedures relating to a request for the exception from the assessment of antidumping or countervailing duties in a regional industry case, see § 351.212(f).

§ 351.215 Expedited antidumping review and security in lieu of estimated duty under section 736(c) of the Act.

(a) *Introduction.* Exporters and producers individually examined in an investigation normally cannot obtain a review of entries until an administrative review is requested. In addition, when an antidumping order is published, importers normally must begin to make a cash deposit of estimated antidumping duties upon the entry of subject merchandise. Section 736(c), however, establishes a special procedure under which exporters or producers may request an expedited review, and bonds, rather than cash deposits, may continue to be posted for a limited period of time if several criteria are satisfied. This section contains rules regarding requests for expedited antidumping reviews and the procedures applicable to such reviews.

(b) *In general.* If the Secretary determines that the criteria of section 736(c)(1) of the Act are satisfied, the Secretary:

(1) May permit, for not more than 90 days after the date of publication of an antidumping order, the posting of a bond or other security instead of the deposit of estimated antidumping duties required under section 736(a)(3) of the Act; and

(2) Will initiate an expedited antidumping review. Before making such a determination, the Secretary will make business proprietary information available, and will provide interested parties with an opportunity to file written comments, in accordance with section 736(c)(4) of the Act.

(c) *Procedures.* The Secretary will conduct an expedited antidumping review under this section in accordance with § 351.221.

§ 351.216 Changed circumstances review under section 751(b) of the Act.

(a) *Introduction.* Section 751(b) of the Act provides for what is known as a ''changed circumstances'' review. This section contains rules regarding requests for changed circumstances reviews and procedures for conducting such reviews.

(b) *Requests for changed circumstances review.* At any time, an interested party may request a changed circumstances review, under section 751(b) of the Act, of an order or a suspended investigation. Within 45 days after the date on which a request is filed, the Secretary will determine whether to initiate a changed circumstances review.

(c) *Limitation on changed circumstances review.* Unless the Secretary finds that good cause exists, the Secretary will not review a final determination in an investigation (*see* section 705(a) or section 735(a) of the Act) or a suspended investigation (*see* section 704 or section 734 of the Act) less than 24 months after the date of publication of notice of the final determination or the suspension of the investigation.