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POR: 11/1/2010-10/31/2011  
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AD/CVD 3: SM

December 3, 2012

MEMORANDUM TO: Ronald K. Lorentzen  
Acting Assistant Secretary  
for Import Administration

FROM: Christian Marsh *cm*  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for Preliminary Results of Antidumping  
Duty Administrative Review: Lightweight Thermal Paper from  
Germany

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## SUMMARY

The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on lightweight thermal paper (LWTP) from Germany. The review covers one producer/exporter of the subject merchandise, Papierfabrik August Koehler AG, and its U.S. affiliate, Koehler America, Inc. (collectively, Koehler). The period of review (POR) is November 1, 2010, through October 31, 2011.

We preliminarily determine that Koehler made sales of subject merchandise at less than normal value (NV), based on the use of total adverse facts available (AFA). We also preliminarily determine to use, as the AFA rate, the highest margin alleged in the petition of 75.36 percent. This rate is corroborated by the highest transaction-specific margin calculated for Koehler during the second administrative review (11/1/2009 – 10/31/2010).<sup>1</sup>

If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries of subject merchandise during the POR.

Interested parties are invited to comment on these preliminary results. We will issue final results no later than 120 days from the date of publication of this notice, pursuant to section

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<sup>1</sup> See Lightweight Thermal Paper From Germany: Notice of Final Results of the 2009–2010 Antidumping Duty Administrative Review, 77 FR 21082 (April 9, 2012), and Lightweight Thermal Paper From Germany: Notice of Amended Final Results of the 2009–2010 Antidumping Duty Administrative Review, 77 FR 28851 (May 16, 2012) (Second Admin Final Results).



751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act).

## **BACKGROUND**

### Initiation of the Administrative Review

On November 1, 2011, the Department issued a notice of opportunity to request an administrative review of this order for the POR of November 1, 2010, through October 31, 2011.<sup>2</sup> On November 30, 2011, we received a timely request from Appleton Papers, Inc. (Petitioner) for the Department to conduct an administrative review of Mitsubishi HiTec Paper Flensburg GmbH, Mitsubishi HiTec Paper Bielefeld GmbH, and Mitsubishi International Corporation (collectively, Mitsubishi), and Koehler. We also received a request from Koehler for the Department to conduct an administrative review of Papierfabrik August Koehler AG. In addition, we received a request from Mitsubishi to conduct a review of Mitsubishi Hitec Paper Europe GmbH. On December 30, 2011, the Department published the notice of initiation of this antidumping duty administrative review covering the period November 1, 2010, through October 31, 2011, naming Mitsubishi and Koehler as respondents.<sup>3</sup>

### Requests for Information

On January 6, 2012, the Department issued initial questionnaires covering sections A, B, and C to Mitsubishi and Koehler with a due date of February 13, 2012. On January 30, 2012, Petitioner requested that the Department determine whether antidumping duties had been absorbed by Koehler and Mitsubishi. On April 26, 2012, Petitioner alleged targeted dumping by Koehler. After granting extensions to Mitsubishi and Koehler, Koehler submitted its section A response to the Department's initial questionnaire on February 21, 2012, and sections B and C on February 27, 2012. On February 27, 2012, Mitsubishi submitted its sections A through C response to the initial questionnaire. On March 7, and on March 20, 2012, Petitioner submitted deficiency comments on Koehler's initial questionnaire responses.

On March 13, 2012, Petitioner requested that the Department extend the time limit for submission of a sales-below-cost of production allegation regarding Koehler. On March 15, 2012, the Department granted the extension until March 29, 2012. On March 29, 2012, Petitioner requested that the Department conduct a sales-below cost of production (COP) investigation with respect to Koehler. Based on Petitioner's allegation and pursuant to section 773(b) of the Act, the Department initiated a COP investigation with respect to Koehler and issued a section D questionnaire to Koehler on the same day.<sup>4</sup> Koehler responded to the section D questionnaire on June 21, 2012, after the Department granted an extension.

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<sup>2</sup> See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review, 76 FR 67413 (November 1, 2011).

<sup>3</sup> See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 76 FR 82268 (December 30, 2011).

<sup>4</sup> See Memorandum from The Team to Melissa Skinner, Director, Office 3, AD/CVD Operations titled "Petitioner's Allegation of Sales Below the Cost of Production for Papierfabrik August Koehler AG," dated May 24, 2012.

On March 29, 2012, both Mitsubishi and Petitioner timely withdrew their requests for a review of Mitsubishi. Accordingly, the Department rescinded the administrative review with respect to Mitsubishi.<sup>5</sup>

On April 2, 2012, Petitioner requested that the Department extend the time limit for the submission of factual information. On April 3, 2012, the Department granted Petitioner's request and extended the time limit for submission of new factual information until May 18, 2012.

On May 16, 2012, the Department issued its first sales supplemental questionnaire to Koehler with a due date of May 30, 2012. After the Department granted two extensions to Koehler, the questionnaire response was submitted on June 27, 2012.

On June 11, 2012, the Department extended the time limit for the preliminary results by 120 days, until November 29, 2012.<sup>6</sup> As explained in the memorandum from the Assistant Secretary for Import Administration, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 29, through October 30, 2012. Thus, all deadlines in this segment of the proceeding have been extended by two days. The revised deadline for the preliminary results of this review is now December 1, 2012.<sup>7</sup> However, as this day falls on a Saturday, the preliminary results are due no later than December 3, 2012.<sup>8</sup>

#### Petitioner's Allegations and Koehler's Response

On May 18, 2012, the final day to submit new factual information, Petitioner submitted new factual information alleging that Koehler had been engaged in a scheme to defraud the Department by intentionally concealing certain otherwise reportable home market transactions.

On June 27, 2012, Koehler responded to the Department's May 16, 2012 supplemental questionnaire (June 27 SQR). At this time Koehler also responded to Petitioner's May 18, 2012 allegations and provided a revised home market sales database and sales printout at Exhibit S1-27.

On July 5, 2012, the Department rejected Koehler's home market sales database and sales printout, which were included in the June 27 SQR, on the grounds that it constituted untimely filed new factual information that was unsolicited by the Department. The Department,

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<sup>5</sup> See Lightweight Thermal Paper from Germany: Notice of Partial Rescission of Antidumping Duty Administrative Review, 77 FR 22560 (April 16, 2012) (Partial Rescission).

<sup>6</sup> See Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, through Melissa Skinner, Office Director, AD/CVD Operations 3, from Stephanie Moore, International Trade Compliance Analyst, Office 3, titled "Lightweight Thermal Paper from Germany: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review," dated June 11, 2012.

<sup>7</sup> See Memorandum to the Record from Paul Piquado, AS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Hurricane," dated October 31, 2012.

<sup>8</sup> See Notice of Clarification: Application of "Next Business Day" Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended, 70 FR 24533 (May 10, 2005).

however, invited Koehler to resubmit its home market sales database without the additional sales observations deemed to be untimely and rejected by the Department.

On July 9, 2012, Petitioner submitted comments regarding Koehler's supplemental sales response. Specifically, Petitioner claimed that Koehler's actions present an extraordinary situation where Koehler conspired with multiple parties, long before the relevant review even began, to systematically structure its sales, pricing, and shipping procedures in such a way that would enable it to defraud the United States government.<sup>9</sup>

On July 16, 2012, Koehler requested that the Department reconsider its rejection of Koehler's data because (1) the missing home market sales information in the initial questionnaire response is the basis for the "unique circumstances" under which the Department granted Koehler's extension request; and (2) the Department explicitly requested submission of those data in its supplemental questionnaire. Koehler also requested that, if the Department still believes that the information is untimely, the Department should either extend the deadline or, pursuant to section 782(d) of the Act, provide Koehler with the opportunity to remedy the deficiency by issuing another supplemental questionnaire to Koehler that specifically requests the additional home market sales. Moreover, Koehler argued that good cause exists to allow Koehler the opportunity to remedy the deficiency so that an accurate antidumping margin can be calculated.

On July 19, 2012, Koehler responded to Petitioner's July 9, 2012 submission, and disagreed with Petitioner's arguments.<sup>10</sup> Koehler also acknowledged that the earliest occurrence of these types of sales began at the end of the previous second administrative review period which ended on October 31, 2010.<sup>11</sup>

On July 24, 2012, Petitioner argued that Koehler's arguments are meritless and should be rejected. Petitioner also argued that rather than accept the new data, the Department should cancel any planned verification of Koehler and proceed immediately with the issuance of preliminary results based on total AFA. Petitioner asserted that the omitted Koehler sales at issue were fundamental to the dumping calculations and, thus, were intentionally concealed by Koehler as part of a premeditated fraud on the Department. Therefore, Petitioner argued that because this is a case of a deliberate effort by Koehler to mislead the Department about the amount of its dumping, the Department must deal with this issue in the strongest possible way. Specifically, Petitioner suggested that the Department use, as AFA, the highest margin alleged in the petition (75.36 percent).<sup>12</sup>

On July 31, 2012, Koehler responded to Petitioner's July 24, 2012 submission and requested that the Department ignore Petitioner's comments, and instead consider the mitigating facts on the record, along with legal and policy considerations, which warrant the acceptance of Koehler's corrected home market sales data.<sup>13</sup> Koehler also stated that based on its investigation of

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<sup>9</sup> See Petitioner's initial comments and rebuttal information regarding Koehler's supplemental sales response, dated July 9, 2012, at 3.

<sup>10</sup> See Koehler's response to Petitioner's letter of July 9, 2012.

<sup>11</sup> See *id.* at 2 and fn. 1.

<sup>12</sup> See Notice of Initiation of Antidumping Duty Investigations: Lightweight Thermal Paper from Germany, the Republic of Korea, and the People's Republic of China, 72 FR 62430 (November 5, 2007) (Investigation Initiation).

<sup>13</sup> See Koehler's response to Petitioner's letter of July 24, 2012.

Petitioner's allegation, Koehler conducted an internal investigation, and acknowledged that the public portions of Petitioner's May 18, 2012 allegations were substantially correct.<sup>14</sup> However, Koehler argued that the Department's rejection of the corrected data effectively blocks Koehler's cooperation and remedial action, and that the application of AFA would result in a demonstrably less accurate dumping margin.

On August 2, 2012, Koehler resubmitted a portion of its June 27, 2012 supplemental sales questionnaire response, without the data that was previously rejected by the Department.

On August 16, 2012, Petitioner responded to Koehler's July 31, 2012 submission. Petitioner reiterated that Koehler's fraud was deliberate, premeditated, and required a conspiracy with multiple outside parties. Petitioner also stated that Koehler induced third parties, including its own home market customers and intermediaries in third-countries, to participate in the fraud.

On August 24, 2012, Koehler argued that contrary to Petitioner's incorrect interpretation of sections 776 and 782 of the Act, the applicable statute does not permit the Department to use facts available under section 776(a) of the Act automatically, but instead requires the Department first to go through the deficiency questionnaire procedures under section 782(d) of the Act. Moreover, Koehler stated that it did not comply fully with the Department's initial request for information, thereby rendering Koehler's response deficient, regardless of whether or not its lack of compliance was inadvertent or deliberate. However, according to Koehler, the requirements of section 782(d) of the Act still apply regardless of whether it withheld information or significantly impeded the investigation. Thus, Koehler concluded that provided that the submission is deficient, the Department must allow the respondent to remedy the deficiency as long as adequate time exists in the review to do so.

Koehler asserted that if the Department decides, pursuant to section 782(e) of the Act, not to rely on all of Koehler's home market sales of 48 gram F20 and FA products, then the Department should use, as partial AFA, Koehler's home market sales of 55 gram products. According to Koehler, use of the 55 gram product would result in a higher weighted average margin for any other segment of the proceeding, yet also achieve a far more accurate dumping margin than what would result from using total AFA.

Finally, Koehler stated that as a result of its internal investigation, it "once again achieved a status of full cooperation with the Department." Therefore, given the dictates of section 782(d) of the Act, the Department should accept the revised home market sales data.

On September 4, 2012, in response to Koehler's argument that the Department should use as partial AFA, Koehler's home market sales of 55 gram products, Petitioner asserted that to the contrary, basing normal value on sales of 55 gram merchandise, which is a significantly lower value product than 48 gram paper, would grossly understate the dumping margin and would not further the goal of deterring future fraud. In addition, Petitioner questioned the reliability of Koehler's financial statements.

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<sup>14</sup> See Koehler's response to Appleton's letter of July 24, 2012, at 5.

On September 7, 2012, Koehler responded to Petitioner's September 4, 2012 submission. Koehler contended that its financial statements are accurate and reliable. Koehler also disagreed with Petitioner's argument that basing normal value on sales of 55 gram merchandise would grossly understate the dumping margin.

On September 17, 2012, Koehler submitted the opinion of its auditor to further support the arguments Koehler made in its September 7, 2012 letter.

On September 19, 2012, Petitioner submitted a letter requesting that the Department, pursuant to 19 CFR 351.302(d), reject the unsolicited and untimely new factual information submitted by Koehler on September 17, 2012. Petitioner stated that Koehler had admitted that the information is untimely, and that Koehler cited no authority requiring acceptance of its submission. Petitioner further argued that there is no reason for the Department to extend the new facts deadline and accept the new information in Koehler's September 17, 2012 letter because no "good cause" had been shown for doing so.

On September 21, 2012, Koehler submitted comments in rebuttal to Petitioner's September 19, 2012 letter. Koehler argued that the opinion of its auditor should not be rejected by the Department.

On September 25, 2012, pursuant to 19 CFR 351.302(d), the Department rejected Koehler's September 17, and September 21, 2012 submissions because they constituted untimely filed new factual information.

On October 2, 2012, Petitioner requested that the Department instruct Koehler to comply with its obligation under 19 CFR 351.304(c) to provide a public version of those portions of its June 27, 2012 supplemental questionnaire response that remain on the record.

On October 4, 2012, the Department requested that Koehler comply with its obligation under 19 CFR 351.304(c), and provide a public version of its June 27, 2012 supplemental questionnaire response to include all narrative portions and exhibits which were not previously rejected by the Department in its July 5, 2012 letter to Koehler, including the narrative and Exhibits 1-13. On October 10, 2012, Koehler provided the requested information.

On November 2, 2012, Koehler submitted comments summarizing its various submissions on the record of this review with issues regarding Petitioner's allegation, the appropriateness of the Department's rejection of certain data provided by Koehler, and the statutory and regulatory rules and precedential determinations that Koehler asserts should govern the outcome of this review.

## **SCOPE OF THE ORDER**

The scope of the order includes certain lightweight thermal paper, which is thermal paper with a basis weight of 70 grams per square meter ( $\text{g/m}^2$ ) (with a tolerance of  $\pm 4.0 \text{ g/m}^2$ ) or less;

irrespective of dimensions;<sup>15</sup> with or without a base coat<sup>16</sup> on one or both sides; with thermal active coating(s)<sup>17</sup> on one or both sides that is a mixture of the dye and the developer that react and form an image when heat is applied; with or without a top coat;<sup>18</sup> and without an adhesive backing. Certain LWTP is typically (but not exclusively) used in point-of-sale applications such as ATM receipts, credit card receipts, gas pump receipts, and retail store receipts. The merchandise subject to this order may be classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 3703.10.60, 4811.59.20, 4811.90.8000, 4811.90.8030, 4811.90.8040, 4811.90.8050, 4811.90.9000, 4811.90.9030, 4811.90.9035, 4811.90.9050, 4811.90.9080, 4811.90.9090, 4820.10.20, and 4823.40.00.<sup>19</sup> Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

## **DISCUSSION OF THE METHODOLOGY**

### Use of Facts Otherwise Available and Adverse Inferences

For these preliminary results, in accordance with sections 773(c)(3)(A) and (B) of the Act and sections 776(a)(2)(A), (B), and (D) and 776(b) of the Act, we have determined that the use of total AFA is warranted for Koehler.

On January 6, 2012, the Department issued Koehler an initial questionnaire and in section A of this questionnaire requested that Koehler:

- (a) State the total quantity and value of the merchandise under review that you sold during the period of review (POR) in (or to) the home market, and (b) provide a complete package of documents and worksheets demonstrating how you identified the sales you reported to the Department in your quantity and value chart and in your comparison market and U.S. market sales databases and reconciling the reported sales to the total sales listed in your general ledger.<sup>20</sup>

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<sup>15</sup> LWTP is typically produced in jumbo rolls that are slit to the specifications of the converting equipment and then converted into finished slit rolls. Both jumbo and converted rolls (as well as LWTP in any other form, presentation, or dimension) are covered by the scope of the order.

<sup>16</sup> A base coat, when applied, is typically made of clay and/or latex and like materials and is intended to cover the rough surface of the paper substrate and to provide insulating value.

<sup>17</sup> A thermal active coating is typically made of sensitizer, dye, and co-reactant.

<sup>18</sup> A top coat, when applied, is typically made of polyvinyl acetone, polyvinyl alcohol, and/or like materials and is intended to provide environmental protection, an improved surface for press printing, and/or wear protection for the thermal print head.

<sup>19</sup> HTSUS subheading 4811.90.8000 was a classification used for LWTP until January 1, 2007. Effective that date, subheading 4811.90.8000 was replaced with 4811.90.8020 (for gift wrap, a non-subject product) and 4811.90.8040 (for "other" including LWTP). HTSUS subheading 4811.90.9000 was a classification for LWTP until July 1, 2005. Effective that date, subheading 4811.90.9000 was replaced with 4811.90.9010 (for tissue paper, a non-subject product) and 4811.90.9090 (for "other," including LWTP).

<sup>20</sup> See Department's initial questionnaire dated January 6, 2012, at Section A.I Quantity and Value of Sales (a) and (i).

Section B requested of Koehler:

Please provide a complete package of documents and worksheets demonstrating how you identified the sales you reported to the Department and reconciling the reported sales to the total sales listed in your general ledger. Include a copy of all computer programs used to separate the reported sales from your total sales and to calculate expenses.<sup>21</sup>

On February 21, 2011, Koehler provided its section A response to the Department's initial questionnaire, and sections B and C on February 27, 2012, and certified to the accuracy and completeness of its responses.<sup>22</sup> Furthermore, in those responses, Koehler claims that it provided all sales transactions and the corresponding expenses, which it reconciled to its financial statements.

On May 16, 2012, the Department issued a supplemental questionnaire to Koehler based on information contained in its initial response, and specifically requested that Koehler:

Explain how you identified which LWTP sales to include in your home market database. As part of your response, identify the fields in the computer program you used to determine sales to Germany and explain what those fields represent. Explain, for example, whether you define German sales by reference to the location of the customer, the billing address of the customer, the "ship to" destination, or some other method. Also, identify any differences between the methodology used in preparing the antidumping duty response from that used in the company's financial accounting records.<sup>23</sup>

On May 18, 2012, Petitioner alleged that Koehler was engaged in a scheme to defraud the Department by intentionally concealing certain otherwise reportable home market transactions. In particular, Petitioner alleged that Koehler was selling 48 gram thermal paper that it knew was destined for consumption in Germany through various intermediaries in third-countries (i.e., "transshipment.") In Koehler's June 27 SQR, Koehler claimed that, based on Petitioner's May 18, 2012 allegation that Koehler was engaging in the concealment of certain of its home market transaction, it conducted an internal investigation. Koehler stated that "its personnel were made aware from the beginning of the antidumping proceedings in 2007 that, a sale must be reported as a home market sale, even though it is physically shipped to a location outside the home market, if, at the time of sale, the manufacturer knew that the product was ultimately destined for its home market."<sup>24</sup> However, as a result of Koehler's internal investigation after Petitioner's allegation, Koehler submitted a revised home market sales database and printout, as part of its response to the Department's May 16, 2012 supplemental questionnaire, and certified to the accuracy and completeness of the revised home market sales database. As noted above, on July 5, 2012, the Department rejected this data as untimely filed new factual information that was not

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<sup>21</sup> See *id.*, at Section B: IV. Foreign Market Sales Reconciliation.

<sup>22</sup> See Koehler's initial questionnaire response - Section A, at Exhibit A-1.

<sup>23</sup> See First Supplemental Questionnaire in the Third Administrative Review of the Antidumping Duty Order on Lightweight Thermal Paper from Germany, at 4.

<sup>24</sup> See Koehler's August 2, 2012 resubmission of Koehler's June 27, 2012 supplemental questionnaire filed on October 10, 2012 at 3.

requested by the Department in its supplemental questionnaire. On July 31, Koehler publicly acknowledged that Petitioner's May 18 allegations "were substantially correct."<sup>25</sup>

#### Department's Position:

The Department has preliminarily determined to apply total AFA to Koehler in the current review because Koehler: (A) withheld information requested by the Department; (B) failed to provide such information in a timely manner or in the form or manner requested; (C) significantly impeded this proceeding; and (D) provided information that cannot be verified. Application of total AFA rather than partial AFA is warranted because it is not possible to reach any reliable conclusions based on Koehler's data. Furthermore, application of facts available with an adverse inference is appropriate because Koehler has failed to act to the best of its ability.<sup>26</sup>

#### *Facts Otherwise Available*

First, pursuant to section 776(a)(2)(A) of the Act, we preliminarily find that Koehler withheld information that had been requested by the Department by failing to report all of its home market sales of subject merchandise during the POR. Evidence on the record (*i.e.*, Petitioner's allegations and Koehler's acknowledgment of those allegations) indicates that Koehler knowingly and deliberately withheld information from the Department that should have been provided in its initial questionnaire response. Moreover, as stated above, Koehler acknowledges that certain sales were not reported during the POR and that the earliest occurrence of these types of sales began prior to the current POR.

Second, in accordance with section 776(a)(2)(B) of the Act, we preliminarily find that Koehler failed to provide such information in the manner requested subject to sections 782(c)(1) and (e) of the Act. As referenced above, section 782(c)(1) of the Act provides that if an interested party "promptly after receiving a request from {the Department} for information, notifies {the Department} that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative form in which such party is able to submit the information," the Department may modify the requirements to avoid imposing an unreasonable burden on that party. Koehler did not submit its complete home market sales as clearly required by the Department's sections A-C initial questionnaire and did not inform the Department that it was unable to submit this sales information in the requested form or manner.<sup>27</sup>

Third, in accordance with section 776(a)(2)(C) of the Act, we preliminarily find that Koehler significantly impeded the proceeding. Specifically, we find that Koehler only provided the revised home market sales database in response to Petitioner's allegation that Koehler was

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<sup>25</sup> See Koehler's July 31, 2012 Letter, at 5.

<sup>26</sup> For a full discussion of our AFA findings, which includes a discussion of business proprietary information, see Memorandum to File through Melissa Skinner, Director, AD/CVD Operations 3, from the Team, titled "Lightweight Thermal Paper from Germany: Preliminary Results of Anti-dumping Duty Administrative Review: Application of Total Adverse Facts Available to Koehler," dated concurrently with this Decision Memorandum (AFA Memo).

<sup>27</sup> See *id.*, at 8 - 9.

concealing certain otherwise reportable home market sales transactions to artificially manipulate prices attributable to those sales of 48 gram paper shipped directly to its German customers. Thus, we reject Koehler's arguments that the Department (1) accept this newly revised database because it is now correct, regardless of whether Koehler deliberately or inadvertently initially provided an erroneous database, (2) accept the database because the Department implicitly requested it in its first supplemental questionnaire, or (3) issue Koehler a supplemental questionnaire requesting Koehler to revise its original home market sales database.<sup>28</sup>

Finally, based on section 776(a)(2)(D) of the Act, we find that Koehler's questionnaire responses are unreliable and unusable in the current review. In accordance with section 771(16) of the Act, the Department considers all products produced by the respondent covered by the descriptions in the "Scope of the Order" section of this memorandum to be foreign like products for the purpose of determining appropriate product comparisons to the respondent's U.S. sales of the subject merchandise. Therefore, it is necessary that the respondents provide a reliable and accurate home market database of subject merchandise for comparison to sales of subject merchandise in the United States. In this instant case, as noted above, Koehler stated that it was aware that a sale must be reported as a home market sale, even though it is physically shipped to a location outside the home market, if, at the time of sale, it knew that the product was ultimately destined for its home market. Yet, based on record evidence, the Department finds that Koehler deliberately neglected to provide all such sales, which were fundamental to the margin calculations.<sup>29</sup>

With respect to Koehler's argument that the Department is required to provide Koehler with the opportunity to remedy any deficiency in its home market sales database by issuing another supplemental questionnaire, pursuant to sections 776(a)(2) and 782(d) of the Act, we disagree. We agree with Petitioner's contention that this is not a routine instance where a respondent, when presented with an antidumping questionnaire, provides an incomplete response by failing to answer fully or in a timely fashion, or omits material information from its response.<sup>30</sup> Petitioner also stated that to the contrary, this is an extraordinary situation where the respondent conspired with multiple parties to systematically structure its sales, pricing, and shipping procedures in such a way that would enable it to defraud the United States government.<sup>31</sup> Moreover, we do not find that Koehler's initial questionnaire response was simply deficient. Instead, we preliminarily find that, based on record evidence, Koehler engaged in an elaborate scheme to conceal certain otherwise reportable home market sales. Thus, we preliminarily determine that Koehler's arguments are not supported by section 782(d) of the Act.

#### *Total Facts Available*

The specific allegations and evidence placed on the record in this segment of the proceeding by Petitioner raises serious concerns as to the reliability and accuracy of all of the information placed on the record by Koehler. Koehler stated that from the beginning of the antidumping

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<sup>28</sup> See *id.*, at 11.

<sup>29</sup> We are not required to determine that Koehler's failure to report these sales was deliberate; nevertheless, the evidence reviewed by the Department supports that conclusion.

<sup>30</sup> See Petitioner's initial comments and rebuttal information regarding Koehler's supplemental sales response (July 9, 2012) at 3.

<sup>31</sup> *Id.*

proceedings in 2007, it was aware that a sale must be reported as a home market sale, even though it is physically shipped to a location outside the home market, if, at the time of sale, the manufacturer knew that the product was ultimately destined for its home market. Although Koehler certified to the completeness and accuracy of its initial home market sales database submitted on February 27, 2012, record evidence indicates that Koehler deliberately neglected to provide an accurate and complete home market sales database.

The Department preliminarily finds that necessary information is not on the record to calculate a dumping margin within the meaning of section 776(a)(1) of the Act. Koehler established a pattern of behavior by not providing an accurate and complete home market sales database, as requested by the Department, which undermines the reliability and credibility of Koehler's entire set of questionnaire responses. Because it is not possible to determine normal value using information on the record of this review in accordance with section 751(a)(2) of the Act, it would be unduly difficult for the Department to perform any comparisons to U.S. prices. The Department's practice in such situations is to resort to a total facts available methodology.<sup>32</sup>

In the instant review, the Department finds that it is not possible to reach any reliable conclusions based on Koehler's home market sales data. Therefore, consistent with the Department's prior practice, we preliminarily determine to resort to a total facts available methodology with respect to Koehler.

#### *Use of Adverse Inferences*

In accordance with section 776(b) of the Act, the Department determines that Koehler has failed to act to the best of its ability by not providing the information requested by the Department. To examine whether an interested party cooperated by acting to the best of its ability under section 776(b) of the Act, the Department considers, *inter alia*, the accuracy and completeness of submitted information and whether the interested party has hindered the calculation of accurate dumping margins.<sup>33</sup> Compliance with the "best of its ability" standard is determined by assessing whether the interested party has put forth its maximum best effort to provide the Department with full and complete answers to all inquiries in a review. To conclude that a party

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<sup>32</sup> See Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review, 72 FR 1982 (January 17, 2007), and accompanying Issues and Decision Memorandum at Comment 7 (explaining that multiple revisions and contradictory explanations at verification resulted in a finding that information on the record was unreliable and the application of total AFA was warranted); Porcelain-on-Steel Cooking Ware from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, 71 FR 24641 (April 26, 2006), and accompanying Issues and Decision Memorandum at Comment 2 (finding that total AFA were warranted because the respondent failed to cooperate to the best of its ability by failing to disclose information regarding its affiliate, and the Department discovered the unreported affiliate by finding the company's license during verification); Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews and Final Rescission and Partial Rescission of Antidumping Duty Administrative Reviews, 70 FR 54897 (September 6, 2005), and accompanying Issues and Decision Memorandum at Comment 9 (determining that the respondent failed to act to the best of its ability when it did not timely notify the Department of verification issues involving its supplier and failed to supply an alternative, verifiable methodology which justified resort to total AFA).

<sup>33</sup> See Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping, 75 FR 20335, 20337 (April 19, 2010).

has not cooperated to the best of its ability and to draw an adverse inference under section 776(b) of the Act, the Department examines two factors: (1) that a reasonable and responsible respondent would have known that the requested information was required to be kept and maintained under the applicable statutes, rules and regulations; and (2) that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to respond fully is the result of the respondent's lack of cooperation in either (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records. While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the antidumping statute does not contain an intent element.

The Department preliminarily finds that Koehler failed to cooperate to the best of its ability, pursuant to section 776(b) of the Act. First, Koehler withheld the requisite information that would have allowed the Department to calculate an accurate dumping margin. Based on Petitioner's allegations and Koehler's acknowledgment of those allegations, we find that Koehler concealed certain otherwise reportable home market sales transactions, thus undermining the credibility and reliability of Koehler's data overall. Second, Koehler failed to provide such information in the manner requested. Moreover, Koehler did not notify the Department that it was unable to submit the information requested in the requested form and manner, and within the required time period. Instead, in response to Petitioner's allegations, Koehler attempted to revise its home market sales database. Third, based on this record evidence, we find that Koehler deliberately engaged in a scheme to manipulate its home market prices through its inaccurate reporting of home market sales transactions, thus significantly impeding the Department's ability to conduct the instant review. As a result of Koehler's conduct, the Department finds that it cannot rely upon any of Koehler's submitted information to calculate an accurate dumping margin, due to Koehler's material omission of this essential sales data. Therefore, we preliminarily determine to apply total AFA to Koehler.

Furthermore, in prior reviews, Koehler manipulated its home market pricing by retroactively issuing monthly rebates on 48 gram products, which were disallowed by the Department.<sup>34</sup> Therefore, we preliminarily find that Koehler's actions in not initially reporting its complete home market sales data was a deliberate attempt to also manipulate its home market pricing. Thus, we preliminarily find that Koehler's actions are consistent with its pattern of home market price manipulation in order to evade antidumping duties and, therefore, we preliminarily determine to use AFA in the instant review.

### *Selection of AFA Rate*

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) and (2) authorize the Department to rely on information derived from: (1) the petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any other information placed on the record.

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<sup>34</sup>See Lightweight Thermal Paper From Germany: Notice of Final Results of the First Antidumping Duty Administrative Review, 76 FR 22078 (April 20, 2011), and accompanying Issues and Decision Memorandum, at Comment 3. See also Second Admin Final Results, and accompanying Issues and Decision Memo, at Comment 2.

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner."<sup>35</sup> The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."<sup>36</sup>

Pursuant to section 776(b) of the Act, we are relying on information from the petition in order to ensure that the AFA rate is sufficiently adverse so as to induce cooperation.<sup>37</sup> Accordingly, we have preliminarily determined to apply a 75.36 percent rate, as AFA, to Koehler.

### **Corroboration of Secondary Information**

The Act provides that in selecting from among the facts available the Department may, subject to the corroboration requirements of section 776(c) of the Act, rely upon information drawn from the petition, a final determination in the investigation, any previous administrative review conducted under section 751 of the Act (or section 753 of the Act for countervailing duty cases), or any other information on the record.<sup>38</sup> The Department is obligated to select an adverse inference that reflects commercial reality and bears some relationship to the available sales data and must corroborate the reliability of any adverse inference used.

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation, the administering authority shall, to the extent practicable, corroborate that information from independent sources that are reasonably available at its disposal. Secondary information, as described in the SAA, is the "information derived from the petition that gave rise to the investigation or review, the final determination concerning subject merchandise, or any previous review under section 751 concerning the subject merchandise."<sup>39</sup> The regulations state that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation.<sup>40</sup> The SAA provides that to "corroborate" means simply that the Department will satisfy itself that the secondary information to be used has probative value.<sup>41</sup> As stated in Tapered Roller Bearings, to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.<sup>42</sup>

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<sup>35</sup> See, e.g., Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082, 65084 (November 7, 2006). See also, Certain Frozen Warmwater Shrimp from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10658 (March 9, 2007), unchanged in Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52055 (September 12, 2007).

<sup>36</sup> See Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, Vol. I, at 870 (1994), reprinted at 1994 U.S.C.C.A.N. 4040, 4199.

<sup>37</sup> See AFA Memo.

<sup>38</sup> See section 776(b) of the Act.

<sup>39</sup> See SAA at 870.

<sup>40</sup> See 19 CFR 351.308(d).

<sup>41</sup> *Id.*

<sup>42</sup> See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of



Nov. 16, 2012

**CONCURRENCE RECORD**

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**ROUTING PURPOSE SYMBOLS (RPS)**  
C- CONCURRENCES  
S- SIGNATURE

**SUBJECT OF DOCUMENT:**

Certain Lightweight Thermal Paper from Germany: Preliminary Results of Third Antidumping Duty Administrative Review (A-428-840)

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	INITIALS DATE 11/16/12	

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