

MEMORANDUM TO: Susan H. Kuhbach  
Acting Assistant Secretary  
for Import Administration

FROM: Joseph A. Spetrini  
Deputy Assistant Secretary  
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for the Final Results of the  
Antidumping Duty New Shipper Review of Certain In-Shell Raw  
Pistachios from Iran

### Summary

We have analyzed the comments and rebuttals of interested parties in the antidumping duty new shipper review on certain in-shell raw pistachios from Iran (A-507-502). As a result of our analysis, we have made changes in the margin calculations. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this review for which we received comments and rebuttals by parties:

1. Adverse Facts Available
2. Bona Fide Sale
3. Verification
4. Exchange Rate
5. Home Market Selling Expenses
6. Disclosure at CVD Verification of Additional Farm
7. Fallah Sales/Expense Data
8. Other Cost Issues
9. Preferential Treatment
10. Combination Rate

### Background

The Department published in the *Federal Register* the preliminary results in this new shipper review on August 6, 2002. See *Certain In-Shell Raw Pistachios from Iran: Preliminary Results of Antidumping Duty New Shipper Review*, 67 FR 50863 (August 6, 2002) (*Preliminary Results*).

The period of review (POR) is July 1, 2000 through June 30, 2001. Since the publication of the *Preliminary Results* the following events have occurred.

On October 17, 2002, the Department postponed the final results of the review until no later than 150 days from the date of issuance of the preliminary results. *See* 67 FR 65337 (October 24, 2002). A request for a public hearing was received by the Department from petitioner (California Pistachio Commission) on August 13, 2002. On August 14, 2002, respondent (Tehran Negah Nima Trading Company) submitted information in response to a supplemental cost of production questionnaire. On September 5, 2002, respondent filed its case brief. On September 6, 2002, petitioner and Western Pistachio Association (WPA), an interested party, filed case briefs. On September 12, 2002, the Department rejected both petitioner's and WPA's case briefs. On September 13, 2002, the Department received comments from petitioner regarding respondent's August 14, 2002 submission. On September 18, 2002, petitioner and WPA resubmitted their case briefs. On September 30, 2002, respondent submitted a supplemental case and rebuttal brief. On October 9, 2002, the Department rejected respondents' supplemental and rebuttal case brief. Respondent resubmitted a supplemental case brief and a rebuttal case brief on October 15, 2002. On October 17, 2002, the Department rejected respondents' October 15, 2002 supplemental case brief. On October 21, 2002, respondent submitted a revised supplemental case brief. On October 28, 2002, petitioner and Cal Pure Pistachios, Inc. (Cal Pure), an interested party, submitted rebuttal briefs. On October 31, 2002, the Department rejected petitioners' rebuttal brief. On November 1, 2002, petitioner submitted a revised rebuttal brief. On December 9, 2002, petitioner, Cal Pure, and Nima submitted comments on the verification reports issued in the concurrent countervailing duty (CVD) new shipper proceedings, copies of which were placed on the record of this review. The public hearing in this proceeding was held on December 12, 2002.

### Scope of Investigation

Imports covered by this review are raw, in-shell pistachio nuts from which the hulls have been removed, leaving the inner hard shells and edible meats, from Iran. The merchandise under review is currently classifiable under item 0802.50.20.00 of the *Harmonized Tariff Schedule of the United States* (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive

### Changes since the Preliminary Determination

For details of our analysis of the above mentioned changes to our final margin calculation, *see* New Shipper Review Final Analysis Memorandum, December 26, 2002.

### Discussion of the Issues

#### **Comment 1: Adverse Facts Available**

Petitioner claims Nima has failed to provide the Department with some of the most fundamental information needed to calculate an actual dumping margin, despite having repeated opportunities to correct its errors and omissions. Petitioner states that the pattern of repeated failure to provide the requested information, without adequate explanation, demonstrates that Nima has failed to act to the best of its ability to cooperate with the Department in this review, and, as a result, the Department should base its final results on adverse facts available.

Cal Pure argues that Nima failed to submit an accurate and complete statement of all the actual planting, development and rearing costs pertaining to the pistachios Nima sold to the United States. Cal Pure further argues that verification of the concurrent CVD proceedings confirms their skepticism concerning the overall integrity of the information submitted by Nima. For example, Cal Pure cites to the fact that two reported home market sales to Bakshie were not recorded in Nima's books and records. They further argue that: 1) the omission from Nima's account book of the service charge incurred in converting Nima's U.S. sale proceeds; 2) the discrepancy in the recorded revenue; 3) the fact that Fallah's invoices did not match the sales information submitted for that entity; and 4) the serious omissions pertaining to the grower's reported costs constitute further evidence that Nima's reporting methodology and recordkeeping are unsound and unreliable.

Cal Pure recognizes that a small farmer is not expected to keep the same types of records as a large corporation, but argues that the Department has consistently acknowledged that it must be able to conclude that the internal company records upon which it bases a margin determination are accurate and complete. *See Certain Cold-Rolled Carbon Steel from Venezuela*, 67 FR 62119 (October 3, 2002) at Comment 1, and *Certain Cut-to-Length Carbon Steel Plate from Sweden*, 62 FR 18396, (April 15, 1997) at Comment 1. Cal Pure further states that when a company does not prepare an audited financial statement in the normal course of business respondent must provide some alternative means, *e.g.*, a tax return, of confirming the accuracy and completeness of all of its submitted data. Cal Pure argues that Nima, Fallah, and Maghsoudi failed to show through such alternative means that they had submitted accurate and complete information. Cal Pure contends that under these circumstances the Department should reject all of the submitted information and terminate the review. In the alternative, Cal Pure argues, the Department should apply facts available, which in the absence of any other evidence, should be the margin determined in the original investigation.

Respondent argues that Nima's focus all along has been to be able to export to the United States; therefore, Nima's ordinary course of business was to enter data in their books and records only with respect to sales to the U.S. market geared towards the new shipper review. Nima argues that the accuracy of entries in their final account book filed with the Government of Iran was confirmed at verification in the concurrent CVD new shipper proceeding. With respect to the Bakhshies sale not appearing in Nima's final account book, respondent states that because the sale was not within the scope and objective of the company, officials did not believe it had to be recorded. Nima points out that the sale was reported to the Department as required and that all costs and revenues associated

with the Bakhshie sales have been accurately reflected in Nima's consolidated financial statement. With respect to Fallah, Nima argues that correct sales and expense figures were submitted on the record of this proceeding on June 3, 2002, and that these figures were verified in the context of the concurrent CVD new shipper proceeding. Finally, Nima argues that the Department should consider the various limitations on Nima's operation, namely: 1) the lack of ordinary business relations between the United States and Iran in the course of the last 22 years; 2) the existence of U.S. sanctions with regards to financial transactions and intermediaries; 3) the existence of the current high tariff levels that virtually make high volume trade impossible; and 4) the level of the development of the Iranian economy with respect to the financial, accounting, and bookkeeping systems by the businesses and individuals, that cannot match similar standards applied and observed in the industrialized world. Nima argues that it tried its best not to let such limitations affect the accuracy of its submissions.

#### *Department's Position*

The Department disagrees with petitioner and Cal Pure that termination or the application of total adverse facts available is warranted in this review. The Department recognizes that respondent in this case is a small company with unsophisticated accounting and recordkeeping system. The evidence on the record of this proceeding indicates that Nima has cooperated with the Department and responded to requests for information in a timely manner and in accordance with Department procedures and regulations.

With respect to Cal Pure's arguments regarding the Bakhshie sales, we note that Nima has stated from the beginning of this proceeding that the Bakhshie sales were not part of its ordinary course of business and were not likely to be repeated in the future. We accept respondent's explanation that the unusual nature of these one-time sales resulted in Nima's decision not to include the transactions in its books and records. We further note that while the Department determined not to rely on these sales for purposes of NV, as evidence suggested that they were outside the ordinary course of trade, respondent did report the sales to the Department in accordance with Departmental instructions.

Regarding the slight discrepancies in reported revenue and service charges, we note that these are insignificant differences and not unexpected in light of the rudimentary accounting systems in place. With respect to the argument that Fallah's invoices did not match its reported sales information, we note that the sales information submitted in the instant review was corroborated at verification of the concurrent CVD new shipper proceeding. It appears that Fallah may have failed to submit corrected sales data in the concurrent CVD new shipper review, assuming the Department would rely on the corrected figures submitted on the record of the AD proceeding. The fact remains, however, that the information submitted in this proceeding was found at the CVD verification to be accurate and reliable.

In summary, as there is no evidence on the record of this proceeding that the information provided with respect to Nima's and Fallah's sales and expenses is inaccurate or distortive, the Department has determined to rely on sales and expense information submitted by these parties for

purposes of these final results. We do find, however, that the cost of production as reported by Maghsoudi Farms is incomplete and unreliable. As a result, the Department has determined to rely on partial adverse facts available rather than on cost data provided by Maghsoudi Farms. *See* Comment 6.

## **Comment 2: Bona Fide Sale**

Petitioner argues that Nima's single sale of subject merchandise to the United States during the POR was not bona fide. Petitioner cites to *Fresh Garlic From the People's Republic of China: Issues and Decision Memorandum From Richard W. Moreland to Faryar Shirzad: New Shipper Review of Clipper Manufacturing Ltd. (Fresh Garlic Memorandum)*, March 6, 2002, at 9, which states that the Department takes its responsibility to review the bona fides of a sale "very seriously" and looks at the totality of the circumstances in determining whether a sale is bona fide. Petitioner states that in *Fresh Garlic* the Department determined that "the circumstances of the sale taken in their totality" revealed that there was no bona fide sale. Petitioner claims in this case, "the circumstances of the sale taken in their totality" also reveal that Nima's sale to the United States was not bona fide.

More specifically, petitioner argues that the quantity of raw pistachios involved in Nima's U.S. sale is extremely small (70 kilograms) and atypical. Petitioner believes a typical sale of pistachios sold in the export market is likely to be 22,000 pounds. Petitioner cites to *Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Rescission of Antidumping Duty Administrative Review (Steel Plate from Romania)*, 63 FR 47232 (September 4, 1999), *aff'd Windmill International Pte., Ltd. v. United States*, 193 F. Supp.2d 1303 (Ct. Int'l Trade 2002) in which "the atypical quantity of the sale" was a factor in the Department finding a sale not to be bona fide. Petitioner believes that, considering the small quantity involved, Nima's sale to the United States could be considered a sample sale. Petitioner point to the *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China*, 59 FR 55625 (November 8, 1994) which states that "it is the Department's practice to exclude sample sales from its calculation, if evidence exists that the sample sales were not made in substantial quantities." Since Nima's U.S. sale involved only 70 kilograms of pistachios, petitioner argues, it was a sample sale, not of substantial quantity, and should be excluded from the Department's calculations.

Petitioner further asserts that Nima is not a legitimate commercial enterprise and that it has no prior experience in handling raw pistachios or any other type of nut or food product. Petitioner points out that Nima did not even have a checking account until the final days of the period of review. Petitioner states that Nima is not a business with an established history but instead is hoping to break into the U.S. raw pistachio market with a single, small volume sale that will give it the ability to export significant quantities of raw pistachios to the United States with only minimal or no antidumping duties assessed.

Petitioner also contends there was no entry or sale of raw pistachios during the period of review, since the entry date shown in the Customs Form 7501 is July 5, 2001, and the POR ended on June 30, 2001. In addition, petitioner argues that the purchase order for the raw pistachios issued by the U.S. customer, Ann's House of Nuts (AHON), indicates that the "date ordered" was July 10, 2001. Petitioner further notes that AHON did not pay for the subject merchandise until July 17, 2001.

In its comments on the verification of the concurrent CVD proceeding, petitioner also argues that Nima did not use ordinary commercial channels, *i.e.*, a commercial bank, in making the sale to the United States and converting the proceeds, but rather used a foreign exchange service. They further argue that the prices in Iran at which the grower sold the subject merchandise to the supplier and the supplier sold to Nima are much lower than the prices at which those entities sold to their other Iranian customers. In addition, petitioner cite to the fact that the price for Nima's single sale to the United States was based on freight costs as further evidence that the sale was not bona fide. Petitioner argues that based upon the totality of the above circumstances there was no bona fide sale during the POR; therefore the Department should disregard Nima's U.S. sale and rescind this new shipper review.

Cal Pure similarly argues in their comments on the CVD verification reports that Nima's U.S. sale was not bona fide. First, Cal Pure cites to the fact that Nima Trading Company (NTC), Nima's apparent predecessor, was not established in compliance with Iranian law, nor did it file a tax return. Cal Pure argues that in order to avoid the law NTC sold subject merchandise to the United States through Globex rather than under its own name. This fact alone, argues Cal Pure, creates suspicion as to the legitimacy of NTC and its successor Nima. Cal Pure further argues that Nima's CVD Verification Exhibit 1 appears to indicate that Nima's company funds were totally depleted after the U.S. sale was completed. Cal Pure argues that it is highly unusual for a company to conduct a single transaction and then, for all intents and purposes, shut down through the depletion of all corporate funds via a transfer back to the company president of previously paid in capital and sales revenue. Cal Pure also notes that Nima had no taxable income and hence paid no taxes. This manner of operation, argues Cal Pure, indicates that Nima has no intention of conducting an ongoing operation but rather was formed solely for the purpose of making a single U.S. sale that would allow it to obtain a new shipper review.

Cal Pure also cites to the pricing patterns of Maghsoudi Farms and Fallah as evidence that the U.S. sale is not bona fide. Cal Pure argues that the CVD verification results indicate that Fallah and Maghsoudi and Maghsoudi and Nima did not deal at arms-length, as the prices at which Maghsoudi sold to Fallah were approximately 20 percent lower than the prices at which Maghsoudi sold to three other larger customers, and the prices at which Fallah sold to Nima were also lower than the prices at which Fallah sold to other, higher volume customers. Cal Pure argues that it is unusual in commercial practice to charge higher prices to large volume customers and lower prices to exceedingly small volume customers like NTC or Nima. This direct rather than inverse correlation between volume and price, argues Cal Pure, strongly suggests that price accommodations occurred between these parties, allowing Nima to set a favorable price to its U.S. customer. Such activity, argues Cal Pure, indicates

that Nima and its supplier did not deal at arm's-length, and if they did not, argues Cal Pure, then Nima's U.S. sale cannot be bona fide. Finally, Cal Pure argues that the basis on which Nima set its U.S. price is evidence that normal commercial considerations were not driving the essential terms of sale. The CVD verification report states that the quantity sold to AHON was "determined by air transport costs." Cal Pure further argues that it appears that the parties agreed only on price after the air freight cost was made known. The very use of air freight to ship a small quantity of nuts, argues Cal Pure, is further evidence that the sale was not bona fide, as no commercial seller of pistachios ships them by air. Cal Pure further notes the statement on the purchase order issued by AHON, which states that the U.S. sale was a "test shipment" as evidence that the U.S. sale was not a normal commercial shipment of pistachios.

Respondent argues that the small volume of its U.S. sale was due to the existing high tariff rates and the risk and expenses involved in undertaking this review. Respondent claims that not even the largest Iranian exporters could afford to export large volumes of pistachios and risk the prospect of 317 percent tariffs. Nima argues that it is a legitimate company formally registered in Iran and that the focal point of its business is to take advantage of business opportunities in the U.S. market. Nima points out that its U.S. sale involved AHON, the tenth largest packer and distributor of nuts in the United States. Nima also argues that the dates of sale and entry are well established in the record of the review. Nima states that it did its best to carry out its sales to the United States in a professional manner adhering, as much as possible, to the standard practice in the normal course of business.

#### *Department's Position*

The Department disagrees with petitioner and Cal Pure. The Department finds that the totality of the evidence on the record of this proceeding does not support a finding that Nima's sale to the United States was not a bona fide transaction. With respect to petitioner's argument regarding quantity, while we note that the quantity sold by Nima appears to be small compared to stated industry standards, established Department practice provides that the size of a transaction is not sufficient, in and of itself, to warrant a finding that the transaction is not bona fide. The Department has stated that "single sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties' normal selling practices." *See Certain Cut-to-Length Carbon Steel from Romania: Notice of Rescission of Antidumping Duty Administrative Review*, 63 FR 47234 (September 4, 1998). Moreover, the Department has found small quantity sales (e.g., test sales) to be bona fide in previous new shipper reviews. *See American Silicon Tech v. U.S.*, 110 F Supp. 2d 992, 996 (Ct. Int'l Trade 2000) (*American Silicon Tech*). While the small quantity of Nima's U.S. sale is of concern, the Department finds no evidence that Nima's sale to the United States was commercially unreasonable or involved selling practices atypical for a new shipper of pistachios (*see* discussion below). Therefore, the Department finds that the small quantity involved in Nima's U.S. sale does not, in and of itself, render the sale not bona fide.

Regarding petitioner's argument that Nima is not a legitimate commercial enterprise, the Department finds no evidence on the record to this effect. The fact that a new shipper is a newly formed entity does not mean it is not a legitimate commercial enterprise. Indeed, at the verification of the concurrent CVD proceeding, the Department confirmed that Nima was a legally registered entity in Iran and that its account book was stamped by the Ministry of Economy and Finance. Nor does the fact that Nima was created to pursue opportunities in the U.S. pistachio market render the entity illegitimate. While it is true that Nima does not have an established history in selling pistachios to the United States, the Department notes that Nima's U.S. customer and the importer of subject merchandise, AHON, is an established distributor of nuts in the U.S. market. There is no evidence on the record to indicate that the transaction between Nima and AHON was not a commercially reasonable transaction.

While Cal Pure has argued that Nima's apparent predecessor, NTC, was not established and did not operate in compliance with Iranian law, the Department notes that a formal successor-in-interest analysis was neither requested nor undertaken in this review. Moreover, the Department is reviewing only sales by Nima in the instant proceeding. Absent a finding that Nima is the successor-in-interest to NTC, NTC's behavior and sales practices are not relevant in the context of this review. With respect to Cal Pure's arguments that Nima's company funds were depleted after the U.S. sale took place, the Department does not find that this fact necessarily speaks to the bona fides of the U.S. sale. While company officials may have decided for a variety of reasons to draw down company funds, there is no additional evidence that the company is not operational or defunct. Indeed, it is not unreasonable that a new shipper formed solely for the purpose of selling subject merchandise to the United States would await the outcome of the Department's review before proceeding with additional sales to the U.S. market.

With respect to petitioner's argument that no U.S. sale or entry took place during the POR, the Department notes that it is established practice to proceed with a review if it can be demonstrated that a sale to the United States occurred during the POR and entry occurred within a reasonable period of time from the end of the period. The Department's regulations provide it with the discretion to expand the normal POR to include an entry and sale to an unaffiliated customer in the United States of subject merchandise if the expansion of the period would likely not prevent the completion of the review within the time limits set forth in Section 351.214(i). *See* Antidumping Duties; Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comment, 61 FR 7308, 7318 (February 27, 1996); Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27319-20 (May 19, 1997). *See* also 19 CFR 351.214(f)(2)(ii). The Department notes that the entry date for Nima's U.S. sale is July 5, 2001, a mere five days (inclusive of a federal holiday) after the end of the relevant POR (June 30, 2001). The Department does not find a delayed entry of five days to be sufficient to terminate this review.

With respect to sale and payment date, the record evidence indicates that the merchandise at issue was ordered verbally on June 10, 2001, and invoiced on June 25, 2001. The record does contain a purchase order from AHON dated July 10, 2001; however, a letter from the Import/Export

Manager of AHON dated July 27, 2001, and contained in Nima's original request for review, states that the purchase order date of July 10, 2001, reflects an internal administrative delay in receiving new part numbers for Iranian pistachios. The letter confirms the verbal order placement date of June 10, 2001. The Department therefore finds that a sale did occur within the POR. In addition, the Department has found in a previous new shipper review that issuance of a purchase order after shipment is not necessarily commercially unreasonable. *American Silicon Tech*, 110 F. Supp. 2d. at 997. With respect to payment, as the goods were entered into the United States on July 5, 2001, payment took place within 12 days of entry. The Department does not find a 12 day lag between entry and payment to be unreasonable. Regarding petitioner's argument that Nima used a foreign exchange dealer rather than a commercial bank to convert its U.S. sale proceeds, the Department accepts respondent's argument that the lack of formal banking and financial relations between the United States and Iran necessitated the involvement of a third-party exchange service.

Regarding petitioner's and Cal Pure's argument that the prices charged by the grower and supplier of subject merchandise to each other and to Nima appear to be based on preferential terms, the Department does not find this argument persuasive. Many factors in addition to the volume of a given sale may be factored into the price set by the seller. We have no evidence on the record to determine what factors went into the setting of prices between the grower and supplier and the supplier and Nima. The fact that prices among these parties may be lower than prices charged to other customers is not, in itself, indicative of affiliation or price collusion, nor is it sufficient to find that the transactions were not at arms-length. Most importantly, there is no evidence on the record to suggest that the sale between Nima and its U.S. customer was made at a commercially unreasonable price. Therefore, we do not find that the prices charged by the grower and supplier to each other and to Nima support a finding that Nima's sale to the United States is not bona fide.

Finally, with respect to the issue of air freight and its effect on price and quantity of the U.S. sale, we acknowledge that the record indicates that transportation costs played a factor in determining the final quantity of the sale. We do not find evidence on the record of this review, however, that the unit price established between Nima and AHON was in any way affected by the costs of transportation. It is reasonable that a customer purchasing goods on an FOB basis would consider freight costs in determining the final quantity of goods he intends to purchase, as he/she is responsible for those costs. Absent any evidence that the unit price of subject merchandise was in some way affected, and/or distorted, by the transportation costs borne by the U.S. customer, we do not find this argument persuasive. As discussed above, the Department has stated and the Courts have upheld that a small quantity test sale/shipment is not necessarily contrary to normal business considerations. *See American Silicon Tech*, 110 F. Supp. 2d. at 996. Absent additional evidence that the sale to AHON was distortive or unreflective of normal business practice, the fact that it may have been a small shipment sent via air freight does not warrant a finding that the sale is not bona fide.

In summary, while the Department notes that the small quantity of the U.S. sale is of concern, and that transportation costs were a factor in establishing the final quantity to be sold, we do not find based on the totality of evidence on the record that Nima's sale to AHON was conducted contrary to

normal business practices. Given the absence of any evidence that the price between Nima and AHON is distortive or that Nima and AHON are not legitimate enterprises, we do not find the sale in question to be commercially unreasonable. As a result, for purposes of this review, we find Nima's U.S. sale to be a bona fide transaction and have determined that rescission of this review is therefore unwarranted.

### **Comment 3: Verification**

Petitioner states that it first made a formal request for verification on December 18, 2001, and argues that verification in this case is particularly important if the Department is going to use documentation submitted by Nima such as exchange rate information. Petitioner states the Department should not use such documentation without verifying its accuracy.

Petitioner contends that verification is particularly important because of the Department's statement in the preliminary results that "[e]xchange rates for the Iranian rial published in the Dow Jones News/Retrieval Service appear to be official rates for public rather than private transactions." Petitioner claims verification will show that the exchange rate for the Iranian rial published by Dow Jones is in fact an official rate for private transactions. Petitioner states that it is commonplace for the Department to conduct verification in a new shipper review and cites to several instances where the Department has conducted verification in new shipper reviews.

WPA argues that the respondent has been particularly evasive in answering the questions presented by the Department. WPA also argues that five supplementals is an unusually high number. WPA contends that when a respondent has been unwilling to be forthcoming with information, the ITA would, at the very least, perform a verification or rely on adverse facts available.

Respondent did not comment on this issue.

### *Department's Position*

The statute and regulations do not require the Department to conduct verification in a new shipper review. *See* 19 CFR 351.307(b)(iv). Where the Department elects not to verify, it will rely on timely submitted information, unless there is evidence that the information is unreliable. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China, Final Results of 1997 - 1998 Antidumping Duty Administrative Review and Final Results of New Shipper Review*, 64 FR 61847 (November 15, 1999). In the instant review, information has been submitted in a timely manner in accordance with Departmental regulations, and the record contains no evidence to suggest that the information provided by Nima and Fallah is unreliable. The Department did elect to conduct a verification under the companion CVD new shipper proceeding, the report of which indicates that with respect to cross-cutting issues such as exchange rates, company structure, *etc.*, information submitted on the record of this proceeding is indeed accurate and reliable.

(See Verification of the Questionnaire Responses Submitted by the Tehran Negah Nima Trading Company in the concurrent CVD New Shipper Review (CVD Verification Report). Thus, for these final results, the Department will rely on the information provided by Nima and Fallah. See comment 6 for a discussion of cost information supplied by Maghsoudi Farms.

#### **Comment 4: Exchange Rate**

Petitioner believes the Department should follow its well-established precedent and use the exchange rate published by Dow Jones News/Retrieval Service (Dow Jones) rather than documentation provided by respondent. Petitioner cites to the Department's policy bulletin (*see* Policy Bulletin 96-1: Import Administration Exchange Rate Methodology, 61 FR 9434 (March 8, 1996) on exchange rates which states that in the absence of the Federal Reserve Bank rate, the Department will identify "another reliable source" for purposes of exchange rate calculations. Petitioner argues that in numerous cases the Department has found "another reliable source" to be the exchange rates published by Dow Jones. Petitioner points to many cases where, in the absence of a Federal Reserve rate, the Department used the Dow Jones rate. Petitioner argues that in following the overwhelming precedent the Department has established the Department should use the Dow Jones rate in this new shipper review.

Petitioner argues that the "actual" rate allegedly received by Nima is irrelevant because it is not the official published rate. Petitioner argues that the official rate on the date of Nima's U.S. sale (June 25, 2001) as published by Dow Jones is 1,746.47478962 rials to USD. Petitioner claims that this rate is not an aberration and is reliable, as it is the exchange rate reported by other reputable sources. Accordingly, petitioner states the Department's established practice requires use of this rate rather than the purported "actual" rate advocated by Nima. Petitioner further argues that, contrary to the Department's finding in the preliminary results, Nima received the Dow Jones rate, and that the Dow Jones rate is applicable to private transactions. Petitioner argues that Nima's assertions on the record that the "oil-notional rate" (which appears to be the rate reported by Dow Jones) applies to governmental transactions and therefore cannot be used for purposes of this review are incorrect. Petitioner argues that substantial evidence on the record indicates that the "oil-notional" rate has been used by the "bonyads," which petitioner defines as private commercial entities responsible for twenty-one percent of the pistachios grown in Iran. Petitioner argues that Nima has not provided any evidence to rebut or contradict these facts.

Petitioner argues that the documentation submitted by Nima regarding exchange rates is not reliable and includes a scribbled handwritten note. Petitioner believes the Department should not rely on such unconvincing and unsound documentation in formulating its results in an antidumping proceeding. Petitioner further argues that the "actual" rate received by Nima is irrelevant because it is not the rate in effect on the date of sale. Petitioner points out that the documentation Nima provides reflects an exchange rate that existed on February 4, 2002, a date well outside the POR. Petitioner further points to the Department's regulations mandating that the Department select an exchange rate

that existed on the date of sale of the subject merchandise. By converting foreign currencies into USD using a rate of exchange that existed on a date other than the date of sale of the subject merchandise, petitioner argues, the Department violated its own regulations. Petitioner claims that in switching from an exchange rate based on objective criteria - *i.e.*, what the Federal Reserve or Dow Jones reports on the date of sale - to an exchange rate based on subjective criteria - *i.e.*, what a particular exporter/producer claims to be the exchange rate is unprecedented and unwarranted.

Even if the Department determines to rely on information submitted by Nima for purposes of exchange rate conversion, petitioner argues, that information supports the use of a rate of 1,755 rials to USD. Petitioner points to Nima's first supplemental questionnaire response dated February 22, 2002, in which Nima provides a bank document showing a deposit of \$1,173 for which it received 2,058,615 Iranian rials in return. Petitioner claims this document demonstrates that Nima received a rate of 1,755 rials to USD. Petitioner states that Nima attempted to downplay its own evidence of this rate by stating that such an exchange rate "is only for bookkeeping purposes." Petitioner states that Nima cannot wish away the use of this exchange rate by merely stating that it is for bookkeeping purposes. Nor, argues petitioner, can Nima assert, without any support, that it received an exchange rate of 7,695 rials to USD. Petitioner argues that Nima appears to pick the exchange rate of 7,695 rials to USD out of the blue.

Petitioner further contends that in the preliminary results of the instant review the Department did not adequately support its reasons for using the documentation provided by Nima for purposes of exchange rate conversion. Petitioner argues that the Statement of Administrative Action (SAA) for the Uruguay Round Agreements Acts (URAA) sets forth that the Department "must specifically reference in ...[its]...determinations factors and arguments that are material and relevant, or must provide a discussion or explanation in the determination that renders evident the agency's treatment of a factor or argument." SAA at 892. Petitioner states the Department neither (a) specifically references in its determination facts and arguments that are material and relevant, nor (b) provides a discussion or explanation that renders evident the agency's treatment of a factor or argument. Petitioner claims that what little discussion the Department provides for its selection of exchange rates is erroneous.

Lastly, petitioner argues that if the Department does not use the exchange rate published by Dow Jones then the Department should use a weighted-average exchange rate which would be indicative of the performance and well being of the Iranian economy with the rest of the world and enable comparison of the Iranian microeconomic picture to the rest of the world. Petitioner believes a weighted average rate more accurately represents the true commercial value of Iranian currency than the "non-oil" rate alone. Petitioner explains the "non-oil" rate represents only a portion of actual commercial foreign exchange transactions in Iran while a weighted average would capture all such commercial trade. It is irrelevant, petitioner states, that much of that commercial trade occurs in the petroleum sector. Petitioner suggests for the period including the date of sale of the subject merchandise, based on transactions in Iran, the weighted-average exchange rate would be approximately 5,339 rials to USD.

WPA claims there is very little explanation in the preliminary results as to why the Department selected the exchange rate it did. WPA argues that considering the lack of significant evidence on the record and the fact that this action was contrary to Department precedent it would seem that a more substantive explanation would be in order. Based on their reading of Department procedures, WPA maintains one would have anticipated the selection of the official exchange rate as published by Dow Jones.

WPA states that during the POR, Iran maintained a dual exchange rate - the Tehran Stock Exchange (TSE) rate (8,000 rial = \$1) and an official rate (1,750 rials = \$1). WPA does not know of any other country which maintains a dual exchange rate with as wide a spread between the two rates. WPA claims neither the TSE nor the official rate represents a true value of the Iranian rial. Because of the complicated exchange rate system, WPA suggests the Department investigate numerous transactions to determine a weighted-average exchange rate which more accurately reflects the real rate of exchange in Iran.

Respondent argues that the Department's use of the "non-oil" rate as opposed to the "oil-notional" rate published by Dow Jones, is the correct and true reflection of the ongoing exchange rate system in Iran during the POR. Respondent argues that the Central Bank of Iran, like all other Central Banks in the world, is the sole and ultimate authority on all monetary and foreign exchange matters related to the country. Respondent contends that the verification of the correct and prevalent exchange rate system in any country, including Iran, as performed by the IMF and the World Bank, is only possible by the records, announcements, and documents published by the central banks. Therefore, respondent states, in the absence of the Federal Reserve Bank rate, the Department should rely on Iran's Central Bank published rates as "another reliable source."

Respondent states the fact that the Federal Reserve Bank does not publish an exchange rate for the Iranian rial should not preclude the fact that the ultimate source of accurate and reliable information on any country's foreign exchange system is the central bank of that country. Respondent maintains that the Dow Jones rates are reflective only of the "oil-notional" rate used exclusively by the Iranian government through the public banking system to settle its own international financial obligations. Respondent states the use of this rate, as recommended by the petitioner, will constitute an outright denial of the realities of the Iranian foreign exchange system and would be contrary to practically all standard and established methodologies in economic and financial analysis in this or any other country regarding the structure and operation of the Iranian foreign exchange system.

Respondent further argues that it did not receive the Dow Jones exchange rate in converting its proceeds from the U.S. sale. Respondent points to the documents submitted in its April 4, 2002, response which reflect the dates, the exchange rate, and the amount in rials Nima received for the proceeds of its sale to AHON. Respondent states that the proceeds were credited initially to Nima's temporary Foreign Exchange account. Respondent explains Nima had three options for converting these proceeds: 1) Nima could have withdrawn the amount of \$1,173 and exchanged it at the free

market rate of 8,000.39 rials to USD; 2) Nima could have sold its dollars to the same bank at the “non-oil” rate of 7,917.99 to USD; or 3) Nima could have left its dollars in its account and exchanged them at a future date. Nima argues that it chose the third option and that on February 4, 2002, Nima decided to exchange the dollars for rials. Respondent states that it received a total of 8,761,500 rials for its deposit of \$1,173, or a rate of 7,965 rials to USD. Respondent argues that it is wrong to argue that Nima received 1,750 rials for its foreign exchange proceeds from the sale. Respondent claims that the banks are obligated per statutory regulations by the Central Bank of Iran to give Nima the “non-oil” rate. Respondent points out that since Nima had no other transactions in that time frame, the original \$1,173 dollars deposited in the foreign exchange account on July 29, 2001, were the same dollars that were withdrawn and converted to rials on February 4, 2002.

Respondent argues that the bank originally entered a rate of 1,750 rials per USD on Nima’s statement due to two factors. Respondent states that during the POR the Iranian banking system had a “three-tier” foreign exchange system which required the government and the banking system to establish two bookkeeping systems that would allow the banks to handle not only government and state enterprises as well as private dollars with domestic origin, but also be capable of processing private transfers from outside the country. Respondent states that the banks used to convert all transactions in the first category (*i.e.*, government, public enterprises and private transfers of dollars with domestic origin) at 1,750 rials per dollar. Respondent states that this system allowed the Central Bank to maintain a more accurate account of the foreign exchange supply in the economy, and differentiated between the new dollars coming into the economy and the existing ones in the hands of the government or private individuals or companies. Therefore, respondent contends, all dollar transfers with a domestic origin, *i.e.*, from one account in an Iranian bank to another account in that same bank, or between two Iranian banks inside the country, were entered on the books at the “oil-notional” rate. However, if and when the same private individual intended to withdraw his money, the bank would either give him or her dollars or purchase the dollars at the “non-oil” rate and credit the individual’s “rial” account at this higher rate. Respondent states that as a result the transfer of dollars with an internal origin into its account was first entered on the books at the “oil notional” rate, but was later converted and exchanged at the “non-oil” rate.

Respondent contends that the dollar proceeds from its U.S. sale were first deemed to be of “domestic-origin” and initially booked at the “oil-notional” rate due to the fact that Nima had to send its dollar proceeds through Sehati Exchange. Respondent argues that it had to use a foreign exchange dealer due to the lack of existing financial and banking relations between Iran and the United States. Respondent argues that the Sehati office in Iran transferred the proceeds from Nima’s U.S. sale to Nima’s account at the Bank of Export Promotion in Iran. Respondent explains that this is the reason Nima’s deposit of dollars was treated as having “domestic origin.” Respondent claims that since the transfer of dollars was between two private dollar accounts with a domestic origin the oil-notional rate was applied originally and solely for “bookkeeping purposes.” Later, respondent argues, proceeds were converted at the “non-oil” rate. Respondent states that the mechanism of the transfer of Nima’s dollars by Sehati, along with the bookkeeping procedures related to the “multi-tier” exchange system in place during the POR, resulted in a two-stage process of exchanging Nima’s dollars to rials.

Respondent argues that the bookkeeping of the banks, *i.e.*, the number of stages the bank chose to convert Nima's dollars to rials, should not have any bearing on the final outcome of this review. Respondent argues that Nima chose to leave its proceeds in its foreign exchange account and convert them at a future time. Respondent asserts that the bank actually exchanged Nima's dollars to rials at a rate of 7,965 rials to USD. Respondent claims the average monthly "non-oil" rates are available in the publications of the Central Bank of Iran or the International Monetary Fund (IMF). Respondent points out that one of petitioner's own documents uses IMF data which reports an exchange rate for year 2001 of 7,924 rials per USD.

Respondent further argues that it did not and does not have any affiliation with any Bonyads in Iran. Respondent states that Nima did not purchase any pistachios from any Bonyads and argues that petitioner's statement that the Bonyads could have used the "oil-notional" rate is only an allegation not substantiated by documented facts. Respondent states there is no documentation to support the allegation that the "oil-notional" rate is used by various private parties. Respondent believes that if private companies had benefitted from the "oil notional" rate, it would have been illegal and in violation of the Iranian banking laws and regulations. Respondent points out that Nima did not exchange its dollars at the "oil-notional rate." Finally, respondent states the exchange rates other entities have access to does not have any bearing on this review, since antidumping reviews are company specific.

Respondent further argues that the use of a weighted-average exchange rate would be conceivable only if the exact rate at which Nima exchanged its dollars to rials was unknown. Respondent argues that the weighted-average proposed by petitioner includes a significant amount of "over valued" rials that are exclusively available to the government as a result of its oil exports. Respondent points out that a weighted- average exchange rate has no bearing on the exchange of Nima's proceeds from its U.S. sale.

#### *Department's Position*

The Department agrees in part with petitioner and in part with respondent. The Department's preferred source for daily exchange rates is the Federal Reserve Bank. In the absence of a Federal Reserve Bank exchange rate, the Department has often relied on rates published in the Dow Jones News/Retrieval Service. In this proceeding, however, there is ample evidence on the record to indicate that the rate published by Dow Jones is not the appropriate rate to use for currency conversion purposes. We do agree with petitioner, however, that the exchange rate relied upon by the Department in the preliminary results of review reflects a rate in effect outside of the POR. For purposes of these final results, therefore, the Department has determined to use the quarterly "non-oil" exchange rate as reported by the Central Bank of Iran for the quarter in which Nima's U.S. sale occurred.

As the Department stated in its preliminary results of the instant review, the International Monetary Fund's (IMF) Annual Report on Exchange Rates and Exchange Restrictions 2001, indicates

that as of March 20, 2000, Iran had in effect a dual exchange rate system<sup>1</sup>. This system as outlined by the IMF consisted of: (1) an official rate of 1,750 rials to USD “applied mainly to the imports of essential goods and services as well as servicing public and publicly guaranteed debt;” and 2) an effective Tehran Stock Exchange (TSE) rate “applied to all transactions except for government imports, imports of essential goods, and services of public and publicly guaranteed debt.” A third official exchange rate consisting of an “export rate” of approximately 3,000 rials to USD had been abolished on March 19, 2000. According to the IMF, therefore, the rate of approximately 1,750 rials to USD advocated by petitioner and published by the Dow Jones is applicable to a distinct set of transactions involving imports of essential goods and services and servicing of public debt. The Government of Iran confirmed this fact at verification of the concurrent CVD new shipper proceeding. Indeed, GOI officials stated that “pistachio growers, whether cooperatives or independent farmers, were never eligible to use Rate 1 for any purpose.” *See* Verification of the Questionnaire Responses Submitted by the Government of the Islamic Republic of Iran, page 2. As a result, the Department finds that this rate is not appropriate for purposes of currency conversion in this proceeding.

Record evidence from the Bank of Export Promotion in Iran indicates that respondent received the “non-oil” or effective TSE rate at the time its proceeds from the U.S. sale were exchanged in February 2002. The Department acknowledges that at the time of the initial deposit through Sehati Exchange, Nima’s USD proceeds were given an Iranian rial equivalent based on the “oil-notional” rate of 1,765 rials to USD. This rate, however, appears to be for internal record-keeping purposes, as argued by respondent, and no evidence exists that this rate was used for any actual currency conversion involving Nima’s U.S. sale proceeds. (*See* Nima’s response dated February 22, 2002, exhibits 2B, 2C, 2D and 2E, April 4, 2002, Exhibits 2, 3 & 4). Indeed, according to the IMF, the proper conversion rate for all transactions except for imports of essential goods and services and servicing of public debt is the effective TSE or “non-oil” rate. The fact that, as a procedural matter, Nima’s U.S. sale proceeds were initially considered by the bank to have come from a “domestic source,” the Sehati Exchange, and given an Iranian rial equivalent based on that fact does not warrant the use of an exchange rate which appears contrary to Iranian monetary policy and which was never realized by respondent.

We disagree with petitioner that an artificially-constructed weighted-average exchange rate would be appropriate in this case. There is no evidence to suggest that such a rate exists in Iran nor any evidence to suggest that respondent realized such a rate during the POR. For the Department to attempt to construct an exchange rate for purposes of this review would be highly unusual and unreflective of the realities of currency conversion in Iran and the evidence on the record of this proceeding. Nor do we find petitioner arguments regarding the bonyads to be persuasive. There is no evidence on the record that Nima is in any way associated with or part of the bonyads. Nor is there

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<sup>1</sup>At the verification in the concurrent CVD proceeding, the Government of Iran cited to an additional exchange rate, the “free market,” or “parallel market” rate, indicating that this rate was illegal in prior years but has been openly traded in the last several years. Officials noted that this rate closely tracks the “non-oil” rate. CVD Verification Report at pages 1 - 2.

compelling evidence to indicate that exchange transactions in Iran involving the bonyads and pistachios are officially undertaken at the “oil-notional” rate. Whether or not the bonyads as a group or as private individuals were able to convert currency at a rate officially applicable to imports of essential goods and services and servicing of public debt is irrelevant for purposes of this proceeding. The Department’s objective is to use the official exchange rate applicable to the transactions at issue.

We do agree, however, with petitioner that Departmental regulations require that currency conversions be based on the rate of exchange in effect on the date of the U.S. sale. Because Nima did not convert its U.S. sale proceeds until after the POR, for these final results, the Department will not rely on the actual conversion rate realized by respondent and evidenced on their bank statements. Rather, the Department will apply the rate published by the Central Bank of Iran for the second quarter of Persian year 1380, the quarter in which the U.S. sale took place, in its margin calculation program (*i.e.*, 7,919.98 rials). (*See* Nima’s response dated February 22, 2002, Exhibit 2e).

#### **Comment 5: Home Market Selling Expenses**

Petitioner argues that the Department should increase Nima’s home market selling expenses for the expenses associated with any trip Mehrdad Valibeigi made to Iran in conjunction with any sale by Nima to the United States. Petitioner points out that the Department included, as part of Nima’s home market selling expenses, expenses associated with the trip to Iran of the President of AHON.

Respondent argues that Mr. Valibeigi’s trip to Iran had nothing to do with his work as a consultant to Nima. Respondent explains that while in Iran Mr. Valibeigi discussed matters with Nima officials but that that was not the main purpose of his trip. Mr. Valibeigi explains that he had not been home in twenty years and wanted to visit friends and family.

#### *Departments Position*

We disagree with petitioner. The Department has captured in its calculation all relevant selling expenses incurred by Nima’s during the POR. There is no evidence to indicate that Nima incurred any additional expenses on behalf of Mr. Valibeigi with respect to his trip to Iran. As noted by petitioner, all expenses incurred by Nima with respect to the visit to Iran of officials from AHON have been properly reported and included in the Department’s calculations.

#### **Comment 6: Disclosure at CVD Verification of Additional Farm**

In its comments on the verification report in the concurrent CVD new shipper proceeding, Cal Pure notes that the Department discovered at the CVD verification that Mr. Maghsoudi, the grower of subject merchandise, owned a second, unreported farm. Cal Pure alleges that this is a material fact that should have been reported to the Department in response to the standard questionnaire. Specifically,

Cal Pure claims that the Department requires cost respondents to provide a list of all plants and facilities involved in the production and sale of subject merchandise and to report a weighted-average cost. Cal Pure contends that Mr. Maghsoudi failed to do so. Cal Pure further notes that the second farm which Mr. Maghsoudi owns is in the region where RPPC operates. Cal Pure argues that the close proximity of the second farm to RPPC's farms and the likelihood possibility of a previous affiliation/relationship between RPPC and Maghsoudi's second farm warrants termination of this new shipper review, since such affiliation would disqualify Maghsoudi and, hence, in this case, Nima, from obtaining a new shipper review.

Cal Pure claims that the existence of the second farm calls into question whether the land was ever used by or for RPPC to produce subject merchandise and whether Mr. Maghsoudi, or previous owners of the land were affiliated with RPPC or any other pistachio producers who exported during the original investigation. Cal Pure argues that the Department would need to conduct a successor-in-interest analysis to ultimately determine these issues. Cal Pure lists five elements that the Department has considered in past cases involving successorship. Absent evidence on the record with respect to these factors, and due to its inability at this stage to conduct such an analysis, Cal Pure argues, the Department should rescind the proceeding.

Cal Pure argues, however, that if the Department does not rescind the review it should rely on adverse facts available for these final results. Cal Pure notes that respondent has made it clear that its cost reporting is based solely on Maghsoudi's one farm consisting of 15 hectares in production during the POR. Cal Pure notes that the second farm consists of 23 hectares. Because the costs of this farm were omitted from Maghsoudi's questionnaire response, Cal Pure argues that potentially 60 percent of relevant costs were not reported. In addition, Cal Pure claims that the actual costs from the second farm could have been used as the basis for any estimated start-up and rearing costs for the farm for which estimated costs were reported.

Petitioner claim that the newly discovered farm renders Mr. Maghsoudi's costs unreliable. Petitioner point to the *Notice of Final Determination of Sales at Less Than Fair Value: Small Diameter Circular Seamless Carbon and Alloy Standard, Line and Pressure Pipe from Germany*, 60 FR 31,974 (June 19 1995) where it claims the Department applied adverse facts available to the respondent in a similar situation.

Respondent did not comment on these issues.

*Department's Position:*

We agree in part with petitioner and Cal Pure. While we disagree that the newly disclosed farm warrants termination of the review because it is located in the region where Rafsanjan Pistachio Producers Cooperative (RPPC) operates and hence suggests a possible affiliation between the previous owners of the land and RPPC, we do agree that the disclosure at the CVD verification of a

second farm owned by Mr. Maghsoudi renders his costs as reported unreliable and unuseable for these final results.

In reviewing Mr. Maghsoudi's cost responses, it is not clear whether Mr. Maghsoudi is a sole proprietor with pistachio orchards at two locations or if each location is a separate legal entity unto itself, with Mr. Maghsoudi as the sole shareholder of both entities. If the former is true, he had an obligation to report costs for both farms from the very beginning of this proceeding, as he was requested to report his costs of growing subject merchandise, *i.e.*, pistachios, at all growing facilities (Sec. D II.A.2). If the latter is true, he was obligated to disclose the affiliation of the two entities, which would have allowed the Department to request the necessary information with respect to the second farm and to perform a proper investigation of it.

Section 351.401(f) of the regulations describes our treatment of affiliated producers in antidumping proceedings. It states that, in an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity, where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for manipulation of price or production. In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:

- (i) The level of common ownership;
- (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
- (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

As petitioner and Cal Pure point out, the Department requests information pertaining to affiliates in its standard questionnaire. In this proceeding, in the initial cost questionnaire issued to Mr. Maghsoudi, we requested a list of all plants involved in production owned by Mr. Maghsoudi or his affiliates (Sec. D II.A.2). We also requested an organizational chart of the company and each operating unit (Sec. D II.A.1). Further, we asked for a description and organizational chart of his legal structure (Sec. D II.A.3). In responding to each of these questions, Mr. Maghsoudi failed to note that he owns an additional 23 hectares engaged in the production of pistachios.

Not only did the Department request the disclosure of all affiliated parties, we also requested that a weighted average cost be calculated and reported if production takes place at more than one location. *See*, Section D questionnaire at I.D., "If more than one unique product produced at a domestic facility falls within the definition of a specific CONNUM, determine first the weighed-average CONNUM specific costs at that facility; then calculate the company-wide weighted-average CONNUM specific costs." This reporting requirement and methodology is consistent with Department practice. *See*, Memorandum to Faryar Shirzad, Assistant Secretary for Import Administration, *Issues and Decision Memorandum for the Antidumping Duty Investigation of Low Enriched Uranium*

from France, dated December 13, 2001, the Department addressed the question of cost differences between identical products produced at different locations with different cost structures and stated: “Regarding respondent’s argument that certain products produced and sold in the home country should be excluded from the cost calculation, we disagree. In calculating the COP and CV, we compute a weighted-average cost including all quantities of that product produced during the POI.”

The Department’s questionnaire and practice thus clearly required Mr. Maghsoudi in this case to report his average cost of production, regardless of the location of his production facilities, in order to calculate the proper cost of production for purposes of this review. We also note that given respondent’s arguments that he does have records for year 1379 (Persian year) costs and expenses for the 15 hectares planted in 1372, or the costs associated with planting and rearing those trees over the past 7 years, the costs of the second farm which Maghsoudi purchased 15 years ago could have been useful in establishing costs for the orchard planted in 1372, and perhaps would have allowed the Department to avoid the use of estimates/surrogates. Given the newly disclosed information, and absent any cost data with respect to the second farm, we cannot conclude that Mr. Maghsoudi’s costs, as reported, are either reliable and/or reasonably reflect his actual costs of production.

Section 776(a)(2) of the Act provides that, if an interested party – (A) withholds information that has been requested by the Department, (B) fails to provide such information by the deadlines for such information or in the form and manner requested, (C) significantly impedes a proceeding under the antidumping statute, or (D) provides information which cannot be verified the Department shall use, subject to sections 782(d), and (e) facts otherwise available in reaching the applicable determination. In this investigation, respondent failed to provide the necessary information (*i.e.*, the growing costs for an additional 23 hectares owned by the producer) to accurately calculate constructed value. In failing to disclose the existence of over half the acreage owned by respondent and used in the production of subject merchandise, respondent prevented the Department from being able to perform a proper analysis of the facts or to request the necessary information. Finally, as the absence from the record of complete cost information renders the reported per-unit costs unreliable, we conclude that, pursuant to section 776(a) of the Act, use of facts otherwise available is appropriate.

Section 782(d) of the Act provides, that if the Department determines that a response to a request for information does not comply with the request, the Department will inform the person submitting the response of the nature of the deficiency and, to the extent practicable, shall provide that person the opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, the Department, subject to section 782(e), may disregard all or part of the original and subsequent responses, as appropriate. In this case, as petitioner and Cal Pure note, the Department requested that the producer provide the weighted- average cost of all facilities producing the product, if Mr. Maghsoudi is in fact a sole proprietor, or to report all affiliated producers so that a proper “collapsing” analysis could have been performed. In responding to our requests for information, Mr. Maghsoudi never mentioned a second farm owned by himself and used to produce subject merchandise. Because Mr. Maghsoudi did not disclose the existence of this second farm until verification in the concurrent CVD proceeding, which occurred approximately five weeks prior to the deadline for these final results

and fourteen months after this review was initiated, we had no opportunity to inform him of any deficiency in his responses or to request additional information. Prior to the disclosure at the CVD verification, the Department appropriately relied upon respondent's assertions that it had disclosed all relevant cost information.

Section 782(e) of the Act provides that the administering authority shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements, if – 1) the information is submitted by the deadline established, 2) the information can be verified, 3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, 4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements, and 5) the information can be used without undue difficulties. In this case, the proper, complete cost data was never provided which renders the costs as reported so incomplete as to be unusable. Moreover, it is clear based on Mr. Maghsoudi's failure to disclose the second farm that Mr. Maghsoudi failed to act to the best of his ability in providing the requested cost data. Thus, in this case Section 782(e) of the Act does not compel use of respondent's reported cost data.

The Department has determined, therefore, that as respondent's reported costs cannot be relied upon, section 776(a) of the Act requires the Department to use facts available for these final results. In doing so, the Department must then determine whether the use of an adverse inference in applying facts available is warranted under section 776(b) of the Act. In the instant review, we find that an adverse inference is warranted given that the respondent failed to provide information with respect to the existence of an additional 23 hectares of pistachio production and, therefore, failed to provide cost data for over half of its production acreage. This omission renders the reported cost data unuseable and prevents the Department from constructing a proper CV using respondent's data.

Section 776(b) of the Act provides that adverse inferences may be used when a party has failed to cooperate by not acting to the best of its ability to comply with requests for information. *See* also the SAA, H. Doc. 3216, 103rd Cong. 2d Sess. at 870 (1996). Specifically, section 776(b) of the Act provides that, where the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority [the Department] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." A new shipper review is premised on the participation of both the exporter and the producer when the exporter does not produce subject merchandise. *See* 19 CFR 351.214 (b)(2). In this case, the producer Mr. Maghsoudi failed to provide information necessary for calculating the cost of producing the subject merchandise. This information was solely within the control of Mr. Maghsoudi, the producer. The Department is therefore applying adverse inferences based on Maghsoudi's failure to cooperate to the best of his ability. Accordingly, consistent with section 776(b) of the Act, we have applied partial adverse facts available in calculating CV.

The statute provides no "clear obligation" or preference for relying on a particular source in determining adverse facts available. Section 776(b) authorizes the Department to use as adverse facts available information derived from the petition, the final determination, a previous administrative review,

or other information placed on the record. As adverse facts available, the Department has determined to rely on cost figures from the Iranian Ministry of Agriculture (IMA) study, submitted in respondent's section D response, for calculating costs of manufacturing. We took, from the IMA study, the amortization of start-up costs, the annual rearing costs, and the post-harvesting costs, all with an adjusted yield. To these costs, we added the general and administrative and profit figures based on the methodology used in the Department's preliminary results. See Memorandum to Neal M. Halper from Gina K. Lee, RE: Constructed Value Adjustments for Final Results, dated December 26, 2002.

#### Comment 7: **Fallah Sales/Expense Data**

Petitioner argues that respondent has attempted to allocate costs for the supplier of subject merchandise without demonstrating that such allocations are consistent with generally accepted accounting principles (GAAP). Petitioner argues that all of the supplier's reported unit costs are based on an allocation across "the average 30,000 kg that the supplier usually sell per year." Petitioner argues the Department requires actual sales volume in order to allocate costs properly since year-to-year variations in the actual figures could have a very significant impact on unit costs. Petitioner argues that the supplier does not describe the period over which the alleged "average" was calculated. Petitioner believes the "average" is a guess rather than a true average of actual annual sales. Petitioner argues that in the absence of data based on the supplier's actual experience during the POR, the cost information submitted by the supplier is inadequate and may not be used. Petitioner also argues that the supplier's information is not certified as accurate by the supplier and must be rejected.

Respondent argues that all costs provided by the supplier of subject merchandise were certified in a submission on the record dated on October 15, 2002.

#### *Department's Position*

First, we agree with respondent that Fallah's reported costs have been properly certified. The proper certifications were submitted on October 15, 2002, in response to the Department's request. With respect to Fallah's cost allocations, we disagree with petitioner's assertion that Fallah allocated costs over an average estimated sales figure. The statement that petitioner refers to was part of Fallah's response to a question raised by the Department with respect to Fallah's general books and records. See Nima's August 14, 2002, submission. In fact, Fallah did not calculate its own per-unit cost, but rather reported the raw data used by the Department to calculate a per-unit cost for the preliminary results of this review. See Fallah submission dated June 3, 2002, and Nima's submission dated August 14, 2002. These raw data included Fallah's reported actual expenses and its total sales quantity. Therefore, the Department will continue to rely on these raw data to calculate a per-unit cost for the supplier for these final results of review.

#### Comment 8: **Other Cost Issues**

Petitioner, Cal Pure, and Nima submitted numerous arguments with respect to cost data supplied by Maghsoudi Farms. Petitioner argues that the cost data as submitted were unreliable, not in accordance with Iranian GAAP, and not based on the grower's actual yields. They further argue that the record does not support the 50-year average useful life of a pistachio tree used by respondent and that the Department should include capital costs in CV even if respondent used his own capital. Lastly, petitioner argue that verification in the concurrent CVD proceeding showed that labor costs were underreported and that the Department failed to include in the exhibits a copy of Maghsoudi's cost book.

Cal Pure argues that Maghsoudi's costs as reported are neither consistent with Iranian GAAP nor based on actual experience. They also argue that a 50-year average useful life is arbitrary and contend that Maghsoudi's depreciation expense must include imputed interest on capital expenditures. Cal Pure further argues that verification of the concurrent CVD proceeding showed that costs associated with water, tractor operators, and irrigation equipment were not properly reported.

Respondent argues that Maghsoudi's per-unit cost should be averaged over Persian years 1379/1380, as pistachios produce on an "on" and "off" year basis, and that cost of capital should be set to zero as the grower did not borrow any funds in setting up his operation.

*Department's Position:*

As a result of the Department's decision to disregard the reported costs of Maghsoudi Farms, and apply facts available with an adverse inference in determining CV, all issues specifically related to Maghsoudi's costs are moot. *See* Comment 6.

**Comment 9: Preferential Treatment**

WPA believes the Department continues to provide preferential treatment to Nima. WPA states the Department has continually provided guidance to Nima and given Nima the benefit of the doubt in questionable situations. WPA points to the numerous extensions Nima has received and argues that the U.S. industry has not received comparable treatment.

Neither petitioner, Cal Pure, nor respondent comment on this issue.

*Department's Position:*

The Department has conducted this proceeding, as in all proceedings, in full accordance with the statute and Departmental regulations and has treated all parties fairly and without bias. All requests for extension were fully considered and granted whenever possible in accordance with statutory and regulatory deadlines. The Department notes its obligation to consider the nature of the respondent (*e.g.*, the size of the company, the extent of its experience, *etc.*) in establishing reporting requirements,

deadlines, *etc.*, and provide assistance whenever possible. *See* 782(c)(1) of the Act; the SAA at 864-865.

### **Comment 10: Combination Rate**

Petitioner believes Nima intends to take advantage of the rate it obtains from this proceeding to ship large quantities of pistachios into the United States. Petitioner states this is only possible if the Department fails to limit the rate in this review to merchandise that has been both produced by Maghsoudi Farms, the grower of the subject merchandise, and exported by Nima, *i.e.*, if the Department fails to issue final results based on a combination rate. Petitioner states the use of a combination rate in this case is more consistent with the Department's standard practice and cites to section 351.107(b) of the Department's regulations. Accordingly, petitioner argues, the Department should employ a combination rate in the final results.

Cal Pure contends that it is essential that the Department clarify in its cash deposit instructions for the final results that those results apply only to the specific exporter/producer combination of Nima/Maghsoudi, as authorized by section 351.107(b). Cal Pure believes this is essential so that other Iranian producers do not manipulate the results of this review by exporting through Nima in the future.

Respondent did not comment on this issue.

### *Department's Position*

The Department agrees with petitioner and Cal Pure that a combination rate is appropriate in this review. Where subject merchandise is exported to the United States by a company that is not the producer of the merchandise, the Department may establish a "combination" cash deposit rate for each combination of the exporter and its supplying producer(s). *See* 19 CFR 351.107(b). The Department has determined a combination rate is appropriate in this case, as Nima is not the producer of the subject merchandise. Therefore, the Department will include in its cash deposit instructions to Customs appropriate language to enforce these final results on the basis of a combination rate involving Nima/Maghsoudi.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the positions set forth above and adjusting all related margin and price comparison calculations accordingly. If these recommendations are accepted, we will publish the final results in the *Federal Register*.

AGREE\_\_\_\_\_ DISAGREE\_\_\_\_\_

\_\_\_\_\_  
Susan H. Kuhbach  
Acting Assistant Secretary  
for Import Administration

\_\_\_\_\_  
Date