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MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
for Import Administration

FROM: Gary Taverman *ST*  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty  
Investigation of Bottom Mount Refrigerator Freezers from the  
Republic of Korea

Summary

We have analyzed the comments of the interested parties in the antidumping duty investigation of Bottom Mount Refrigerator Freezers (refrigerators) from Korea. As a result of this analysis and/or based on our findings at verification, we have made changes to the margin calculations for the three respondents in this case, Daewoo Electronics Corporation (Daewoo), LG Electronics, Inc. (LG), and Samsung Electronics Co., Ltd. (Samsung or SEC). 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 investigation on which we received comments from parties.

General Issues

1. Targeted Dumping
2. Zeroing in Average-to-Transaction Comparisons
3. Adjustments to Expenses Paid to Affiliated Parties
4. Classification of Return Freight Expenses

Company-Specific Issues

Daewoo

5. General and Administrative Expenses for Daewoo

LG

6. LG's Corrected Control Numbers
7. LG's Home Market Rebates



8. LG's Home Market Advertising Expenses
9. LG's Home Market Payment Dates
10. LG's U.S. Payment Dates
11. LG's U.S. Billing Adjustments
12. LG's U.S. Lump Sum and Sell-Out Rebates
13. LG's Non-Product-Specific Accruals for U.S. Rebates
14. LG's U.S. Freight Expenses
15. LG's U.S. Indirect Selling Expenses
16. LG's U.S. Inventory Carrying Costs
17. LG's Materials Purchased from Affiliated Parties
18. LG's Research and Development (R&D) Expenses

### Samsung

19. Critical Circumstances
20. Use of Total Adverse Facts Available (AFA) for Samsung
21. Samsung's Early Payment Discounts in the Home Market
22. Samsung's Home Market Rebates on Discontinued Models and Kimchi Refrigerators
23. Samsung's Remaining Home Market Rebates
24. Samsung's Home Market Advertising Expenses
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26. Corrections Presented at the Start of Samsung's Sales Verifications
27. Samsung's U.S. Rebates
28. Treatment of Payments for Defective Samsung Merchandise
29. The Denominator of Various Expense Calculations for Samsung
30. Samsung's U.S. Credit Periods
31. Samsung's U.S. Interest Rate
32. Samsung's U.S. Indirect Selling Expenses
33. Classification of Certain Costs as Packaging or Packing for Samsung
34. Corrections Presented at the Start of Samsung's Cost Verification
35. SEC's G&A Ratio
36. Samsung's Scrap Sales
37. Samsung's Financing Costs
38. Samsung's Materials Purchased from Affiliated Parties
39. Samsung's R&D Expenses

### Background

On November 2, 2011, the Department of Commerce (the Department) published the preliminary determination in the less-than-fair-value (LTFV) investigation of refrigerators from Korea. See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea, 76 FR 67675 (Nov. 2, 2011)

(Preliminary Determination). The petitioner<sup>1</sup> and the three respondents requested a hearing, which was held at the Department on February 23, 2012. The period of investigation (POI) is January 1, 2010, through December 31, 2010.

We invited parties to comment on the preliminary determination. We received comments from the petitioner and the three respondents. Based on our analysis of the comments received, as well as our findings at verification, we have changed the weighted-average margins from those presented in the preliminary determination.

### Margin Calculations

We calculated export price (EP), constructed export price (CEP), and normal value (NV) using the same methodology stated in the preliminary determination, except as follows:

- We revised our margin calculations for each respondent to take into account our findings from the sales and cost verifications.
- We revised LG's reported home market shipment dates for sales to construction companies based on the average difference between the reported and actual shipment dates, as observed at verification. See the January 27, 2012, Memorandum from Henry Almond, Senior Analyst, to the File, entitled, "Verification of the Sales Response of LG Electronics Inc. in the Less-Than-Fair-Value Investigation of Bottom-Mount Refrigerator Freezers from Korea" (LG Korea Sales Verification Report) at page 23. We did not revise the corresponding dates of sale for these transactions to use the earlier of shipment date or invoice date because: 1) this revision would result in the exclusion of transactions shipped prior to, but invoiced during, the POI from our analysis; and 2) LG did not report the corresponding sales shipped during, but invoiced after, the POI. We will consider this issue further in subsequent segments of this proceeding involving LG (if any).
- We revised LG's reported U.S. shipment dates for EP sales based on the average difference between the reported and actual shipment dates, as observed at verification. Id. at page 24. We did not exclude any shipments made prior to the POI from our analysis for the reasons noted above.
- We reclassified LG's U.S. and home market return freight expenses, reported as part of movement expenses, as indirect selling expenses in accordance with our practice. See Comments 4 and 14.
- We included the restructuring costs related to the closure of the microwave oven line at Daewoo's Gwangju factory in the calculation of Daewoo's G&A expense ratio. See Comment 5.

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<sup>1</sup> The petitioner in this investigation is Whirlpool Corporation.

- We based LG's sell-out rebates reported on home market sales on AFA, based on a finding that the company's reporting methodology was distortive and LG did not act to the best of its ability in reporting these rebates. As AFA, we capped these rebates at the lowest sell-out rebate percentage at observed verification. See Comment 7.
- We accepted LG's classification of certain advertising expenses reported in its home market sales listing as direct expenses, based on our findings that these advertisements were: 1) directed at LG's customers' customers; and 2) specifically related to bottom mount refrigerators. at verification. See Comment 8.
- We adjusted LG's reported payment dates for sales paid via "flooring" transactions based on our observations at verification, pursuant to section 776(a) of the Act, because the actual payment dates are not on the record. We recalculated U.S. credit expenses using these dates. See Comment 10.
- We based LG's sell-out rebates reported on U.S. sales on AFA, based on a finding that the company's reporting methodology was distortive and LG did not act to the best of its ability in reporting these rebates. As AFA, we have determined the highest non-aberrational rebate percentage contained in LG's U.S. sales listing and then used this percentage to compute a sell-out rebate amount for all U.S. sales for which LG reported sell-out rebates (or for which LG applied a rebate floor). See Comment 12.
- We disregarded the "rebates" reported by LG in the fields REBATE9U, REBATE11U, and REBATE12U in its U.S. sales listing for purposes of the final determination because these "rebates" are accounting adjustments, rather than actual rebates. See Comment 13.
- We adjusted LG's reported U.S. inland freight expenses using the verified information on the record for the transactions examined at verification. See Comment 14.
- We revised LG's R&D and G&A rates for the following: 1) to reflect the refrigerator-related and common R&D expenses per the company's normal books and records; 2) to rely on consolidated cost of goods sold (COGS) denominators for the calculation of the refrigerator-related and common R&D expense rates; and 3) to exclude from LG's reported COGS adjustment factor the effect of costs already accounted for in the COGS denominators used in the G&A and R&D expense rate calculations. See Comment 18.
- We adjusted LG's reported financial expense rate calculation to include the net foreign exchange gains and net losses on derivatives that were reported under other operating income and expenses in the financial statements.
- For control numbers (CONNUMs) sold by LG, but not produced during the POI, we relied on the costs of the most similar CONNUM as identified by the Department's model matching criteria.

- Samsung reported a negative amount under the field REBATE2\_4H for one sale of kimchi refrigerators in the home market. We removed this rebate from our final calculations because it related to a return, rather than the reported sale. See Comment 22.
- We reconsidered our treatment of Samsung's home market advertising expenses and are now accepting Samsung's classification that these expenses are direct selling expenses, based on our findings at verification. See Comment 24.
- We accepted Samsung's classification of "subcontracted outside companies allowance" expenses as direct warranty expenses because they appear to vary directly with warranty services provided for foreign like product. See Comment 25.
- We calculated certain rebates for one model of bottom-mount refrigerators sold by Samsung in the United States in accordance with the terms of an agreement between Samsung's U.S. affiliate and its customer. See Comment 27.
- We revised the calculations of Samsung's per-unit G&A expenses by applying Samsung Gwangju Electronics Co., Ltd.'s (Samsung Gwangju's) and SEC's company-wide G&A expense ratios to the total cost of manufacturing plus packing. See Comment 35.
- We corrected two clerical errors in the calculation of Samsung's scrap sales value. See Comment 36.
- We excluded a portion of Samsung's interest income offset that we deemed related to accounts receivable and certain available-for-sale assets when calculating financing costs for this company. See Comment 37.
- We used the verified selling, general, and administrative (SG&A) ratios submitted by Samsung after the preliminary determination to calculate the cost of production (COP) of certain affiliated party transactions in question. We based the resulting adjustment factor on the revised COP of all materials obtained from the affiliated party. See Comment 38.
- We revised Samsung's R&D ratio to reflect the total R&D expenses incurred by its Digital Appliance business as a percentage of the consolidated cost of sales of all entities included in that business. We applied this ratio to Samsung's per-unit COMs to determine the per-unit R&D expenses. See Comment 39.

## Discussion of the Issues

### General Issues

#### Comment 1: Targeted Dumping

Prior to the Preliminary Determination, the petitioner alleged that targeted dumping existed with respect to Samsung and LG and asserted that the Department should apply the average-to-transaction methodology in calculating the margins for these respondents pursuant to section 777A(d)(1)(B) of the Act. In each of these allegations, the petitioner asserted that there are patterns of U.S. sales prices for comparable merchandise that differ significantly among time periods. We conducted time-period targeted dumping analyses for Samsung and LG using the methodology we adopted in Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (UAE Nails), and Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) (PRC Nails) (collectively Nails), and more recently articulated in Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Final Determination of Sales at Less Than Fair Value, 75 FR 59223 (Sept. 27, 2010), and accompanying Issues and Decision Memorandum at Comment 1 (Coated Paper), and Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (Oct. 18, 2011) (Wood Flooring), and accompanying Issues and Decision Memorandum at Comment 4. Our methodology is discussed in more detail in the Preliminary Determination, 76 FR at 67678-79, and the Department's memoranda entitled "Calculations Performed for LG for the Preliminary Determination in the Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea" (LG Preliminary Calculation Memo); and "Calculations Performed for Samsung Electronics Corporation (Samsung) for the Preliminary Determination in the Antidumping Duty Investigation of Bottom Mount Refrigerators from Korea" (Samsung Preliminary Calculation Memo), dated October 26, 2011.

For both LG and Samsung, we found both a pattern of prices that differed significantly for certain time periods and that these differences could not be taken into account using the average-to-average methodology. Accordingly, we applied the average-to-transaction methodology to all U.S. sales made by Samsung and LG in the Preliminary Determination.

Both LG and Samsung objected to the bases of the petitioner's targeted dumping allegations, and the application of the Department's targeted dumping methodology (i.e., the Nails test) in the preliminary determination. The petitioner defended its allegations and the Department's application of the Nails methodology. The respective arguments are outlined below.

*a) Basis for the Targeted Dumping Allegations and the Application of Time Period Targeted Dumping Analysis*

LG and Samsung assert that, when a targeted dumping allegation is made with respect to a specific time period, the domestic party has an obligation to explain whether it is appropriate to apply the targeted dumping price analysis to the specific time period alleged by the domestic party. Both parties cite the Preamble to the Department's Regulations which states that the domestic industry has the "intimate knowledge of regional markets, types of customers, and the effect of specific time periods on pricing in the U.S. market in general. Without the assistance of the domestic industry, the Department would be unable to focus appropriately any analysis of targeted dumping. For example, the Department would not know what regions may be targeted for a particular product, or what time periods are most significant and can impact prices in the U.S. market."<sup>2</sup> Therefore, they contend, it is incumbent upon the domestic party to fully justify its selection of the appropriate basis for its targeted dumping allegation.

In this instance, Samsung argues that the petitioner is obliged to address specific bases for its targeted dumping allegation, such as why the alleged targeted period, the fourth quarter of 2010, constituted a targeted period, and how the pricing strategy employed during the alleged targeted period differs from the pricing strategy employed during the rest of the POI. Samsung notes that the petitioner has claimed that targeting occurred only during three holiday promotion periods - Columbus Day, Veterans Day and "Black Friday" (the day after Thanksgiving), but it has alleged targeted dumping for the entire fourth quarter of the POI. Without any other support for its time-period-based targeted dumping allegation, Samsung contends that the petitioner's allegation for the fourth quarter must be rejected.

LG notes the variety of targeted time periods alleged by the petitioner in its separate allegations against the respondents in Mexico and Korea (i.e., the last 13 weeks of the POI for LG Electronics Monterrey Mexico, S.A. de C.V. (LGEMM),<sup>3</sup> the fourth quarter of the POI for LG, Samsung Mexico,<sup>4</sup> and Samsung Korea, but another period for Electrolux and for its earlier allegations against LG and the Samsung companies). LG asserts that the petitioner has failed to demonstrate a nexus between sale promotions, such as those for Black Friday, and targeted dumping. Rather, LG continues, the petitioner appears to have based its time period allegations on whatever period passes the Nails test for each respondent. LG concludes that such an arbitrary basis for

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<sup>2</sup> See Preamble, Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 29374 ( May 19, 1997) (Preamble)

<sup>3</sup> For purposes of this discussion, the alleged targeted period for LG may also be referred to as the fourth quarter of 2010.

<sup>4</sup> On December 5, 2011, the petitioner revised its targeted dumping allegation with respect to Samsung to reflect the fourth quarter of the POI, after taking into account revisions made to Samsung's reported U.S. sales data in response to the Department's November 2011 supplemental questionnaire. The allegation analyzed in the Preliminary Determination focused on specific months during the POI, for which the petitioner had previously alleged targeted dumping.

establishing the time periods for a targeted dumping analysis fails to meet the statutory and regulatory standard.

Samsung argues that, as the petitioner has repeatedly insisted that targeted dumping has occurred during holiday promotion periods, the Department should consider the petitioner's allegation with respect to those specific holiday periods, rather than the entire calendar quarter alleged by the petitioner. Because the petitioner has failed to make its targeted dumping allegation consistent with its arguments concerning holiday period pricing, Samsung asserts that the Department should reject the petitioner's calendar quarter allegation as unsupported by the commercial pricing practices in the industry.

Notwithstanding the above arguments, Samsung conducted its own analysis using the Nails test as applied to the three-day holiday period covering the seven U.S. holidays during which Samsung typically promotes at least some of its bottom mount refrigerators. Samsung included its analysis in its case brief, comparing all sales made during each of these holidays as a single targeted period to sales made during the rest of the POI. According to Samsung's analysis, the Nails test did not demonstrate targeted dumping for the holiday periods. Its pricing analysis reveals a relatively small statistical deviation in prices, which Samsung states can be explained by factors that have nothing to do with targeting. Moreover, Samsung notes that its total sales volume during the holiday promotion period disproves the petitioner's contention that Samsung's "targeted" holiday promotions generate a disproportionate percentage of total annual sales.

Samsung also conducted its own analysis based on weekly time periods centered around the seven holiday promotion periods. This analysis too, according to Samsung, did not demonstrate targeted dumping based on the Nails test. Finally, Samsung conducted an additional targeted dumping analysis using the Nails test based on the petitioner's post-preliminary determination allegation, using the fourth quarter of 2010 as the time period. Again, Samsung states, the analysis shows that Samsung did not engage in targeted dumping during the alleged time period.

Samsung adds that its average monthly U.S. sales volume data demonstrates that it did not engage in targeted dumping during the fourth quarter of 2010. According to Samsung, the only reason a company would lower its prices during a specified period would be to increase its overall sales volume in order to achieve greater overall profit. Thus, if Samsung had engaged in targeted dumping during the fourth quarter, Samsung holds that the average monthly sales volume during the fourth quarter would exceed its average monthly sales volume for the rest of the POI. However, Samsung's volume data analysis, included in its case brief, shows that its average monthly volume during the first three quarters of the POI exceeded the average monthly sales volume during the fourth quarter of the POI. This result is inconsistent with the theory of targeting, according to Samsung, and therefore provides a further basis to reject the petitioner's allegation.

In addition, LG contends that the petitioner's targeted dumping allegation based on the last quarter of the POI is inappropriate because it is based on normal commercial practices in the United States. This period, centered around Black Friday and the winter holiday shopping season, is a



seasonal, well-documented commercial pattern in the United States, according to LG, and as such, pricing behavior during this period is not an appropriate basis for a targeted dumping finding. LG refers to the regulatory criteria for a finding of critical circumstances under 19 CFR 351.206(h)(1)(ii), where the Department is required to consider “seasonal trends” before making an affirmative finding of the existence of “massive imports.” Similarly, LG points to the Department’s discussion of the targeted dumping provision in the Preamble to the regulations where the Department stated that it would ensure that parties would have the opportunity to explain whether a particular pattern of U.S. prices constitutes targeted dumping. See Preamble at 29374. In this instance, LG maintains that any price patterns observed during the alleged targeting period result from well-established commercial pricing patterns, rather than targeted dumping.

Similarly, Samsung argues that the petitioner’s time period allegation based on a calendar quarter is inconsistent with industry pricing and rebate practices. In its case brief, Samsung included its quantitative analysis that it claims demonstrates that, for most of the sales included in its analysis, invoice price changed only minimally, if at all, during the POI. Samsung notes the impact of rebates on net prices and emphasizes that the time period during which net price varies is not tied to a calendar month or quarter. Samsung also provided a quantitative analysis for one product sold in the United States, which it claims demonstrates that the net price (i.e., after accounting for rebates) varied on a daily basis. As a result, Samsung contends that it is irrational for the alleged time period or any other calendar quarter to be the subject of a time-period targeted dumping allegation because the industry practice does not reflect such time-period targeting.

Samsung points to the impact of post-sale “sell-through” rebates (or “sell-out” rebates in LG’s terminology), where the customer does not receive the rebate at the time of sale or invoicing. In calculating the net price, the Department assigns a post-sale rebate according to the sale date. However, Samsung notes that it is the customer, not the seller, who controls the timing of the sell-through rebate. Samsung notes the Department’s acknowledgement in UAE Nails at Comment 2 that “other factors not related to targeting, such as {level of trade} or circumstances of sale, may have an impact on price comparability in a targeted dumping analysis.” Samsung argues that, in an industry where companies offer dozens, or even hundreds, of carefully-tailored rebate programs, a time-period targeted dumping analysis based on a calendar month using the Nails test is inappropriate.

LG also claims that the petitioner’s allegation based on time period is flawed because the price differences occurring during the alleged targeted period occurred due to promotional prices offered on certain models, rather than a general price reduction during the period. LG cites the International Trade Commission’s (ITC’s) preliminary determination to support its contention that only certain models were discounted during the targeted time period and the majority of LG models were not discounted during this period.<sup>5</sup> According to LG, this “product targeting” is not covered by the statutory targeted dumping provision. Similarly, Samsung asserts that the only

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<sup>5</sup> See Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico, ITC Inv. Nos. 701-TA-477 and 731-TA-1180-1181 (Prelim.), Pub. 4232 at page 19 (May 2011) (ITC Report).

pattern of lower prices revealed by the Department's targeted dumping analysis is a pattern of selling certain models at reduced prices. For holiday periods, Samsung argues that it may reduce prices for certain models, and that targeting by model is not considered "targeted dumping" under either the statute or the World Trade Organization (WTO) Antidumping Agreement (WTO AD Agreement).<sup>6</sup>

The petitioner defends its allegation of targeted dumping by LG and Samsung directed at the fourth quarter of 2010 by asserting that that period of time, particularly the period around Black Friday, is when the deepest discounting and targeted dumping occurs. The petitioner states it is proper to use the fourth quarter for purposes of analyzing targeted dumping, rather than the specific days surrounding the holidays, because the dumping analysis is based on the respondents' sales to retailers, not the retailers' sales to their customers. Accordingly, the petitioner continues, the Department must take into account the period when the retailers are building inventory for the holiday sales, and when they are fulfilling back orders for those sales. Thus, the petitioner concludes, analyzing the fourth quarter provides the best mechanism to examine the impact of the most intense holiday promotion season.

The petitioner disputes LG's and Samsung's contention that there can be no product-based targeting, because in this investigation, the targeting was achieved through the sale of specific products during the specific time period alleged. As section 777A(d)(1)(B) of the Act permits application of the targeted dumping methodology where the prices of "comparable merchandise" differ by periods of time, the petitioner asserts that the Nails test appropriately determined in this investigation whether a sufficient proportion of products, as defined by CONNUMs, appeared to have been the subject of targeted dumping.

With respect to the respondents' claim that targeted dumping cannot be found because the pricing pattern during holiday time periods reflects the normal course of business in the industry, the petitioner responds that addressing such episodic pricing behavior is the intent of the targeted dumping provision, particularly with regard to the inclusion of the "periods of time" language in section 777A(d)(1)(B) of the Act. According to the petitioner, the evidence in this investigation confirms that targeted dumping by the LG and Samsung companies did occur during the fourth quarter period and the Department correctly applied the Nails test to measure the impact of that targeting.

*b) The Targeted Dumping Methodology Applied in the Investigation*

Citing the Court of International Trade (CIT) decision in Thai I-Mei Frozen Foods Co., Ltd. V. United States,<sup>477 F. Supp. 2d 1332, 1357 (CIT 2007)</sup>, LG asserts that the Department must justify the application of a targeted dumping methodology in light of the specific factual circumstances that occur in a proceeding. As the Department has publicly announced that it will

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<sup>6</sup> See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

determine targeted dumping on a case-by-case basis,<sup>7</sup> LG also maintains that the Department must now justify its application of the Nails test to the instant investigation.

LG and Samsung contend that the Nails test utilizing a standard deviation statistical analysis does not yield meaningful results when applied to their sales in this investigation. They assert that a standard deviation is only a valuable measure of distribution when a data set exhibits normal distribution, as indicated by a bell-shaped distribution curve.<sup>8</sup> However, Samsung asserts that the distribution of its sales prices shows a much wider variation than would be expected using one-standard-deviation analysis, thus rendering the Nails test unreliable in the instant application. LG argues further that a statistical test to determine whether the price distribution of its sales was suitable for use with the Nails statistical methodology should have been included in the petitioner's targeted dumping allegation. LG performed its own tests, submitted to the Department on October 20, 2011, and repeated in LG's case brief, in which LG claims that the resulting distribution analysis demonstrates that the Nails test statistical methodology does not provide a sufficiently high level of confidence to support its use in this investigation.

Moreover, LG contends that the Nails test does not identify significant pricing differences in this investigation to warrant a finding of targeted dumping. LG asserts that the targeting allegations are based on very small price variations on certain relatively high-priced products. To support its assertion, LG points to the results of the Nails test for a number of CONNUMS which were found to be contributing to the targeted pricing pattern. For most of these CONNUMS, the mean price that exceeded the standard deviation was very small (for example, \$5 to \$10) on products priced at hundreds of dollars. LG contends that these deviations are negligible and do not establish a consistent pattern of price differences, particularly with respect to demonstrating a pattern of targeted dumping. LG's case brief includes other examples that purport to show that the pricing differences among CONNUMS are small and not statistically meaningful. LG claims that such examples demonstrate that the Nails test is unreasonable in this case because it fails to isolate meaningful price differences for purposes of supporting a statutory finding of targeted dumping.

Furthermore, LG contends that the preliminary determination finding of targeted dumping does not consider that the pricing pattern observed may be the result of normal commercial pricing variations, rather than targeted dumping. Citing to page 19 of a remand redetermination regarding the less than fair value investigation of Certain Pasta from Italy, issued on August 28, 1998, LG argues that it "would not be consistent with the purposes of Section 777A(d)(1)(B) of the Act for normal variations in customer prices to become the standard basis for targeted dumping allegations." In this case, LG states that it has provided information that it granted price discounts

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<sup>7</sup> See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930, 74931 (Dec. 10, 2008).

<sup>8</sup> LG cites the following as an example to support its statistical methodological argument: Edwin Mansfield, Statistics for Business and Economics: Methods and Applications (W. W. Norton and Co., 1980), at page 47-50 ("The standard deviation is the most important summary measure of dispersion . . . If the frequency distribution of a population conforms to the so-called normal distribution . . . then we know that 68.3 percent of measurements in the population that fall between + or - 1 standard deviation. Of course, it is essential to realize that results such as these pertain only to populations that conform to the normal distribution.").

or rebates for clearance or model closeout purposes, or for other reasons that are not considered targeted dumping. LG maintains that the Department's reliance on the Nails test in the preliminary determination did not account for these or other commercial selling practices that would not be considered evidence of targeted dumping.

If the Department were to continue to apply the Nails test for the final determination, LG argues that the methodology must be modified to reflect the commercial realities of this investigation. At the least, LG contends that the one-standard-deviation threshold for the pattern of export price test should be increased to two or more standard deviations in order to distinguish between normal commercial activity in the bottom mount refrigerator industry and targeted dumping. At the same time, LG argues that the sales volume threshold for meeting the "pattern of export prices" test should be increased from 33 percent to at least 50 percent, or at least 66 percent if the standard deviation threshold is not also modified. LG contends that the inclusion of a higher ratio of sales needed in this test is required in order to reliably and fairly indicate the presence of a pattern of prices to identify the possibility of targeted dumping. Because of the negligible price differences captured by the current test, and that the fact its sales database does not conform to normal distribution patterns, LG asserts that it has provided the necessary and specific reasons for the Department to modify the Nails test in this instance. Additionally, LG notes that there is relatively little precedent regarding time period-based targeted dumping and therefore the Department's re-evaluation of its targeted dumping analysis methodology is warranted in light of the facts of this investigation.

The petitioner notes that the Nails test has been used in numerous previous cases and the Department has addressed many of the methodological concerns raised by LG and Samsung. Specifically, the petitioner notes the following aspects of the Nails test that the Department discussed in previous proceedings:

- Use of the standard deviation test;<sup>9</sup>
- Rejection of a change in the threshold for the pattern test;<sup>10</sup>
- Support of the thresholds in the Nails test;<sup>11</sup>
- Rejection of methodology challenges based on WTO decisions;<sup>12</sup> and

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<sup>9</sup> See PRC Nails at Comment 3.

<sup>10</sup> See Wood Flooring at Comment 4.

<sup>11</sup> See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Determination of Sales at Less Than Fair Value, 75 FR 59223 (Sept. 27, 2010) (Coated Paper), and accompanying Issues and Decisions Memorandum at Comment 3.

<sup>12</sup> See Coated Paper at Comment 4.

- Rejection of a proposed threshold change from one to two standard deviations.<sup>13</sup>

The petitioner claims that LG's proposals to increase the statistical thresholds in the Nails test for this investigation are results-oriented and lack statistical integrity. While acknowledging that aspects of the Nails test could be refined, the petitioner contends that the Nails test was reasonably applied in this investigation. The petitioner also notes that a change to the Nails test for the final determination without notice and an opportunity for comment would violate the petitioner's rights.

#### Department's Position:

Based on the updated U.S. sales data and calculation revisions discussed elsewhere in this Decision Memorandum, we have continued to find that pursuant to section 777A(d)(1)(B) of the Act, the use of an average-to-transaction methodology is warranted for LG and Samsung. Consistent with our practice and the statute, we have applied the Nails test, as updated, to determine whether the respondents at issue engaged in targeted dumping during the alleged time periods, and in making average-to-transaction comparisons, we have not granted offsets for nondumped transactions in aggregating the comparison result for purposes of calculating the weighted-average dumping margin.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the EP or CEP of the subject merchandise" (emphasis added). The definition of "dumping margin" calls for a comparison of NV and EP or CEP. Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act and 19 CFR 351.414 provide the methods by which NV may be compared to EP or CEP. Specifically, the statute and regulations provide for three comparison methods: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the EPs or CEPs have been averaged together (averaging group).

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and CEPs of such exporter or producer." The definition of "weighted average dumping margin" calls for two aggregations which are divided to obtain a percentage. The numerator aggregates the results of the comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

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<sup>13</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 (April 19, 2010) (OCTG from the PRC), and accompanying Issues and Decision Memorandum at Comment 2.

Section 777A(d)(1) of the Act establishes that, in a less-than-fair-value investigation, the normal comparison methodology will be either average-to-average or transaction-to-transaction. Section 777A(d)(1)(B) of the Act sets forth the exception when the Department may apply an average-to-transaction methodology:

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or CEPs) of individual transactions for comparable merchandise, if

(i) there is a pattern of export prices (or CEPs) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and

(ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

We find the petitioner's allegations regarding patterns of United States prices that differ significantly between and among time periods to be sufficient. The Act describes a difference among "periods of time," and does not limit the Department's analysis as to the length of time which the agency must consider. If the Department were restricted in its analysis, for example, to only analyzing "seasons," as suggested by the respondents, then one would anticipate that Congress would have placed such a restriction in the text of the Act. Instead, the Act requires simply that the Department review United States prices on the basis of "periods of time," and determine on the basis of that analysis if there is a pattern of prices for comparable merchandise that differs significantly "among" those periods. It is therefore sufficient for purposes of the requirements of Section 777A(d)(1)(B) of the Act that a petitioner in a less-than-fair value investigation make an allegation under this provision unique to a designated period of time within which the Department can analyze prices on the basis of the alleged periods of time, as the petitioner has done in this investigation, e.g. the time periods of the fourth quarter, and the remainder of the POI.

With respect to the respondents' arguments about the purpose of Section 777A(d)(1)(B) of the Act, Congress explained in the SAA that this provision is meant to address "situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that different significantly among purchasers, regions, or time periods, i.e., where targeted dumping may be occurring."<sup>14</sup> Congress explained that "before relying on this methodology, however," after finding a pattern among the time periods, the Department is first required to "establish and provide an explanation why it cannot account for such differences through the use of an average-to-average or transaction-to-transaction comparison."<sup>15</sup>

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<sup>14</sup> See Statement of Administrative Action, Uruguay Round Agreements Act, H. Doc. 316, Vol. 1, 103d. Cong. (1994)(SAA) at 843.

<sup>15</sup> Id.

Congress did not speak to the “intent” of the producers or exporters in setting prices that are significantly different as between the periods of time being examined, nor did it provide that the Department is prohibited from conducting an analysis under this provision if certain products might be seasonal in nature. Instead, Congress stated that “the Administration intends that in determining whether a pattern of significant prices differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another.”<sup>16</sup>

Consistent with the text of Section 777A(d)(1)(B) of the Act and the language of the SAA, the Department has analyzed whether or not a pattern existed, and whether or not differences in prices were “significant.” The Act and legislative history do not require that the Department conduct an additional analysis, as argued by the respondents, and determine the reasons that significant differences in prices exist. Accordingly, because no such analysis is mandated by the Act, where the Department has determined that there was a pattern of export prices (or CEPs) for comparable merchandise that differs significantly among or between periods of time in this case, the Department has not opined on the reasons for such price differences. Instead, the Department simply has applied a different comparison methodology, average-to-transaction, rather than average-to-average, as directed by the Act.

In order to determine whether or not a pattern existed in this case, as well as whether or not the differences in prices were “significant,” the Department relied on the Nails test, as it did in the Preliminary Determination. This test has been applied and updated in numerous cases since UAE Nails and PRC Nails. See, e.g., Wood Flooring. Further, the CIT has upheld our use of the Nails test, finding it reasonable and consistent with the statute and regulations. See Mid Continent Nail v United States, 712 F. Supp 2nd 1370 (CIT 2010) (Mid Continent Nail).

In the first stage of the test, the “standard-deviation test,” we determined the share of the alleged targeted time-period sales of subject merchandise (by sales volume) that are at prices more than one standard deviation below the weighted-average price of all sales during the POI, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (i.e., CONNUM by CONNUM) using the POI-wide weighted-average prices for the alleged targeted time period and the time periods not alleged to have been targeted. If that share did not exceed 33 percent of the total volume of a respondent’s sales of subject merchandise during the alleged targeted time period, then we determined that the pattern requirement was not met and we did not conduct the second stage of the test. If that share exceeded 33 percent of the total volume of a respondent’s sales of subject merchandise during the alleged targeted time period, on the other hand, we determined that the pattern requirement was met and we proceeded to the second stage of the test.

In the second stage, we examined all sales of identical merchandise (i.e., by CONNUM) sold during the alleged targeted time period. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales during the alleged

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<sup>16</sup>

Id.

targeted time period and the next higher weighted-average price of sales during the non-targeted time periods exceeds the average price gap (weighted by sales volume) for the non-targeted group.<sup>17</sup> We weighed each of the price gaps in the non-targeted group by the combined sales volume associated with the pair of prices during the non-targeted time period that made up the price gap. In doing this analysis, the alleged targeted time-period sales were not included in the non-targeted group; the alleged targeted time-period average price was compared only to the average prices during the non-targeted time periods. If the share of the sales that met this test exceeded five percent of the total sales volume of subject merchandise during the targeted time period, we determined that the significant-difference requirement was met and we determined that time-period targeting occurred.

Based on our final analysis, we found that both LG and Samsung met both of the above-described stages of the Nails test. As a result, we determine that, with respect to sales by LG and Samsung for certain time periods, there was a pattern of prices that differed significantly.

Our analysis shows that the standard average-to-average methodology does not take into account the price differences because the alternative average-to-transaction methodology yields a material difference in the margin. Accordingly, we find that these differences cannot be taken into account using the average-to-average methodology because the average-to-average methodology conceals differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. We therefore applied the average-to-transaction methodology to all U.S. sales made by LG and Samsung. See the Memorandum from Henry Almond to the file entitled, “Calculations Performed for LG for the Final Determination in the Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea,” dated March 16, 2012 (LG Final Sales Calculation Memo) and the Memorandum from Elizabeth Eastwood to the file entitled, “Calculations Performed for Samsung Electronics Corporation (Samsung) for the Final Determination in the Antidumping Duty Investigation of Bottom Mount Refrigerators from Korea,” dated March 16, 2012 (Samsung Final Sales Calculation Memo).

We have considered each of the arguments raised as to the validity of the Department’s Nails test and have concluded that the agency’s test is still an accurate test for finding a pattern of United States prices that differ among the periods of time at issue, and determining that the differences in prices are “significant.”

With respect to LG’s argument that the one-standard-deviation threshold is too low to distinguish between normal commercial activity and targeted dumping and a higher, two-standard deviation (or higher) threshold should be applied, we disagree. The Department has consistently held the

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<sup>17</sup> The next higher price is the weighted-average price to the non-targeted group that is above the weighted-average price to the alleged targeted group. For example, if the weighted-average price to the alleged targeted group is \$7.95 and the weighted-average prices to the non-targeted group are \$8.30, \$8.25, and \$7.50, we would calculate the difference between \$7.95 and \$8.25 because this is the next higher price in the non-targeted group above \$7.95 (the average price to the targeted group).



one-standard-deviation threshold to be a distinct and reasonable “bright line” to quantitatively measure significant price differences. As the Department first explained in PRC Nails:

We consider the price threshold of one standard deviation below the average market price as a reasonable indicator of a price difference that may be based on targeted dumping because (1) it is a measure of “low” relative to the spread or dispersion of prices in the market in question, and

(2) it strikes a balance between two extremes, the first being where any price below the average price is sufficient to distinguish the alleged target from others ..., and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others....

The CIT also affirmed the use of the standard deviation threshold. See Mid Continent Nail v United States, 712 F. Supp 2nd 1370, 1377-78 (CIT 2010) (Mid Continent Nail).

The Department has rejected past proposals to raise the standard deviation threshold because to do so would likely mask all but the most obvious examples of dumping, thus thwarting the purpose of conducting a price pattern analysis. In OCTG from the PRC at Comment 2, we stated:

... the number of sales with prices that are two standard deviations below the average market prices is too restrictive a standard because it would likely only identify outliers in the observed price data and not identify a pattern of targeted prices within the observed price data. Therefore, the Department believes that one standard deviation, rather than two standard deviations, is a better measurement to distinguish potentially targeted prices using this test.

LG also contends that the 33 percent volume threshold for the pattern of export prices test is too low and should be raised to 50 percent or more. Here too, we believe that raising the volume threshold would not sufficiently unmask dumped sales where a pattern of price differences exist. The Department explained in PRC Nails at Comment 5 that it considers “the requirement under our targeted dumping methodology that the “low” prices constitute at least 33 percent of the sales volume to the alleged target to be a reasonable threshold for establishing a pattern indicative of targeted dumping.” The CIT concurred. See Mid Continent Nail at 1377.

Comment 2: Zeroing in Average-to-Transaction Comparisons

LG and Samsung contend that when the Department applied average-to-transaction comparisons in the preliminary determination, it improperly “zeroed” out non-dumped transactions from its comparisons. According to LG, the statute and the WTO AD Agreement are silent on zeroing when using average-to-transaction comparisons, but the WTO has ruled that the use of zeroing in administrative reviews, where average-to-transaction comparisons are the norm, is inconsistent with the WTO AD Agreement.<sup>18</sup> LG also claims that the Court of Appeals for the Federal Circuit

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<sup>18</sup> See United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R at ¶ 190(c) (Jan. 9, 2007); and United States – Continued Existence and Application of Zeroing Methodology,

(CAFC) has determined that the Department's interpretation of the statute to permit zeroing in administrative reviews, but not investigations, is impermissible in Dongbu Steel v. United States, 635 F.3d 1363 (Fed. Cir. 2011) (Dongbu Steel) (“{T}here is no statutory basis for interpreting {section 771(35) of the Act} differently in investigations than in administrative reviews.”) and JTEKT Corp. v. United States, 642 F.3d 1378, 1383-85 (Fed. Cir. 2011) (JTEKT). Although these CAFC decisions involve administrative reviews rather than investigations, LG maintains that the principle with respect to the use of zeroing in average-to-transaction comparisons is the same, and thus the Department has been effectively barred by the CAFC from using zeroing in average-to-transaction comparisons.

Samsung also contends that zeroing used in conjunction with the average-to-transaction comparison methodology is inconsistent with the WTO AD Agreement. Samsung cites in particular the WTO Appellate Body (AB) decision in United States - Final Dumping Determination on Softwood Lumber from Canada Recourse to Article 21.5 of the DSU by Canada, WT/DS264/AB/RW (1 September 2006), where the WTO Appellate Body concluded that zeroing under a transaction-to-transaction comparison methodology did not conform to the requirements under Article 2.4.2 of the WTO AD Agreement. Samsung points to the WTO AB decisions regarding the use of zeroing in administrative reviews<sup>19</sup> in support of the principle that zeroing is also not permitted under the WTO AD Agreement in average-to-transaction comparisons under a targeted dumping methodology.

In the Preliminary Determination, the Department applied the average-to-transaction methodology to all of LG's U.S. sales. LG and Samsung object to the Department's practice to apply the average-to-transaction methodology to all U.S. sales, not just to those sales where targeted dumping is found to have occurred, as first applied in Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value, 75 FR 14659 (Mar. 26, 2010) (Bags from Taiwan), and accompanying Issues and Decision Memorandum at Comment 1. LG states that, in accordance with section 777A(d)(1) of the Act, the Department may only apply the average-to-transaction comparison methodology in investigations when the targeted dumping criteria are met and thus, in turn, the targeted dumping criteria can only be met with respect to the target – the time period in this case. Under section 777A(d)(1)(B)(ii) of the Act, LG states that the Department may only apply the average-to-transaction methodology when the Department explains why differences in the patterns of prices cannot be taken into account by the normal average-to-average methodology. Thus, LG continues, because by definition, there is no pattern of price differences for the non-targeted sales, there is no basis to resort to the average-to-transaction methodology for those sales. LG adds that including non-targeted sales within the average-to-transaction comparison does not unmask a pattern of significant price differences, as the alternative averaging methodology is intended to do, because these sales do not

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WT/DS350/AB/R at 395(d) (Feb. 4, 2009).

<sup>19</sup> See e.g., United States - Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/R, adopted 9 May 2006; and United States - Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R, adopted 19 February 2009.

demonstrate such a pattern. Finally, LG expresses the concern that applying the average-to-transaction methodology may find dumping on certain sales when dumping would not be found under the preferred average-to-average methodology. According to LG, the targeted dumping methodology should therefore not be used to create dumping where it would otherwise not exist.

Samsung stresses that the application of the average-to-transaction methodology to the non-targeted sales is inconsistent with the WTO AD Agreement. Samsung cites the language in Article 2.4.2 of the Agreement<sup>20</sup> as limiting the use of the average-to-transaction methodology to only those comparisons involving targeted export sales. Samsung further states that its interpretation is supported by the WTO AB in United States - Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R, adopted 23 January 2007, which concluded that “{i}n order to unmask targeted dumping, an investigating authority may limit the application of the {average-to-transaction} comparison methodology to the prices of export transactions falling within the relevant pattern.

LG disagrees with the Department’s view that the targeted dumping provision is an exception to the WTO’s decisions that have found zeroing to be inconsistent with U.S. obligations under the WTO AD Agreement. LG expects that the Department’s application of zeroing in targeted dumping situations will be challenged at the WTO in the future. LG asserts that the Department’s continued acceptance of the time-period targeted dumping allegation in this investigation would undermine the Department’s defense of its targeted dumping practice before the WTO because of the targeted dumping allegation deficiencies addressed above. LG advises the Department to find that there is no reasonable basis for determining that targeting by time period has occurred in the instant investigation in order to avoid an adverse WTO decision that would impair the Department’s ability to apply the targeted dumping provision in more appropriate situations.

The petitioner dismisses the respondents’ objections to the Department’s use of zeroing in conjunction with its targeted dumping methodology as allegedly inconsistent with the WTO AD Agreement, stating that there is no reason to alter this methodology conducted under applicable U.S. law based on speculation about future WTO opinions.

#### Department Position:

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons, such as were applied in this investigation.

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<sup>20</sup> “A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchases, regions, or time periods...”

The issue of “zeroing” versus “offsetting” involves how certain results of comparisons are treated in the aggregation of the numerator for the weighted average dumping margin and relates back to a statutory ambiguity in the word “exceeds” as used in the definition of “dumping margin” in section 771(35)(A) of the Act. Application of “zeroing” treats comparison results where NV is less than EP or CEP as indicating an absence of dumping, and no amount (zero) is included in the aggregation of the numerator for the weighted-average dumping margin. Application of “offsetting” treats such comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative amount may be included in the aggregation of the numerator of the “weighted average dumping margin” to the extent that other comparisons result in the inclusion of dumping margins as positive amounts.

The Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department undertakes a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. The Department’s interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this investigation, and to permit offsetting in average-to-average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

Whether “zeroing” or “offsetting” is applied, it is important to note that the weighted-average dumping margin will reflect the value of all export transactions, dumped and non-dumped, examined during the POI; the value of such sales is included in the aggregation of the denominator of the weighted-average dumping margin. Thus, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin under either methodology.

The difference between “zeroing” and “offsetting” reflects the ambiguity the CAFC has found in the word “exceeds” as used in section 771(35)(A) of the Act. See Timken Co. v. United States, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (Timken). The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.<sup>21</sup> For decades, the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the CAFC and other courts squarely addressed the reasonableness of

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<sup>21</sup> See PAM, S.p.A. v. United States, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (PAM) (“{The} gap or ambiguity in the statute requires the application of the *Chevron* step-two analysis and compels this court to inquire whether Commerce’s methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute.”); Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996) (Bowe Passat) (“The statute is silent on the question of zeroing negative margins.”); and Serampore Indus. Pvt. Ltd. v. U.S. Dep’t of Commerce, 675 F. Supp. 1354, 1360 (CIT 1987) (Serampore) (“A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. . . . Commerce may treat sales to the United States market made at or above prices charged in the exporter’s home market as having a zero percent dumping margin.”).

the Department's zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.<sup>22</sup> In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law."<sup>23</sup> The CAFC explained in Timken that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value." See Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department.

In 2005, a panel of the WTO Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the WTO AD Agreement when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations. See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (Oct. 31, 2005) (EC-Zeroing Panel). The initial WTO Dispute Settlement Body Panel Report was limited to the Department's use of zeroing in average-to-average comparisons in antidumping duty investigations. See EC-Zeroing Panel, WT/DS294/R. The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 USC § 3533(f), (g)) (Section 123). See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006); and Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (June 26, 2007) (together, Final Modification for Investigations). Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context.

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as in investigations using average-to-transaction comparisons. As the CAFC recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance.

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<sup>22</sup> See, *e.g.*, Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008) (Koyo 2008); NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007) (NSK); Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus I); Timken, 354 F.3d at 1341-45; PAM, 265 F. Supp. 2d at 1370 ("Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice."); and Bowe Passat, 926 F. Supp. at 1149-50; and Serampore, 675 F. Supp. at 1360-61.

<sup>23</sup> See Serampore, 675 F. Supp. at 1361 (citing Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9092 (Mar. 17, 1986)); see also Timken, 354 F.3d at 1343; PAM, 265 F. Supp. 2d at 1371.

See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States, 603 F. 3d 928, 934 (Fed. Cir. 2010). The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations. See Final Modification for Investigations, 71 FR at 77722. With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in investigations. Id., 71 FR at 77724.

The CAFC subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in certain investigations and administrative reviews. See U.S. Steel Corp., 621 F. 3d. at 1355 n.2, 1362-63. In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the CAFC accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations. Id., at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping). The CAFC's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type. Id., at 1361-63.

The CAFC acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist. Id., at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); see also section 777A(d)(1)(B) of the Act. The CAFC also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing. See U.S. Steel Corp., 621 F. 3d at 1363. In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the CAFC acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that "{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do not exist." Id. (emphasis added). Furthermore, we note that where average-to-transaction comparisons are used in situations of targeted dumping, the results of not applying zeroing methodology in those comparisons as well as in average-to-average comparisons would be the same. Therefore, the provision for different comparison methodologies under section 777A(d) of the Act would be meaningless. This outcome could not

have been intended by Congress in providing for different comparison methodologies under section 777A(d) of the Act.

We disagree with LG that the CAFC's decisions in Dongbu Steel and JTEKT require the Department to change its methodology in this investigation with respect to application of the average-to-transaction comparison methodology. These holdings were limited to finding that the Department had not adequately explained different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews. The CAFC did not address the use of zeroing in the context of a "targeted dumping" analysis in a less-than-fair value investigation.

Unlike the determinations examined in Dongbu Steel and JTEKT, this is an original investigation using a "targeted dumping" analysis – the very circumstance the CAFC contemplated in U.S. Steel Corp. as a situation where the zeroing methodology would continue to be applicable.

The Department's interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons, the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if normal value does not exceed export price. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the Uruguay Round Agreements Act for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department's interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

In the Final Modification for Investigations, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the Charming Betsy doctrine, to comply with certain adverse WTO dispute settlement findings.<sup>24</sup> Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the Charming Betsy doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the

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<sup>24</sup> According to Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." The principle emanating from the quoted passage, known as the Charming Betsy doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

Executive Branch may determine whether and how to comply with international obligations of the United States. Neither section 123 nor the Charming Betsy doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of Commerce's legitimate policy choices in this case – *i.e.*, to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review. Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F. 2d 660, 665 (Fed. Cir. 1992). These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

Moreover, the Department's interpretation reasonably accounts for inherent differences between the results of distinct comparison methodologies. The Department interprets section 771(35) of the Act depending upon the type of comparison methodology applied in the particular proceeding. This interpretation reasonably accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology, *see, e.g.*, section 777A(d)(1)(A)(i) of the Act, the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average export price or CEP of transactions within one averaging group to an average normal value for the comparable merchandise of the foreign like product. In calculating the average export price or CEP, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average normal value for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis "on average" for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset positive, averaging-group comparison results. This approach maintains consistency with the Department's average-to-average comparison methodology, which permits EPs above normal value to offset EPs below normal value within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an "on average" aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.



In contrast, when applying an average-to-transaction comparison methodology in a targeted dumping analysis in an investigation under 777A(d)(1)(B) of the Act, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average normal value for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its normal value. The Department then aggregates the results of these comparisons – i.e., the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the period of review or investigation. To the extent the average normal value does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.<sup>25</sup> Thus, when the Department focuses on transaction-specific comparisons in its targeted dumping analysis, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison method inherently permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation where average-to-average comparison results are aggregated, such that offsets are (1) implicitly granted when calculating average export prices and (2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using average-to-average comparisons does not extend to situations where the Department is using average-to-transaction comparisons because no offsetting is inherent in the average-to-transaction comparison methodology.

The CIT recently sustained the Department’s explanation for using zeroing in administrative reviews using an average-to-transaction comparison methodology, while not using zeroing in certain types of investigations. See Union Steel v. United States, Consol. Court No. 11-00083, Slip Op. 12-24 (CIT Feb. 27, 2012). Because the Department’s explanation in both situations

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<sup>25</sup> As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

relies, in part, on the inherent differences between average-to-transaction comparisons and average-to-average comparisons, the explanation is also relevant to the context of investigations using average-to-transaction comparisons as a result of a targeted dumping analysis.

Regarding other WTO reports cited by LG and Samsung finding the denial of offsets by the United States to be inconsistent with the WTO AD Agreement, the CAFC has held that WTO reports are without effect under U.S. law, “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the URAA. See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; and NSK, 510 F.3d 1375. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to trump automatically the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. 3533(g).

Accordingly, and consistent with the Department’s interpretation of the Act described above, in the event that the Department employs the average-to-transaction comparison methodology for any respondent in this investigation, and any of the U.S. sales transactions examined in this investigation are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

Finally, we respect to the application of the average-to-transaction methodology to the non-targeted sales, the Department has previously determined that the language of section 777A(d)(1)(B) of the Act does not preclude adopting a uniform application of average-to-transaction comparisons for all transactions when satisfaction of the statutory criteria suggests that application of the alternative average-to-transaction methodology is appropriate. The only limitations the statute places on the application of the average-to-transaction method are the satisfaction of the two criteria set forth in the provision. When the criteria for application of the average-to-transaction method are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the average-to-transaction comparison methodology to certain transactions. Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average normal values to the export prices (or CEPs) of individual transactions. While the Department does not find that the language of section 777A(d)(1)(B) of the Act mandates application of the average-to-transaction method to all sales, it does find that this interpretation is a reasonable one and is more consistent with the Department’s approach to selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally. Thus, if the criteria of section 777A(d)(1)(B) of the Act are satisfied, as is the case for LG and Samsung in this investigation, the Department will apply the alternative average-to-transaction methodology to all sales in calculating the weighted-average dumping margin. See, e.g., Bags from Taiwan at Comment 1; and OCTG from the PRC at Comment 2.

Comment 3: *Adjustments to Expenses Paid to Affiliated Parties*

Each respondent reported that it used services (e.g., freight, warranty repair) provided by affiliated parties when making sales in the home market and United States. Because the affiliates did not provide the same service to unaffiliated parties, nor did the respondents use unaffiliated companies for the same services, we were unable to test the arm's-length nature of the fees paid by the respondents. Therefore, we based these expenses on the affiliate's costs. See Preliminary Determination, 76 FR at 67680-67681 and 67685-67686. In order to compute these costs, we deducted from the reported expenses an amount for profit charged by the affiliate in question, which we determined using the affiliate's 2010 financial statements.

According to Samsung, it is unnecessary for the Department to deduct the affiliates' profit from its reported expenses. Samsung argues that the Department has long held that if comparable transactions are unavailable for the arm's length test, the respondents may instead show that the transfer price exceeds the supplier's COP. According to Samsung, the fact that its affiliates made a profit during the POI demonstrates that these transactions were not made at less than the COP. Consequently, Samsung argues that the Department should make no adjustment to the reported expenses for the final determination.

Nonetheless, in the event the Department continues to remove the affiliates' profit, Samsung argues that, at a minimum, it should not make this adjustment to certain warranty expenses (i.e., free parts expense and subcontracted outside engineers). Samsung maintains that its affiliate Samsung Electronics Services (SES) paid these warranty expenses to outside parties and there is no evidence that any profit is included in them.

The petitioner disagrees, arguing that the Department should continue to follow the methodology it used in the preliminary determination to adjust Samsung's home market expenses. The petitioner notes that Samsung offers no support for its position on this issue, and thus the Department should disregard it. According to the petitioner, there is considerable opportunity for a respondent to manipulate home market prices when it reports expenses charged by an affiliated party. The petitioner contends that, under Samsung's theory, Samsung's affiliates could increase their prices by a factor of ten and the Department would have to accept them.

The petitioner does not address Samsung's argument relating to certain warranty expenses charged by SES. Regarding Samsung's affiliated freight provider, Samsung Electronics Logitech (SEL), however, the petitioner points out that at verification in Korea the Department attempted to see if SEL's fees for providing shipping services were the same as its costs. According to the petitioner, the Department observed that SEL earned a profit on the freight services it provided to Samsung in June which differed from the profit rate used in the preliminary determination. The petitioner contends that this difference demonstrates that Samsung has overstated the home market movement expenses charged by SEL. As a result, the petitioner argues that for the final determination the Department should deduct SEL's profit percentage observed at verification from the home market movement expenses charged by SEL (i.e., INLFTW1H, INLFTW2H, INLFTCH, and WAREHSH).

The petitioner did not comment on the calculations for U.S. expenses paid to affiliated parties. LG and Daewoo did not comment on this issue.

Department's Position:

After considering this issue, we find that it is appropriate to continue to adjust the reported expenses to remove any inter-company profit. We disagree with Samsung that, in instances where comparable transactions are unavailable for the arm's-length test, the Department's practice is to accept expenses paid to affiliated parties if a respondent shows that the transfer prices exceed the affiliate's costs. We note that Samsung provides no case precedent to support its position.

Under Samsung's theory, the Department would be required to accept any reported expenses charged by an affiliate so long as the affiliate earned a profit. The Department addressed a similar issue in Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part, 75 FR 50999 (Aug. 18, 2010), and accompanying Issues and Decision Memorandum at Comment 11, where a respondent claimed that its reported U.S. international freight expenses were at arm's length because the amounts paid to an affiliated party exceeded the amount that affiliate charged an unaffiliated party. In that case, the Department disagreed that the respondent's reported expenses were at arm's length, stating: "the mere fact that prices between affiliated parties are higher does not mean that they are at arm's length. In this case, the prices at issue differ significantly from the prices charged to an unaffiliated company, which leads us to conclude that they are affected by the relationship between {the respondent} and its affiliate." Samsung's arm's-length theory here is similarly flawed because it does not show that the prices between affiliated parties are unaffected by their relationship and, thus, are market based.

Regarding the selection of the profit rate for SEL, we disagree with the petitioner that it is appropriate to use the rate observed at verification. This rate was based on a comparison of the prices that SEL paid to unaffiliated trucking companies for shipping Samsung's goods to home market customers and the subsequent charges by SEL to Samsung. Therefore, because this rate shows SEL's mark-up, rather than its actual profit (which would also account for the cost of SEL's G&A and other expenses), it is not a true reflection of SEL's profit.<sup>26</sup> Consequently, we have continued to deduct from the home market and U.S. expenses incurred by SEL (i.e., INLFTW1H, INLFTW2H, INLFTCH, WAREHSH, DINLFTPU, DINLFTWU, and INTNFRU) an amount for profit calculated using SEL's 2010 financial statements.

Finally, we also disagree with Samsung's argument that the Department should not deduct a profit amount for certain direct warranty expenses paid to SES. The fact that SES pays outside parties

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<sup>26</sup> We note that the Samsung Korea sales verification report at page 41 alternately characterizes this amount as a surcharge and a profit. However, it is only correct to refer to this amount as a surcharge for the reasons stated above. See the February 2, 2010, memorandum from Henry Almond, Senior Analyst, to The File, entitled "Verification of the Sales Response of Samsung Electronics Co., Ltd in the Less-Than-Fair-Value Investigation of Bottom-Mount Refrigerator-Freezers from Korea" (Samsung Korea sales verification report).

for the direct warranty expenses it incurs is immaterial; rather, what is relevant is that Samsung pays SES, its affiliate, for these services. Our verification report notes that Samsung based its warranty expense calculations on those direct warranty expenses paid to SES (rather than to SES and unaffiliated parties). See the Samsung Korea Sales Verification Report at page 31. Further, the documents examined at verification indicate that Samsung's home market warranty expenses include an amount for SES's profit. Id. at Verification Exhibit 48. Finally, we calculated SES's profit ratio as net profit before tax divided by its 2010 sales revenue. To the extent that SES's costs for the materials and fees in question are in the denominator of the profit rate calculation, it is proper to compute a profit amount for them in order not to understate SES's profit experience (i.e., the aggregate costs in the denominator must match the sum of the individual costs to which the rate is applied). Therefore, we have continued to deduct SES's profit from Samsung's reported home market warranty expenses for purposes of the final determination.

Comment 4: Classification of Return Freight Expenses

Both LG and Samsung included freight on returned merchandise as part of their reported inland freight expenses. In the preliminary determination, we reclassified this portion of Samsung's freight expenses as an indirect selling expense. See Preliminary Determination, 76 FR at 67687. We did not make a similar change to LG's calculations because LG did not disclose its methodology in its questionnaire response, and thus we were unaware of it until verification.

Samsung argues that the adjustment made in the preliminary determination was unnecessary because: 1) the freight expenses in question are direct transportation expenses; and 2) the Department has treated freight on returns as direct movement expenses in past cases. As support for the former statement, Samsung cites the Department's regulations at 19 CFR 351.410(c) which define direct selling expenses as expenses (like warranties) "that result from, and bear a direct relationship to, the particular sale in question." Samsung contends that its return freight expenses are directly attributable to the Korean market and arise as a direct consequence of the original sale. Samsung opines that these expenses are similar to warranties in that, although the seller does not know the specific expense at the time of sale, it can anticipate that an expense will be incurred based on its historical experience.

As support for its claim regarding the Department's practice, Samsung cites Chlorinated Isocyanurates From Spain: Notice of Final Determination of Sales at Less Than Fair Value, 70 FR 24506 (May 10, 2005), and accompanying Issues and Decision Memorandum at Comment 1 (Chlorinated Isos from Spain); and Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador, 69 FR 76913 (Dec. 23, 2004), and accompanying Issues and Decision Memorandum at Comment 10 (Shrimp from Ecuador).

LG takes no position on the classification of this freight expense as a selling or movement expense. However, it argues that the Department should classify these expenses consistently in both the home and U.S. markets.

The petitioner argues that the Department should continue to treat return freight expenses as indirect selling expenses in the home market. Also citing Shrimp from Ecuador, the petitioner asserts that the Department's practice is to treat return freight as a direct expense only if the respondent "linked them to a particular customer." The petitioner notes that Samsung cannot link these expenses to a reported home market sale, and therefore it misapplied the principle set forth in the Department's regulations regarding direct selling expenses.

#### Department's Position:

We disagree with Samsung. It is the Department's general practice to include freight expenses associated with returned merchandise as part of indirect selling expenses. See Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia, 69 FR 20592 (Apr. 16, 2004), and accompanying Issues and Decision Memorandum at Comment 2 and Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52065 (Sept. 12, 2007), and accompanying Issues and Decision Memorandum at Comment 7. This practice has been upheld by the CIT. See Agro Dutch Industries, Ltd. v. United States, 20 C.I.T. 320 (June 23, 2006), and Agro Dutch Industries, Ltd. v. United States, 30 C.I.T. 977 (July 25, 2006).

Contrary to Samsung's argument, freight on returned merchandise is not one of the direct expenses contemplated by the Department's regulations at 19 CFR 351.410(c). Specifically, this regulation defines direct selling expenses as "expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question." (emphasis added). While this regulation does not provide an exhaustive list of direct selling expenses, it does require those expenses to be associated with specific sales in order to be considered direct.

We disagree with Samsung that returned freight expenses are analogous to warranty expenses because they are expenses that result from sales of subject merchandise. Under this logic, the Department should treat all expenses which result from sales as direct. However, the Department normally does not do so where the expenses are not associated with particular sales. For example, the Department normally treats bad debt expenses as indirect selling expenses, unless the write-off is associated with a specific sale to an individual customer. See, e.g., Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Notice of Revocation of Order in Part, 75 FR 41813 (July 19, 2010), and accompanying Issues and Decision Memorandum at Comment 5.

Finally, we find that Samsung's reliance on Chlorinated Isos from Spain and Shrimp from Ecuador is misplaced. In both of those cases, unlike here, the returns in question were directly associated with sales to specific customers. Moreover, also unlike here, in neither of those cases did the Department classify the return expenses as movement expenses. Thus, we find that the facts in those cases are distinguishable. Further, there is nothing on the record of this investigation to indicate that these expenses were related to warranty claims. Therefore, for purposes of the final determination, we have continued to classify U.S. and home market return freight expenses for

Samsung as indirect selling expenses, and we have reclassified LG's U.S. and home market return freight expenses in the same manner. For further discussion of LG's U.S. return freight expenses, see Comment 14.

### Company-Specific Issues

#### Daewoo

#### Comment 5: *General and Administrative Expenses for Daewoo*

During the POI, Daewoo restructured certain of its production operations, including shutting down a production plant located in Incheon and closing a production line that manufactured microwave ovens at its Gwangju factory. Because Daewoo reported the costs associated with these restructuring activities as a single amount in its cost response, we did not have the necessary information to make an adjustment at the preliminary determination (and thus we accepted Daewoo's exclusion of this amount from G&A). However, we reviewed these costs at verification and now have the costs related to each activity separately identified on the record.

The petitioner argues that the Department should include the restructuring costs associated with the closure of the microwave oven production line in the G&A expense ratio calculation. According to the petitioner, it is the Department's well-established practice to include restructuring costs in G&A unless they qualify as extraordinary expenses.<sup>27</sup> In this regard, the petitioner cites Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review, 74 FR 50774 (Oct. 1, 2009), and accompanying Issues and Decision Memorandum at Comment 1 (Chlorinated Isos from Spain Administrative Review) and asserts that restructuring costs are commonly incurred by companies in the manufacturing sector as they try to reduce operating costs or streamline operations.

The petitioner points out that in Chlorinated Isos from Spain Administrative Review the Department concluded that a line closure does not constitute the permanent closure of a facility, but rather is more akin to the routine disposal of assets. In the instant proceeding, the petitioner argues that, although the microwave oven line at the Gwangju factory was closed, the washing machine and refrigerator lines at the facility continue to operate. Accordingly, the petitioner asserts, the line closure costs are restructuring costs because the facilities in question continue to operate and produce products for Daewoo.<sup>28</sup> Thus, the petitioner contends that the Department should include these costs in the G&A expense ratio for purposes of the final determination.

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<sup>27</sup> See Notice of Final Results of the Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part, 70 FR 71464 (Nov. 29, 2005), and accompanying Issues and Decision Memorandum at Comment 11 (Pasta from Italy); and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From the United Kingdom, 67 FR 3146 (Jan. 23, 2002), and accompanying Issues and Decision Memorandum at Comment 4 (SS Bar from the UK).

<sup>28</sup> In support of this assertion the petitioners cite Certain Softwood Lumber Products From Canada: Notice of Final Results of Antidumping Duty Administrative Review, 70 FR 73437 (Dec. 12, 2005), and accompanying Issues and Decision Memorandum at Comment 8 (Softwood Lumber from Canada).

Daewoo argues that the costs associated with shutting down the microwave oven production lines at Gwangju are properly excluded from G&A expense. Daewoo asserts that the closure of the lines constituted the complete and permanent shutdown of all of its microwave oven facilities. As such, Daewoo maintains that this was not a routine restructuring undertaken to reduce operating costs or streamline operations. Rather, Daewoo contends that this was a one-time strategic decision to exit an entire line of business and permanently close and dispose of its entire microwave oven production operations.

Daewoo argues that, because the line closure represents the complete and permanent shutdown of its entire microwave oven operations, the costs incurred in connection with this closure are akin to the costs incurred in relation to the disposal of an entire production facility, which the Department has consistently found to be properly excluded from G&A expense.<sup>29</sup> Like the respondent in Softwood Lumber from Canada, Daewoo contends that it not in the business of shutting down and disposing of production facilities with respect to an entire line of business. Accordingly, Daewoo concludes that the Department should treat the costs associated with the closing of its microwave oven production as extraordinary expenses and exclude them from G&A.

Daewoo asserts that the authorities cited by the petitioner in support of its argument are inapposite. Daewoo states that in Pasta from Italy the expenses in question were not related to the shutdown of production operations and that in SS Bar from the UK the closures did not involve the complete shutdown of production facilities for an entire production line. Further, Daewoo claims that in Chlorinated Isos from Spain Administrative Review the impairment and restructuring costs in question were related to the closure of only two of three production lines related to certain non-subject merchandise.

#### Department's Position:

We agree with the petitioner that the Department should include the restructuring costs related to the closure of the microwave oven line at Daewoo's Gwangju factory in the calculation of Daewoo's G&A expense ratio. As noted by the petitioner, restructuring costs are commonly incurred by companies in the production and manufacturing sector as they try to streamline operations and reduce operating costs. Companies evaluate their overall operations and change them accordingly to meet the changing needs of the general organization. Thus, restructuring costs are period costs that relate to the general operations of the company, rather than to the production of a specific product. Accordingly, the Department considers restructuring costs to be general expenses and has an established practice of including them in the G&A expense ratio calculation. See, e.g., Chlorinated Isos from Spain Administrative Review at Comment 1, Softwood Lumber from Canada at Comment 8 and Pasta from Italy at Comment 11.

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See Softwood Lumber from Canada.



The Department also has an established practice of excluding the closure costs related to the shutdown of an entire facility if the respondent can provide evidence that the facility no longer exists or has been permanently closed.<sup>30</sup> In situations where the shutdown consists of the closure of some production lines at a facility but other production lines at the same facility continue to operate (i.e., where the entire facility has not been shut down), the Department's approach has been to include the associated costs or gains in G&A expense.<sup>31</sup> Accordingly, because the refrigerator and washing machine lines at Daewoo's Gwangju factory continue to operate, the restructuring costs of the microwave oven line are not incurred in relation to the shutdown of a complete facility, and they cannot be excluded from G&A expense on this basis.

With regard to Daewoo's argument that the shutdown of the microwave oven line at Gwangju is akin to the disposal of an entire production facility because it represents the complete and permanent shutdown of its entire microwave oven operations, we disagree. Record evidence indicates that Daewoo's microwave oven division continued to incur significant manufacturing costs through the last month of the POI (i.e., December 2010).<sup>32</sup> Further, the segment data in Daewoo's 2010 audited unconsolidated financial statements show that Daewoo continues to hold assets in its microwave oven division.<sup>33</sup> Thus, although Daewoo may have shut down its microwave oven production line at the Gwangju plant, it had not completely shut down its entire microwave oven operations as of the end of the POI and remained in the microwave oven business. Accordingly, the shutdown of the microwave oven line represents neither a complete shutdown of a facility nor the disposal of an entire line of business, and the associated restructuring costs do not qualify for exclusion under the Department's established practice. We have therefore included these costs in Daewoo's total G&A expense for the final determination.

## LG

### Comment 6: LG's Corrected Control Numbers

At the start of the cost verification and both sales verifications, LG provided the Department with a number of corrections to its reported U.S. and home market product characteristics and control numbers. These revisions resulted in the reclassification of certain models from one control number to another, as well as the creation of new control numbers. The petitioner asserts that, while these changes may seem minor in isolation, the revisions affect a substantial portion of LG's

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<sup>30</sup> See, e.g., Chlorinated Isos from Spain Administrative Review at Comment 1; Softwood Lumber from Canada at Comment 8; and Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review, 72 FR 69663 (Dec. 10, 2007), and accompanying Issues and Decision Memorandum at Comment 8.

<sup>31</sup> See, e.g., Chlorinated Isos from Spain Administrative Review at Comment 1 and Softwood Lumber from Canada at Comment 8.

<sup>32</sup> See Cost Verification Exhibit 5.

<sup>33</sup> See Exhibit A-10 of the June 24, 2011 Section A Response.

home market database and evidence a severe lack of diligence and cooperation on the part of LG. The petitioner maintains that these changes go above and beyond the sort of “minor” corrections the Department normally accepts at verification.<sup>34</sup> Moreover, the petitioner asserts that the Department need not consider all information gathered at verification. In support of this assertion, the petitioner cites Shandong Huarong General Group Corp. v. United States, 27 CIT 1568 (2003).

Citing Nippon Steel Corp. v. United States, 337 F. 3d 1373, 1382 (Fed. Cir. 2003), the petitioner contends that section 776(b) of the Act requires respondents to conduct prompt, careful, and comprehensive investigations of relevant records in preparing its responses to the Department. The petitioner maintains that, because the information necessary to properly code its product characteristics were readily available to it, LG failed to conduct a reasonable investigation into its own information and therefore failed to act to the best of its ability in accurately reporting its product characteristic information to the Department. Moreover, the petitioner maintains that it is still unclear whether LG has, in fact, reported accurate product characteristic information for its home market sales. In support of this assertion, the petitioner points to its December 29, 2011, submission, which contains internet advertisements, including product details, for several in-scope models. The petitioner asserts that the information in this submission demonstrates that certain of the revised product codes reported by LG are incorrect.

Based on its position that LG has failed to act to the best of its ability and that there are still flaws in LG’s reported information, the petitioner asserts that the Department should resort to partial AFA with respect to LG’s product codes. As partial AFA the petitioner proposes assigning a margin equal to the highest non-aberrational margin calculated for any U.S. sale to any sales that are matched to the newly-identified home market control numbers.

LG, on the other hand, characterizes its revisions as “minor” and contends that the petitioner overstates the scope of its control number revisions. Moreover, LG maintains that the corrections neither indicate a failure by LG to act to the best of its ability nor warrant the application AFA. According to LG, both the information submitted at verification and the verification reports subsequently issued by the Department demonstrate that the corrections affect only 19 out of 117 control numbers. Moreover, LG maintains that 17 out of the 19 affected control numbers resulted in a “one-to-one” exchange (*i.e.*, all products grouped under one former control number were shifted to a single new control number), and thus, these changes did not result in a wholesale revision to its COP data.

Additionally, LG maintains that this sort of revision to product coding has been accepted by the Department in previous cases. In support of this position, LG cites Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People’s Republic of China:

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<sup>34</sup> In support of this position, the petitioner cites Certain Kitchen Appliance Shelving and Racks from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 36656 (July 24, 2009), and accompanying Issues and Decision Memorandum at Comment 4 (Kitchen Racks from the PRC); and Chlorinated Isos from Spain.

Final Determination of Sales at Less Than Fair Value, 75 FR 59217 (Sept. 27, 2010) (Coated Paper from the PRC). LG contends that the fact pattern here is nearly identical to the situation in Coated Paper from the PRC. Specifically, LG asserts that in that case, like here, the respondent provided the corrected information at the beginning of verification (three months prior to the due date for case briefs), the Department verified the revisions, and the Department found that the revisions themselves neither evidenced a failure of the respondent to act to the best of its ability, nor undermined the accuracy of the respondent's data. Accordingly, LG maintains that the Department should use the revised data in the final determination without resorting to partial AFA.

Department's Position:

It is the Department's practice to review the corrections presented at the start of any verification and determine whether they relate to minor changes to previously-submitted data or whether they reach the level of significant new factual information.<sup>35</sup> Where the changes are minor, we typically accept the information as part of the administrative record in the form of a verification "exhibit" and we examine that information during the course of the verification. Where the Department determines the revisions constitute significant new factual information, the Department generally declines to accept the revisions as part of the administrative record.

Here, LG presented the corrections first at the cost verification, and subsequently at the sales verification. See LG Cost Verification report and LG Korea Sales Verification Report. At each of these verifications, we reviewed LG's revisions and found that they were clerical in nature, as the errors arose due to oversight on the part of LG in identifying the product characteristics for the models in question. Additionally, we reviewed the corrected information for a number of the products affected by the revisions, as well as the reported information for various additional products reported in the home market sales listing, and confirmed that the product characteristics were appropriately classified. See LG Cost Verification report at 18 and LG Korea Sales Verification Report at 11-12. Thus, because the revisions were clerical in nature, accepted at verification and verified by the Department, we are relying on them for the final determination in accordance with our practice. See, e.g., Coated Paper from the PRC at Comment 10.

Regarding the petitioner's argument that the revisions amount to a substantial revision of LG's response and evidence a lack of diligence that warrants the application of AFA, we disagree. While it is true that LG did not accurately identify the physical characteristics for certain refrigerator models prior to verification, the errors were limited to a small subset of its numerous refrigerator models (i.e., 19 out of 121 control numbers). Moreover, most of LG's revisions resulted in "one-to-one" exchanges (i.e., all products grouped under one former control number were shifted to a single new control number), and thus, these changes did not result in a wholesale revision to its COP data. Finally, we found no pattern of misreporting or any attempt to withhold information. Therefore, we find the errors in question to be more indicative of a lack of precision on LG's part in preparing its initial response than of a failure to cooperate.

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See, e.g., Coated Paper from the PRC at Comment 10.

The petitioner contends that the seemingly minor errors amount to a substantial revision of LG's data, but we disagree that this is the case. As outlined above, these errors were limited to a small portion of LG's reported refrigerator models. While the petitioner claims that the proportion of the sales affected is relevant, the question is not solely whether the number of affected transactions was large, but also, what was the nature of the errors and whether or not the errors call into question the reliability of LG's reported data. See Brake Manufacturers v. U.S., 44 F. Supp 2d 229, 236 (CIT 1999). Consistent with this standard, here the errors were clerical and the data now on the record is reliable. Accordingly, applying AFA to LG's reported control numbers would not be appropriate.

We find that the petitioner's reliance on Kitchen Racks from the PRC and Chlorinated Isos from Spain is misplaced. Both of these cases are distinguishable from the situation at hand. In Kitchen Racks from the PRC the Department rejected the respondent's proposed revisions on the basis that they were methodological in nature. See Kitchen Racks from the PRC at Comment 4. Here LG's revisions were clerical and not methodological. In Chlorinated Isos from Spain, the Department rejected revisions to the respondent's freight calculations because the Department was unable to verify the corrections (i.e., the respondent corrected multiple errors across several variable fields and included data that the Department had previously requested but had not been reported until verification). See Chlorinated Isos from Spain at Comment 4. Thus, the fact pattern in Chlorinated Isos from Spain is clearly distinguishable because we were able to verify LG's revised data. Therefore, neither of these cases supports the rejection of LG's revised product coding information, let alone the application of AFA.

Finally, regarding the petitioner's December 29, 2011, submission (which consists of advertisements on third-party websites for certain of LG's home market refrigerator models), we disagree that this is the "smoking gun" that the petitioner holds it out to be. Specifically, in its case brief, the petitioner identified four products for which it alleges that LG reported an incorrect door finish, and one product for which it claims that LG reported an incorrect user interface. After reviewing this submission, we are unable to reach the same conclusion as the petitioner. First, the petitioner asserts that certain acronyms "may" denote a certain type of finish; however, there is no evidence on the administrative record to conclude that these acronyms necessarily signify what the petitioner implies. Additionally, the English translation for one of the models contains a clear translation error (the Korean version lists an "LED display" while the English version lists an "LCD display"). Meanwhile, the original Korean versions for most of the other models are simply illegible. Thus it is inconclusive if other similar translation errors exist in the document. Because it is unclear as to the correct translation of some of the documents, we relied on our findings at verification. Significantly, we reviewed LG's corrections to one of the models contained in the December 29 submission and found no discrepancies in LG's revised product coding for this model. See LG's Cost Verification report at Cost Verification Exhibit 8, page 13, for an excerpt of the documents that were examined. Therefore, we find no basis to reject LG's reported and verified product coding information.

Comment 7: LG's Home Market Rebates

During the POI, LG paid both “sell-in” and “sell-out” rebates in the home market.<sup>36</sup> LG calculated all sell-out, and certain sell-in, rebates on a customer- and product-specific basis. Specifically, LG used as the numerator of its calculations the amounts reflected in the sales system for each program, customer, and product during 2010, and as the denominator the corresponding POI sales of the same product/customer combination (irrespective of whether the rebate was earned on sales during this period).<sup>37</sup> See the LG Korea Sales Verification Report at 2-3.

Because LG did not link the rebates paid to the sales on which they were earned, the application of LG's methodology yielded certain rebate figures which were unreasonably high; therefore LG capped the reported amounts at 50 percent of the price. This cap was calculated as the sum of: 1) a rebate rate “occasionally offered . . . for new products”; and 2) a “cushion” designed to account for the fact that LG did not report any rebates owed in 2011 which related to sales in 2010. See the LG Korea Sales Verification Report at 34. At verification, we found no evidence that LG paid rebates of 50 percent. Moreover, when we attempted to assess the pervasiveness of the distortions created by LG's calculation methodology, we found that the tested sell-out rebates were only a fraction of those reported. Therefore, in our verification report we raised the issue of how to treat these rebates for the final determination. See the LG Korea Sales Verification Report at 2-3.

The petitioner argues that the Department should disallow these rebates for the final determination. According to the petitioner, the Department's LG Korea verification definitively revealed that LG's rebate reporting was anything but complete and accurate. The petitioner maintains that LG failed to inform the Department of either the distortive effect its methodology has on its rebate experience or the fact that it arbitrarily set a cap to the percentages it reported, despite a clear opportunity to do so. Moreover, the petitioner notes that LG provided no evidence at verification to support its 50 percent cap, nor did it provide any evidence to conclude that the “cushion” is reliable. Finally, the petitioner asserts that the Department found at verification that LG over-reported its lump sum rebates by a significant margin (both in the aggregate and on individual transactions).<sup>38</sup> The petitioner argues that a methodology that results in such distortive results cannot be the basis for granting LG a downward adjustment to NV.

The petitioner disagrees with LG's argument (see below) that the Department should limit its analysis to the question of whether LG's allocation methodology is reasonable. According to the petitioner, the proper focus of the Department's analysis is whether it was reasonable for LG to set caps and floors on its reported rebate rates and to fail to disclose the distortive effect of its

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<sup>36</sup> “Sell-in” rebates are determined at the time of sale to the customer, while “sell-out” rebates are determined only after the customer's resale (generally at the retail level).

<sup>37</sup> For example, if LG recorded sell-out rebates in 2010 which related to models sold in 2009, it included these rebates in the numerator of its calculations but it did not include the corresponding sales in the denominator.

<sup>38</sup> Lump sum rebates are a type of sell-out rebate.

allocation methodology, in contravention of the Department's regulations at 19 CFR 351.402(g)(2). The petitioner points out that this regulation requires respondents reporting allocated expenses to "demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible and . . . explain why the allocation methodology does not cause inaccuracies or distortions."

The petitioner also disagrees with LG's argument (see below) that the Department should consider the fact that LG only reported a limited number of transactions with capped rebates when assessing the reasonableness of its methodology. The petitioner claims that, in citing to the regulations which approve of reasonable allocations, LG mistakenly leaves off the key portion of the provision that places the burden on the respondent to prove that its allocation is reasonable and accurate. The petitioner asserts that the Department's verification findings demonstrated that LG did not meet this regulatory burden.

According to the petitioner, when the Department discovers previously unreported information for the first time at verification, its practice is to apply adverse inferences with respect to that information, especially in cases where, as here, the facts discovered were related to questions asked early in the investigation. As support for this statement, the petitioner cites (among other cases) Certain Lined Paper Products From the People's Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review and Partial Rescission, 76 FR 23288 (Apr. 26, 2011); Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review, 75 FR 34980 (June 21, 2010), and accompanying Issues and Decision Memorandum at Comment 6; Tianjin Magnesium International Co., Ltd. v. United States, Slip Op. 11-100 (CIT Aug. 11, 2011); Tung Mung Development Co. v. United States, 25 C.I.T. 752, 758 (July 3, 2001); and Foshan Shunde Yongjian Housewares & Hardware Co. Ltd. v. United States, Slip Op. 11-123 (CIT Oct. 12, 2011). The petitioner claims that LG's obfuscation has both given it an unfair commercial advantage over Samsung and unfairly limited the amount of dumping duties for which LG may ultimately be liable (given that the rate that LG received in the preliminary determination will set its provisional measures deposit cap).

In summary, the petitioner argues that, after analyzing the facts, the Department should conclude that: 1) the existence of the distortions created by LG's methodology undercuts its accuracy; 2) the discovery of these problems at verification significantly impeded the investigation; and 3) LG's failure to inform the Department of these problems demonstrates that LG failed to cooperate to the best of its ability. Therefore, the petitioner contends that the Department should disallow LG's home market sell-out rebates for the final determination, as well as any sell-in rebates calculated using the same methodology.

LG argues that the Department should accept its home market rebate reporting rebate methodology without adjustment for the final determination. According to LG, the Department verified that: 1) LG's rebate programs were longstanding because similar programs were in place in 2009; and 2) the reported amounts were actual amounts which could be tied to LG's financial statements. LG asserts that the sole question is whether the manner in which LG allocated its sell-out rebates to its

home market sales was reasonable and non-distortive, and LG submits that the record shows that it is.

LG notes that the Department's regulations at 19 CFR 351.401(g)(1) permits allocations where transaction-specific reporting is not feasible so long as the allocation does not cause inaccuracies or distortions. LG states that, in interpreting this regulation, the Department considers not only whether the allocation methodology results in distortions but also whether: 1) the products included in the allocation vary significantly in terms of value, physical characteristics, or manner of sale; and 2) the respondent acted to the best of its ability. As support for its position, LG cites Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 62 FR 2081, 2090 (Jan. 15, 1997) (AFBs 1997); and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 63 FR 33320, 33326 (June 18, 1998) (AFBs 1998). LG asserts that its allocation methodology meets each of these tests.

LG maintains that it was unable to directly link the rebates granted to a particular customer to that customer's purchase because LG does not require its customers to identify specific units sold, but only overall quantities. Therefore, LG notes that it reported sell-out rebates on a customer- and model-specific basis. LG asserts that this methodology is non-distortive because it takes into account value, physical characteristics, and the manner in which the merchandise is sold. Further, LG asserts that its methodology is consistent with (and even more specific than) the Department's practice, which requires that respondents calculate rebates on a customer-specific basis. As support for this statement, LG cites 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; Final Results of Antidumping Duty Administrative, 63 FR 2558, 2567 (Jan. 15, 1998) (TRBs); and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 62 FR 54043, 54051 (Oct. 17, 1997) (AFBs).

Regarding the cap, LG acknowledges that its methodology potentially captured rebates earned on sales made prior to the POI, and therefore it established a cap of 50 percent in order to ensure that its approach "did not unfairly overstate" the amount of the reported rebates. LG notes that it applied the cap only to a handful of sales, and it reported rebates in excess of 30 percent for only a fraction of its database. LG argues that the "trivial number of anomalous results" does not call into question the integrity of the company's overall approach, and it claims that it demonstrated at verification that its approach was reasonable. Indeed, LG claims that its methodology is conservative in that LG underreported sell-out rebates earned on sales at the end of the POI but paid in 2011.

LG also acknowledges the Department's question in the LG Korea Sales Verification Report as to whether LG's methodology has the potential to distort the company's actual rebate experience.

However, LG asserts that averaging rebate amounts is simply the unavoidable effect of allocation. LG argues that, assuming it has otherwise satisfied the prerequisites for allocation of expenses, the Department should not disallow the use of allocations simply because they have an averaging effect. In any event, LG contends that there is no evidence that the hypothetical scenario set out in the verification report occurred during the POI. According to LG, it would be both inappropriate for the Department to reject LG's allocation methodology because of speculation and inconsistent with the preamble to the Department's regulations (which states that "it is not our intent to require a party to 'prove a negative' or demonstrate what the amount of the expense or price adjustment would have been if transaction specific reporting had been used). See Preamble, 62 FR at 27347.

Finally, LG contends that the "reasonableness test" proffered in the LG Korea Sales Verification Report is based on incorrect assumptions and should not be relied on for the final determination. Specifically, LG states that the Department incorrectly assumed that, for the first sale used in this test, LG made no sales of the same product prior to October 2010 when in fact the record shows otherwise, while the second sale used in the test was an outlier transaction on which LG applied the 50 percent cap. According to LG, when the additional sales of the product used in the first test are taken into account, the resulting rebate ratio is very close to the reported figure.

LG disagrees with the petitioner's argument that it over-reported its rebates in the aggregate by a significant margin. LG notes that the Department examined the difference in the total value of rebates in the home market sales listing and those shown in its 2010 financial statements at verification and found it to be attributable to: 1) LG's use of the 50 percent cap; and 2) LG's non-reporting of rebates paid on its sales to its affiliated reseller. Thus, LG asserts that this difference is not a sign of error.

LG also disagrees with the petitioner's argument that it intentionally withheld information. LG asserts that it responded fully to every rebate question the Department asked, and it disclosed its capping methodology in a supplemental response. As to the petitioner's allegation that LG was gaming the system to gain advantage over Samsung, LG asserts that this allegation is belied by the factual record which shows that LG's methodology for sell-out rebates affected only a trivial number of transactions in a manner designed to increase NV. Therefore, LG argues that there is no basis to apply AFA in this case.

#### Department's Position:

We agree with the petitioner, in part. After analyzing the facts on the record, we find that LG's methodology for reporting sell-out rebates was distortive and unreasonable. Moreover, we find that LG did not act to the best of its ability in reporting these rebates because: 1) LG's methodology resulted in rebate amounts which were excessive and not consistent with its commercial activity; 2) LG attempted to mask the unreasonable results of its chosen methodology by capping its reported amounts at 50 percent of gross unit price (rather than requesting guidance from the Department as to an acceptable methodology); and 3) LG failed to disclose its capping methodology in its initial questionnaire response, and when it finally disclosed the cap, it only did



so as a note in an exhibit attached to a supplemental response, rather than in the narrative itself. Therefore, for this final determination, pursuant to sections 776(a) and 776(b) of the Act, we have based LG's sell-out rebates on AFA. As AFA, we have capped the reported figures at the lowest sell-out rebate percentage observed at verification.

However, we disagree with the petitioner that AFA is warranted with respect to LG's sell-in rebates calculated using the same methodology. While these rebates suffer from many of the same deficiencies noted above, at verification we found that LG had understated the reported amounts and thus the figures in the home market sales listing are conservative. See the LG Korea Sales Verification Report at page 37. Therefore, we are relying on these rebates as reported for the final determination.

The facts surrounding these conclusions are as follows:

LG responded to the Department's antidumping duty questionnaire on July 22, 2011. In this submission, LG stated that it reported three types of rebates (labeled "Type 1," "Type 2," and "Type 3," respectively).<sup>39</sup> LG described each type, stating (in relevant part) "Type 2 rebates were those that could be not be traced to particular orders, but are recorded on a customer- and model-specific basis. For these programs, LGE calculated a customer/model specific rebate, and reported that amount in this field." See LG's July 22, 2011, submission at page B-21. LG also indicated that it included a worksheet illustrating the calculation of this rebate in Exhibit B-9 of the same submission. The worksheet which LG claimed was included, however, was mislabeled as Rebate1 and thus did not appear to be included to Department officials who reviewed and analyzed this submission.

Absent from the above description was any mention of "sell-out" rebates or the fact that LG had mismatched the numerator of its calculations (rebates booked during the POI, including amounts granted on pre-POI sales) with the denominator (POI sales). Also absent from this submission was any worksheet labeled Type 2 rebates. In fact, this response appeared to show LG's rebates were of a type normally reported to the Department (e.g., rebates based on the aggregate sales performance of a customer) and appropriately matched to POI sales. Therefore, in our September 14, 2011, supplemental questionnaire, we merely questioned LG as to the absence of its Type 2 worksheet and asked a number of questions about customer eligibility for the rebate and duration of the rebate programs. We also asked for source documentation to support LG's calculations for two sales, one with a potentially "normal" (but high) rebate and another for which LG appeared to have miscalculated the reported figure (because the rebate was 50 percent of price).

On October 11, 2011, two weeks prior to the preliminary determination, LG responded to the Department's supplemental questionnaire. See LG's supplemental questionnaire response, dated October 11, 2001. In this submission, LG provided no further description of its calculation methodology (other than to state on page 8 that it "reported the rebate expense based on the POI" and thus a question asked by the Department was not applicable). Regarding the "missing"

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<sup>39</sup> These rebates are reported in the fields REBATE1H, REBATE2H, and REBATE3H in the home market sales listing, respectively.

worksheet, LG stated that the label on its worksheet in Exhibit B-9 was “in error,” and it provided a corrected copy of this worksheet with the appropriate heading in an attachment. See LG’s October 11, 2011, submission at Exhibit 33. LG also provided calculation worksheets for the rebates reported for the two requested sales. See id. at Exhibit 36. The first of these worksheets included the notation “Conservative Limited Rebate Ratio 50% (=Reported RebateH)” and an indication that the company had determined the amount of the rebate by multiplying the reported price by 50 percent (rather than reporting the amount computed using LG’s rebate methodology).

At verification, we discussed LG’s rebate reporting methodology with company officials. This methodology is set forth in the LG Korea Sales Verification Report:

In order to calculate the rebates reported in the sales listing, company officials stated that LGE determined the amount reflected in its rebate module for each program, customer, and product during 2010. It then allocated these amounts over sales of that product to that customer during 2010. Company officials stated that LGE employed this methodology because sell-out rebates were given on products sold by their customers and LGE’s system could not link the rebate paid to particular purchases.

Where rebate programs crossed fiscal years, company officials stated that LGE: 1) reported the full amount of the rebate granted on 2009 sales for which the bound liability was incurred in 2010; and 2) LGE did not report rebates paid on its customers’ purchases at the end of the period because the bound liability was incurred in 2011. Company officials acknowledged that, in certain instances, LGE’s methodology yielded rebates which were a large percentage of gross unit price. For example, LGE officials noted that the rebate percentage could be high in cases where the rebate program related mostly to 2009 sales of a model discontinued in 2010; in such a scenario, the full amount of the rebate would be contained in the numerator but none of the 2009 sales of that model would be contained in the denominator. For this reason, company officials stated that LGE capped the reported amount at 50 percent of the price. FN 10.

FN 10: This methodology was not discussed in the narrative of LGE’s submissions, and its response contained only a single reference to it. See LGE’s REBATE2H worksheet contained in Exhibit 36 of its October 11, 2011, submission.

Company officials stated that LGE set the cap at 50 percent because the company occasionally offered rebates of [ ] percent for new products. Company officials further stated that LGE included an extra [ ] percent as a cushion because LGE did not report any rebates owed in 2011 which related to sales in 2010. In order to test whether this cap was consistent with LGE’s actual rebate experience, we requested that company officials provide evidence of rebate programs which offered terms of rebates granted at [ ] percent or more of price. In response, LGE provided a rebate agreement for kimchi refrigerators which started in October 2010; this agreement provided for rebates of [ ] percent on units sold for display.

See the LG Korea Sales Verification Report at pages 34 and 35.

Based on these facts, we identified the issue of how to treat home market sell-out rebates in the final determination in the LG Korea Sales Verification Report:

LGE reported “sell-out” rebates (i.e., rebates determined after resale by LGE’s customer and based on the resale price) on an annual basis. LGE reported these rebates in the field REBATE2H. LGE used as the numerator of its calculation the amounts reflected in its rebate module for each program, customer, and product during 2010 and as the denominator the corresponding POI sales of the same product/customer combination. Company officials stated that LGE’s system could not link the rebate ultimately paid to the customer’s original purchase, and thus they considered this methodology reasonable.

Because LGE did not link the rebates paid to the sales on which they were earned, the application of LGE’s methodology yielded certain rebate figures which were, on their face, distortive (see, e.g., the worksheet for REBATE2H for sequence number 9869, contained in verification exhibit 34, which shows a rebate percentage of [ ]). Company officials stated that LGE did not pay rebates at this rate and that they had accounted for this fact by capping any reported amount at 50 percent of the price. At verification, we found no evidence that LGE paid rebates of a magnitude of [ ] percent.

The larger question, however, is whether the distortions caused by LGE’s calculation methodology are limited to outlier transactions. FN 1. In an attempt to answer this question, we recalculated the rebate percentages for two sales (one selected in the verification agenda and another selected at verification) by removing all rebates recorded in the LGE’s system before the first reported sale of that model to the customer. In both instances, we found that the recalculated rebates were only a fraction of those reported. FN 2. Therefore, the issue is how to treat LGE’s reported REBATE2H amounts for the final determination. Moreover, because LGE used the same calculation methodology to report REBATE1H for its sales to [ ], this issue also applies to those rebates.

FN 1: Because time-period-specific data is not on the record, there is no way to measure the overall impact of LGE’s chosen rebate allocation methodology. (For example, the actual rebate percentages for sales of a particular model could have been [ ] percent during a promotion weekend and 0 for the next weekend.) Therefore, the following “test” accounts for only the inclusion of rebates on 2009 sales in LGE’s calculations.

FN 2: The recalculated rebates were approximately [ ] and [ ] percent; LGE reported rebates of [ ] and [ ] percent. Moreover, because LGE did not link the rebates to the time period over which they were applicable (e.g., a holiday weekend or a particular month) but instead allocated them over 2010 sales, it is unclear what LGE’s actual rebate experience was. For example, the actual rebate percentage for sales during a given weekend could have been [ ] for the next weekend. Because

time-period-specific data is not on the record, there is no way to measure the overall impact of LGE's chosen rebate allocation methodology.

See the LG Korea Sales Verification Report at pages 2 and 3.

In analyzing this issue, we looked to the Department's regulations as a starting point. The regulation governing allocations is found at 19 CFR 401(g)(2) and states:

(2) Reporting allocated expenses and price adjustments. Any party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions.

In this case, LG's reporting methodology is not "on as specific a basis as is feasible," and it is clearly both inaccurate and distortive. This methodology resulted in rebate amounts which were not in line with its normal commercial practice (as evidenced by the rebate programs examined at verification), producing certain rebates which were far in excess of the 50 percent cap. We disagree with LG's argument that the Department should not give the cap much weight when considering this issue because it related to only a handful of transactions. LG reported many more transactions with a rebate percentage higher than the highest rebate offered during the POI (i.e., a rebate program for kimchi refrigerators sold as display units proffered at verification to prove the cap's reasonableness). Moreover, we find that the necessity of applying a cap is in and of itself evidence that LG's methodology was distortive. Had LG's methodology yielded results which were in line with its actual rebate experience, a cap would have been unnecessary.

Further, we find that the size of the cap was set arbitrarily, without reference to specific rebate programs in place during the POI. As noted above, LG officials stated at verification that they determined the amount of the cap by adding a rebate percentage "occasionally offered . . . for new products" to a "cushion" designed to account for fact that LG did not report any rebates owed in 2011 which related to sales in 2010. See the LG Korea Sales Verification Report at page 35. LG was unable to substantiate the amount of this cap when asked, instead providing a rebate program document for display units which differed significantly in magnitude. Id. The cap size question aside, however, we find that this document does not validate LG's cap because it is for a rebate program which is arguably not representative of LG's mainstream sell-out rebate programs (given that display units are not completely new goods).

Finally, we note that LG made no attempt to link its reported rebates to the sales transactions on which they were based, but instead allocated all rebates owed in 2010 over sales during the year. Thus, LG included rebates in its calculations which were earned on sales made in 2009 (and thus not subject to this investigation) and it excluded rebates granted on POI sales which were paid in 2011. Further, to the extent that the rebate percentages differed throughout the year (as LG stated that they did<sup>40</sup>), LG's methodology overstated the reported rebates on some sales and understated

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<sup>40</sup> See the LG Korea Sales Verification Report at page 34, which states that "spot rebates apply mainly to weekends and holiday periods."

them on others. For these reasons, we find that LG's calculations were not sufficiently specific and not accurate. We recognize that this latter inaccuracy is less meaningful in a less-than-fair-value investigation than in an administrative review (because NV is calculated on a POI-average basis at the investigation stage). However, accuracy is still a relevant consideration because of the impact on the cost test, which is performed at the sales-specific level.

Based on the foregoing, we find that LG failed to meet its burden in this case to demonstrate that its reported allocation methodology for these rebates was "on as specific a basis as is feasible," pursuant to section 19 CFR 351.401(g)(2). In fact, we have concluded that LG's reported allocation methodology creates significant inaccuracies and distortions, and therefore, the Department is unable to use that methodology in its calculations.

Section 776(a) of the Act provides that when "(1) necessary information is not available on the record" or "(2) an interested party (C) significantly impedes a proceeding under this title or (D) provides such information but the information cannot be verified as provided in section 782(i)," the Department "shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title." LG did not report the necessary accurate rebate amounts because the allocation methodology it applied on the record was distortive. Accordingly, the application of facts available is warranted pursuant to section 776(a)(1). Furthermore, the Department was unable to verify LG's sell-out rebate amounts and without this information, the Department was unable to use the correct rebate amounts in its final calculations. Therefore, because LG's distortive allocation methodology significantly impeded the Department's ability to calculate an accurate margin for LG, the application of facts available is also warranted pursuant to both sections 776(a)(2)(C) and (D).

Section 776(b) of the Act states that if the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," then it "may use an inference that is adverse to the interests of that party in selection from among the facts otherwise available." We have determined that, pursuant to section 776(b) of the Act, the application of adverse inferences is warranted with respect to LG's sell-out rebate amounts because LG did not cooperate to the best of its ability with respect to this issue.

It appears that LG was aware throughout investigation that its methodology was problematic, yet made no mention of this fact to the Department. Indeed, it failed to fully disclose its capping methodology until after verification began, and at that point the Department had no time to consider and analyze that methodology in detail and request different, accurate data from LG. Although it is true that LG did report a cap on the record in a supplemental response, it did not discuss the cap in the narrative, but instead effectively buried this information in an accompanying exhibit. Thus, it was not obvious to the Department that anything was amiss in LG's calculations until several days into the verification. Further, it is impossible to conclude that LG itself did not recognize that its methodology was distortive because LG attempted to mask the unreasonable results by capping the reported amounts at 50 percent of gross unit price, an arbitrary rate which is not consistent with LG's own business practices.

Based on the foregoing, we find that LG had the necessary information within its control and did not report this information. Instead, LG permitted the Department at the preliminary determination to believe that there was nothing wrong with the value of its reported sell-out rebates, and gave no explanation about the existence of its arbitrary cap amounts until Department officials were in Korea at verification. These rebates are a significant part of LG's commercial activity and business practices, and therefore the inaccurate reporting of those rebates can have a large impact on LG's antidumping calculations. LG's treatment of this information leads us to conclude, therefore, that LG did not cooperate to the best of its ability during the investigation with respect to this issue.

Thus, for this final determination, pursuant to section 776(b) of the Act, we have based LG's sell-out rebates on AFA. As AFA, we have capped the reported figures at the lowest sell-out rebate percentage observed at verification. This percentage is stated in the LG Korea Sales Verification Report at page 3 and is based on LG's own primary data. This rate is appropriate because it is tied to LG's commercial experience and its use recognizes that LG did in fact grant this type of rebate during the POI. This rate is also sufficiently adverse to "ensure" that LG "does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA at 870.

LG argues that the Department should deem its methodology acceptable because the company did the best that it could with the information that it had. However, we disagree with this argument for two reasons. First, and most importantly, LG could have requested guidance from the Department as to an acceptable methodology, instead of forging ahead with a distorted allocation and capping scheme that has no basis in the company's own experience or the Department's practice. Instead, the Department finds that the record supports the conclusion that LG's actions and inactions ended up shielding its reporting methodology from scrutiny. LG should have been forthcoming about the problems in its calculations throughout the entire investigation. Second, LG should have been well aware that sell-out rebates were a significant issue for another respondent in this case, Samsung. The Department laid out its concerns with Samsung's rebate reporting in detail in the Federal Register notice issued for the preliminary determination. Thus, knowing that its reporting methodology was problematic, and that sell-out rebates were an issue that concerned the Department for another respondent, LG should have also known that its methodology, and the inaccurate results of that methodology, would raise serious concerns for the Department when discovered.

LG also argues that the Department should find that its methodology is not distortive because the types of products, their value, and the manner in which they are sold all meet the Department's test for deeming an allocation methodology non-distortive. LG posits that, because its products are relatively homogenous in terms of these factors, any allocation involving them must necessarily be non-distortive; however, the correct interpretation of the cases cited for this proposition (AFBs 1997 and AFBs 1998) is that, where these factors are present, non-distortive allocations are possible. Clearly, where these factors are present, distortive allocations are also possible, as is the case here. In any event, we disagree that AFBs 1997 and AFBs 1998 set forth a decision rule that reaches the level of a test. For example, while the Department did consider these factors in AFBs

1997, the question in that case involved allocations which included both scope and out-of-scope merchandise. See AFBs 1997, 62 FR at 2090. Moreover, in both AFBs 1997 and AFBs 1998 the Department found no evidence of distortion in the respondent's calculations, independent of whether these factors were present (rather than because they were). Id. and AFBs 1998, 63 FR at 33326.

LG also contends that the Department should find its methodology reasonable because: 1) it is consistent with (and even more specific than) the Department's practice, which requires that respondents calculate rebates on a customer-specific basis; and 2) it demonstrated at verification that its approach was both reasonable and conservative. We disagree on both counts.

Regarding the first point, we find that LG's reliance on TRBs is misplaced. In TRBs, unlike here, the respondent's books and records did not permit it to calculate its reported rebates more narrowly than the customer level. See TRBs, 63 FR at 2567. The Department accepted the allocations in that case because it found that the respondent did not maintain the records necessary to report on a more specific basis and the allocations were not distortive, not because they were customer-specific. Id. With respect to AFBs, while we agree that the Department accepted customer-specific allocations, it did so only after finding those allocations "reasonable and not distortive." See AFBs, 63 FR at 54051. Thus, these two cases are factually distinct from the instant case.

Regarding the second point, we disagree with LG that it demonstrated at verification that its approach was reasonable and conservative. As noted above, the verification report characterizes these rebates as distortive, and it identifies the appropriate treatment of them as an issue. See the LG Korea Sales Verification Report at pages 2 and 3. Also, each of the tests performed to measure this distortion showed that LG over-reported sell-out rebates to a significant extent. Id.

LG also challenges these reasonableness tests because they were based only on two sales, one of which was, by the Department's own admission, aberrational, and the other for which the Department misunderstood the record. Regarding the first point, we agree that the rebate reported for one transaction was clearly distortive. However, we disagree that this transaction was aberrational and that it is inappropriate to use this transaction in our tests. While the rebate calculated using LG's methodology was aberrational, there is no evidence that the underlying transaction or the recalculated percentage in the verification report is itself unreliable.<sup>41</sup> Regarding the second point, while LG claims that the Department misunderstood the record for one tested transaction and thus failed to account for certain rebates paid on models which were sold, cancelled, and then re-invoiced by LG, it is not credible that all sales prior to the month of the tested sale had this fact pattern. In fact, there is no evidence on the record that indicates that most (or even any) of the sales prior to the month of the tested sale had this fact pattern. Further, LG

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<sup>41</sup> Moreover, LG had an opportunity to provide rebate calculations for additional transactions but did not do so in the time allotted for verification. Thus, the fact that the Department had only two transactions available to test resulted from LG's inability to supply additional documents requested at verification. Based on this, LG cannot complain that the sample size was too small.

did not report any shipment dates for the model in question prior to the month of the tested sale, and thus LG's sale/cancellation/re-invoicing scenario is not plausible because there is no evidence that the customer held inventory of these models while it awaited re-invoicing, much less that LG knew the size of the rebate granted after the retail sale months before shipment to the retailer even occurred. In addition, further analysis of the documents on the record does not appear to support LG's claim. Because the documents used in this analysis are proprietary in nature, we are unable to discuss them here. For further discussion, see the LG Final Sales Calculation Memorandum. Therefore, we find unpersuasive LG's explanation for the difference between its reported rebate percentage and the "test results" percentage in the LG Korea Sales Verification Report and we have not relied on it here.

With respect to LG's alternative rebate percentage set forth in its case brief at page 34,<sup>42</sup> this percentage is higher than the percentage granted on the display unit program proffered as support for its 50 percent cap. Had LG actually paid rebates of the magnitude of its alternative percentage, surely it would have been able to provide a rebate program showing this rate (or higher). We therefore do not believe that the alternative rebate percentage set forth in LG's case brief is any more accurate than the rebates it reported in its questionnaire responses, and in fact, it appears just as distortive as those rebates.<sup>43</sup>

Finally, LG argues that the Department should not disallow its use of allocations simply because it did not link them to the time periods covered by the rebate programs. LG bases this contention on two conclusions: 1) averaging is an unavoidable effect of allocations; and 2) there is no evidence that the hypothetical scenario set out in the verification report occurred during the POI (and thus any finding based on it would involve speculation).

With respect to the first point, we agree that averages can be appropriate. For this reason, 19 CFR 351.401(g)(2) permits the use of averages as long as the calculations which contain those averages are as specific as possible and not inaccurate or distortive. Here, we have not rejected LG's allocations because they are averages, per se, but rather because the manner in which these particular averages were calculated yields inaccurate and distortive results.

With respect to the second point, we disagree that the hypothetical scenario set forth in the verification report is based entirely on speculation.<sup>44</sup> LG itself stated that some of its rebates apply mainly to weekends and holiday periods. See the LG Korea Sales Verification Report at page 34. In any event, we find that LG's allocations were distortive for other reasons as detailed

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<sup>42</sup> In its case brief, LG performs its own analysis of the data for the sale discussed above. As a result of this analysis, LG proposes an alternative rebate percentage which it claims is very close to the reported percentage.

<sup>43</sup> We agree, however, with LG's point that certain rebate transactions in a particular month should not have been excluded from one of the Department's calculations for the reasons stated in LG's case brief. This change does not alter the central fact, however, that the other calculations showed significant differences.

<sup>44</sup> The hypothetical scenario referenced by LG is contained in footnote 1 in the LG Korea Sales Verification Report, set forth as FN1 above.



above. Therefore, we find that the use of AFA with respect to this issue is appropriate for the final determination.

Comment 8: LG's Home Market Advertising Expenses

LG reported its home market advertising expenses in six separate variable fields, each related to advertising performed at a different product grouping level (e.g., kimchi refrigerators, all refrigerators, all built-in appliances, etc.). In the Preliminary Determination, the Department treated three of these variables as direct expenses, and it re-classified the remaining three (i.e., ADVERT4H, ADVERT5H, and ADVERT6H, related to "Home Appliance Division," "Refrigerator Common," and "LGE Common" advertising expenses, respectively) as indirect expenses on the basis that these expenses related to a broader class of merchandise than that covered by this investigation. See Preliminary Determination, 76 FR at 67685.

LG argues that the Department should treat all six of its reported advertising expenses as direct selling expenses in the final determination. Regarding the three reclassified expenses, LG asserts that: 1) the Department verified that these expenses relate to advertising covering both subject and non-subject merchandise; and 2) LG's allocation methodology is accurate because it properly computed the portion of the expenses related to bottom mount refrigerators. LG contends that the Department's normal practice is to allocate multi-product advertising expenses to subject merchandise based on the proportion of the advertising specifically directed at the merchandise under consideration relative to the total advertising. In support of this assertion, LGE cites Chapter 8 of the Department's Antidumping Manual at page 28 (Jan. 22, 1997); Drycleaning Machinery From West Germany; Final Results of Administrative Review of Antidumping Finding, 50 FR 32154 (Aug. 8, 1985); Smith-Corona Group v. United States, 713 F.2d 1568 (Fed. Cir. 1983) (Smith-Corona); Bicycle Tires and Tubes From Korea; Final Results of Administrative Review of Antidumping Finding, 48 FR 26492 (June 8, 1983); and Color Television Receivers From Korea; Final Results of Administrative Review of Antidumping Order, 49 FR 50420 (Dec. 28, 1984).

The petitioner contends that the Department properly treated ADVERT4H, ADVERT5H, and ADVERT6H expenses as indirect expenses. The petitioner maintains that, while the advertisements were directed at end users, the advertisements themselves were not related to sales of subject merchandise. The petitioner asserts that it is the Department's practice to treat advertising expenses that are not specifically related to subject merchandise as indirect selling expenses. In support of this position, the petitioner cites Certain Welded Carbon Steel Pipe and Tube from Turkey: Notice of Final Results of Antidumping Duty Administrative Review, 76 FR 76939 (Dec. 9, 2011), and accompanying Issues and Decision Memorandum at Comment 6 (Pipe and Tube from Turkey); Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel sheet and Strip in Coils from Japan, 64 FR 30574 (June 8, 1999) (SSSSC from Japan); and Frontseating Service Valves from the People's Republic of China: Final Results of the 2008-2010 Antidumping Duty Administrative Review of the Antidumping Duty Order, 76 FR 70706 (Nov. 15, 2011), and accompanying Issues and Decision Memorandum at Comment 15 (Frontseating Service Valves from the PRC).

The petitioner maintains that the advertisements at issue were not sufficiently related to sales of subject merchandise to qualify as direct expenses. Moreover, given that LG's methodology allocates multi-product advertising expenses, the petitioner contends that LG has not met its burden of establishing why its methodology is as specific as possible. Accordingly, the petitioner urges the Department not to alter its treatment of these expenses in the final determination.

Department's Position:

After reviewing the nature of the advertisements included in the field ADVERT4H (related to "Home Appliance Division Built-in Common" advertisements), we have accepted LG's classification of these expenses as direct advertising because these advertisements were: 1) directed at LG's customers' customers and 2) specifically related to bottom mount refrigerators. However, we have continued to treat ADVERT5H and ADVERT6H (related to "Refrigerator Common" and "LGE Common" advertisements, respectively) as indirect selling expenses because the advertisements included in this category are not specifically related to bottom mount refrigerators.

Regarding ADVERT4H, the documentation in LG's October 11, 2011, submission and the documentation examined at verification indicate that each of the advertisements included in this category related directly to bottom mount refrigerators. Specifically, while the advertisements included in ADVERT4H were multi-product in nature (as the advertisements covered all of LG's built-in home appliances), each example included advertising for bottom mount refrigerators. Thus, contrary to the petitioner's assertions, the advertisements included in this category are specific to bottom mount refrigerators. As such, classifying these expenses as direct expenses is appropriate and in accordance with the Department's practice. Further, although the petitioner cites SSSSC from Japan, in support of its position, that case actually supports the treatment of multi-product advertisements as direct expenses. See SSSSC from Japan, 64 FR at 30581-30582 (where the Department treated advertising expenses related "to all stainless steel products, including subject and non-subject merchandise" as direct expenses). Regarding Pipe and Tube from Turkey, the petitioner's reliance on that case is also misplaced with respect to ADVERT4H. The respondent there included general, brand-related advertising in its advertising expenses; thus, the Department concluded that the advertisements included in its expense calculation were not sufficiently specific to the bottom mount refrigerators. See Pipe and Tube from Turkey at Comment 6.

We agree with LG that its allocation methodology accurately assigns the appropriate portion of advertising expenses related to bottom mount refrigerators to the sales of those bottom mount refrigerators. According to 19 CFR 351.401(g)(1), the Department may allow allocated expenses, provided that the Department is satisfied that the allocation method used does not cause inaccuracies or distortions.<sup>45</sup> Consistent with this regulation, the Department routinely accepts

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<sup>45</sup> See e.g., Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 FR 41808 (July 19, 2010) and accompanying Issues and Decision Memorandum at Comment 3.

revenue-based allocation methodologies.<sup>46</sup> Moreover, similar advertising expense allocations have been sanctioned by the Department and the courts. See e.g., Smith-Corona, 713 F.2d 1568, 1582 (“The ITA apportioned the advertising expense on the basis of actual, verified cost data. We feel that this was entirely reasonable.”). Similarly, LG’s revenue-based methodology is reasonable and there is no evidence that its methodology is inaccurate or distortive. Further, Frontseating Service Valves from the PRC, the lone case cited by the petitioner for the proposition that LG has not sufficiently demonstrated the reasonableness of its allocation, is inapplicable here. In Frontseating Service Valves from the PRC, the issue was whether the respondent appropriately included or excluded advertising expenses from its calculation of indirect selling expenses, not whether a particular allocation methodology was reasonable. See Frontseating Service Valves from the PRC at Comment 15.

Regarding the remaining categories at issue, while we do not disagree with LG that multi-product advertising can be treated as a direct selling expense in circumstances such as those noted above, the advertisements included in the fields ADVERT5H and ADVERT6H are not of the same kind. Thus, while the cases cited by LG do support its position, these cases do not apply to ADVERT5H and ADVERT6H because the advertisements associated with these expenses are general brand-related advertisements that are not specifically related to bottom mount refrigerators. For example, while the Department allowed allocation methodologies based on the space devoted to the merchandise under consideration in Bicycle Tires from Korea and Color TVs from Korea, the advertisements there, at a minimum, included that merchandise. See Bicycle Tires from Korea, 48 FR 26492 and Color TVs from Korea, 49 FR 50420, 50425. Similarly, in Smith-Corona, while the advertisements in question “were not exclusively directed to the relevant merchandise, a portion of each advertising effort was.” See Smith-Corona, 713 F.2d 1568, 1581. As discussed below, LG has not demonstrated that a portion of each advertisement included in the fields ADVERT5H and ADVERT6H was specifically directed to bottom mount refrigerators. Therefore, we have continued to treat these fields as indirect selling expenses in our final determination.

Regarding ADVERT5H, the documentation included in LG’s October 11, 2011, submission and the documentation examined at verification shows that these advertisements were for LG’s “DIOS” brand. While this brand covers LG’s bottom mount refrigerators, the brand also covers a much broader group of refrigerator types and the documentation on the record does not demonstrate that all of the advertisements included in this category are directly related to bottom mount refrigerators. Similarly, the advertisements included in the field ADVERT6H appear to be general LG brand-related advertisements. As shown in LG’s October 11, 2011, submission and the documentation examined at verification, these advertisements cover televisions and air conditioners, as well as refrigerators. Moreover, this documentation demonstrates that not all of the advertisements specifically contained the merchandise under consideration, and thus are not specific to bottom mount refrigerators.

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<sup>46</sup> For example, the Department has accepted revenue-based allocations in this case with respect to LG’s indirect selling expenses, U.S. advertising expenses, and multi-product promotional expenses, none of which were challenged by the petitioner. See e.g., Exhibit B-21 of LG’s July 22, 2011, submission.

Accordingly, because the advertisements in the field ADVERT4H are for bottom mount refrigerators and are appropriately allocated to bottom mount refrigerators, we have reclassified these expenses as a direct selling expense. However, because ADVERT5H and ADVERT6H are general brand advertising and are not specifically tied to, or directly represent, bottom mount refrigerators, we find it appropriate to treat these expenses as indirect selling expenses for the final determination.

Comment 9: *LG's Home Market Payment Dates*

At verification, we found that LG reported home market payment dates using the date that it credited its customer's accounts receivable balance, rather than the date that the funds were deposited in LGE's bank account. These dates were the same for three of the five sales examined and differed significantly for two. Therefore, we raised the issue in our verification report as to whether it would be appropriate to adjust the home market credit period for purposes of the final determination.

LG argues that the Department should accept its payment dates as reported. LG claims that it disclosed its reporting methodology in its questionnaire response (because it stated that its customers pay against open invoices and it reported payment dates on a "first in, first out" basis) and the Department did not challenge it. Moreover, LG asserts that the Department has accepted this methodology in prior cases where respondents were unable to link payments to specific open invoices. Finally, LG notes that one of the two payments questioned was conservative, as LG reported the date that it converted an accounts receivable balance into a note receivable (rather than the date that the note was paid off).

The petitioner argues that the Department should reject LG's home market payment dates and instead base home market credit expenses on AFA. As AFA, the petitioner contends that the Department should apply the smallest home market credit expense for any sale to all home market sales. The petitioner claims that this action is warranted because: 1) the Department's practice is to view the date that payment hits the bank balance as the date of payment; and 2) the Department observed material differences between when payment was received by the bank and when LG credited the customer's accounts receivable. The petitioner implies that LG has not cooperated fully in this investigation, asserting that this is another example of LG's failure to follow the Department's instructions and present an accurate questionnaire response.

Department's Position:

It is the Department's practice to require respondents to base their reported payment dates on the dates that the funds are deposited in their bank accounts, rather than the dates that the receipt of the funds are recognized in their accounting records. See e.g., Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia, 69 FR 20592, (April 16, 2004) and accompanying Issues and Decision Memorandum at Comment 11. Nonetheless, after considering the facts on the record with respect to this issue, we have accepted

LG's payment dates as reported and/or verified for the final determination. In all but one instance, we found at verification that the reported dates were either identical to the bank deposit date or conservative.

We disagree with the petitioner that the application of AFA, pursuant to section 776(b) of the Act, is warranted here. Although the number of examined transactions was small, we found no consistent pattern of misreported data. Moreover, while we have some concerns with the data, we have deemed them sufficiently reliable for use in our final calculations. Therefore, we find that the conditions for facts available set forth in section 776(a) of the Act have not been met here, and as a result there is no basis to resort to AFA under section 776(b) of the Act.

Finally, we disagree with LG that it fully disclosed its reporting methodology in its questionnaire response. Rather, LG merely stated that it reported its payment dates "on a FIFO basis, by applying any payments received to the oldest open invoice. Where the customer made multiple payments against a single invoice, LG reported a weighted average payment date." See LG's July 22, 2011, submission at page B-15. Because LG did not specify that it considered payments to be received only when they cleared the company's accounting records, we find LG's response ambiguous at best. Nonetheless, the lack of clarity in LG's response is not a factor in our decision to accept its data as reported for the final determination, given that we have deemed LG's reported data reliable in this segment of the proceeding. However, if an antidumping duty order is issued, we intend to examine LG's reporting methodology more closely in subsequent segments of this proceeding involving LG.

#### Comment 10: LG's U.S. Payment Dates

During the POI, LG's U.S. affiliate, LGEUS, received payment for sales to certain customers from a financing company, rather than from the customers themselves. In these cases, the customer had a "flooring" arrangement with the financing company (*i.e.*, a line of credit secured by the customer's inventory); the financing company paid LGEUS the invoice amount less a fee and then it in turn collected payment from the customer. Thus, this arrangement is similar to factoring.<sup>47</sup>

As the payment date for these transactions, LGEUS reported the invoice date, which is the date that the transaction cleared the company's accounts receivable ledger. However, at verification, we found that the finance company normally deposited funds in LGEUS's bank account a set number of days after this date. Therefore, in our verification report, we questioned whether it was appropriate to use an alternative payment date for these transactions.

LG argues that the Department should accept its reported U.S. payment dates because: 1) these dates are consistent with the LGEUS's internal accounting; 2) the identification of different dates would require a manual search through LGEUS's accounting records and would thus be administratively burdensome (because of the large number of transactions involved); and 3) the

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<sup>47</sup> Factoring involves the selling of an accounts receivable at a discount, to an intermediary which then assumes the credit risk associated with the receivable.

use of different dates would effectively double count U.S. credit expenses (once as the flooring “fee” deducted as a direct selling expense and again as imputed credit). Regarding this latter point, LG maintains that the flooring fee reflects the cost to LGEUS of the “deferred third party payment,” and the Department should only account for this cost once.

The petitioner maintains that the crux of this issue is when payment is actually received, and in this case it is not received until a number of days after the invoice is issued. Therefore, the petitioner argues that the Department should increase LGEUS’s credit period by the number of days between the issuance of the invoice and payment by the flooring company, as observed at verification. The petitioner notes that this would be consistent with LGEUS’s characterization of its normal practice.

#### Department’s Position:

Consistent with our practice, discussed below, we have treated flooring fees as direct selling expenses for the final determination. In addition, because the actual payment dates are not on the record, we have adjusted LG’s reported payment dates used in the calculation of U.S. credit expenses by adding the additional time between the reported payment date for the transaction examined at verification and the date this payment was deposited in LG’s bank account, as facts available, pursuant to section 776(a) of the Act.

At the start of verification, LGEUS informed the Department that it incurred “flooring fees,” which it reported as part of its indirect selling expenses. See the LG U.S. sales verification report at page 17. Company officials described these fees as expenses paid to third party finance companies which extend lines of credit to U.S. customers. Company officials explained the process as follows:

...certain customers contract with {the flooring} companies to obtain lines of credit; when LGEUS sells to them, it receives payment from the finance company for the full invoice amount minus a fee (rather than receiving payment directly from the customer).<sup>48</sup> LGEUS’s customer is responsible for paying the finance company the full invoice amount. Accordingly, LGEUS’s portion of this arrangement ends once it delivers the merchandise and is paid by the finance company; if the customer does not pay the finance company, LGEUS retains the payment from the finance company, and thus LGEUS’s credit risk is minimized.

#### Id.

LGEUS officials stated that, because these fees are tied to specific sales, the expenses should be reclassified as direct expenses. Accordingly, LGEUS provided a revised indirect selling expense calculation that excluded them as well as a list of the affected transactions and the associated

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<sup>48</sup> Company officials stated that these fees are referred to as “flooring fees” because the finance company typically takes a security interest in the customer’s inventory, which is normally held on the customer’s retail floor.

per-unit flooring fee amounts, which company officials stated should be included in the bank charge fee field (BANKCHARU). Upon reviewing payment documentation for one of these transactions, we found that the money from the finance company was deposited in LGEUS's bank account a number of days after the reported date of payment. LGEUS officials stated that the finance company normally deposits funds in LGEUS's bank account a set number of days after the date of sale, and that they had reported the date that the transaction was cleared from the company's accounts receivable ledger as the payment date.

Given these facts, we find that LGEUS's arrangement with the flooring companies is similar to factoring, whereby a company "sells" (or "discounts") its accounts receivables to a financing company for a fee. In situations involving discounted receivables, it is the Department's normal practice to: 1) base the date of payment for sales transactions on the date that the respondent receives funds from the bank; and 2) deduct any discounting fees incurred on the sale as a direct selling expense. See Stainless Steel Bar From India; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 69 FR 55409 (Sept. 14, 2004), and accompanying Issues and Decision Memorandum at Comment 6. We find that this practice appropriately measures the opportunity cost associated with extending credit to customers because it accounts for the time between shipment and receipt of funds (as part of credit expenses) and the actual costs associated with the bank providing advance payment on the sale (as part of direct bank charges).

We disagree with LG that adjusting its payment dates would effectively double count U.S. credit expenses (once as the flooring fee and again as imputed credit). As noted above, under this methodology the Department: 1) defines the credit period as the time between when the respondent ships the goods and receives payment for them in its bank account; and 2) treats the fees paid in return for receiving the funds earlier than they otherwise would have been as a direct selling expense. This methodology would only double count credit expenses were the Department to define the credit period as the time between shipment and payment by the customer (not the flooring company), which is not the case here.

Comment 11: LG's U.S. Billing Adjustments

LG reported U.S. billing adjustments on a customer-specific basis (rather than on a transaction- or model-specific basis) for all sales of subject merchandise during the POI. At verification, we found that LGEUS's credit memos referenced specific model numbers, and LG used this information to calculate Mexico- and Korea-specific billing adjustment percentages. Because it appears that LG could have calculated billing adjustments on a more specific basis, we raised the issue in our verification report of how to treat LGEUS's billing adjustments for the final determination.

LG disagrees that it could have reported model-specific billing adjustments, in part because of the limitations of its recordkeeping system and in part because of a prohibitive volume of documents associated with these adjustments. LG asserts that while the credit notes issued by LGEUS during the POI may have referenced specific model numbers, they did not contain details sufficient to link

them to particular transactions. Moreover, LG maintains that, although LGEUS attempted to compute model-specific factors, the results did not, on their face, appear to be consistently reasonable and as a consequence LG did not report billing adjustments in this manner. Finally, LG claims that the Department: 1) provided no guidance on how to reallocate its billing adjustments; 2) did not request at verification that LGEUS recalculate these adjustments; and 3) did “fully verify” the reported amounts.

LG argues that the Department has accepted the reporting of post-sale price adjustments on a customer-specific basis in cases where a respondent’s recordkeeping only permitted the reporting in that manner. As support for this assertion, LG cites 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; Final Results of Antidumping Duty Administrative Reviews, 63 FR 2558, 2566 (Jan. 15, 1998); and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 62 FR 54043 (Oct. 17, 1997). Thus, LG requests that the Department accept its U.S. billing adjustments as reported for the final determination.

The petitioner contends that LG’s position calls into question the validity of its separation of billing adjustments for Korean- and Mexican-made models, because if the data on the credit/debit memos are inadequate to calculate customer- and product-specific billing adjustments, then they should also be inadequate to assign correctly country-of-origin designations. In any event, the petitioner maintains that LG failed to calculate billing adjustments in the most customer-, product-, and time-specific manner possible, and thus the Department should base these adjustments on AFA for the final determination. As AFA, the petitioner asserts that the Department should use the highest billing adjustment amount reported for each customer and apply that amount to all sales to that customer.

#### Department’s Position:

After considering the facts on the record, we have accepted LG’s billing adjustments as reported for the final determination. As noted above, LG calculated its reported billing adjustments on a customer-specific basis for all POI sales of subject merchandise. At verification, company officials explained that LG was unable to report billing adjustments on a more specific basis because the company’s sales and accounting systems do not contain a link between billing adjustment memos and specific invoices, and thus any closer allocation would require a manual review; however, they also noted that LG could not report billing adjustments on a sale-by-sale basis (even manually) in instances where the credit memos did not include the original invoice number. See the February 2, 2012, Memorandum from David Goldberger and Henry Almond, Senior Analysts, to the File entitled, “Verification of the U.S. Sales Response of LG Electronics Inc., and LG Electronics USA Inc.” (LG US Verification Report) at pages 2-3.

At verification, we confirmed LG’s claim that not all of the credit memos referenced specific invoices. However, we found that all of the examined credit memos did reference, at a minimum,



specific model numbers. Moreover, we noted that LG had calculated Mexico- and Korea-specific billing adjustment percentages (by identifying billing adjustments related to Korean or Mexican bottom-mount refrigerators based on the product codes associated with each billing adjustment). *Id.* Given that LG used its credit and debit memos to differentiate the products subject to each investigation for billing adjustment reporting purposes, it is unclear why these documents are not equally reliable for the purpose of reporting model-specific billing adjustments.

While we have significant questions about LG's methodology, we believe the record evidence on this point is inconclusive. For example, it is possible that the credit/debit memos themselves may not completely identify all models associated with a given billing adjustment transaction. Based on this, we find that there is sufficient doubt over whether the company could have reported in a more specific manner. Thus, we find that rejecting this information, and instead basing billing adjustments on AFA, would be inappropriate. We intend to revisit this issue in subsequent segments of this proceeding involving LG (in the event that an antidumping duty order is issued).

Comment 12: LG's U.S. Lump Sum and Sell-Out Rebates

LG reported "lump-sum" rebates (*i.e.*, one-time payments not tied to sales) and sell-out rebates on an annual basis in the field REBATE10U in its U.S. sales listing. LG calculated these rebates using the same methodology employed to determine home market sell-out rebates, except that LG: 1) used amounts accrued in its sales system for each program, customer, and product during 2010 (rather than actual amounts); and 2) established a floor of zero and a ceiling of 30 percent of price and then re-allocated the excess positive or negative rebate amounts to the remaining models sold to that customer (rather than establishing a cap of 50 percent as LG did in the home market). This methodology was first disclosed to the Department at verification.

Moreover, as with U.S. freight expenses, at the start of verification LG informed the Department that it had discovered that certain REBATE10U amounts had been double counted, and they offered to provide corrected data. However, due to the volume of affected transactions, we did not take the revisions as a verification exhibit. Nonetheless, we examined revised REBATE10U calculation worksheets for the majority of the reported U.S. sales.

According to the petitioner, the Department discovered at verification that LG's reporting of REBATE10U was anything but accurate. The petitioner faults LG for not informing the Department of the distortion that its methodology had on its rebate experience or that it set arbitrary floors and caps to the rebate percentages reported. The petitioner asserts that, separate from these findings of non-transparency and non-cooperation, the actual, unadjusted rebate amounts themselves as set forth in the Department's U.S. sales verification report serve as a "stunning indictment of the inherent unreasonableness and distortions of LG's U.S. rebate methodology." The petitioner argues that, where the Department discovers at verification such failures to report information, its practice requires it to find that the respondent failed to act to the best of its ability. As support for this assertion, the petitioner cites Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 75 FR 3201 (Jan. 20, 2010). Consequently, the

petitioner argues that the Department has no recourse but to apply AFA to the rebates in question, pursuant to section 776(b) of the Act. As AFA, the petitioner contends that the Department should compute the highest non-aberrational REBATE10U percentage reported for any U.S. sale and apply that percentage to all non-OEM CEP sales reported in the U.S. sales listing.

The petitioner disagrees with LG's argument (see below) that its reallocation of any excess or negative amount renders its reporting methodology reasonable. According to the petitioner, this argument misses the key point – that LG should have disclosed its methodology before verification, especially since it knew that this methodology was distortive and inaccurate. Thus, the petitioner contends that AFA is warranted here.

LG contends that it reported lump sum and sell-out rebates on the most specific basis on which these rebates are tracked in the ordinary course of business. LG asserts that the verification report accurately reflects the adjustments that LG had to make to the product-specific rates calculated for certain customers, where the calculated factor “did not yield a reasonable result.” LG notes that it allocated any excess amounts over the remaining purchases of those customers, and, thus, these rebates are reported in the U.S. sales listing. LG also notes that the Department verified without discrepancy all of the underlying data upon which the allocations were based.

According to LG, its adjustments reflect the difficulty in attempting to further refine data when the database is large. LG asserts that its reporting methodology reasonably reflects the rebates granted to its customers. LG recognizes that it used a different cap in its home market rebate reporting, but it asserts that the cut-offs used by each entity must reflect its assessment as to what reasonably accounts for the commercial practices in its respective market. LG asserts that, for home market reporting, LG did not reallocate the excess rebates, thereby justifying a larger range.

LG disagrees with the petitioner that the use of facts available is warranted because its reported amounts are consistent with the way that the U.S. affiliate does business. LG asserts that its reallocations were not done to make its rebate values “appear” reasonable (contrary to the language in the U.S. verification report), but rather they were done in order to have the reporting comport with the normal commercial practices of LG's U.S. affiliate. Finally, LG maintains that its reporting methodology is consistent with the Department's questionnaire instructions, which direct respondents to report allocated amounts in cases where (as here) transaction-specific reporting is not possible.

LG notes that the administrative record contains revisions covering only approximately 85 percent of the reported transactions. LG argues that all of the reported values should be revised, and it offered to submit the corrected figures for the remaining 15 percent of sales. Alternatively, LG argues that the Department should accept its reported values for those 15 percent (even though these amounts are slightly overstated and, thus, conservative) for purposes of the final determination.

Department's Position:

We agree with the petitioner, in part. The rebates in question were reported in LG's U.S. sales listing in the field REBATE10U. After analyzing the facts on the record, we find that LG's methodology for calculating these rebates was distortive because: 1) LG's methodology (before adjustment) resulted in rebates ranging from negative amounts to rates significantly exceeding gross unit price; and 2) LG's modification to this methodology via an arbitrary cap and floor did not make the results more reasonable (but instead only masked the distortion). Moreover, we find that LG did not act to the best of its ability because it: 1) did not respond fully to the Department's supplemental questions; 2) stated inaccurate information in its questionnaire responses; 3) did not disclose its methodology until verification; and 4) failed to request guidance from the Department as to an acceptable methodology (but rather tried to mask what the company itself recognized as unreasonable results by spreading what it considered to be excess amounts over other, unrelated sales).

Therefore, for this final determination, pursuant to section 776(b) of the Act, we have based LG's U.S. sell-out rebates on AFA. As AFA, we have determined the average rebate percentage for all U.S. non-OEM sales contained in LG's U.S. sales listing for which LG reported a positive rebate amount. We then used this percentage as a floor for all U.S. sales for which LG reported sell-out rebates (or for which LG applied a rebate floor). For further discussion, see the LG Final Sales Calculation Memo. We find that the use of a floor as AFA ensures that LG does not benefit from any underreported rebates that result from its distorted allocation methodology, but retains the rebates that may have been over-reported as a result of the same methodology. We disagree that the AFA proposed by the petitioner is appropriate here because we find that the selected AFA is sufficiently adverse in that it addresses the Department's concern that LG not benefit from its distorted allocation methodology.

The facts surrounding these conclusions are as follows:

LG responded to the Department's antidumping duty questionnaire on July 22, 2011. In this submission, LG stated that:

LGEUS uses several kinds of sales promotion programs. Usually sales programs are categorized in one of two ways. One is a sell-in rebate, in which benefits are earned based on LGEUS's sales to its customers; the other is a sell-out rebate, in which benefits are earned when LGEUS's customers sell to end users. Thus the sell-in rebate relates to LGEUS's sales figures, and the sell-out rebate relates to the retailers' (LGEUS's customers') sales figures.

. . . The sell-out rebates include sell-out supports, mail-in rebates, price protection, and sales person incentives.

LGE usually decides the sell-in program for customers on an annual basis and accrues (recognizes) certain amounts as expenses when LGEUS sells to its customers. In the case

of sell-out related programs, the ultimate payments are hard to estimate precisely, since they depend upon the customer's sales to its customers. As a result, LGEUS usually sets up payments on a lump-sum basis."

See LG's July 22, 2011, submission at pages C-22 and C-23.

In our August 30, 2011, supplemental questionnaire, we noted that the above discussion only described the rebate programs in general terms, and we requested that LG revise its response to provide the rebate information requested in the Department's questionnaire for each specific rebate program applicable to the sales reported. This information included a description of the terms and conditions of each rebate program and when those terms and conditions were established in the sales process. We also requested that LG provide: 1) documentation, including sample agreements, for each type of rebate; 2) source documentation supporting the rebates calculated for selected transactions/customers, including sales invoices, rebate eligibility worksheets, rebate payment documents, and the corresponding ledger entries recording the transactions as well as any calculation worksheets; 3) the rebate agreement(s) related to sales to a particular customer, the relevant source documentation to tie the reported numerator and denominator of the rebate ratio calculation to LGEUS's accounting system, and an explanation of what universe of sales was contained in the denominator of LGEUS's calculation; and 4) supporting documentation for the rebates reported for one of 10 rebate amounts that were higher than the corresponding gross unit prices. Finally, we requested that LG report each type of rebate program under a separate computer variable, instead of the single category used in its initial response.

On September 28, 2011, LG responded to the Department's supplemental questionnaire. In this submission, LG provided a one-sentence description of its lump sum sell-out rebate program. Because LG requested proprietary treatment for this sentence, it cannot be disclosed here. See LG's September 28, 2011, submission at page 19. In response to our various requests for calculation details and supporting documentation for LG's sell-out rebates, LG provided calculation worksheets and the following description: "LGEUS has calculated the ratio of 'Sell out' rebates by using the sales amount and the lump sum amount by customer, and applied the ratio to GRSUPRU." Id. at page 22. LG provided no narrative accompanying the program documents and only a one-line answer to the denominator question (stating that "{t}he figures relate to total refrigerator sales"). Id. at pages 22 and 23 and Exhibit C-46. Finally, LG also provided no narrative explanation as to why certain rebate amounts exceeded gross unit price, but rather submitted one calculation worksheet (with no supporting documentation) that showed that the rebate percentage was based on amounts accrued in LGEUS's accounting system. Id. at page 23 and Exhibit C-48. Although certain information on this worksheet was inconsistent with the program descriptions contained in Exhibit C-41 of the same submission, we did not question it (mainly because the information in Exhibit C-41 was prominently displayed and the information in Exhibit C-48 was contained in a heading in a calculation chart and thus easy to miss).

In the preliminary determination, we accepted LG's rebates as reported. LG did not identify how these rebates related to the specific rebate programs shown on the program documents in Exhibit

C-46. However, upon review, we found no indication that LG's rebates were not reported in as specific a manner as possible or appropriately linked to the original sale. Nonetheless, because these documents were not completely clear and because LG's methodology yielded unusual results in certain instances, we issued an additional supplemental questionnaire to LG after the preliminary determination. See the November 1, 2011, letter to LG from Shawn Thompson, Program Manager. In this questionnaire, we requested that LG clarify its rebate reporting for lump sum and sell-out rebates by describing its methodology in more detail and providing a chart showing each rebate program/customer/product combination. We also required LG to report its rebates on a customer-, product-, and time-specific basis if it had not already done so. Id. at page 1. As part of this request, we notified LG that it must base its reporting on rebates paid on 2010 sales, rather than on rebates paid in 2010 regardless of when the underlying sale took place.

Our questions were as follows:

1. According to the description on page 19 and Exhibits C-46 and C-47 of your September 28, 2011, submission it is unclear if this rebate category applies to a single rebate program or a broad group of multiple rebate programs. Provide a chart, organized by customer, which lists each rebate program that is included in this rebate field. This chart must include:
  - Each rebate program applicable to each customer;
  - The time period to which each program applies to each customer;
  - The products to which each rebate program applies; and
  - A summary of the terms/rebate percentages for each program/customer combination.
2. While we note that the per-unit amount reported for REBATE10U is calculated on a customer-specific basis, we are unable to determine from the questionnaire response whether the REBATE10U amount has been calculated on the most product-, time-, and customer-specific basis possible. Explain in detail how you calculated the per-unit REBATE10U amount on the most specific basis possible for sales made during the POI.
3. If the REBATE10U amount can be reported on a more specific basis, revise your calculations accordingly and include a detailed narrative description of your revised allocation and reporting methodology
4. In preparing the above-requested chart and any revisions to your sales listing, ensure that you include all rebates related to merchandise sold during the POI, rather than all rebates paid out during the POI (including those paid on sales made prior to the POI). For example, if LG sold a product in December 2009 but paid rebates related to that sale in 2010, do not include these rebates in your chart and any revised sales listing.

Similarly, if LG sold foreign like product<sup>49</sup> in December 2010 but did not pay rebates on these sales until 2011, include these rebates.

In response to the Department's directive in this questionnaire to "{e}xplain in detail how you calculated the per-unit REBATE10U amount on the most specific basis possible for sales made during the POI," LG responded:

The lump-sum sell out rebate covers a broad group of rebate programs. Thousands of programs are included within this rebate. The amounts payable under these programs may be based on the payment of a single amount applicable to individual models or total sales within the Home Appliances division. In the ordinary course of business, LGEUS accrues the amounts earned under each of these programs. In all cases, LGEUS revised its reporting of REBATE10U to reflect the amount accrued for each transaction, which would be the most product-specific, time-specific, and customer-specific basis possible for reporting the lump sum rebates."

See LG's November 10, 2011, submission at pages 1-2.

In addition, in response to the Department's instruction to eliminate rebates paid on sales in 2009 and add rebates on 2010 sales paid in 2011, LG stated:

Because LGEUS is reporting the amounts accrued for each transaction, these amounts include all rebates earned in 2010 related to merchandise sold during the POI. In preparing the chart and necessary revisions to the file, LGEUS identified rebates relating to transactions that occurred in 2009 that were included in the earlier reported rebate values, as well as reversals of 2010 accruals that were not reflected in the earlier reported data. For transparency purposes, the corrections to rebates relating to transactions that occurred in 2009 that were included in the earlier reported rebate values are reflected in REBATE11U, and the corrections to rebates relating to reversals of 2010 accruals that were not reflected in the earlier reported data are reflected in REBATE12U.

Id. at page 2.

Thus, LG's response, although vague and lacking any details on the actual calculation methodology, appeared to indicate that it had revised its reporting of sell-out rebates to report them on a transaction-specific basis. Moreover, this response seemed to show that LG had revised its reporting to eliminate rebates paid in 2010 for 2009 sales and to include 2011 rebate payments for 2010 sales. Finally, LG clearly stated that it based the reported amounts on accruals, thereby resolving the contradictory references in its September 28, 2011, response to accrued amounts and actual payments.

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<sup>49</sup> The questionnaire incorrectly referenced foreign like product, instead of subject merchandise. However, the correct reference should have been clear to LG from the context of the question, and LG did not contact the Department request clarification.

Because reporting rebates on an accrual basis is not consistent with the Department's practice (unless the respondent demonstrates the accruals accurately reflect actual rebate expenses) the Department normally would have instructed LG to either demonstrate that its accruals accurately reflected its actual rebate expenses or to revise its reporting methodology to use actual rebate amounts. However, we were unable to do so in this instance because LG's clarification only came two business days prior to the start of the U.S. sales verification. Nonetheless, we did not view this reporting deficiency as a fatal flaw, given that LG would be given the opportunity at verification to demonstrate that either: 1) its actual and accrued amounts were the same; or 2) its methodology, while not accurate, was conservative.

At verification, we discussed LG's rebate reporting methodology with company officials. This methodology is set forth in the LG U.S. Sales Verification report:

Company officials stated that they reported the lump-sum and sell-out rebates as a POI average by customer and model, which they stated is the most specific basis on which LGEUS tracks them in the ordinary course of business. Regarding sell-out rebates, company officials further explained that they could not link these rebates to their sales on a more specific basis because the event that qualified the customer for the rebate was the customer's downstream sale at the retail level. Thus, if LGEUS had a rebate program in place applicable to all of a customer's sales of model X on President's Day weekend, LGEUS officials indicated that LGEUS would have no way to link the rebate paid on those sales to the sales between LGEUS and its customer because: 1) the transaction between LGEUS and its customer could have taken place well before the promotional period; and 2) LGEUS does not have access to its customers' inventory and sales information. Moreover, company officials explained that they are unable to anticipate accurately exactly what sell-out rebate programs a particular sale will qualify for at the time of the customer's purchase. Therefore, company officials stated that it was appropriate to allocate all sell-out rebates on a model- and customer-specific basis.

Similarly, for lump-sum rebates, company officials explained that these rebates represented one-time payments to their customers which were not tied to any particular set of sales. Thus, company officials stated they allocated these rebates based on the sales value of the products covered by the rebate program (for example, all products or all home appliance products).

LGEUS initially reported REBATE10U on a customer-specific basis. In its November 10, 2011, submission, LGEUS revised its REBATE10U calculation to reflect a customer-specific, product-specific rebate allocation. To calculate REBATE10U on a per-unit basis, LGEUS first calculated a customer- and product-specific ratio in a two-step process. First, LGEUS identified the rebate amounts attributable to each model sold to a customer for each applicable rebate program. These amounts are the POI accrual amounts (either actual or estimated) maintained on a customer- and product-specific basis in LGEUS's Trade Management rebate system. Next LGEUS summed the customer-,

product-, and rebate program-specific accrual amounts and divided the sum by the total POI sales by model and customer.

However, company officials explained that in certain situations these calculations resulted in rebate ratios that were not reasonable. Specifically, company officials explained that in their calculations they established a 30 percent cap and a zero percent floor for their rebate percentage calculations. Company officials explained that they did not normally grant rebates greater than 30 percent of gross-unit price and that rebate percentage calculations of less than zero reflected instances where prior excess accruals were offset during the POI (i.e., the only accruals during the POI were negative). Company officials explained that both scenarios likely occurred due to timing issues (e.g., LGEUS could accrue a substantial rebate amount during 2010, but the bulk of the sales to which it applied occurred in 2011, resulting in a rebate percentage of more than 30 percent; similarly, LGEUS could reverse 2009 accruals in 2010 resulting {in} a negative rebate percentage). In these instances, to ensure complete rebate reporting, company officials stated that they summed the excess positive and negative accruals and allocated the resulting amount equally across all models to that customer (except they did not allocate positive excess accruals to models that were capped at 30 or negative accruals to models that were capped at zero percent).

Nonetheless, we noted that LGEUS reported negative rebate amounts or amounts greater than 30 percent of gross unit price for certain customer/model combinations. Company officials explained that they applied the 30 percent and zero percent caps to the primary calculation, but not to the allocation of excess rebate amounts. Thus, if a particular combination had a calculated rebate percentage of 29.99 percent, it was possible that, after allocating the remainder amounts, such a combination would have a rebate percentage of greater than 30 percent. This rebate cap and re-allocation methodology had not been disclosed by LGEUS in its submissions to the Department.

See the LG US Sales Verification Report at pages 21-23.

Based on these facts, we identified the issue of how to treat U.S. sell-out rebates in the final determination in the Sales Verification Report:

In summary, we found that for REBATE10U LGEUS: 1) reported accrued, rather than actual, rebates; 2) did not link these rebates to the underlying sales on which they were earned, but instead reported all accruals made during 2010; and 3) incorporated a cap/floor in order to make the size of the rebates appear reasonable. Moreover, we do not have corrected rebate information for approximately 16 percent of LGEUS's U.S. sales. Therefore, the issue is how the Department should treat the amounts reported in the field REBATE10U for the final determination.

See the LG US Sales Verification Report at pages 3-4.



Based on the foregoing, we disagree with LG that its reporting methodology for lump sum and sell-out rebates is acceptable. As with LG's home market sell-out rebates (see Comment 7, above), we looked to the Department's regulations as a starting point when analyzing this issue. The regulation governing allocations is found at 19 CFR 401(g)(2) and states:

(2) Reporting allocated expenses and price adjustments. Any party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions.

In this case, LG's reporting methodology is not "on as specific a basis as is feasible," and it is clearly both inaccurate and distortive. LG, by its own admission, offered sell-out rebate programs for particular holiday periods, but it made no effort to account for this fact in its rebate reporting.<sup>50</sup> Because LG's description of its sell-out rebate programs was limited to a few sentences, the Department did not know until verification that LG offered such time-specific programs. Thus, during our information gathering stage, we were unable to elicit the information necessary to assess LG's verification claim that "LGEUS would have no way to link the rebate paid on those sales to the sales between LGEUS and its customer." See the LG US Sales Verification Report at page 22. Moreover, at verification, our focus was on understanding what LG did (given that much of its methodology was not disclosed prior to that point) and less on what LG could have done with the information maintained in the ordinary course of business. Nonetheless, we did observe that LG offered sell-out rebate programs which were for specific dollar amounts or rebate percentages and which were linked to particular time periods, customers, and models. See LG Sales Verification Report at Verification Exhibit 13 at page 3644.

Similarly, LG made no attempt to link its reported rebates to the sales transactions on which they were based, but instead allocated all rebates accrued in 2010 over sales during the year. Thus, LG included rebates in its calculations which were earned on sales made in 2009 (and thus not subject to this investigation) and it excluded rebates granted on POI sales which were paid in 2011. In our November 1, 2011, supplemental questionnaire, we clearly instructed LG to make such a linkage, and we had no indication until verification that LG had failed to comply.

Finally, we find that LG's rebates were not adequately specific because, instead of reporting actual rebate amounts, LG used the accruals recorded in its system. As noted above, the Department requires respondents to report actual rebate amounts, rather than accruals unless the respondent demonstrates that the accruals accurately reflect actual rebate expenses. Due to the inconsistencies in LG's responses on this point, we did not realize until a few days prior to verification that LG had not based its calculations on actual amounts granted and paid on specific sales made during the POI. Moreover, given the other problems with LG's reporting methodology, we find that the accrued amounts are not an acceptable proxy for actual amounts because use of these accruals led to distortive and inaccurate results (as discussed below).

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<sup>50</sup> Thus, to the extent that the rebate percentages differed throughout the year, LG's methodology overstated the reported rebates on some sales and understated them on others.

LG's allocations were not only too general, they were also inaccurate and distortive. LG's chosen methodology resulted in rebate amounts which were not in line with LG's normal commercial practice, as evidenced by the fact that this methodology, before the cap/floor refinement, produced certain rebates which were far in excess of gross unit price and others which were significantly negative. See the LG US Sales Verification Report at page 29 and 32. Moreover, we find that the necessity of applying a cap and setting a floor is in and of itself evidence that LG's methodology was distortive. Had LG's methodology yielded results which were in line with its actual rebate experience, the cap/floor would have been unnecessary.

Further, we find that the size of the cap was set arbitrarily, without reference to specific rebate programs in place during the POI. At verification, LG offered no proof that the cap was linked to commercial reality. Rather LG officials merely asserted that LGEUS "did not normally grant rebates greater than 30 percent of gross-unit price." See the LG US Sales Verification Report at page 22. With respect to the floor, LG asserted at verification that this device was necessary to offset prior excess accruals which were likely made in 2009, and thus not related to POI sales activity. Id. Both the arbitrariness of the cap and the inaccuracy of reducing the reported amounts for pre-POI activity are problematic, and LG's reallocation of excess positive and negative accruals makes its reporting no better. We disagree with LG that the primary goal of these reallocations was to make its reporting comport with LGEUS's normal commercial practices, rather than to make its rebate values "appear" reasonable. There is no evidence that the reported figures are in any way accurate or tied to LGEUS's normal commercial practices, despite LG's assertions to the contrary. In fact, had LG wanted to report figures that were tied to its U.S. affiliate's usual experience, it would have reported actual amounts paid on POI sales without resorting to the artifice of floors, caps, and reallocations.

Based on the foregoing, we find that LG failed to meet its burden in this case of demonstrating that its reported allocation methodology for these rebates was "on as specific a basis as is feasible," pursuant to section 19 CFR 351.401(g)(2). In addition, we have concluded that LG's reported allocation methodology creates significant inaccuracies and distortions, and therefore, the Department is unable to use that methodology in its calculations.

Section 776(a) of the Act provides that when "(1) necessary information is not available on the record" or "(2) an interested party (C) significantly impedes a proceeding under this title or (D) provides such information but the information cannot be verified as provided in section 782(i)," the Department "shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title." LG did not report the necessary accurate rebate amounts because the allocation methodology it applied on the record was distortive. Accordingly, the application of facts available is warranted pursuant to section 776(a)(1). Furthermore, the Department was unable to verify LG's U.S. lump sum/sell-out rebate amounts and without this information, the Department was unable to use the correct rebate amounts in its final calculations. Therefore, because LG's distortive allocation methodology significantly impeded the Department's ability to calculate an accurate margin for LG, the application of facts available is also warranted pursuant to both sections 776(a)(2)(C) and (D).

Section 776(b) of the Act states that if the Department “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information,” then it “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” We have determined that, pursuant to section 776(b) of the Act, the application of adverse inferences is warranted with respect to LG’s sell-out rebate amounts because LG did not cooperate to the best of its ability with respect to this issue.

It appears in its last submission that LG was aware that its methodology was problematic, yet it made no mention of this fact to the Department. Indeed, it failed to fully disclose its capping/flooring methodology until after verification began, and at that point the Department had no time to consider and analyze that methodology in detail and request different, accurate data from LG. Indeed, it was not obvious to the Department that anything was amiss in LG’s calculations until several days into the verification. Further, it is impossible to conclude that LG itself did not recognize that its methodology was distortive because LG attempted to mask the unreasonable results by capping the reported amounts at 30 percent of gross unit price, which is at best an arbitrary rate, or setting the computed amounts to zero and then reallocating the excess positive/negative amounts to other sales.

Based on the foregoing, we find that LG had the necessary information within its control and did not report this information. Instead, LG permitted the Department at the preliminary determination to believe that there was nothing wrong with the value of its reported sell-out rebates, and gave no explanation about the existence of its arbitrary cap amounts until Department officials were at verification at LGEUS’s offices in New Jersey. These rebates are a significant part of LG’s commercial activity and business practices, and therefore the inaccurate reporting of those rebates can have a large impact on LG’s antidumping calculations. Moreover, because these rebates can significantly affect net price, inaccurate reporting can also skew the Department’s targeting dumping analysis. LG’s treatment of this information leads us to conclude, therefore, that LG did not cooperate to the best of its ability during the investigation with respect to this issue.

Thus, for this final determination, pursuant to section 776(b) of the Act, we have based LG’s US sell-out/lump sum rebates on AFA. As AFA, we have determined the average rebate percentage for all U.S. non-OEM sales contained in LG’s U.S. sales listing for which LG reported a positive rebate amount. We then used this percentage as a floor for all U.S. sales for which LG reported sell-out rebates (or for which LG applied a rebate floor). This rate is sufficiently adverse to “ensure” that LG “does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See SAA at 870.

We disagree with LG that the Department should deem its methodology acceptable because its reporting methodology is consistent with the Department’s questionnaire instructions, which direct respondents to report allocated amounts in cases where (as here) transaction-specific reporting is not possible. While it is true that the Department’s questionnaire permits allocations, it does not solicit or sanction allocations which are inconsistent with 19 CFR 401(g)(2). As noted above, this regulation only permits allocations which “are calculated on as specific a basis as is

feasible” and do not “cause inaccuracies or distortions.” In this case, we find that LG has not met either condition.

We also disagree with LG’s argument that the Department should accept its methodology because LG did the best that it could with the information that it had (*i.e.*, it had no better way to link its rebates to the underlying sales and its allocations were consistent with its books and records<sup>51</sup>). First, and most importantly, LG could have requested guidance from the Department as to an acceptable methodology, instead of forging ahead with a distorted allocation and capping/flooring scheme that has no basis in the company’s own experience or the Department’s practice. Instead, the Department finds that the record supports the conclusion that LG’s actions and inactions ended up shielding its reporting methodology from scrutiny. LG should have been forthcoming about the problems in its calculations throughout the entire investigation. Second, LG should have been well aware that sell-out rebates were a significant issue for another respondent in this case, Samsung, because the Department laid out its concerns with Samsung’s rebate reporting in detail in the Federal Register notice issued for the preliminary determination. Thus, knowing that its reporting methodology was problematic, and that sell-out rebates were an issue that concerned the Department for another respondent, LG should have also known that its methodology, and the inaccurate results of that methodology, would raise serious concerns for the Department when discovered.

As to the arguments that the Department verified without discrepancy all of the underlying data upon which the allocations were based, we agree that the numbers used in LG’s allocations tied to the numbers in LGEUS’s books and records. This fact, however, is distinct from the question of whether LG’s methodology verified. While the rebates themselves (in terms of aggregate dollar amounts) are indeed recorded in the company’s books, we find that the per-unit amounts derived from these figures were inaccurate for the reasons stated above. Moreover, this fact also does not account for the various other problems found with LGEUS’s rebates, including the actual/accrual issue and the inclusion of pre-POI accrual reversals/exclusion of post-POI payments question<sup>52</sup>. For this reason, we also disagree with LG that its reporting methodology reasonably reflects the rebates granted to its customers.

Finally, we disagree with LG’s argument that its use of different caps in its different markets (see Comment 7 above) is appropriate because the cut-offs used by each entity must reflect its assessment as to what reasonably accounts for the commercial practices in its respective market. LG has offered no basis for its assertion that its failure to reallocate the excess rebates in the home market somehow justified a larger range. Moreover, as discussed above, we find no evidence that either cap is grounded in LG’s actual commercial practice, despite LG’s assertions to the contrary.

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<sup>51</sup> We also disagree with LG’s contention that it reported lump sum and sell-out rebates on the most specific basis on which these rebates are tracked in the ordinary course of business. As noted above, LGEUS offered rebate programs which varied by customer, product, and time period. LG made no effort to develop a reporting methodology which took all of these factors into account.

<sup>52</sup> Regarding this last point, we disagree with LG that it did not exclude any rebates from its reporting because it reallocated any excess amounts. To the extent that LG included negative amounts related to pre-POI sales as offsets to the reported numbers, LG understated its rebates granted on POI sales.

Therefore, for the foregoing reasons, we find that the use of AFA with respect to this issue is appropriate for the final determination.

Comment 13: LG's Non-Product-Specific Accruals for U.S. Rebates

LG reported budgeted accruals for sell-out rebates in the variable fields REBATE9U and REBATE11U in its U.S. sales listing. At verification, LGEUS explained that these accruals do not relate to specific rebate programs and are not paid out to customers; rather, they were designed to comply with International Financial Reporting Standards (IFRS). Moreover, while LG reported REBATE9U using the amounts accrued in LGEUS's books for December 2010, it allocated the REBATE11U accrual amounts (which relate to the January 2010 reversal of December 2009 accruals) equally over all 2010 sales. Based on these facts, we raised the following issues related to these accruals in our U. S. verification report: 1) whether it is appropriate to account for these "rebates" in our calculations for the final determination, given that they appear to be theoretical amounts unconnected to particular rebate programs; and 2) if so, whether it is appropriate to accept LGEUS's different allocation methodologies for them.

LG states that it reported these accruals in order to "stay within {its} POI booked values" and develop a complete rebate record and analysis. LG acknowledges that it allocated these accruals over different bases, but it maintains that there is a logical reason for this: REBATE9U was allocated over the POI sales on which they were accrued, but LG could not use the same methodology for REBATE11U because this accrual did not relate to POI sales. Thus, LG claims that it would be impossible to report REBATE11U in any other manner. However, LG argues that, if the Department disagrees, it should eliminate both REBATE9U and REBATE11U from its final analysis.

The petitioner contends that the Department should disregard both rebates for purposes of the final determination. The petitioner asserts that the Department verified that these amounts are "accounting devices," rather than actual rebates paid by LG.

Department's Position:

We agree with the petitioner. The amounts in question are not rebates, per se. Rather, they are budgeted amounts designed to bring LG's accounting records in line with IFRS accounting standards. See the LG US Sales Verification Report at pages 23-24. Effectively, these adjustments are complementary, as REBATE9U is a POI accrual that was reversed after the POI, and REBATE11U is the reversal of a pre-POI accrual. However, LG acknowledges that these complementary adjustments were calculated on different time bases. Furthermore, these amounts were calculated and applied uniformly, without any attempt to adjust the amounts on a customer-, product- or program-specific basis. Therefore, we are excluding both REBATE9U and REBATE11U from the final determination calculation.

Similarly, LG also reported an adjustment in the field REBATE12U for sell-in rebate accruals reported in the fields REBATE1U through REBATE8U. As with the REBATE9U and REBATE11U amounts, the REBATE12U adjustment was calculated and applied uniformly, without any attempt to reconcile it with actual rebate payments on a customer-, product-, or program-specific basis. See id. at page 24. In the absence of any specific link to the sell-in rebate amounts accrued, we also disregarded this adjustment for the final determination.

Comment 14: LG's U.S. Freight Expenses

At the start of LG's U.S. sales verification, LG identified two errors with respect to its reported freight expenses from the warehouse to the customer. First, LG disclosed that it had included a model-specific (and miscalculated) amount for returned freight in its calculations. Second, LG indicated that it had erroneously based a number of the reported inland freight expense amounts on an average expense (rather than the transaction-specific expenses LG intended to report). LG offered corrected return freight expense amounts as well as revised transaction-specific expenses. However, while we accepted the revised return freight amounts, we did not take the transaction-specific data as a verification exhibit due to the volume of the transaction-specific expense data affected. Thus, the revised data are not on the administrative record of this proceeding. See the LG U.S. sales verification report at 16.

The petitioner argues that LG failed to cooperate to the best of its ability in reporting these expenses because the proposed revisions were not minor (either in the number of transactions affected or in the magnitude of the change). Therefore, the petitioner contends that the Department should base their amount on AFA because the necessary inland freight information is not on the record. Further, the petitioner contends that LG's reporting errors are methodological in nature, and thus, they are not the sort of errors the Department normally permits to be corrected as verification revisions. In support of this assertion, the petitioner cites Maui Pineapple Co. v. Unites States, 264 F. Supp. 2d 1244 (CIT 2003), Kitchen Racks from the PRC, 74 FR 36656, and Chlorinated Isos from Spain, 70 FR at 24509. As AFA, the petitioner proposes calculating the highest inland freight rate (as a percent of gross unit price) and then applying this rate to all sales for which LG reported inland freight expenses.

LG maintains that the Department should solicit the revised transaction-specific data from LG for use in the final determination. LG contends that it is appropriate to use these data because LG provided it at the outset of verification and the Department verified it.

LG contends that the record does not support the use of AFA. First, LG maintains that it has cooperated to the best of its ability. LG notes that it provided the revisions at verification and the Department found that each of the figures selected for examination was fully supported. Thus, LG contends that the fact that the revised information is not on the record is not because LG failed to cooperate; rather, the information is not on the record because the Department did not take it at verification and has not subsequently requested it. Further, while LG concedes that the revisions affected a large number of transactions, LG maintains that this fact alone does not mean that the

revisions themselves were not minor nor the sort of corrections the Department normally accepts during verification.

Furthermore, LG argues that, although the revisions presented at verification were designed to recalculate freight expenses in a more detailed manner, the data originally reported are accurate, reasonable, and consistent with freight expense data that the Department normally accepts. In support of this assertion, LG cites Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From France, 64 FR 30820 (June 8, 1999). Accordingly, LG maintains that the administrative record does not necessarily contain a hole, let alone one that would require AFA to fill. Thus, LG maintains that the Department should either permit LG to submit the revised freight expense data offered at verification or rely on the freight expense data included in LG's most recent U.S. sales listing for the final determination.

#### Department's Position:

We disagree with the petitioner that AFA is appropriate here. Therefore, where the corrected information is on the record, we have accepted it for the final determination. Where the corrected information is not on the record, as facts available, we have adjusted the reported expenses using the data gathered at verification.

As noted above, LG identified errors in its freight reporting at the start of the U.S. verification at LGEUS. The LG U.S. sales verification report states:

Company officials explained that they intended their INLFWCU expense reporting to include: 1) actual transaction-specific freight expenses; plus 2) a product-specific average amount for returned freight expenses. However, at the start of verification company officials explained that both components of this expense contained errors. Regarding the transaction-specific portion of their expense calculation, company officials explained that in their most recent sales listing they had inadvertently used an average expense amount (and not a transaction-specific amount) for certain transactions. With respect to the return freight component, company officials explained that they failed to include all return freight expenses in their product-specific return freight calculation. See verification exhibit 1.

Company officials explained that because of these two errors, and because they recalculated the return-freight component for all models, virtually all transactions were affected by the revisions to the INLFWCU calculations. Company officials offered a "patch file" to their U.S. sales listing to revise the reported amounts. However, due to the number of transactions in the U.S. sales file, we declined to accept the patch file with the revised inland freight amounts. Regarding the return freight component of the INLFWCU calculation, company officials provided a model-specific list of the revised return freight amounts. See verification exhibit 1.

See the LG U.S. sales verification report at page 15 (footnote omitted).

At verification, we examined the corrected transaction-specific expenses for nine sales, consisting of eight selected prior to, and one selected during, verification. We also examined the return freight expenses for certain models selected at verification. Based on this examination, we found that, although the errors affected a large percentage of the U.S. database, they were not in and of themselves large mistakes.<sup>53</sup> Moreover, we found no pattern of misreporting of data, as some of the submitted amounts were overstated and others understated. Finally, LG identified the errors at the earliest possible moment at verification and offered a complete set of corrections. For each of these reasons, we disagree with the petitioner that LG failed to cooperate to the best of its ability or that an adverse inference is appropriate here.

As to the petitioner's point that that LG's reporting errors are methodological in nature, and thus, they are not the sort of errors the Department normally permits to be corrected as verification revisions, we disagree. LG stated in its questionnaire response that its reported U.S. inland freight data were transaction specific. During its preparations for verification, however, LG discovered that it in fact had reported average freight expenses for certain (but not all) transactions. Thus, in accordance with the instructions in the Department's verification outline, LG identified these changes on the first day of verification and explained the circumstances surrounding them. After reviewing LG's corrections for the sales examined at verification, we concluded that these corrections were clerical in nature and not of a type that would warrant the wholesale rejection of LG's revised freight data. Therefore, we accepted the corrections that we examined at verification as part of the administrative record of this proceeding.

We agree with the petitioner that LG's calculation of freight expenses contained a methodological flaw. Specifically, LG informed us for the first time at verification that it had included a returned freight component in its reported amounts. While we find that the inclusion of returned freight is inappropriate (for further discussion, see Comment 4, above), we disagree that this error in and of itself justifies a decision to reject the expenses *in toto*. As noted above we found that LG's reported amounts were substantially correct and thus were sufficiently reliable to use in our final calculations (as adjusted, below).

We acknowledge the fact that we did not accept the complete set of corrections for this expense offered by LG at verification. However, we disagree with the petitioner that this fact signifies that the data were unverified or unverifiable. Rather, because LG's U.S. sales database contained an extraordinarily large volume of transactions, we did not take the revised data as a verification exhibit. See LG U.S. sales verification report at pages 15-16. As noted above, we have deemed the errors at issue to be minor. This fact combined with LG's cooperative conduct means that the

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<sup>53</sup> Moreover, we disagree that it is meaningful simply to rely on the number of changes to the database in order to assess the magnitude of the error. See *Brake Manufacturers v. U.S.*, 44 F. Supp 2d 229, 236 (CIT 1999). In this case, LG reported thousands of sales transactions (and thus a small change to thousands of sales is no more meaningful than a small change to a database containing dozens of sales). Although the petitioner points to the percentage difference between the reported and revised/verified figures, on balance the revisions do not reflect a major change to the reported inland freight expenses. See the LG Calc Memo (showing that the adjustment factor does not reflect a major revision). Additionally, we note that while the percentage differences that the petitioner cites appear to be major revisions, all of the changes to the reported U.S. inland freight expenses examined at verification are miniscule as a percentage of gross unit price.



statutory conditions for the application of AFA do not exist. That said, because the record does not contain accurate information for LG's U.S. inland freight expenses, we have resorted to facts available to fill in the missing data in accordance with section 776(a)(1) of the Act.

Finally, we find the petitioner's reliance on Kitchen Racks from the PRC and Chlorinated Isos from Spain to be misplaced. Although the Department found the respondent's revisions in Kitchen Racks from the PRC to be methodological in nature, the issue there was whether the Department should accept the revisions – not whether to apply AFA with respect to the respondent's data. See Kitchen Racks from the PRC at Comment 4. Moreover, here LG's revisions were clerical and not methodological.

In Chlorinated Isos from Spain, the Department rejected revisions to the respondents' freight calculations because the Department was unable to verify the corrections (i.e., the respondent corrected multiple errors across several variable fields and included data that the Department had previously requested but had not been reported until verification). See Chlorinated Isos from Spain at Comment 4. Thus, the fact pattern in Chlorinated Isos from Spain is clearly distinguishable because we were able to verify LG's revised data. Therefore, neither of these cases supports the application of AFA with respect to LG's U.S. inland freight data.

Nonetheless, as facts available for LG's U.S. inland freight expenses, we have adjusted LG's reported data using the verified information on the record for the transactions examined. Specifically, we computed the average percentage difference between the reported freight figures and the observed actual figures (excluding return freight).<sup>54</sup> Then we applied this ratio to LG's reported freight expenses for all transactions except those examined at verification, for which we used the actual expenses we verified were incurred. See LG Final Sales Calculation Memo. Finally, we reclassified LG's return freight amounts as indirect selling expenses.

Regarding LG's position that we should use the originally reported freight data in our final determination, we find that doing so would also not be appropriate. Specifically, LG itself identified errors in this data. Thus, although LG characterizes its original data as sufficient, that conclusion is not supported by the record, which shows that the original data included clerical errors. Accordingly, we are not relying on LG's unadjusted original data.

#### Comment 15: LG's U.S. Indirect Selling Expenses

In its questionnaire response, LG calculated two separate indirect selling expense ratios for LGEUS: one for LG branded sales and one for sales to original equipment manufacturers (OEMs). The petitioner argues that LG understated these indirect selling expenses by using as the denominator of its calculations a revenue figure greater than that shown in LGEUS's audited financial statements. Accordingly, the petitioner contends that, as AFA, pursuant to section 776(b) of the Act, the Department should recalculate LG's U.S. indirect selling expenses based on

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In performing this calculation we excluded one transaction which was shipped on an express basis at a freight cost which was not in line with LG's normal commercial experience.

the sales revenue figure shown in LGEUS's audited financial statements.<sup>55</sup> The petitioner asserts that this action is warranted because, throughout the investigation, LG failed to cooperate in providing its financial statements and documentation related to its OEM sales. As part of this discussion, the petitioner asserts that LG may have misclassified its OEM sales as CEP rather than EP (although the petitioner does not contend that the Department should reclassify these sales as EP).

LG disagrees that it failed to provide any requested documentation or otherwise to cooperate to the best of its ability. Moreover, LG maintains that it properly classified its OEM sales as CEP sales (although it would not object if the Department reclassified them as EP). Finally, LG maintains that its calculations of LGEUS's indirect selling expenses were proper. Specifically, LG asserts it used accurate sales revenue figures as the denominator of these calculations, and these figures tied to LGEUS's accounting records. While LG recognizes that the figures in LGEUS's accounting records differ from those shown in the audited financial statements, it asserts that this difference was fully explained and examined at verification. Specifically, LG notes that LGEUS records the full value of its OEM sales as sales revenue, in accordance with IFRS, while it records the transfer price between LG and LGEUS as a cost; however, LGEUS's financial statements, prepared in accordance with U.S. Generally Accepted Accounting Principles (GAAP), only include the profit earned on these sales.

Based on the foregoing, LG contends that the petitioner's proposed revision would overstate its indirect selling expenses for OEM sales because: 1) it would allocate all of the selling expenses incurred for OEM sales to only the profit earned on those sales; and 2) the resulting ratio would be multiplied by sales price (which includes cost plus profit).

#### Department's Position:

We agree with LG that it properly reported these indirect selling expense ratios. At verification, we examined LGEUS's indirect selling expense calculation for OEM sales. We tied the expense numerator and sales revenue denominator to LGEUS's accounting system and found no inconsistencies. See the LG CEP verification report at page 36. We also tied LGEUS's accounting system to its audited financial statements. See the LG CEP verification report at pages 11-12. While the sales revenue in LGEUS's accounting system differs from that in its audited financial statements, both numbers are derived from the same set of sales data, with the only difference being how the sales revenue from the company's OEM sales is reported in the audited financial statements. Therefore, we disagree with the petitioner that it is appropriate to recalculate this ratio based on the revenue figure in LGEUS's audited financial statements.

Because the revenue figure in the financial statements only includes LGEUS's profit earned on OEM sales (rather than the full sales value), we find that such a methodology would be distortive

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<sup>55</sup> Although LG reported two separate indirect selling expense ratios for its U.S. affiliate with two different denominators (i.e., one including only LG-brand sales and one including OEM sales) the petitioner has only requested that we revise LGEUS's indirect selling expense denominator with reference to the single sales revenue figure included in its audited financial statement.

and would overstate LGEUS's per-unit indirect selling expenses. Specifically, the petitioner's methodology would yield a ratio which expressed total indirect selling expenses as a percentage of total revenue (for non-OEM sales) and profit (for OEM sales). Because the denominator of this ratio does not include all of the revenue received on OEM sales, the denominator would be understated and the resulting percentage overstated. Accordingly, we have used LG's reported U.S. indirect selling expenses in our calculations for the final determination.

Comment 16: LG's U.S. Inventory Carrying Costs

During the POI, LG sold refrigerators from inventory in the United States. In order to determine the inventory carrying costs associated with these sales, we multiplied LG's cost of manufacturing (COM) of the subject merchandise (in Korean won) by both the short-term interest rate paid by LG (in Korean won) and the time that the merchandise remained in inventory.

LG argues that it is against Department policy and precedent to calculate U.S. inventory carrying costs using a Korean won short-term interest rate. As support for its position, LG cites the Department's Policy Bulletin on imputed credit expenses. See Policy Bulletin 98.2, dated February 23, 1998. According to LG, this policy bulletin states that, for the purposes of calculating U.S. credit expenses, the Department will use a short-term interest rate tied to the currency in which the sales are denominated.

LG claims that the Department has applied this policy not only to credit expenses, but also to inventory carrying costs. Specifically, LG states that the Department uses a short-term interest rate tied to the currency in which the U.S. sales were denominated to impute inventory carrying costs incurred within the United States. As support for its position, LG cites Final Determination of Sales at Less Than Fair Value, Gray Portland Cement and Clinker from Mexico, 55 FR 29244, 29252 (July 18, 1990), where the Department calculated U.S. inventory carrying costs using the respondent's verified U.S. dollar interest rate. Therefore, for the final determination LG argues that the Department should revise its calculation of imputed U.S. inventory carrying costs using LG's U.S. dollar short-term interest rate.

The petitioner did not comment on this issue.

Department's Position:

We have continued to calculate LG's U.S. inventory carrying costs using LG's Korean won-denominated short-term interest rate. The Department has a practice of calculating inventory carrying costs based on COM and of matching the currency of the interest rate to the currency of the cost being imputed.<sup>56</sup> In this case, given that LG's COM was incurred in Korean

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<sup>56</sup> See, e.g., Paul Müller Industrie GMBH Co. et al. v. United States, 502 F. Supp. 2d 1271, 1276 (CIT 2007) citing to Extruded Rubber Thread from Malaysia: Final Results of Antidumping Duty Administrative Review, 63 FR 12752, 12760 (Mar. 16, 1998) (Extruded Rubber Thread from Malaysia); Final Determination of Sales at Less than Fair Value: Canned Pineapple Fruit from Thailand, 60 FR 29553 (June 5, 1995); and Certain Corrosion-Resistant Carbon Steel Flat Products from Australia: Final Results of Antidumping Duty Administrative Reviews, 61 FR 14049

won, calculating LG's U.S. inventory carrying costs required the use of the home market (i.e., Korean won) interest rate. Contrary to LG's claim that we departed from our practice in the preliminary determination, the Department has calculated U.S. inventory carrying costs in this manner in numerous other cases.<sup>57</sup>

While we recognize that LG has cited to another case where we used a different methodology, in more recent cases as noted above, we have been consistent in our practice of basing our calculation of inventory carrying costs on COM and matching the currency of the interest rate to the currency of the COM. See OJ from Brazil at Comment 5. Given that LG's COM is in Korean won, we have calculated LG's U.S. inventory carrying costs using LG's cost of borrowing in Korea. We find this approach reasonable because it ensures that the opportunity costs in question are calculated in the same currency as the inventory on which those costs are incurred.

Regarding LG's reliance on Policy Bulletin 98.2 in support of its argument to use the U.S. short-term interest rate in the calculation of U.S. inventory carrying costs, we note that the methodology discussed in that policy bulletin is not relevant to the issue at hand because it relates to the opportunity cost of financing receivables between shipment and payment date, not the opportunity cost of financing inventory between shipment from the factory and shipment to the customer.

Comment 17: LG's Materials Purchased from Affiliated Parties

In accordance with section 773(f)(2) of the Act, in the preliminary determination we analyzed -- and consequently adjusted to market value -- LG's transactions with one affiliated supplier, LG Chemical. Section 773(f)(2) of the Act provides that the Department may disregard "a transaction directly or indirectly between affiliated persons" if it determines that the transaction price "does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration." In performing this analysis in the preliminary determination, we relied only on those inputs for which LG provided a market value. Although LG had submitted LG Chemical's cost of production in lieu of market prices, it had not provided the supporting documentation requested by the Department at that time so we did not rely on these data in the preliminary determination. At verification, we confirmed LG Chemical's cost data, along with the market data submitted for comparison purposes with LG Chemical's transfer prices. Based on this information, in the cost verification report we analyzed LG's transactions with LG Chemical using a hierarchy of preferred market values which consisted of respondent purchases from unaffiliated parties, affiliated supplier sales to unaffiliated parties, affiliated supplier's COP, and last, any reasonable market data.<sup>58</sup>

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(Mar. 29, 1996).

<sup>57</sup> See, e.g., Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part, 75 FR 50999 (Aug. 18, 2010), and accompanying Issues and Decision Memorandum at Comment 5 (OJ from Brazil); and Extruded Rubber Thread from Malaysia, 63 FR at 12760.

<sup>58</sup> See the December 22, 2011, Memorandum from Heidi K. Schriefer, Senior Accountant, to Neal M.

LG maintains that, while the Department's transactions disregarded analysis in the cost verification report is an improvement over the analysis in the preliminary determination, its analysis is still incorrect for two reasons. First, LG disagrees with the Department's comparison of the weighted-average affiliated transfer prices of each input by type to the weighted-average unaffiliated market price of each input by type. Instead, LG argues that the Department's analysis would be more accurate if it limited the comparison to identical inputs. According to LG, the Department's analysis is equivalent to a comparison of apples and oranges because not all of the inputs are identical, or even within the same general category. LG contends that if the Department would limit its analysis to a comparison of identical raw material codes, the overall weighted-average price paid to its affiliated party reflects arm's-length prices. Second, LG argues that the Department's analysis relies on market prices that are in vastly smaller quantities than the purchases from LG Chemical. LG contends that it would be unreasonable for the Department to consider that such purchases reflect the market value of purchases made at large volumes; in fact, LG claims that it would be consistent with the Department's practice to reject these much smaller volume purchases as indicators of market value.<sup>59</sup> Therefore, LG claims that the Department should not rely on these "suspect" market prices, but instead rely on LG Chemical's production cost data, which the Department verified, and which demonstrate that the transfer prices paid by LG were greater than LG Chemical's costs to produce the inputs. Consequently, LG maintains that the Department should make no adjustment to its affiliated transfer prices for the final determination.

The petitioner argues that the Department's adjustment to LG's cost data in the preliminary determination was both proper and sustained by the cost verification findings; thus, in the final determination the petitioner maintains that the Department should continue to increase LG's costs by the amount by which market prices exceeded the LG Chemical transfer prices.

With regard to determining market value, the petitioner states that in Final Results of Antidumping Duty Administrative Review: Silicomanganese from Brazil, 69 FR 13813 (Mar. 24, 2004) (Silicomanganese from Brazil), and accompanying Issues and Decision Memorandum at Comment 7, the Department outlined a preference of using a respondent's purchases from unaffiliated parties as the benchmark for market value, and if not available, then the affiliated supplier's sales to unaffiliated parties, and finally, other market values that are reasonably available. Moreover, according to the petitioner, the Department has emphasized that it will rely

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Halper, Office Director, entitled, "Verification of the Cost Response of LG Electronics Inc. in the Antidumping Investigation of Bottom-Mount Combination Refrigerator Freezers from the Republic of Korea," (LG Cost Verification report) at 31.

<sup>59</sup> In support of this assertion, LG cites Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review, 73 FR 7710 (Feb. 11, 2008), and accompanying Issues and Decision Memorandum at Comment 2 (Mexinox), where the Department stated that "...after examining supporting record evidence obtained at verification concerning the market price data, we have determined that Mexinox's purchases from its unaffiliated supplier are not a fair reflection of a market price, because these individual transactions were not in quantities typical of trade in stainless hot band."

on its first preference for market price (*i.e.*, a respondent's own unaffiliated purchases), absent evidence of unusual circumstances surrounding the purchase.<sup>60</sup> Based on these criteria, the petitioner notes that the Department followed its normal practice and properly relied on LG's purchases from unaffiliated suppliers where such were available by input type. Furthermore, the petitioner dismisses LG's claim that the unaffiliated party purchases were made in quantities that were too small to be meaningful. The petitioner notes that the Department does not consider the volume of transactions to be the determining factor in finding whether transaction prices between affiliates reflect market values, citing Notice of Final Results of Antidumping Duty Administrative Review and Notice of final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada, 69 FR 75921 (Dec. 20, 2004), Issues and Decision Memorandum at Comment 7 (2004 Softwood Lumber from Canada). Thus, the petitioner concludes that LG has failed to demonstrate that the purchase prices from unaffiliated parties cannot serve as a reliable benchmark for market price. Consequently, the petitioner urges the Department to adjust LG's transfer prices to market values as illustrated in the analysis performed in the cost verification report.

#### Department's Position:

We agree with LG in part. For the final determination, we have analyzed LG's transactions with its affiliated supplier by specific material type (*i.e.*, at the level of detail for which market prices are available on the record). However, with regard to LG's argument that certain of its reported unaffiliated purchases should be rejected because they were transacted at volumes too small to be considered a fair reflection of market value, we find that the record evidence fails to support LG's assertions. In reaching this conclusion, the Department found a more detailed examination of Mexinox to be instructive. In Mexinox the Department determined that it is not the aggregate volume of the transactions, nor the significance of the unaffiliated purchases to the affiliated purchases, that is determinative of whether the purchases are a reasonable reflection of market value. Rather, the critical question is whether the purchases are at quantities "usually reflected" in the market (*i.e.*, at commercial quantities). See Mexinox at Comment 7. A review of LG's POI purchase journal, placed on the record at Cost Verification Exhibit 18 (pages 6313-6326), demonstrates that, during the POI, LG purchased the input in disparate quantities (*i.e.*, in a range of high and low volume purchases) from both affiliated and unaffiliated parties.<sup>61</sup> Thus, when viewed at the most detailed level (*i.e.*, unique purchases) the record shows that LG made purchases of the input from both affiliated and unaffiliated parties at comparable volumes. Consequently, we have not excluded LG's unaffiliated purchases in determining whether the company's affiliated transactions reflect arm's-length prices.<sup>62</sup>

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<sup>60</sup> See Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France, 70 FR 54359 (Sept. 14, 2005), and accompanying Issues and Decision Memorandum at Comment 3.

<sup>61</sup> In its brief, LG references a particular input type as an example of the large volume difference between affiliated and unaffiliated purchases. However, this comparison incorrectly compares the total affiliated purchase quantity to the average unaffiliated purchase quantity by input type (*i.e.*, total unaffiliated purchase quantity divided by the number of input types purchased from unaffiliated sources).

<sup>62</sup> We did exclude unaffiliated purchases from our analysis in instances where the input type was

Finally, in performing our analysis for the final determination, we note that there were certain material input types that LG did not purchase from unaffiliated parties. This fact pattern required that the Department rely on alternative sources for establishing market value. As the petitioner correctly points out, the Department's preference for establishing a market value is a respondent's own purchases of the input from unaffiliated suppliers. When no such purchases are available, the Department looks to the affiliated supplier's sales of the input to unaffiliated parties, and, lacking that, to any reasonable source for market value. See *Silicomanganese from Brazil* at Comment 7. The Department followed this hierarchy in analyzing LGE's affiliated transactions. Where LG unaffiliated purchases or LG Chemical sales were not available, the Department resorted to LG Chemical's COP data as the best available evidence of whether the transactions reflected arm's-length values. See section 773(f)(2) of the Act (stating that "if the transaction is disregarded" and "no other transactions are available for consideration," then "the determination shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated"). Based on this analysis, the Department finds that LG's POI transactions with its affiliated supplier, LG Chemical, reflected market values. Therefore, we have made no adjustment to LG's affiliated transfer prices in the final determination.

Comment 18: *LG's R&D Expenses*

In responding to the Department's questionnaire, LG submitted three categories of R&D expenses: 1) refrigerator R&D expenses; 2) common R&D expenses; and 3) other product R&D expenses. In its response to a supplemental questionnaire, LG expressed its refrigerator and common R&D expenses as a percentage of the home appliance divisional consolidated and company-wide consolidated cost of goods sold (COGS), respectively, and allocated them to the reported products, while excluding other product R&D expenses from its reported costs. In the preliminary determination, we revised LG's "common" R&D expense rate to express the figure as a percentage of unconsolidated, rather than consolidated, COGS.

The petitioner argues that LG's methodology creates a mismatch between the level of consolidation used for the numerator and denominator in the R&D expense rate calculation. According to the petitioner, the inappropriateness of this mismatch is highlighted by the fact that the increase from the unconsolidated to consolidated COGS is significantly higher (i.e., 75.6 percent based on the petitioner's calculations) than the increase from unconsolidated to consolidated R&D expenses (i.e., 3.7 percent based on the petitioner's calculations). As such, the petitioner surmises that the consolidated COGS likely includes large amounts of purchased and resold finished goods, sales by non-manufacturing entities, and costs incurred by marketing divisions which are treated as COGS for those divisions. Hence, the petitioner concludes that the unconsolidated COGS is the appropriate choice for the denominator as it more closely matches LG's manufacturing costs. Furthermore, the petitioner states that the Department has a clear preference for the use of unconsolidated financial statements, albeit with a "layered" approach if

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purchased from unaffiliated parties, but not affiliated parties (i.e., the purchase was not needed for comparison).

the unconsolidated financial statements fail to fully capture expenses borne by the parent company on behalf of the respondent.<sup>63</sup> Consequently, for the final determination, the petitioner states that the Department should continue to use LG's unconsolidated COGS as the denominator of the R&D expense rate calculation.

In addition, the petitioner contends that the Department should calculate a company-wide R&D expense rate for LG. According to the petitioner, this approach is necessary because throughout this proceeding LG has attempted to obfuscate the breadth of its R&D activities and has submitted an artificial allocation methodology intended to diminish the company's R&D activities that clearly benefit refrigerators. By the petitioner's account, these actions have resulted in an incomplete record of LG's R&D expenses. In reaching these conclusions, the petitioner references various technology projects listed on LG's press releases or on LG's own website, all of which the petitioner submitted on the record over the course of this proceeding. While these projects were available in a public forum, the petitioner argues that LG has either refused to acknowledge such technology exists or has significantly understated the R&D expenses relative to the technology. As such, the petitioner maintains that at a minimum LG's company-wide R&D expenses cross-fertilize each of the company's product lines. Accordingly, the petitioner asserts that the Department should calculate a company-wide R&D expense rate for LG by using the total R&D expenses from its unconsolidated financial statements divided by the COGS from these financial statements. The petitioner notes that such a calculation is in accordance with the Department's long-established practice with regard to R&D expenses when there is evidence of cross-fertilization, pointing to Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea; Final Results of Administrative Review, 65 FR 38976 (Nov. 15, 2000), and accompanying Issues and Decision Memorandum at Comment 10 (DRAMs I); and Dynamic Random Access Memory Semiconductors from the Republic of Korea; Final Results of Administrative Review, 66 FR 52097 (Oct. 12, 2001), and accompanying Issues and Decision Memorandum at Comment 3 (DRAMs II).

Finally, the petitioner alleges that further discrepancies in LG's costs require the application of five additional adjustments to the company's R&D expense rate. The petitioner suggests that the Department should revise the numerator of LG's R&D expense ratio calculation as follows: 1) include the 2010 fiscal year increase in LG's intangible asset account because LG has failed to explain the change in its capitalized development costs; 2) include the balance of a reserve account related to write-downs in the valuation of R&D projects because LG has not properly captured such costs; and 3) exclude all unexplained negative R&D amounts reported for LG accounting units. The petitioner also states that the Department should adjust the COGS denominator of the calculation to exclude packing expenses and to include scrap offsets. In its fifth and final recommendation, the petitioner urges the Department to take into account the impact of the R&D

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<sup>63</sup> In support of this assertion, the petitioner cites Final Determination in the Antidumping Investigation of Light-Walled Rectangular Pipe and Tube from Mexico, 69 FR 53677 (Sept. 2, 2004) and accompanying Issues and Decision Memorandum at Comment 25 (Pipe from Mexico), where the Department describes its practice of calculating G&A expenses based on the respondent's unconsolidated financial statements.



expenses incurred by LG's Mexican affiliate, LG Electronics Monterrey Mexico, S.A. de C.V. (LGEMM).

LG points out that, while revising its R&D expense ratio to reflect an unconsolidated COGS denominator in the preliminary determination, the Department also stated its intention to allocate a portion of LG's R&D expenses to LGEMM in the final determination. LG argues that the Department cannot sustain both positions – it cannot both infer that LG's R&D expenses are related only to its unconsolidated activities but at the same time allocate a portion of its R&D expenses to its affiliated Mexican producer. While LG disagrees that its R&D expenses should be allocated to LGEMM as these costs are offset by markups received by LG through the resale of LGEMM's products, LG submits that, if the Department makes such an allocation, it must also ensure that R&D expenses are not double-counted. Accordingly, LG proposes that the most straight-forward approach to avoid double-counting would be to calculate its R&D expenses as a percentage of consolidated COGS.

LG maintains that it has accurately and fully reported its R&D expenses to the Department. While acknowledging the Department's verification finding that it inadvertently understated its Home Appliance R&D expenses, and that it may be more appropriate to base its common R&D expenses on the headquarter and chief technology officer unit activities, LG disputes that the Department must increase its R&D expenses to reflect the difference between unconsolidated and consolidated R&D expenses. According to LG, there is no record evidence to support the contention that the R&D activities incurred by its subsidiaries are related to refrigerator production. Rather, pointing to the Department's verification exhibits, LG notes that the Department reviewed the trial balances of two of its subsidiary refrigerator producers which show that neither incurred R&D expenses. See the LG Cost Verification report at Cost Verification Exhibit 15. However, should the Department revise its R&D expenses, LG contends that the adjustment should be limited to the percentage difference between the consolidated and unconsolidated R&D expenses.

LG further asserts that applying the adjustments that were identified in the Department's verification report would effectively negate the majority of the petitioner's R&D arguments. As for the remaining issues raised by the petitioner, LG finds the petitioner's arguments unpersuasive. Specifically, LG rejects the petitioner's contentions based on publicly available data that LG has failed to disclose all of its R&D projects and their related costs. On the contrary, LG states that throughout the proceeding it has responded to each of the petitioner's allegations by identifying whether such activities were related to refrigerators and incurred during the POI, and if so, confirming that it included such expenses in the R&D expense rate. Furthermore, LG refutes the petitioner's claim that it refused to provide certain information to the Department as a mischaracterization. LG states that it informed the Department that it incurred no POI expenses related to the project in question, a fact that was verified by the Department. In the end, LG contends that the petitioner's arguments suggest that the Department should reconcile LG's R&D expenses to LG's press accounts, rather than to its financial statements.

Finally, LG dismisses each of the petitioner's five additional adjustments to its R&D expenses in turn, stating: 1) as it explained in its responses to the Department, LG capitalizes certain R&D expenses and this increase in the intangible asset account reflects the 2010 capitalization of R&D expenses; 2) because the R&D project write-down account is a reserve account it is appropriately excluded from reported costs; 3) the negative amounts in the R&D departments reflect the fact that these units received offsetting revenue greater than their expenses; 4) LG has already accounted for the scrap revenue and packing expense adjustments to the COGS denominator in its calculations; and 5) any expenses incurred on behalf of its subsidiary companies are reimbursed through its markups on LG's resales. However, should the Department allocate a portion of LG's R&D expenses to LGEMM in the final determination, LG argues that the Department should use a consolidated COGS denominator to ensure that it does not double count expenses.

#### Department's Position:

We disagree with the petitioner that LG's R&D expense rate should be calculated on a company-wide basis. While the Department has in the past calculated a more expansive R&D expense rate such as in DRAMs I and DRAMs II, the petitioner's cites are unpersuasive as the courts have subsequently struck down the Department's theory of cross-fertilization in later proceedings of the same case.<sup>64</sup> See e.g., Hyundai Electronics v. United States 395 F. Supp. 2nd 1231 (CIT 2005) (Hyundai) and Hynix Semiconductor Inc., v. United States 424 F.3d 1363 (Fed. Cir. 2005) (Hynix).

In Hynix, the CAFC held that the record failed to provide substantial evidence of cross-fertilization, and, as a result, affirmed the respondent's normal books and records with regard to the allocation of R&D expenses. In reaching its conclusion, the CAFC held that simply citing a list of projects without proof of the underlying activities was paltry evidence of cross-fertilization. See Hynix 424 F.3d at 1371.

A review of Hyundai provides additional guidance on the evidentiary hurdle that must be cleared to disregard a company's normal books to reallocate costs based on the theory of cross-fertilization. The CIT stipulated that specific evidence must be provided to show how non-subject merchandise R&D activities directly impacted the development of subject merchandise. See Hyundai 395 F. Supp. 2nd at 1239. The CIT found that a mere recitation of a company's R&D projects, even R&D projects that list subject merchandise in the context of non-subject R&D, failed to provide substantial evidence of cross-fertilization. Id. at 1238-1239. Specifically, the CIT held that "simply because the word 'DRAM' is in a project does not provide substantial evidence that the R&D actually relates to DRAM development." Id. Furthermore, the CIT found that the introduction of subject merchandise technology into the design of non-subject merchandise still failed to provide "specific explanation of how these various advancements directly impact DRAM R&D." Id. Hence, while the court's decision suggests that cross-fertilization may exist in certain industries, the burden of proof is high. Upon failing to

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<sup>64</sup> With regard to antidumping procedures, cross-fertilization refers to the theory that R&D activities related to non-subject merchandise may also benefit or stimulate the development of subject merchandise.

reach this burden of proof in the DRAMs cases, the Department was directed to rely on the companies' product-specific R&D expenses. See Hynix, 424 F. 3d at 1371.

Consequently, the Department's subsequent practice has been to allocate R&D expenses to products consistent with the company's normal books (i.e., calculating product and/or division specific R&D costs as they are calculated in the company's normal books and records), which, in accordance with section 773(f)(1)(A) of the Act, is conditioned upon whether the company's books are in compliance with home country GAAP and reasonably reflect the costs associated with producing the merchandise under consideration.<sup>65</sup>

Thus, contrary to the petitioner's claims, the Department does not have a long-established practice of calculating a company-wide R&D expense rate, nor do we find that this case presents clear evidence of cross-fertilization. Rather, we note that the product lines under LG's company-wide umbrella fall under a diverse range of production and R&D activities including, for example, home entertainment and mobile communications.<sup>66</sup> While the petitioner provides evidence from the public domain supporting LG's wide array of products and technology, there is no compelling evidence that technology advances in the mobile communications arena, for example, directly impacted the company's refrigerator developments. In addition we are not persuaded by the petitioner's arguments that LG has failed or refused to provide the data requested by the Department, thereby warranting a facts available decision. Throughout these proceedings LG has responded to each of the Department's questions with regard to R&D expenses.<sup>67</sup> While at times further clarification has been needed, and certain areas of LG's responses were not fully understood until the Department's verification, the Department does not find that LG's responses with respect to this issue reflect actions that "significantly impede{d}" the proceeding as outlined by section 776(a) of the Act. In fact, at verification, the Department reviewed with LG each of the R&D activities of concern to the petitioner.<sup>68</sup> For each, LG identified whether the R&D activities took place in a period that would impact POI costs, and if so, LG identified where such expenses were recorded in the company's normal books. Id. Based on the foregoing, we do not find that the petitioner's arguments provide substantial evidence that LG's R&D activities for its other product lines (e.g., mobile communications, etc.) directly impacted LG's product development with regard to the merchandise under consideration, nor do we find that LG has failed to provide or

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<sup>65</sup> See e.g., Chlorinated Isos from Spain Administrative Review Issues and Decision Memorandum at Comment 3, where the Department stated that the respondent "records its R&D expense specifically by division. Based on this information, we were able to verify the exact amount of R&D expense related to water treatment products (i.e., the merchandise under consideration). Accordingly, we allocated this amount to all water treatment products in accordance with our practice."

<sup>66</sup> See the LG Cost Verification report at page 13.

<sup>67</sup> See e.g., LG's October 11, 2011 Supplemental Section D Response at 7-8; LG's October 3, 2011, Supplemental Section D Response at 1-4.

<sup>68</sup> See LG Cost Verification report at pages 35-36.

has withheld information such that the use of company-wide R&D expenses as facts available is warranted.

Nonetheless, we have determined that certain adjustments to LG's reported R&D expense rate calculations are warranted. First, at verification we found that, while LG had correctly identified its total R&D expenses to the Department, for reporting purposes the company analyzed the underlying R&D projects and attempted to extract from the total the costs relative to refrigerators and common to all products.<sup>69</sup> These extracted figures were the Home Appliance (or "HA") and common R&D expenses used in the numerators to LG's reported R&D expense rate calculations. However, at verification we found that although LG normally records R&D expenses by division (e.g., HA division), the company did not rely on these figures for reporting to the Department. Furthermore, a simple scan of the company-wide R&D projects called into question whether LG's reporting methodology had captured all projects relative to refrigerators.<sup>70</sup> Similar to the CIT's findings in Hynix the Department agrees that a mere review of project names cannot be determinative of whether such projects are related to the merchandise under consideration. See Hynix 424 F. 3d at 1371. Nor can the Department, in the limited time accorded to verification, perform an extensive review of every R&D project to confirm that all projects related to the merchandise under consideration have been reported. Hence, lacking evidence that such allocations are distortive, the Department's practice is to rely on the R&D expense allocations normally recorded by the company. Therefore, for the final determination, we have relied on the R&D expenses reported in the HA division for the refrigerator-related R&D expenses and the unallocated R&D expenses remaining in the "HQ" and "CTO" divisions as the common R&D expenses.

Next, we note that LG originally reported consolidated HA and consolidated company-wide COGS as the denominators to the HA and common R&D expense rate calculations, respectively. LGE's rationale was that its R&D activities are related to both LG and its subsidiaries.<sup>71</sup> In the Preliminary Determination, the Department relied on unconsolidated COGS for the R&D expense rate calculations, but we also noted our intention to obtain the information necessary to allocate a portion of LG's R&D expenses to the costs of the products manufactured by LGEMM which are under consideration in the companion antidumping duty investigation of refrigerators from Mexico. Based on our findings at verification, we find that LG's original reliance on consolidated HA and consolidated company-wide COGS represents an appropriate approach for allocating a portion of LG's R&D expenses to LGEMM without also double-counting R&D expenses. Also underlying this decision was our confirmation that the R&D functions for the LG Group as a whole have been for the most part centrally positioned within LGE (i.e., the unconsolidated company). See LG Cost Verification report at pages 5-6. Hence, LG's

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<sup>69</sup> See LG Cost Verification report at page 34.

<sup>70</sup> Id.

<sup>71</sup> See LG's September 7, 2011 Supplemental Section D Response (9/7/11 Section D Response) at 10-11.

subsidiaries produce and sell products that are reliant on the R&D activities performed by LG. See e.g., LG Cost Verification report, Cost Verification Exhibit 15 at 5034-5035. As such, the fact pattern of the current case supports LG's contentions that its refrigerator-related R&D activities benefitted its subsidiaries that also produced and sold its refrigerator products. As a result, we have relied on the consolidated COGS denominators to allocate LG's refrigerator-related and common R&D expenses to the beneficiaries of LG's technological advancements.

With regard to LG's arguments that an allocation of R&D expenses to LGEMM is unnecessary because such expenses have already been captured via the markup on transfers of finished refrigerators between the affiliated parties, we disagree. At verification, the Department reviewed the trail of transactions between the companies when such transfers of product occur. Specifically, the Department noted that LGEMM first invoices LG for the refrigerators and then LG invoices LGEUS.<sup>72</sup> In the Cost Verification report, the Department also notes that LG's invoice to LGEUS includes a markup which is considered to cover costs incurred on behalf of LGEMM. See LG Cost Verification report at 15. It is through this markup that LG contends that LGEMM's R&D expenses have been captured, or rather, that LG has been reimbursed.

The Department's concern is not whether LG has been reimbursed for its outlay of funds on behalf of LGEMM, but rather whether the costs reported to the Department by LGEMM "reasonably reflect the costs associated with the production and sale of the merchandise." See section 773(f)(1)(A) of the Act. Because the R&D expenses incurred by LG on behalf (or to the benefit) of its subsidiaries are not recognized on its subsidiaries' books and records, the Department finds that LGEMM's costs do not appropriately reflect the R&D expenses associated with the refrigerators that LGEMM produces. Therefore, for the final determination, we have allocated a portion of LG's R&D expenses to LGEMM. In doing so, we have taken note of LG's arguments regarding the double-counting of expenses and have accounted for this concern via the use of consolidated COGS in the denominators of the R&D expense rate calculations.<sup>73</sup>

Relative to our decision to rely on consolidated COGS as the denominators to the R&D expense rate calculations, we disagree with LG's contention that no adjustment should be made for the difference between the unconsolidated and consolidated R&D expenses. Although LG provided financial statements for two of its subsidiary refrigerator producers, we were unable to examine the financial statements of LG's other seven refrigerator-producing subsidiaries.<sup>74</sup> See LGE Cost Verification report at page 34. In addition, LG did not provide a reconciliation of the total R&D expenses from the unconsolidated to consolidated financial statements. Therefore, lacking the information to confirm that the difference between the financial statements reflected R&D

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<sup>72</sup> See the LG Cost Verification report at page 15.

<sup>73</sup> See the March 16, 2012 Memorandum from Heidi K. Schrieffer to Neal M. Halper, entitled "Cost of production and Constructed Value Calculation Adjustments for the Final Determination – LG Electronics Inc. and LG electronics USA, Inc." (LG Cost Calc Memo).

<sup>74</sup> See the LG Cost Verification report at page 34.

expenses that would fall under the HA or common categories, pursuant to section 776(a) of the Act, as facts available we have adjusted the unconsolidated HA and common R&D expenses from LG's normal books and records by the percentage difference between the R&D expenses reported on LG's unconsolidated and consolidated financial statements.

With regard to the petitioner's additional suggested five adjustments, we note that the first two comments reference the POI activity in two of LG's balance sheet accounts. Specifically, the petitioner seeks to increase LG's R&D expenses by the net POI change in the intangible asset account for capitalized development costs and by the December 31, 2010, balance in the contra-asset account set up to recognize future impairments in that intangible asset account. The Department disagrees that the inclusion of these amounts in LG's R&D expenses is appropriate. First, these accounts are presented on LG's December 31, 2010, balance sheet, which as a part of LG's financial statements, was pronounced by the company's auditors to fairly reflect the financial position of the company in conformity with IFRS as adopted by the Republic of Korea (Korean IFRS).<sup>75</sup> See LG's 9/7/11 Section D Response at Exhibit 26. Lacking any evidence to the contrary, the Department accepts the findings of LG's auditors (*i.e.*, that the balances are appropriately reported in LG's balance sheet). Moreover, we found no evidence to suggest that any POI expenses related to these balance sheet accounts (*e.g.*, amortization of the intangible asset account, adjustment of the contra-account to reflect current year estimates) were not appropriately reported, or that such reporting is distortive to the reported costs. Consequently, we have not reclassified the net POI change and the year-end balance in LG's intangible asset and contra-asset accounts, respectively, to R&D expenses in the final determination.

Similarly, we uncovered no evidence that disputes LG's claims that the credit balances in certain R&D accounts are due to offsetting revenues received from joint government projects.<sup>76</sup> Therefore, we have not adjusted LG's normal books to exclude these credit balances from the R&D expense rate calculations in the final determination.

Finally, with regard to the petitioner's last two suggested adjustments, we agree. However, with regard to the COGS adjustments, we note that, as correctly argued by LG, the COGS denominator was adjusted for packing and scrap both by LG in its submissions and by the Department in its preliminary determination. See *e.g.*, the LG Cost Verification report at Cost Verification Exhibit 16. For the final determination, we have continued to account for scrap offsets and packing expenses in the R&D expense rate denominators, and, as noted previously, we have accounted for the impact of LG's R&D activities on LGEMM's costs.

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<sup>75</sup> LG adopted Korean IFRS in 2010. Prior to 2010, the company prepared its financial statements in compliance with Korean GAAP (K-GAAP). See the LG Cost Verification report at page 7.

<sup>76</sup> See LG's Rebuttal Brief at 12-13 and LG Cost Verification report at page 35.

SamsungComment 19: Critical Circumstances

The Department preliminarily determined that there is no reasonable basis to believe or suspect that critical circumstances exist with respect to the subject merchandise exported from Korea. See Preliminary Determination, 76 FR at 67686-67687. Samsung argues that, for purposes of the final determination, the Department should continue to find that critical circumstances do not exist because none of the statutory criteria outlined in section 735(a)(3) of the Act has been met.

Specifically, Samsung asserts that in the preliminary determination the Department correctly determined there was no history of injurious dumping of the subject merchandise from Korea pursuant to section 733(e)(1)(A)(i) of the Act. Samsung argues that because the petitioner has presented no new evidence related to this criterion, the Department's preliminary determination should stand. With respect to the importer knowledge of dumping criterion, Samsung argues that once the Department corrects or reverses certain methodological decisions that it applied to Samsung in the preliminary determination, its sales and cost data will demonstrate that its weighted-average dumping margin is far below the 15- and 25-percent thresholds necessary to impute importer knowledge of dumping. Samsung notes that if this statutory criterion has not been satisfied, the Department should make a negative critical circumstances finding for Samsung on this basis alone.

However, in the event the Department determines that there are margins sufficient to impute Samsung's knowledge of dumping, Samsung addresses whether its imports of subject merchandise have been massive over a relatively short period of time in accordance with 735(a)(3)(B) of the Act. Samsung argues that the Department should use seven-month comparison periods for the final determination, as opposed to the four-month periods used in the preliminary determination, because this is the longest period for which data is available. Samsung maintains that even though its import volumes increased using the seven-month base and comparison periods, the Department will find that the analysis remains the same as in the preliminary determination; thus, the Department should continue to find that the increase was not massive because it was attributable to seasonal trends. Therefore, Samsung insists that for the final determination the Department should continue to find that critical circumstances do not exist for it.

Department's Position:

We continue to find that critical circumstances do not exist with respect to imports of bottom mount refrigerators produced in and exported from Korea by Samsung. In this case, we calculated a final margin of 5.16 percent for Samsung, which does not meet the 15- and 25-percent thresholds necessary to impute knowledge of dumping for either CEP or EP sales. Therefore, we find that the importer knowledge criterion, as set forth in section 735(a)(3)(A)(ii) of the Act, has not been met for Samsung. Therefore, an analysis of the updated verified shipment information Samsung submitted after the preliminary determination is unnecessary. For further discussion of

this issue, see the Memorandum to James P. Maeder from the team entitled, “Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from Korea - Final Determination of Critical Circumstances,” dated March 16, 2012.

Comment 20: Use of Total AFA for Samsung

In the preliminary determination, the Department based Samsung’s dumping margin, in part, on AFA, based on a finding that Samsung failed to cooperate to the best of its ability in providing certain requested information. Specifically, we found that: 1) Samsung’s reported data for home market sales of kimchi refrigerators was unusable due to numerous inconsistencies between the narrative response and the sales database; and 2) Samsung failed to report certain rebates in both the home and U.S. markets in the form and manner requested. See Preliminary Determination, 76 FR at 67677-78, 67681, and 67685. We provided Samsung an opportunity to remedy these deficiencies after the preliminary determination, and Samsung submitted additional information in response.

The petitioner claims that there are serious flaws in Samsung’s revised kimchi refrigerator and rebate data, and thus it argues that the Department should base Samsung’s final dumping margin on total AFA. Specifically, the petitioner maintains that certain of Samsung’s home market rebates are reported in a manner inconsistent with the program terms, others are reported for arbitrary amounts on ineligible sales, and some were either not reported at all (despite the fact that the customers appeared to qualify) or reported as negative values. The petitioner asserts that Samsung’s U.S. rebate reporting is no better, given that Samsung: 1) revised the reported amounts for one rebate on the first day of verification; 2) reported other rebates on ineligible products and failed to report rebates on eligible ones; 3) refused to provide documentation at verification to support its claim that it did not pay one type of rebate; and 4) reported one rebate that is “plainly contradicted” by the supporting rebate agreement.

Regarding kimchi refrigerators, the petitioner disagrees with Samsung’s assertion (see below) that it has remedied all of the deficiencies identified by the Department in the preliminary determination. The petitioner maintains that Samsung has a track record of evasion and non-disclosure, which is hardly illustrative of “good faith.” The petitioner asserts that Samsung bears the burden of creating a complete and accurate record, and Samsung has failed to meet this burden here.

The petitioner notes that the Department warned Samsung that total AFA was a possibility if it did not begin to cooperate, and, given the scope of the deficiencies outlined above, the Department has an obligation to assign Samsung AFA for the final determination. According to the petitioner, the Act affords the Department wide discretion in situations such as these in order to ensure that an uncooperative party is not rewarded for its failure to cooperate. The petitioner maintains that Samsung failed even to attempt to provide the requested information, and as a result it should bear the consequences.



Samsung disagrees that AFA is warranted for the final determination. According to Samsung, it had a good faith rationale for not reporting its sales of kimchi refrigerators in its initial questionnaire response (i.e., the bottom compartments are not designed to freeze). Nonetheless, Samsung notes that it provided this sales data to the Department in September 2011 and it also responded to all of the Department's subsequent requests for information regarding these sales. Samsung contends that the Department fully verified this information and noted no discrepancies with it.

Regarding the petitioner's claims that Samsung's rebate data remains deficient, Samsung asserts that the petitioner fundamentally misunderstands both the Department's specific instructions to Samsung concerning how it should revise its home market rebate reporting methodology and the results of the Department's detailed verification of the resulting rebate calculations. Samsung contends that its rebates were accurately reported in a manner consistent with the Department's instructions, and thus no adjustments to its rebate calculations (much less the wholesale rejection of its rebate data) are necessary. (For further discussion, see Comments 22, 25, and 26, below.)

Samsung contends that the Department may only apply AFA under certain conditions, none of which is met here. Specifically, Samsung notes that the Department must first notify the respondent of any deficiencies in its responses and afford it an opportunity to remedy them, pursuant to section 782(d) of the Act. The Department must also find that the respondent failed to cooperate to the best of its ability in complying with a request for information. Samsung points out that, in this case, the Department issued additional supplemental questionnaires after the preliminary determination and Samsung responded fully and accurately to them (as confirmed by verification). Therefore, Samsung asserts that there is no factual or legal basis for finding that Samsung has failed to cooperate in this investigation.

According to Samsung, the Department has a history of finding that AFA is no longer warranted when a company is able to remedy any deficiencies in the reported data. As support for this assertion, Samsung cites various cases, including Certain Lined Paper Products from the People's Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review, 74 FR 17160 (Apr. 14, 2009), and accompanying Issues and Decision Memorandum at Comment 1 and Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, 74 FR 45221, 45222 (Aug. 17, 2009). Therefore, Samsung argues that the Department should accept its reported data for the final determination instead of applying AFA, consistent with its past practice.

#### Department's Position:

According to section 776(a) of the Act, the Department shall use the facts otherwise available in reaching a determination if:

- 1) necessary information is not available on the record, or
- 2) an interested party or any other person –

- A) withholds information that has been requested by the administering authority or the Commission under this title,
- B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782,
- C) significantly impedes a proceeding under this title, or
- D) provides such information but the information cannot be verified as provided in section 782(i).

In this case, none of these criteria exist with respect to Samsung. Specifically, we find that, with a few isolated exceptions, all data necessary to perform our margin calculations is on the record of this proceeding. While we had concerns regarding the usability of the data reported prior to the preliminary determination, we issued a supplemental questionnaire to Samsung in November 2011, and Samsung provided a complete response. Further, we verified Samsung's reported sales and cost information and, with a few minor exceptions, noted no discrepancies. See the Samsung Korea Sales Verification report, the Samsung U.S. Sales Verification report, and the Samsung Cost Verification report. Therefore, we disagree with the petitioner that Samsung's data contain significant deficiencies and omissions. For a discussion of the specific arguments related to Samsung's rebate reporting, see Comments 22, 23, and 27, below.

We disagree with the petitioner that Samsung's actions prior to the preliminary determination overshadow Samsung's subsequent remedying of its deficiencies after the preliminary determination in response to the Department's supplemental questionnaires. A necessary precondition for AFA is a finding that one of the conditions in section 776(a) of the Act is met before resorting to section 776(b). As noted above, we find that Samsung provided all necessary information in a timely manner (and by extension, it has not withheld any information) and this information was successfully verified by the Department. Thus, the conditions for facts available in section 776(2)(A), (B) and (D) of the Act have not been satisfied. Given that we are able to rely on Samsung's data to calculate an accurate margin, we also have no basis for finding that Samsung has significantly impeded the proceeding pursuant to section 776(2)(C) of the Act. As a result, we find that the application of total facts available is not warranted for purposes of the final determination, much less AFA.

Comment 21: Samsung's Early Payment Discounts in the Home Market

Samsung reported both early payment discounts and late payment fees in the field REBATE1H in the home market sales listing. We disallowed an adjustment to NV for these discounts in the preliminary determination because Samsung did not calculate them on a transaction-specific basis. See Preliminary Determination, 76 FR at 67685. However, we afforded Samsung an opportunity

to revise its reporting of these discounts/fees prior to verification and Samsung did so in November 2011.

The petitioner argues that the Department should continue to disallow these discounts for the final determination because: 1) Samsung reported discounts for numerous sales which appeared not to qualify for them based on the payment terms; 2) Samsung reported negative early payment discounts for other sales; and 3) Samsung's methodology for assigning discounts to particular transactions, as described in the home market sales verification report, is distortive and, thus, unreasonable. The petitioner notes that at the start of the home market sales verification Samsung revised its reporting methodology for these rebates to base them on a "customer/payer" code, rather than a consolidated customer code, basis. However, the petitioner claims that this change in methodology does not fix the fundamental problems inherent in the data.

Samsung argues its revised rebate reporting is both accurate and fully verified by the Department. Samsung maintains that the petitioner's first argument is based on a misstatement of the payment terms and a misunderstanding of how these terms were applied, while its second argument is based on a misunderstanding of the facts on the record (given that Samsung reported that it charged late payment penalties and reported these fees as negative discounts). Regarding the petitioner's third argument, Samsung asserts that this argument is based on one example set forth in the verification report, involving a discount granted in December 2010 but applied to sales made in September 2010. Samsung maintains that the Department examined this issue in detail at verification and confirmed that: 1) September was the closest prior month to December in which Samsung made sales to that customer; and 2) Samsung's application of early payment rebates to these sales was consistent with its reporting methodology. Samsung contends that this methodology -- to apply discounts granted in one month to sales made in the prior month -- is reasonable because it accurately reflects how early payment discounts (and penalties) are calculated and applied by Samsung's system in the ordinary course of business.

#### Department's Position:

After considering all arguments on this issue, we have accepted Samsung's early payment discount and late payment fees for purposes of the final determination. We examined the calculation of these discounts/fees at verification and found that all of the reported amounts (as revised at the start of verification) were supported by source documentation. See the Samsung Korea Sales Verification report at pages 35, 36, and 38 through 40.

Our verification report describes Samsung's methodology as follows:

SEC reported early payment rebates . . . in both the kimchi refrigerator and non-kimchi refrigerator sales listings. Company officials stated that these rebates were calculated based on amounts automatically computed by SEC's sales system and reflected on the "Customer Balance Report" prepared each month. Company officials stated that these amounts were determined as follows: 1) the system calculated an average sales date and value using the difference between the actual sale date in the month and the first day of the

month; 2) the system also calculated an average payment period using the difference between the average sales date and the maturity date (which is 30 days after the average sales date); and 3) the system multiplied the average sales amount by the average early/late payment period, and then divided this amount by the interest rate shown in the contract between SEC and the customer (restated on a daily basis).

In order to allocate the total rebate/interest revenue amounts to individual sales, SEC assumed that amounts granted/charged in a particular month related to sales made in the previous month. Company officials stated that they used this methodology because it was consistent with SEC's payment terms for eligible customers.

See the Samsung Korea Sales Verification report at pages 33 and 34.

As can be seen from this description, Samsung reported both early payment discounts and interest revenue under the same field in the company's home market sales listings. This methodology was disclosed to the Department well in advance of the verification. See, e.g., Volume 2 of Samsung's September 29, 2011, submission at page 40 (which states "SEC has reported the per unit interest revenue as a negative amount (i.e., as an addition) in the field 20.1 (REBATE1H)"). Thus, contrary to the petitioner's assertions, the fact that Samsung reported negative amounts in this field is neither surprising nor problematic.

With respect to the petitioner's more general objections to Samsung's methodology, we disagree that a simple examination of the reported payment terms is indicative of whether this methodology is flawed. As Samsung correctly notes, the petitioner misstated the payment terms used in its argument (Term A); instead of the terms alleged, Samsung reported the terms shown on page 12 of Samsung's February 16, 2012, rebuttal brief (Term B).<sup>77</sup> See Volume 2 of Samsung's September 29, 2011, submission at Exhibit 9. Moreover, while the record does show that Samsung reported a non-zero discount/revenue amount for a miniscule number of home market sales with payment terms of Term A,<sup>78</sup> we disagree that this fact proves that Samsung's methodology is inaccurate. As explained above, Samsung calculated its early payment discounts/interest revenue on a customer-specific basis, and in certain instances (including a number of instances involving sales of refrigerators with Term A) Samsung also offered Term B to that customer. Therefore, it is not surprising that Samsung reported early payment discounts, or earned interest revenue, for these transactions, given that Samsung's system computes these discounts/revenue on a customer-wide basis in the ordinary course of business. See the Samsung Korea Sales Verification Report at page 33.

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<sup>77</sup> We note that the number of sales with Term B payment terms in the kimchi refrigerator sales listing is identical to the number stated in the petitioner's case brief.

<sup>78</sup> These transactions account for significantly less than a tenth of one percent of the reported sales. See the Samsung Sales Calculation Memo.

Finally, we disagree with the petitioner that: 1) Samsung should have reported negative credit periods for sales on which it granted early payment discounts; and 2) a passage from the verification report demonstrates that the application of Samsung's methodology to individual transactions is unreasonable and distortive. Regarding the former argument, as noted above, Samsung's system computes discounts owed to customers using an average payment period determined by the system, which is only indirectly tied to actual shipment or payment dates. *Id.* Thus, we disagree that an analysis of Samsung's credit periods, like its payment terms, is instructive here. Regarding the latter point, we verified that Samsung's system functioned as described, Samsung actually paid the amounts calculated by the system, and it consistently applied these amounts to individual transactions using its stated methodology.<sup>79</sup> While it is indeed true that Samsung's system calculated discounts in certain instances where the company made no sales in the prior month, this fact does not change the central point that the company paid those discounts to the customer and thus they were actual expenses paid on sales of foreign like product. Moreover, because Samsung's methodology linked these discounts to the sales on which they were based, we find that the methodology was not only reasonable, but accurate. Therefore, we have accepted the reported discounts/revenue for purposes of the final determination.

Comment 22: *Samsung's Home Market Rebates on Discontinued Models and Kimchi Refrigerators*

Samsung reported rebates granted on sales of discontinued models in the fields REBATE2H and REBATE2\_1H in its home market sales listings for non-kimchi and kimchi refrigerators, respectively, and it reported other types of rebates granted on sales of kimchi refrigerators in the fields REBATE2\_4H, REBATE2\_5H, and REBATE2\_6H in the home market sales listing for kimchi refrigerators. Because these rebates were "sell-out" rebates (*i.e.*, earned on the customer's resale of the product, rather than on its purchase from Samsung), Samsung was unable to report transaction-specific amounts. Therefore, it calculated these rebates on a customer- and model-specific basis, and it applied them to particular sales using a last-in, first-out (LIFO) method.<sup>80</sup>

The petitioner argues that the Department should disallow each of these rebates because they suffer from significant defects. Specifically, the petitioner alleges that: 1) rebates were assigned to sales in months before the model was eligible for rebate (REBATE2H and REBATE2\_1H); 2) certain rebate amounts appear to be arbitrary and unsupported by record evidence (REBATE2H and REBATE2\_1H); 3) Samsung did not report transaction-specific rebates for discontinued models but it should have because of the small number of affected sales (REBATE2H and REBATE2\_1H); 4) Samsung reported negative rebate amounts for certain sales (REBATE2\_4H);

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<sup>79</sup> See the Samsung Korea sales verification report at pages 36 and 40. (where we stated that we "reviewed SEC's calculations and noted that the company's methodology was consistently applied").

<sup>80</sup> For example, if Samsung granted rebates on the customer's retail-level sales of 10 units in October, and the customer purchased 5 units from Samsung in October, 10 units in September, and 10 units in August, Samsung reported a rebate on the 5 units purchased in October, 5 of the 10 units purchased in September, and none of the units purchased in August.

5) Samsung reported different rebate amounts on the same product sold in the same month, or rebates on some sales of the same customer/month combination but not others (REBATE2\_4H and REBATE2\_5H); and 6) Samsung reported rebates to customers who do not appear to be eligible for them (REBATE2\_5H) and it did not report rebates to customers and/or products who do appear eligible (REBATE2\_6H).

The petitioner concludes from the above list that either Samsung's method of assigning rebates is flawed or it did not implement it properly. As a result, the petitioner argues that Samsung did not cooperate to the best of its ability by reporting accurate and reliable data, and thus the Department should zero each of the reported rebates as facts available.

Samsung maintains that its method of assigning rebates was consistent with the Department's instructions to report rebates on a "model-, customer-, and time-specific basis." Samsung asserts that the Department examined its methodology at verification and deemed it acceptable, and it found no discrepancies with the company's calculations. As with its early payment discounts, Samsung contends that the petitioner did not understand Samsung's reporting methodology, nor did it understand the Department's instructions on how to implement it. Therefore, Samsung requests that the Department rely on the reported amounts for purposes of the final determination.

Regarding the petitioner's specific arguments, Samsung notes that it could not report sell-out rebates on a transaction-specific basis because they are earned only upon the customer's resale of the product (rather than on its purchase). Samsung asserts that the Department recognized this fact when it instructed the company to report these rebates on a broader basis, and it provided explicit guidance on acceptable methodologies. Moreover, Samsung asserts that the petitioner's analysis accompanying its arguments is flawed because the petitioner computed its average rebate amount on a model-specific basis for each month, rather than a model-, customer-, and appropriate time-specific basis. Samsung provided various worksheets illustrating its methodology, and it maintains that these worksheets demonstrate that the petitioner's analysis has no probative value.

Regarding the petitioner's argument that Samsung reported negative rebates, Samsung asserts that the rebate program related to rebates in the field REBATE2\_4H is granted on the net sales made by the company's customers. Samsung asserts that negative amounts were rare and only arose when the customer returned a greater quantity of a particular model than they sold in a month. Samsung also provided a worksheet showing how the reported information was applied to particular sales.

Finally, Samsung disagrees with the petitioner's argument that it reported rebates to customers who do not appear to be eligible for them and it did not report rebates to customers and/or products who do appear eligible. Samsung maintains that the petitioner improperly focused its analysis at the consolidated, rather than the individual, customer level. Moreover, Samsung notes that it is perfectly logical that Samsung reported rebates on sales prior to the start of the program in question, as the rebates related to products resold from the customer's inventory. As to the petitioner's claim that Samsung should have reported additional rebates in the field REBATE2\_6H, Samsung states that the customers for which no rebate were reported did not meet

the program conditions. Thus, Samsung contends that the petitioner confused the potential for eligibility with actual eligibility.

For the foregoing reasons, Samsung contends that the Department should accept its home market rebates as reported and verified for purposes of the final determination.

Department's Position:

We agree with Samsung. Therefore, we have accepted its reported information for the final determination.

Specifically, regarding REBATE2H and REBATE2\_1H, our verification report states the following:

SEC reported discontinued model allowance rebates in the field REBATE2H in the non-kimchi refrigerator sales listing and in the field REBATE2\_1H in the kimchi refrigerator sales listing. Company officials stated that this rebate program applied to specific models that were discontinued during the POI. According to company officials, SEC granted these rebates as a fixed amount per model, and they applied these rebates to particular sales in the home market sales listings using a LIFO method.

See the Samsung Korea Sales Verification Report at page 34.

At verification, we examined the amounts reported in the field REBATE2U for certain customer/product/month combinations. We found that each of the amounts examined was supported by source documentation and consistent with the information recorded in Samsung's books and records.<sup>81</sup> While we did not explicitly examine the rebates reported for kimchi refrigerators in the field REBATE2\_1H, we found no indication that the reported information was incorrect. Moreover, given our finding that Samsung accurately applied its LIFO reporting methodology for non-kimchi refrigerator models, we have no reason to believe that Samsung misapplied this methodology to sales of kimchi refrigerators.

We disagree with the petitioner that: 1) Samsung should have been able to report transaction-specific amounts given the small number of transactions involved; and 2) Samsung's method of assigning rebates using LIFO led to perverse results (including the assignment of arbitrary rebates in months before a model was eligible to receive them). These rebates were "sell-out" rebates which were only granted after Samsung's customer resold the merchandise at

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<sup>81</sup> See, e.g., the Samsung Korea Sales Verification report at page 39 (stating that we "confirmed that SEC reported the fixed amounts shown in the notification documents, and that it accurately applied its LIFO methodology" for one customer/product/month combination and we "tied the amount owed to the customer to the Sales Deduction Management (SDM) system details for the relevant program/month, to the offset to A/R in the accounting system, and to the cash receipt slip provided to the customer to notify it of the credit" for another combination).

the retail level. Samsung employed a LIFO methodology at the express direction of the Department<sup>82</sup> precisely because it could not link its original sale to the customer's resale (and thus transaction-specific reporting was not possible). Further, given the lag time between the initial sale and subsequent resale, it is not surprising that Samsung reported these rebates on sales made prior to the start of the rebate eligibility period. See footnote 80 above for an illustration of this methodology.

Finally with respect to REBATE2H and REBATE2\_1H, we find that the petitioner's analysis in Attachment 1 of its case brief is unpersuasive. This analysis sets forth the average rebates reported for all sales of particular products in particular months, without taking into account the fact that Samsung also granted (and assigned) these rebates on a customer-specific basis. While the results of this analysis do indeed seem perverse, they have only a superficial relationship to the rebate amounts actually reported by Samsung and verified by the Department.

Regarding REBATE2\_4H, REBATE2\_5H, and REBATE2\_6H, we also disagree with the petitioner that Samsung's reporting of these rebates is problematic. Our verification report describes these rebates as follows:

Company officials stated that these rebate programs are granted in fixed amounts and they apply to SEC's customers' resale of tall kimchi refrigerators, mainly on a sell-out basis. . . Company officials stated that they determined the sell-out rebates in these fields using LIFO. . .

See the Samsung Korea Sales Verification Report at page 34.

Although we did not select these programs for further review at verification, as with REBATE2\_1H, we found that Samsung had applied its LIFO methodology consistently and accurately to its other rebate programs, and the petitioner has provided no basis for finding that Samsung has not been equally meticulous here. We disagree with the petitioner that the analysis set forth in Attachments 2 and 3 of its case brief calls into question Samsung's methodology because this analysis suffers from the same defects as that performed for REBATE2H/REBATE2\_1H (i.e., it is based on average amounts and fails to account for the customer component of the calculation).

We similarly disagree that Samsung's reporting of a negative REBATE2\_4H amount for a single transaction invalidates the company's entire reporting methodology. We find Samsung's explanation (i.e., that this negative amount was the result of a return) plausible. Because this rebate amount was not associated with a sale reported in the sales listing, we have removed it from our final calculations.

With respect to the petitioner's arguments that Samsung failed to report REBATE2\_5H to one customer that was eligible for it and it reported inaccurate amounts for another, we agree with

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<sup>82</sup> See the letter to Samsung from Shawn Thompson, Program Manager, Office 2, dated November 1, 2011, at question 2.c.



Samsung that the former of these claims is explained by: 1) the petitioner's incorrect reliance on a consolidated customer code (rather than the individual customer branch); and 2) Samsung's LIFO methodology. It also appears that the petitioner misunderstood information on the record with respect to its claim that Samsung reported inaccurate amounts.<sup>83</sup>

Finally, regarding REBATE2\_6H, we agree with Samsung that the petitioner also misunderstood the terms of eligibility for this program. These terms are set forth in Exhibit 4 of Samsung's November 28, 2011, submission and clearly show that the customer must meet a greater number of conditions than those enumerated by the petitioner. As to the variation in the reported amounts, we also agree with Samsung that these variations are adequately explained by a combination of the eligibility terms and application of LIFO.

For the foregoing reasons, in all but the one instance for REBATE2\_4H, we have accepted Samsung's home market rebates as reported for the final determination.

Comment 23: Samsung's Remaining Home Market Rebates

Samsung reported rebates granted under two additional rebate programs in the fields REBATE3H and REBATE4H in the home market sales listing. As with early payment discounts, we disallowed certain of these rebates in the preliminary determination because the reported amounts did not appear to be consistent with the program terms. See Preliminary Determination, 76 FR at 67685. However, we afforded Samsung an opportunity to revise its reporting of these rebates prior to verification and Samsung did so in November 2011.

Samsung contends that the Department verified the accuracy of its revised rebates, and thus it argues that the Department should accept the reported amounts for purposes of the final determination.

The petitioner did not comment on this issue.

Department's Position:

We agree with Samsung. Therefore, we have accepted the revised rebates for purposes of the final determination.

Comment 24: Samsung's Home Market Advertising Expenses

In the preliminary determination, the Department treated Samsung's reported home market advertising expenses as indirect expenses because the expenses were not product-specific. Samsung disagrees with this treatment, contending that the Department fully verified its reported advertising expenses and found no indication that this was true. Accordingly, Samsung maintains

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See Samsung's November 28, 2011, submission at Exhibit 4.

that the Department should treat its home market advertising expenses as direct expenses in the final determination.

If the Department continues to treat its home market advertising expenses as indirect, however, Samsung contends that the Department should also treat its U.S. advertising expenses as indirect. Samsung asserts that there is no record evidence that its home market advertising expenses differ from its U.S. advertising expenses.

The petitioner did not comment on this issue.

Department's Position:

After reviewing the information on the record, we have reconsidered our treatment of Samsung's home market advertising expenses and have determined that the home market advertising expenses in question are, in fact, direct expenses. Specifically, at verification, we found that the expenses included in Samsung's calculations were related to advertisements covering bottom mount refrigerators that were directed at Samsung's customers' customers. See the Samsung Korea Sales Verification Report at pages 30-31. Accordingly, we have treated Samsung's home market advertising expenses as direct expenses in our calculations for the final determination.

Comment 25: Samsung's Home Market Warranty Expenses

During the POI, Samsung incurred both direct and indirect warranty expenses. In the preliminary determination, we reclassified certain categories of Samsung's direct warranty expenses as indirect because these expenses appeared to be unrelated to materials or labor expenses. See Preliminary Determination, 76 FR at 67686. According to Samsung, the Department erred in its reclassification of these expenses. Specifically, Samsung maintains that it determined which warranty expenses were direct using the directions set forth in the Department's antidumping questionnaire, and thus it classified as direct those expenses that are variable in nature and incurred as a direct and unavoidable consequence of particular sales. Samsung contends that it also properly identified its indirect warranty expenses, stating that these expenses are ones which do not relate directly to specific sales or services provided to customers.

Samsung disagrees that only "free parts" and "subcontracted outside companies engineer labor costs" should be treated as direct warranty expenses. Samsung argues that, just as the cost of engineering labor incurred by outside contractors is a direct expense, other expenses incurred by those subcontractors are also direct. Samsung points out that, but for the need to provide warranty services on sales, it would not have incurred the expense of paying outside subcontractors. Moreover, Samsung contends that it is inconsistent for the Department to treat engineering labor as a direct expense, but not the allowance expense incurred for the same engineers (which is paid for each authorized service activity and related to the engineers' cost). Similarly, Samsung alleges that the operation fee paid to subcontractors is a direct expense because it is directly related to

providing repair services.<sup>84</sup> Regarding the category “A/S expense beyond SEC’s guideline to customers,” Samsung notes that these expenses are fees charged to Samsung when authorized service expenses exceed budgeted levels; thus, they bear a direct relationship to the volume of Samsung’s sales. Regarding the two categories of expenses which relate to Samsung’s call center, Samsung notes that a customer’s consultation with the call center is the first step in the warranty process, while the online authorized service center structure is part of an integrated customer service process. Thus, Samsung argues that these expenses should be treated as direct because they are directly proportional to the volume of Samsung’s sales.

Samsung argues that in other cases the Department has treated all warranty activity as a direct expense. As support for this position, Samsung cites Large Power Transformers from France; Final Results of Antidumping Administrative Review, 60 FR 62808, 62812 (Dec. 7, 1995), and accompanying Issues and Decision Memorandum at Comment 10 (LPTs from France). Therefore, Samsung contends that for the final determination the Department should accept Samsung’s direct home market warranty expenses as reported.

The petitioner disagrees, asserting that Department should continue to reclassify certain of Samsung’s reported warranty expenses as indirect. The petitioner maintains that the Department’s reclassification is reasonable because Samsung neither: 1) incurred these expenses independent of the level of its sales activity; nor 2) has adequately supported treating these expenses as direct. The petitioner asserts that Samsung’s reliance on LPTs from France is misplaced because in that case the Department was able to separate the respondent’s warranty expenses between subject and non-subject merchandise and tie the warranty expenses to specific sales. The petitioner states that, in contrast, here Samsung’s reported warranty expenses are not tied to specific sales. Thus, the petitioner maintains that the Department should continue to treat the warranty expenses in question as indirect.

#### Department’s Position:

In the preliminary determination, we reclassified the following components of Samsung’s reported warranty expenses as indirect: 1) “subcontracted outside companies allowance”; 2) “subcontracted outside companies operation fees”; 3) call center expenses; 4) SES’s “A/S Center” expense; and 5) “A/S expense beyond SEC’s guideline to customers.” See the October 26, 2011, Memorandum to the File from Elizabeth Eastwood, entitled “Calculations Performed for Samsung Electronics Corporation (Samsung) for the Preliminary Determination in the Antidumping Duty Investigation of Bottom Mount Refrigerators from Korea.” After examining the information on the record related to each of these categories, we have reconsidered our position only with respect to the “subcontracted outside companies allowance.” According to the documents contained in Samsung’s response and reviewed at verification, this expense is described as an “engineer allowance incurred for each authorized service activity.” See Samsung Korea Sales Verification exhibit 48. Thus, it appears to vary directly with warranty services provided for foreign like product.

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<sup>84</sup> Nonetheless, Samsung acknowledges that some portion of this fee may relate to the subcontractors’ rental expense.

Regarding the remaining categories, we have continued to follow the methodology used in the preliminary determination. The record shows that one of these expenses is general in nature. Specifically, the documents on the record describe “subcontracted outside companies operation fees” as “fees paid to outside companies for its {sic} general operation (i.e., rental expense, etc.). Id. Therefore, we find that this expense is indirect.

For the remaining three categories, the record does not contain sufficient detail to determine the specific nature of the expense. The same document noted above describes “A/S expense beyond SEC’s guideline to customers” as “when A/S fees over predetermined level incurred after warranty period, excess fees are charged to SEC”; this document does not explain what the fees are for or how they are paid and thus there is no way to determine whether the fees are direct or indirect in nature. Similarly, with respect to the call center, the record contains no information on the types of expenses incurred or how these expenses are charged. In addition, there is no information on “A/S Center” expenses at all. Accordingly, as facts available pursuant to section 776(a)(1) and (2) of the Act, we are continuing to treat these expenses as indirect.

We find that Samsung’s reliance on LPTs from France is misplaced. While the Department may have treated all warranty expenses reported in that case as direct, we disagree that LPTs from France stands for the proposition that all warranty expenses are by definition direct. Such findings with respect to warranty expenses are unique to the facts of each individual case. In fact, the Department’s standard questionnaire, which was issued to Samsung in May 2011, reflects that warranty expenses may be treated as either direct or indirect expenses and specifically requests companies to report them as one or the other.

The Department’s regulations at 19 CFR 351.401(b)(1) state that “{t}he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment...” We find that Samsung has not met its burden under 19 CFR 351.401(b)(1) in providing the Department with sufficient information to determine whether the three categories of warranty expenses noted above are direct or indirect. Given the paucity of detailed information related to these expenses, therefore, consistent with our analysis in the preliminary determination, as facts available, we have continued to classify them as indirect.

Comment 26: Corrections Presented at the Start of Samsung’s Sales Verifications

Samsung provided a list of corrections to its sales data at the start of its sales verifications in Korea and the United States. The petitioner does not comment on the corrections presented at the start of the sales verification in Korea. However, it argues that the Department should not accept Samsung’s rebate changes presented at the start of the U.S. verification, contending that these changes amount to wholesale revisions to the U.S. sales database. According to the petitioner, this statement is supported by the fact that: 1) the Department’s verifiers refused to take certain information with them (and thus the verifiers themselves believed these corrections were not minor); and 2) the Department needed to request entirely new sales databases because of the extent

of the changes that the verifiers did accept at verification. The petitioner points out that these changes affected a significant proportion of Samsung's reported U.S. sales, and it illustrates its argument using the data reported in the field REBATE2\_1U.

The petitioner asserts that the Department's presumption at verification is against accepting new factual information, given that its function is to test the completeness and accuracy of data previously submitted. The petitioner maintains that Samsung has a history of non-cooperation in this investigation and an uncooperative party should not benefit from a liberal interpretation of what constitutes a minor correction.

Samsung disagrees, claiming that the Department verified that these corrections were both accurate and minor. Therefore, it contends that the Department should rely on the corrected data submitted at the start of the sales verifications in both Korea and the United States for purposes of the final determination.

Regarding the petitioner's arguments relating to U.S. rebates, Samsung notes that it corrected the reported rebate data for five of its U.S. rebate programs. However, Samsung contends that the petitioner failed to explain why the revisions to four of these programs constituted "wholesale changes," and thus the Department has no basis upon which to consider the petitioner's claim for these programs. With respect to the fifth program, reported in the field REBATE2\_1U, Samsung notes that the change was limited to the denominator of the calculation, and this change was one of formula rather than of substance (*i.e.*, Samsung allocated the revised rebates over the net, rather than gross, price).

Samsung asserts that the petitioner has not challenged the revised methodology, but instead claims that the number of affected transactions is too high. However, Samsung notes that the petitioner identified no case precedent in which the number of transactions determined whether the correction itself was "minor." Indeed, Samsung contends that case precedent on this point does not support the petitioner's position because the Department has consistently examined the facts surrounding any corrections before deciding whether to accept them. As support for this statement, Samsung cites Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 39940 (July 11, 2008) (*Shrimp from Brazil*), and accompanying Issues and Decision Memorandum at Comment 6; and Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 37116 (June 23, 2003), and accompanying Issues and Decision Memorandum at Comment 1. Samsung asserts that here the changes were minor, as they resulted in a minimal percentage change in the rebate amount, and the Department recognized this fact when it requested that Samsung report these corrections in a post-verification sales listing. Therefore, it argues that the Department should continue to accept these minor corrections the final determination.

Department's Position:

We disagree with the petitioner. As noted in Comment 6, above, it is the Department's routine practice to review the corrections presented at the start of any verification and determine whether these relate to minor changes to previously-submitted data or whether they reach the level of significant new factual information. Where the changes are minor, we accept the information as part of the administrative record in the form of a verification "exhibit" and we examine that information during the course of the verification. See, e.g., Shrimp from Brazil at Comment 6.

In this case, we followed our practice with respect to the corrections presented at the start of the U.S. and Korean sales verifications. While the list of corrections was long, the corrections themselves were minor/generally clerical in nature. Moreover, while the number of transactions affected by the corrections is indeed high, we disagree that it is meaningful solely to total the number of changes. In this case, Samsung reported thousands of sales transactions (and thus a small change to thousands of sales may be no more meaningful than a small change to a database containing dozens of sales); similarly, where Samsung changed the calculation of a ratio (as it did with the denominator of its REBATE2\_1U amounts), the change by definition will affect all sales for which Samsung reported the associated expense.

We disagree with the petitioner that the Department's verifiers refused to take certain information with them (and thus the verifiers themselves believed these corrections were not minor). While the Department's verifiers did not accept certain information offered by LG, this situation did not occur in either of the sales verifications held at Samsung's offices.

Finally, we also disagree with the petitioner that our request for new sales databases after verification is in any way a reflection on the magnitude of the corrections themselves. The Department routinely requests new databases after verification, solely as a method of alleviating the administrative burden on the Department. Indeed, we note that in this case, we requested that all three respondents submit revised databases.<sup>85</sup> Thus, we find no basis to reject Samsung's data here.

For further discussion of Samsung's U.S. rebates, see Comment 27 below.

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<sup>85</sup> See the Memorandum from Elizabeth Eastwood and David Crespo to the file entitled, "Request for Revised Section B and C Sales Listings for Daewoo Electronics Corporation in the Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from Korea," dated January 20, 2012; the Memorandum from Henry Almond to the file entitled, "Request for Revised Section B and D Databases for LG Electronics Inc. in the Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from Korea," dated February 8, 2012; Memorandum from Henry Almond to the file entitled, "Request for Revised Section C Sales Listing for LG Electronics Inc. in the Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from Korea," dated February 8, 2012; and the Memorandum from Elizabeth Eastwood and Henry Almond to the file entitled, "Request for Revised Section B and C Sales Listings for Samsung Electronics Co., Ltd. in the Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from Korea," dated February 8, 2012.

Comment 27: Samsung's U.S. Rebates

As noted in Comment 20 above, the Department made a preliminary finding that Samsung failed to report certain U.S. rebates in the form and manner requested, and therefore we based the amount of these rebates on AFA, pursuant to section 776(b) of the Act. See Preliminary Determination, 76 FR at 67681. However, we afforded Samsung an opportunity to revise its rebate reporting prior to verification, and we provided specific instructions on how to do so. In response to this questionnaire, Samsung added nine variables to its U.S. sales listing (for a total of 13 rebate fields), and it reported U.S. rebates in these fields on a product-, customer-, and time-specific basis. Where the rebate involved a “sell out” program, Samsung used a LIFO methodology to assign these rebates to specific sales, consistent with its calculation of home market rebates.

The petitioner argues that the Department should base the amount of four of these rebates on AFA for purposes of the final determination. Specifically, the petitioner argues that the rebates reported in the fields REBATE1U (early payment discounts), REBATE2\_2U (product-specific and/or quarterly rebates), REBATE3\_2U (Sales Performance Incentive Fund (SPIFF) rebates), and REBATE4U (the name of which is proprietary information and, thus, it cannot be discussed here) do not match supporting documentation on the record of this investigation. As support for this claim, the petitioner cites various examples in its case brief.<sup>86</sup> According to the petitioner, not only do these problems affect a significant portion of Samsung's U.S. sales database, but they also either demonstrate that Samsung has failed to comply with the Department's instructions or they underscore the general inattentiveness to detail pervasive in Samsung's responses. As AFA, the petitioner requests that the Department use the amounts set forth in its case brief.<sup>87</sup>

Regarding the rebates reported in the field REBATE4U in particular, the petitioner claims that Samsung refused to provide the Department with requested data relating to these rebates, instead claiming that it did not pay these rebates despite clear evidence on the record that it did. The petitioner maintains that this failure is inexcusable, especially when the Department's verification outline specified that Samsung was to provide this information, and thus the petitioner argues that Samsung failed to prepare adequately for verification. The petitioner disagrees with Samsung's statement (see below) that a document referenced in the verification report relates to pre-POI sales because: 1) that document references “units on order” but not yet shipped; and 2) some of those units appear to be reported in the U.S. sales listing at the old price. Thus, the petitioner contends that the Department should conclude that Samsung's rebates reported in the field REBATE4U failed to verify.

Samsung argues that it has gone to extraordinary efforts to respond fully to the Department's supplemental questionnaires. According to Samsung, whatever the merits of the Department's original decision to use AFA in the preliminary determination, there is no question that its revised rebate reporting now fully complies with the Department's detailed instructions. Samsung asserts

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<sup>86</sup> See the petitioner's case brief at pages 28-31.

<sup>87</sup> The petitioner provides no guidance regarding the amounts the Department should use for REBATE1U but rather simply requests that the Department “apply adverse inferences.”

that, with the possible exception of a rebate reported in the field REBATE4U paid on a single sale, the Department found no discrepancies in the information examined at verification.

With respect to the petitioner's arguments, Samsung maintains that it either over-reported the amounts in question (REBATE1U) or it calculated them in accordance with the Department's instructions (REBATE2\_2U and REBATE3\_2U). Regarding REBATE2\_2U, Samsung contends that the petitioner's argument is based on a misunderstanding of Samsung's LIFO reporting methodology, and it provided a detailed explanation of how each of the questioned rebates was calculated, accompanied by supporting documentation. Regarding REBATE3\_2U, Samsung maintains that the petitioner confused the country of origin of certain of the models cited in its case brief, and the Department verified that Samsung either did not pay rebates during the POI on the other models cited or correctly reported those rebates in its response. Thus, Samsung contends that there is no basis for applying AFA to any of these programs.

Regarding the rebates reported in the field REBATE4U, Samsung argues that the record clearly establishes that it did not pay these rebates on any sale during the POI. Samsung asserts that the rebate questioned in the verification report related to pre-POI sales and thus it was properly not reported in Samsung's U.S. sales listing. Samsung argues that the petitioner again misunderstands Samsung's LIFO methodology, which assigns the payment of these rebates to models sold to this customer no later than the end of 2009, because the agreement was signed on January 2, 2010. Accordingly, Samsung contends that the Department should not deduct these rebates in the final determination.

#### Department's Position:

We agree with Samsung, in part. For all four rebates, we have determined that the application of AFA is not warranted. For REBATE1U, REBATE2\_2U, and REBATE3\_2U, we have accepted Samsung's rebate data as reported. For REBATE4U, we have concluded that Samsung granted rebates on one model in accordance with the terms of an agreement on the record of this investigation. Therefore, we have calculated rebates for all sales of this model in accordance with these terms.

At verification, we examined the amounts reported in the fields REBATE1U and REBATE3\_2U for certain customers and/or certain sales. We found that each of the amounts examined was supported by source documentation and consistent with the information recorded in the books and records of Samsung's U.S. affiliate, Samsung Electronics America Inc. (SEA). See the Samsung U.S. sales verification report at pages 20-23. Moreover, while we did not select the rebates reported in the field REBATE2\_2U for examination, we: 1) found no evidence at verification which called the reported information into question; and 2) verified that Samsung correctly applied its LIFO reporting methodology for other types of rebates. Given this latter point, we have no reason to believe that Samsung's LIFO methodology used to report REBATE2\_2U was not also appropriately applied. Finally, we disagree that any of the alleged problems identified by the petitioner exist. Therefore, we have accepted Samsung's reported information for the final determination.



Specifically, regarding REBATE1U, our verification report states the following:

Regarding early payment rebates, we examined agreement documentation from SEA's sales department. We tied the total expenses shown on the calculation worksheet to SEA's general ledger in SAP and the early payment ratio shown on the worksheet to the U.S. sales listing. We noted no discrepancies.

Id. at 22-23.

Therefore, contrary to the petitioner's argument, we disagree that there were errors in Samsung's reporting of this rebate, much less that these errors "underscored a general inattentiveness to detail" on Samsung's part.

Regarding REBATE2\_2U, the petitioner alleged five individual errors on page 28 of its case brief. We have examined the record and find that Samsung's explanation contained in its rebuttal brief is consistent with the reported data. Regarding the first two of these items, we agree that the differences alleged by the petitioner are accounted for by Samsung's LIFO methodology.<sup>88</sup> Regarding the remaining alleged errors, we find Samsung's explanation for the third and fifth items equally persuasive (*i.e.*, Samsung made a clerical error in its November 23, 2011, submission, which it subsequently corrected), and the record supports Samsung's explanation for the fourth.

Regarding REBATE3\_2U, we find no basis for the petitioner's assertion that Samsung reported this rebate on ineligible models. Specifically, we note that the specific model referenced in the final line on page 29 of the petitioner's case brief is identified in Samsung's U.S. Sales Verification Exhibit 10 (showing that SEA paid rebates on this model during the POI). We also find no basis for the petitioner's assertions with respect to the other models referenced on the same page of the case brief. Samsung produced the first of these models in Mexico (and reported the related rebate in the companion Mexico investigation), while it did not pay a rebate on the other model (because of the application of its LIFO methodology).

Regarding REBATE4U, however, we disagree with Samsung that the documents on the record establish that SEA did not pay this type of rebate during the POI. In its September 29, 2011, submission at Exhibit 12, Samsung provided a rebate agreement between SEA and a customer which provided for rebates on various models. Because this agreement covered "units on order" as of the end of 2009, any units of these models shipped and invoiced in 2010 should have been

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<sup>88</sup> Specifically, we note that the petitioner references the wrong line of Samsung's worksheet contained in Exhibit 9 of its November 23, 2011, response. The petitioner referenced line one of page 4 of this worksheet for its first alleged error, when in fact it should have referenced line 46. Similarly, the petitioner referenced line two of page 4 of this worksheet for its second alleged error, when in fact it should have referenced line 29. Finally, we note that the "reported" amounts shown on page 28 of the petitioner's case brief match the amounts in the U.S. sales listing for the customer/model combinations at issue when the correct starting amount is combined with the rebate determined using the ratio shown in the second table on page 4 of Exhibit 9.

eligible for the rebate (up to the quantity shown in the agreement). Therefore, we requested that Samsung provide documentation during the verification conducted at SEA that it did not, in fact, grant rebates on the models listed in the agreement during the POI. However, SEA did not provide the requested documentation in the time allotted for verification. See the Samsung U.S. sales verification report at page 24.

We disagree with Samsung that, because the agreement was signed at the beginning of 2010, all products covered by it were sold prior to the POI. The agreement clearly provided for rebates on units ordered but not yet shipped. In this case, Samsung reported (and the Department accepted) the invoice date as the date of sale. Because Samsung reported U.S. sales of one model at prices/rebates which were inconsistent with those shown in the agreement and because Samsung failed to demonstrate at verification that the agreement did not apply (despite being given an opportunity to do so), we find that it is reasonable to conclude that Samsung granted rebates on this model in accordance with the terms of the agreement. Therefore, we have calculated rebates for all sales of this model in accordance with these terms. We disagree that a LIFO methodology applies here because the rebates in question were prospective in nature and LIFO is retrospective.

Finally, we disagree with the petitioner that it is appropriate to determine a REBATE4U amount based on AFA for all of Samsung's remaining U.S. sales. Samsung reported its prices net of the rebate at issue for each of the other models shown in the agreement in question. Moreover, while the documents provided at verification raise more questions than they answer on this topic,<sup>89</sup> we found no indication (other than the agreement discussed above) that Samsung actually had this type of rebate program in place during the POI. Therefore, we find no basis to apply AFA to these rebates for the final determination.

Comment 28: Treatment of Payments for Defective Samsung Merchandise

During the POI, SEA made payments to two customers to keep these customers from returning defective merchandise. During the verification conducted at SEA, we found that Samsung inconsistently reported these payments in the U.S. sales listing. Specifically, we found that Samsung included the payments to one customer in the calculation of the POI average warranty expense ratio and it treated the payments to the other customer as a customer-specific rebate. See the Samsung U.S. verification report at page 2.

Samsung argues that the different treatment of the two types of payments is appropriate. Samsung contends that it is proper to classify the payment to the first customer as a warranty expense because SEA refunded cash to the downstream consumer in instances where a repair was

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<sup>89</sup> We have reexamined the documents that Samsung provided at verification to demonstrate that its U.S. affiliate, SEA, did not pay these rebates during the POI. See Samsung's U.S. sales verification exhibit 10. We found that none of prices shown on these documents tied to the prices reported in the U.S. sales listing, and thus it is unclear how they relate to SEA's actual rebate experience during the POI. However, because the reported value of SEA's sales reconciled to its audited financial statements without discrepancy, we are not concerned that Samsung misreported its U.S. prices (despite the appearance that it did so).

requested but warranty service was not available (due to either the repair magnitude or the consumer's location). According to Samsung, the fact that the payment was made to the downstream customer should be controlling.

In the second instance, Samsung explains that SEA established a rebate program in advance and made a payment to the customer during the POI. Therefore, according to Samsung, it was appropriate to report the amount paid to the second customer pursuant to an advance rebate program as a rebate.

The petitioner did not comment on this issue.

Department's Position:

We agree with Samsung. We have reexamined the documentation taken at verification. We find that this documentation confirms Samsung's explanation because the two payments at issue are treated differently in Samsung's records (*i.e.*, one payment is recorded as a rebate, while the other is recorded as a warranty expense). In light of this, we believe that Samsung's treatment of these payments is reasonable and we have no information on the record which would point us to a different conclusion. Therefore, we have accepted these payments as reported for the final determination.

Comment 29: *The Denominator of Various Expense Calculations for Samsung*

Samsung calculated certain U.S. movement and selling expenses as a percentage of SEA's price net of rebates. At verification, Samsung provided alternate calculations for these expenses as a percentage of SEA's POI gross sales. Samsung contends that the Department should use these revised expense ratios for the final determination because: 1) the original sales figure was net of rebates, many of which were calculated using the LIFO basis suggested by the Department; and as a result, 2) the aggregate net price calculated using the prices and rebates reported in the U.S. sales listing does not match the total net sales value shown on SEA's 2010 financial statements. Therefore, in order to ensure a consistent calculation, Samsung argues that the Department should apply the expense ratios obtained at verification, calculated on a gross sales basis, to its reported gross unit prices for purposes of the final determination.

In the event the Department chooses not to apply these alternate expense ratios in its calculations, Samsung maintains that the Department should ensure that it applies a ratio based on net sales to the net price, and a ratio based on gross sales to the gross unit price.

The petitioner disagrees, maintaining that the Department should continue to calculate the U.S. movement and selling expenses in question using Samsung's expense ratios based on net sales. The petitioner contends that it is unable to find SEA's gross sales value in U.S. verification exhibit 6 (*i.e.*, the exhibit cited in the U.S. verification report to support the sales reconciliation exercise). The petitioner asserts that it cannot evaluate the extent to which one denominator more closely matches the price to which the expense rate is applied without analyzing the source of the

differences between the gross and net sales figures. Moreover, the petitioner argues that, to the extent that these differences relate to returns and billing adjustments, it is more accurate to base the ratios on net sales. Given that the Department examined the expense ratios based on net sales at verification and found no errors with Samsung's reporting methodology, the petitioner maintains that the Department should continue to use these ratios in its calculations for the final determination.

Department's Position:

After considering the arguments on this issue, we have recalculated USBROKU, USDUTYU, ADVERTU, and WARRU to base these expenses on the alternative ratios obtained at verification. We agree with Samsung that it is more accurate to calculate these ratios as a percentage of gross sales, given that the net sales values used in the denominators of the original ratios do not match the net sales values reported in the U.S. sales listing (because of the LIFO methodology that Samsung used to determine many of its rebates). While the difference between the net and gross sales values is not limited to rebates (because Samsung also included billing adjustments when determining net sales), we disagree that this difference alone is sufficient to render the net sales values more accurate.

Regarding the petitioner's claim that it cannot find SEA's gross sales value in U.S. verification exhibit 6, we note that these figures are contained on page 1 of this exhibit. Moreover, while the petitioner is correct that we found no error at verification with the expense ratios calculated on a net sales basis, we also verified these calculations on a gross sales basis. See Samsung U.S. sales verification report at pages 15, 16, and 26. Therefore, for the reasons stated above, we have recalculated these expenses using ratios stated on a gross sales basis.

Comment 30: Samsung's U.S. Credit Periods

In the preliminary determination, pursuant to section 776(a) of the Act, we adjusted Samsung's reported credit periods for both CEP and EP sales using facts available to: 1) increase the credit period for all CEP sales based on the difference observed between a reported payment date and the date shown on bank payment documentation provided for the associated invoice; and 2) set the credit period equal to the payment terms for all EP sales. See Preliminary Determination, 76 FR at 67681, 67685. In addition, while we accepted Samsung's reported shipment dates (based on the bill of lading date) as facts available for the preliminary determination, we requested that Samsung revise its reported U.S. dates of shipment to report the date Samsung shipped merchandise from its factory in Korea. Id. at 67680. We issued a supplemental questionnaire to Samsung covering these issues, among others, after the preliminary determination and we received Samsung's response prior to verification.

Samsung asserts that the Department fully verified its revised U.S. credit periods. Therefore, Samsung maintains that the Department should accept them for purposes of the final determination.

The petitioner disagrees in part, arguing that the Department should make an additional adjustment to the credit period reported for Samsung's CEP sales. The petitioner notes that at the U.S. sales verification, the Department found that Samsung misreported a shipment date for a U.S. sale. The petitioner claims that this discrepancy both understates the credit expenses reported for this sale and discredits Samsung's claim that it corrected all of the errors in its original reporting. Therefore, for the final determination, the petitioner argues that the Department should increase the credit period for all of Samsung's CEP sales by the difference in the shipment dates observed at verification.

Department's Position:

We have accepted Samsung's reported data for purposes of the final determination. At verification, we examined the payment dates for three EP and seven CEP sales. See the Samsung Korea Sales Verification Report at 20 and the Samsung U.S. sales verification report at 12-13. We noted only one discrepancy in the reported shipment dates, and no discrepancies in the reported payment dates, for these sales. We disagree with the petitioner that a single difference in a sample of ten transactions is sufficient to demonstrate that Samsung failed to correct errors in its original data.

Moreover, there is no evidence on the record that this error was of the sort that would call into question Samsung's reporting methodology. Rather, the record shows that Samsung simply made a clerical mistake in determining the point of shipment to the customer (*i.e.*, Samsung reported that it made the sale from its U.S. inventory, whereas it actually shipped the merchandise from Korea directly to the customer).

Comment 31: Samsung's U.S. Interest Rate

At the start of the home market sales verification, Samsung provided a worksheet showing a short-term interest rate calculation based on interest paid to banks in inter-company factoring transactions, and it proposed using this rate to calculate credit expenses on EP sales. However, we noted that Samsung's calculation included borrowings denominated in currencies other than U.S. dollars. Therefore, we found that Samsung's proposed rate was not an accurate reflection of the company's U.S. dollar short-term borrowing rate. See the Samsung Korea Sales Verification Report at page 2.

Samsung agrees, noting that this calculation was merely provided as an alternative rate. According to Samsung, where a respondent does not have its own U.S. dollar borrowings, the Department's practice is to use the U.S. dollar short term borrowing rate of the respondent's U.S. affiliate to calculate U.S. credit expenses for EP sales. As support for this assertion, Samsung cites Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip From India, 67 FR 34899 (May 16, 2002), and accompanying Issues and Decision Memorandum at Comment 9. Therefore, Samsung requests that the Department use the verified U.S. dollar borrowing rate of Samsung's U.S. affiliate SEA to calculate credit expenses for Samsung's EP sales.

The petitioner did not comment on this issue.

Department's Position:

We agree. We found at verification that Samsung's alternative U.S. interest rate was not an accurate reflection of its U.S. dollar-denominated short-term borrowings. Therefore, we have continued to calculate U.S. credit expenses using SEA's short-term borrowing rate for EP sales.

Comment 32: Samsung's U.S. Indirect Selling Expenses

Samsung included an amount for negative bad debt expenses, related to a settlement, in the U.S. indirect selling expense ratio calculated for SEA. In the CEP sales verification report, we raised the issue of whether it was appropriate to treat this item as an offset to SEA's indirect selling expenses because it appeared to be extraordinary income.<sup>90</sup>

Samsung argues that the Department should allow the negative bad debt expenses, consistent with its practice. According to Samsung, it is well established that a respondent is entitled to offset bad debt recovery income against bad debt expenses. As support for this assertion, Samsung cites Notice of Final Determination of Sales at Less Than Fair Value: Glycine from India, 73 FR 16640 (Mar. 28, 2008), and accompanying Issues and Decision Memorandum at Comment 2 (Glycine from India), where the Department treated both bad debt expenses and bad debt recovery income as part of indirect selling expenses. Samsung maintains that the Department should employ the same methodology here because there is no basis to determine that the settlement payment is an "extraordinary income item" rather than the recovery of a previously-recorded bad debt. Samsung argues that the fact that a particular bad debt recovery is large does not render it "extraordinary income" under U.S. GAAP. Samsung speculates how the Department would treat this amount if the issue were not a bad debt recovery as a result of a settlement, but instead an additional bad debt expense in the same amount as the settlement. Samsung contends that in its hypothetical scenario the Department would treat this amount as an expense in the year incurred, not as an "extraordinary" item to be excluded. Thus, Samsung states that consistency and fairness require that the Department treat its recovery of bad debt in the same manner.

Samsung notes that in the CEP verification report the Department discussed the reversal of a chargeback from a customer (also reported as part of U.S. indirect selling expenses). According to Samsung, at verification the Department noted no inconsistencies in Samsung's explanation as

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<sup>90</sup> The Department in some instances will exclude extraordinary items, provided that they are both unusual in nature and infrequent in occurrence. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Japan, 64 FR 30574, 30591 (June 8, 1999). An event is "unusual in nature" if it is highly abnormal, and unrelated or incidentally related to the ordinary and typical activities of the company, in light of the company's operational environment. An event is "infrequent in occurrence" if it is not reasonably expected to recur in the foreseeable future. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber from Canada, 67 FR 15539 (April 2, 2002) and accompanying Issues and Decision Memorandum at Comment 33.

to why both the bad debt recovery and the chargeback reversal should be included in U.S. indirect selling expenses. Therefore, Samsung contends that the Department should accept Samsung's treatment of both of these items for purposes of the final determination.

Alternatively, Samsung contends that, because the potential upward adjustment to SEA's U.S. indirect selling expense ratio is very small, it meets the definition of an "insignificant adjustment" under 19 CFR 351.413. Therefore, Samsung argues that the Department should disregard it on that basis.

The petitioner disagrees that it is proper to treat Samsung's settlement as a reduction to SEA's bad debt expenses. The petitioner notes that Samsung made the sales related to the recovery of bad debt well before the POI. According to the petitioner, the Department's practice is to exclude prior period items, like the reversal of bad debt, from the calculation of both G&A expenses and indirect selling expenses.<sup>91</sup>

Moreover, the petitioner argues that Samsung's reliance on Glycine from India is misplaced because the respondent in that case used a direct write-off method to recognize its bad debt. The petitioner notes that a respondent who uses a direct write-off method recognizes its bad debt expenses (and any recovery) on the income statement, unlike a company which uses the provision/allowance method where such expenses and recoveries are recorded in a provision/allowance account on the balance sheet. The petitioner points out that SEA uses the provision/allowance method and, thus, it would be inappropriate for the Department to treat SEA's bad debt recovery in the same manner as the debt recovery in Glycine from India. Consequently, the petitioner maintains that the Department should not offset SEA's U.S. indirect selling expenses for the settlement in the final determination.

#### Department's Position:

We have accepted Samsung's U.S. indirect selling expenses as reported for purposes of the final determination. Section 777A(a)(2) of the Act permits the Department, when determining U.S. price or NV to "decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise." Insignificant adjustments are defined in the Department's regulations at 19 CFR 351.413 as "any individual adjustment having an *ad valorem* effect of less than 0.33 percent..."

Because the potential upward adjustment to Samsung's U.S. indirect selling expenses that would occur as a result of disallowing its offset to bad debt expenses is insignificant within the meaning

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<sup>91</sup> As support for this assertion, the petitioner cites Notice of Final Results of Antidumping Duty Administrative Review: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe From Brazil, 70 FR 7243 (Feb. 11, 2005) and accompanying Issues and Decision Memorandum at Comment 6; Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Final Results of Antidumping Administrative Review, 66 FR 18747 (Apr. 11, 2001), and accompanying Issues and Decision Memorandum at Comment 11; and Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Canada, 67 FR 55782 (Aug. 30, 2002), and accompanying Issues and Decision Memorandum at Comments 12 and 29.

of the Department's regulations at 19 CFR 351.413, we have declined to take into account such an adjustment. Therefore, there is no need to address the merits of the arguments raised by either the petitioner or Samsung on this issue.

Comment 33: Classification of Certain Costs as Packaging or Packing for Samsung

In the preliminary determination, the Department treated the packaging costs that Samsung reported in its COP database as packing costs. Samsung disagrees with this treatment, arguing that the costs in question are more properly classified as packaging costs and, as such, should be included in COP.

Samsung maintains that costs incurred in packaging goods for sale are part of COP, while packing costs are expenses that should be deducted to arrive at net price. Samsung cites the Department's Antidumping Manual as support for this distinction, and it asserts that Samsung's packaging operations differ from the cases referenced in this document.<sup>92</sup> Specifically, Samsung claims that, unlike the products at issue in Brazil Shrimp and Indonesian Mushrooms, refrigerators are not packed in inner containers that are subsequently packed inside a "master carton" for shipping. Rather, according to Samsung, refrigerators are packed only once after they come off the assembly line.

Samsung asserts that it sells refrigerators in cartons (not unpacked), which it claims is a situation similar to the one discussed in Seamless Refined Copper Pipe and Tube From Mexico: Final Determination of Sales at Less Than Fair Value, 75 FR 60723 (Oct. 20, 2010), and accompanying Issues and Decision Memorandum at Comment 10 (Pipe and Tube). Samsung submits that, in that case, the Department found that the respondent correctly included carton boxes, separators, core, reinforcements and carton lids in the "other material" field in the COP database. According to Samsung, given that nothing distinguishes the packaging materials that it used to package refrigerators from those used by the respondent in Pipe and Tube, the Department should treat these materials in the same manner.

The petitioner disagrees, arguing that the corrugated cardboard, tape, cushioning blocks and other such packing materials are not an integral part of the refrigerator. The petitioner maintains that, if cartons are an integral part of the refrigerator such that they should be treated as packaging costs (as Samsung claims), then the retailer must always sell the refrigerator with the carton. However, the petitioner contends that the record does not support this argument, citing a statement in its March 30, 2011, Antidumping and Countervailing Duty Petitions on Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea and Mexico (Petition) that notes that a particular

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<sup>92</sup> See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from Brazil, 69 FR 47081 (Aug. 4, 2004) (Brazil Shrimp); and Certain Preserved Mushrooms from Indonesia: Final Results of Antidumping Duty Administrative Review, 66 FR 36754 (July 13, 2001), and accompanying Issues and Decision Memorandum at Comment 16 (Indonesian Mushrooms).



model was purchased from the store without packing.<sup>93</sup> Moreover, the petitioner asserts that the list of packing materials for a representative Samsung refrigerator includes, for example, the door spacer, PE and PP films for protection, and PP strapping (among other things), which clearly do not become an integral part of the refrigerator. Therefore, the petitioner contends that the Department should continue to treat the materials in question as packing, rather than packaging.

Department's Position:

We agree with the petitioner and have continued to treat the costs at issue as packing costs.

Packaging costs refer to materials that are an integral part of the merchandise that is sold and are reported in the COP database. Packing costs refer to materials that are used only for the shipment of the merchandise and are reported in the sales listings. See Indonesian Mushrooms and Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52055 (Sept. 12, 2007), and accompanying Issues and Decision Memorandum at Comment 6.

Samsung's statement that refrigerators are packed only once after they come off the assembly line demonstrates that the materials in question are not packaging because they are not part of the product itself. Samsung's argument appears to be that, in order for a product to have both packaging and packing, it must have at least two layers of materials (e.g., an inner and outer carton). However, the relevant distinction is not how many layers of materials are used but rather whether the materials are part of the product itself. In Certain Orange Juice From Brazil: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 15438 (April 6, 2009), unchanged in Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, 74 FR 40167 (August 11, 2009), we considered the drums containing orange juice to be packing expenses as opposed to product packaging. A drum is equivalent to an outer carton and is, in effect, a single packing layer added after the product comes off the production line, not unlike the addition of a carton to the refrigerator once it comes off the assembly line.

With respect to Samsung's reference to the Antidumping Manual in support of its position that the costs at issue are packaging costs, as opposed to packing costs, we disagree that the cases cited therein (i.e., Indonesian Mushrooms and Brazil Shrimp) are on point. We do not consider the packing materials cited by Samsung to constitute an "integral part of the merchandise," contrary to the two cases cited in the Antidumping Manual. Unlike bottom mount refrigerators, both shrimp and mushrooms must be placed in some sort of container prior to being packed for shipment. Finally, with respect to Samsung's argument that this case is analogous to Pipe and Tube, the issue in that case was not one of packing versus packaging, but rather whether packing costs for certain products were properly reported. See Pipe and Tube at Comment 10. Therefore, it is not relevant to the disposition of the issue at hand.

Accordingly, for purposes of the final determination, we continue to treat the materials expenses at issue as packing, as opposed to packaging, expenses.

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See the Petition at Exhibit 25, Attachment A, p. 10.

Comment 34: Corrections Presented at the Start of Samsung's Cost Verification

Samsung contends that the Department should accept its minor corrections presented at the cost verification.

The petitioner disagrees that all of the corrections presented at the cost verification are “minor.” Specifically, the petitioner argues that the corrections related to the allocation of certain cost center expenses (originally reported in Exhibit SD-23G of the September 2, 2011, submission) is new information; the petitioner alleges that, because the revised exhibit presented at verification contains two allocation calculations that differ from the single calculation shown in Exhibit SD-23G, the resulting allocation of the cost center's expenses is new information which should be rejected. Moreover, the petitioner also alleges that Samsung's correction to Exhibit SD-29A of the September 2, 2011, submission is new information because the revised exhibit shows the combined inventory values of compressors manufactured by plant #3 and transferred to plant #1 whereas Exhibit SD-29A shows the inventory values of each plant separately. Therefore, the petitioner argues that since the information provided at verification appears to contain new information and it represents methodological changes, the Department should reject these corrections.

Department's Position:

We agree with Samsung and have accepted its minor corrections presented at the cost verification. Contrary to the petitioner's allegations, the corrections to Exhibits SD-23G and SD-29-A did not involve new information. Instead, the corrections relate only to the presentation and explanation of certain calculations and did not impact Samsung's reported costs.

As described by the Department in the cost verification report,<sup>94</sup> Samsung's Exhibit SD-23G shows that the allocation of all the expenses incurred by a specific cost center was performed using a three-step allocation methodology. The revised exhibit SD-23G presented at verification shows that some of that cost center's expenses were allocated using a two-step allocation rather than a three-step allocation methodology. We do not consider the correction of Samsung's explanation of the allocation methodology to be new information. The allocation provided in Samsung's submitted exhibit SD-23G was misstated, and the revision presented at verification was simply the correction of that misstatement. In addition, all of the methodologies used by Samsung in the normal course of business to allocate costs incurred by its cost centers were previously discussed in the company's September 2, 2011, submission.<sup>95</sup> Furthermore, we verified that the correction

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<sup>94</sup> See the December 21, 2011, Memorandum to the File entitled, “Verification of the Cost Response of Samsung Electronics Co., Ltd. and Samsung Gwangju Electronics Co., Ltd. in the Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea,” (Samsung Korea Cost Verification report) at page 4.

<sup>95</sup> See Samsung's September 2, 2011, submission at 2 and Exhibit SD-17.

to the presentation of the allocation methodologies for this particular cost center did not change Samsung's reported costs.<sup>96</sup>

Samsung submitted a compressor inventory movement schedule for plant #3 in Exhibit SD-29D of its September 2, 2011 response and a summary compressor inventory movement schedule for plants #1 and #3 in Exhibit SD-29A of that response. Samsung officials explained at verification that the schedule submitted in exhibit SD-29D should have reflected the inventory values for both plants #1 and #3.<sup>97</sup> Contrary to the petitioner's assertions, the revised Exhibit SD-29D does not contain new information because the same information was provided in Exhibit SD-29A of Samsung's September 2, 2011, submission. The minor correction presented at verification provided further clarification of the values of compressors transferred between plants #1 and #3 as reflected in Samsung's inventory movement schedules. As discussed at length in the verification report,<sup>98</sup> the Department tested the schedules in Exhibit SD-29A and the revised Exhibit SD-29D and found the information to be consistent with the company's inventory records. Moreover, we found that this minor correction did not impact Samsung's reported costs.<sup>99</sup>

Therefore, we have accepted these corrections for the final determination.

#### Comment 35: SEC's G&A Ratio

Samsung reported two G&A rates, one for its affiliated producer, Samsung Gwangju, and another for SEC, which provides production management, quality assurance, R&D, and administrative services to Samsung Gwangju. In the preliminary determination, we recalculated SEC's G&A expenses, originally reported by Samsung based on the income statements of its Digital Appliance business, using SEC's fiscal year 2010 audited unconsolidated financial statements. See Preliminary Determination, 76 FR at 67684. Samsung disagrees with this approach, arguing that the appropriate basis for its G&A expense ratio is the Digital Appliance business' income statement.

Samsung points to section 773(f)(1)(A) of the Act which states that costs shall be based on the records of the exporter or producer of the merchandise. Samsung argues that period costs, such as G&A expenses, do not necessarily relate to all activities in the company simply because they are not product costs. Samsung contends that the Department's methodology of using company-wide income statements to calculate a G&A ratio erroneously equates activities that cannot be tied to manufacturing to activities that benefit the company as a whole. According to Samsung, the Department must consider an alternate allocation when, as in the instant case, the record evidence demonstrates that the general activities do not benefit the company as a whole.

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<sup>96</sup> See Samsung Korea Cost Verification report at page 4.

<sup>97</sup> See Samsung Korea Cost Verification report at page 3.

<sup>98</sup> See Samsung Korea Cost Verification report at pages 30-32.

<sup>99</sup> See Samsung Korea Cost Verification report at page 3.

Samsung maintains that each of its businesses operates independently and maintains a dedicated staff that performs administrative functions that benefit that particular business. According to Samsung, SEC in the normal course of business separately recognizes each division's own G&A expenses. Samsung asserts that the G&A expenses incurred for each business reflect its unique nature. For example, Samsung claims that the production activities of the Digital Appliance business are primarily performed by external entities, such as Samsung Gwangju, and as a result, the Digital Appliance business' G&A functions and related expenses are relatively low in comparison to other business divisions, such as the Semiconductor and Telecommunications divisions, that have full production departments and require significantly more G&A functions and related expenses. Samsung maintains that the Department verified that certain fees incurred by the Telecommunications and Semiconductor businesses were significant in comparison to such fees incurred by the Digital Appliance business. Samsung also asserts that any general expenses that correspond to activities that benefit the company, as a whole, are separately accumulated and allocated to each business unit in the normal course of business.

According to Samsung, the Department has departed from its company-wide G&A calculation methodology in cases, like here, where its normal methodology resulted in significant distortions. As support for this assertion, Samsung cites Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Taiwan, 64 FR 30592, 31616 (June 8, 1999) (SSSSC from Taiwan); Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from South Africa, 50 FR 22550, 22556 (May 8, 1995) (Furfuryl Alcohol from South Africa); and Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile, 63 FR 31411, 31434 (June 9, 1998) (Salmon from Chile).

Nonetheless, Samsung argues that, if the Department relies on Samsung's company-wide financial statements as a whole for purposes of calculating its G&A expenses, it should rely on the Samsung-wide G&A ratio it submitted on October 14, 2011, rather than the G&A ratio the Department calculated in the preliminary determination.

The petitioner claims that, because the cross-fertilization of R&D, technologies, and markets for Samsung's eight businesses is substantial, the G&A expenses incurred by each business must also be cross-fertilized. Moreover, Samsung's company-wide adopted goals of eliminating polyvinyl chloride and brominated flame retardants from new models of all its products, as well as the company's efforts in reducing greenhouse gas emissions, provide further evidence of company-wide coordination which results in G&A expenses that benefit the company as a whole. Therefore, the petitioner maintains that the Department should continue to calculate Samsung's G&A expense ratio in the same manner as in the preliminary determination.

#### Department's Position:

We have not relied on SEC's G&A expense ratio that we calculated for the Preliminary Determination, as suggested by the petitioner, because that calculation was based on an allocation between SEC's SG&A rather than the segregation of selling expenses from G&A expenses as

recorded in SEC's normal books and records. Selling expenses are not included in the Department's calculation of a company's G&A expense ratio in order to avoid double-counting of the selling expenses. As per the Department's request, Samsung submitted the calculation of SEC's unconsolidated company-wide G&A expenses on October 14, 2011, which reflected the segregation of selling expenses from G&A expenses. However, that response was not received in time for the Department to use the information for the Preliminary Determination. Because the information received in Samsung's October 14, 2011, submission is based on SEC's normal books and records and has been verified by the Department (see Samsung Korea Cost Verification report at 41), we relied on the October 14, 2011, calculation of SEC's G&A expense ratio for the final determination.

Section 773(b)(3)(B) of the Act states that, for purposes of calculating COP, the Department shall include "an amount for selling, general and administrative expenses based on actual data pertaining to the production and sales of the foreign like product by the exporter in question." Because there is no definition in the Act of what a G&A expense is or how the G&A expense rate should be calculated, the Department has developed a reasonable, consistent and predictable practice for calculating and allocating G&A expenses. This method is to calculate the rate based on the company-wide G&A costs divided by the company-wide cost of sales as reported in the respondent's audited financial statements and not on a consolidated, divisional, or product-specific basis. See e.g., Softwood Lumber from Canada at Comment 23. In calculating the G&A expense ratio, the Department normally includes certain expenses and revenues that relate to the general operations of the company as a whole and to the accounting period, as opposed to including only those expenses that directly relate to the production of the merchandise. The CIT has agreed with the Department that G&A expenses are those expenses which relate to the general operations of the company as a whole rather than to the production process. See U.S. Steel Group, et al. v. United States, 998 F. Supp 1151, 1154 (C.I.T. 1998) (citing Rautaruukki Oy v. United States, 19 C.I.T. 438, 444 (1995)).

If the Department identifies expenses that are directly related to a particular production process or product, we normally and more appropriately consider those expenses to be manufacturing costs. By contrast, G&A expenses by their nature are indirect expenses incurred by the company as a whole, and are not directly related to a process or product. See Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 64 FR 24329, 24354 (May 6, 1999), and accompanying Issues and Decision Memorandum at Comment 25.

The expenses in question in this case are all treated as G&A costs in Samsung's audited financial statements, and there is no evidence on the record to support the conclusion that they are anything other than general in nature. Samsung claims that each business operates independently and maintains dedicated staff and, as such, can directly trace the G&A costs to each business. This claim, however, is contradicted by the fact that the majority of Digital Appliance business'

administrative costs, which Samsung claims were attributable specifically to the Digital Appliance business, were allocated general costs.<sup>100</sup>

Using our normal methodology of allocating company-wide G&A costs based on the company-wide cost of sales recognizes the relative significance of each business unit in relation to the others. Since the Digital Appliance business' cost of sales is significantly less than that of the Semiconductor or Telecommunications businesses, the amount of G&A costs attributed to the Semiconductor or Telecommunications businesses greatly exceed the G&A expenses allocated to the Digital Appliance business. As such, Samsung's concern that its Semiconductor and Telecommunications businesses require more administrative resources is addressed under the Department's normal company-wide cost of sales allocation methodology.

Samsung argues that, because the G&A expenses assigned to a business are unique to that business, it would be distortive to rely on Samsung's unconsolidated financial statements to calculate its G&A rate. As support for this argument, Samsung points to certain fees examined by the Department during the cost verification. We disagree with Samsung that the fees in question demonstrate that Samsung's G&A expenses directly relate to a particular product and are not general in nature. Due to the proprietary nature of this discussion, we have addressed this issue in detail in the March 16, 2012, Memorandum to the File, entitled "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc." (Samsung Korea Final Cost Calculation Memo) at page 2.

Samsung also asserts that, because the production activities of the Digital Appliance business are primarily performed by external entities (e.g., Samsung Gwangju), the G&A functions and related expenses for the Digital Appliance business are relatively low in comparison to other businesses that have full production departments. We find this argument unpersuasive. In its description of the production of the merchandise under consideration in its response, Samsung stated that it performs "functions other than physical assembly, including administrative functions."<sup>101</sup> Samsung also stated in that submission that it incurred production management, quality assurance, and mold costs related to the merchandise under consideration and reported those costs in its cost data file.<sup>102</sup> By Samsung's own admission, SEC is involved in the production of the digital appliances. Samsung has failed, however, to show how the record evidence demonstrates that the level of its involvement in production directly impacts the company's G&A functions or that the G&A functions related to the Digital Appliance business are different in nature from the functions performed by the Telecommunications or Semiconductor businesses. Moreover, under the Department's methodology, the denominator used to compute a company's G&A ratio normally includes the cost of merchandise purchased for resale (i.e. merchandise in which the respondent company has no involvement in production). As part of its normal operations, a company may

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<sup>100</sup> See Samsung Korea Cost Verification report at Cost Verification Exhibit 17.

<sup>101</sup> See Samsung's July 22, 2011, submission at 1.

<sup>102</sup> Id. at 2.

purchase merchandise for resale to satisfy customer needs. As such, the Department considers such purchases for resale and the corresponding expenses to be related to the general operations of the company and includes those expenses in a respondent's G&A rate calculation even though the respondent did not produce the merchandise.<sup>103</sup>

We disagree with Samsung that the Department's findings in SSSSC from Taiwan, Furfuryl Alcohol from South Africa, and Salmon from Chile are directly applicable to the instant case. In SSSSC from Taiwan, the issue was whether the respondent included the G&A expenses of the parent company in the calculation of the G&A ratio. In this case, Samsung treated SEC and Samsung Gwangju as a collapsed entity in reporting its costs of production. Because SEC's G&A expenses were included in Samsung's reported COP, we find Samsung's reliance on this case to be misplaced. In Furfuryl Alcohol from South Africa, cited in Salmon from Chile, the respondent's G&A rate was calculated based on the sum of the overall company G&A expenses, consistent with the Department's normal methodology, and also included certain chemical operations-specific expenses. Here, Samsung has not provided record evidence to prove that certain G&A expenses incurred by the company were specific to only the Telecommunications and Semiconductor business units. As a result, we have treated those expenses as general expenses and have based Samsung's G&A rate derived from Samsung's company-wide financial statements.

Comment 36: Samsung's Scrap Sales

The bottom mount refrigerators sold by Samsung during the POI were produced by Samsung Gwangju. In the preliminary determination, we reclassified the offset reported for Samsung Gwangju's sales of scrap from Samsung Gwangju's G&A expenses to the COM. See Preliminary Determination, 76 FR at 67684. According to Samsung, this reclassification contained the following two errors: 1) the Department calculated the offset ratio as scrap income divided by COM, but it applied the ratio to the product-specific material costs rather than the product-specific COM; and 2) when calculating the adjustment to G&A, the Department omitted a negative sign and, as a result, overstated Samsung Gwangju's G&A expenses. Therefore, Samsung maintains that the Department should correct these errors in its calculations for the final determination.

The petitioner did not comment on this issue.

Department's Position:

We agree with Samsung that, because the denominator of the Department's scrap offset ratio was calculated using the COM, the ratio should be applied to the product-specific COM rather than the product-specific direct material costs. We also agree with Samsung that the Department omitted a negative sign in its calculations of Samsung Gwangju's G&A expense ratio in the preliminary determination. As a result, we have made the necessary corrections to the Department's calculations for the final determination. See Samsung Korea Final Cost Memo for further detail.

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<sup>103</sup> See e.g., Metal Calendar Slides from Japan: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances, 71 FR 36063 (June 23, 2006) and accompanying Issues and Decision Memorandum at Comment 10.

Comment 37: Samsung's Financing Costs

The petitioner argues that the Department should limit Samsung's interest income offset to short-term interest income, in accordance with its practice. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Italy, 64 FR 30750 (June 8, 1999), and accompanying Issues and Decision Memorandum at Comment 24. Specifically, the petitioner claims that Samsung's offset should be limited to the relative percentage of short-term financial assets to total financial assets, as reflected on Samsung's consolidated balance sheet.

Samsung maintains that all of the company's interest-bearing assets are short term in nature as shown on the company's consolidated financial statements. Samsung argues that, because there is no record evidence that the receivables shown on Samsung's consolidated balance sheet generated income, there is no justification for reducing Samsung's short-term interest income offset based on the value of those receivables. However, if the Department determines that an analysis of Samsung's balance sheet is relevant, Samsung asserts the Department must follow its past practice. As an example of this practice, Samsung cites Notice of Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils from the United Kingdom, 64 FR 30688, 30710 (June 8, 1999), where the Department compared the respondent's liquid assets to its total assets and assumed that the ratio of liquid assets to total assets represented the ratio of short-term interest income to total interest income because liquid assets by their nature are short-term assets. Samsung asserts that such an analysis shows that a reduction to its reported interest income offset is not warranted.

Department's Position:

We agree with the petitioner that Samsung's reported interest income offset should be revised. However, the issue in this case is not whether the interest income was generated from short-term interest bearing assets. The issue is whether any of the interest income was generated by accounts receivable. Consistent with Samsung's claims, the record evidence shows that all of the consolidated interest income in question was generated by short-term interest bearing assets.<sup>104</sup> Footnote 26<sup>105</sup> accompanying the consolidated financial statements shows that interest income was generated from two categories of short-term assets, "loans and receivables" and "available-for-sale" assets.

Footnote 26 does not further identify the assets which generated the interest income from "loans and receivable." Therefore, we looked to SEC's short-term interest bearing assets (other than the available-for-sale assets) shown on the company's consolidated balance sheet to determine

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<sup>104</sup> See SEC's fiscal year 2010 consolidated balance sheet (June 27, 2011, submission, Exhibit A-14B at 2) that shows that none of SEC's long-term assets are interest bearing assets. Therefore, all of the interest income must have been generated by SEC's short-term interest bearing assets.

<sup>105</sup> See Samsung's June 27, 2011, submission, Exhibit A-14B at 68.



whether any of the interest income should be excluded from SEC's reported offset. SEC's short-term interest bearing assets include cash and cash equivalents, short-term financial instruments, and accounts receivables. We disagree with Samsung's argument that there is no record evidence that the interest income was generated by SEC's receivables. Footnote 26 specifically refers to the interest income as generated from loans and "receivables."

The Department disallows interest income related to accounts receivable as an offset to financial expenses because such interest income is sales-related. Moreover, Samsung reported the interest income generated from accounts receivable as an adjustment to the sales prices in its sales data file.<sup>106</sup> Therefore, consistent with past practice<sup>107</sup> and to avoid double-counting of the interest income, we have excluded that portion of SEC's interest income offset that we deem related to accounts receivable. We determined the value of the interest income related to accounts receivables by first calculating the ratio of SEC's value of trade and accounts receivables, as reflected on December 31, 2010, by the sum of the values of cash and cash equivalents, short-term financial instruments, and trade and other receivables also reflected on that date. We then applied that ratio against the total interest income generated by loans and receivables shown in footnote 26 to determine the value of the interest income to be excluded from SEC's reported interest income offset. See Samsung Korea Final Cost Memo for further detail.

We have also excluded a portion of SEC's interest income offset for interest income generated from available-for-sale assets. Footnote 7 accompanying SEC's consolidated financial statements<sup>108</sup> shows that SEC's available-for-sale assets are comprised of short-term and long-term assets. The short-term available-for-sale assets include bonds, time-deposits, certificates of deposit, call loans and other assets. The Department's practice, which has been upheld by the CIT,<sup>109</sup> is to exclude interest income generated by investments other than short-term investments of working capital. Bonds are typically investments of funds other than short-term working capital. Because the record evidence does not prove otherwise, we have excluded the interest income related to the bonds from SEC's interest income offset.

We have also excluded the interest income related to the long-term available-for-sale assets. To calculate the interest income offset generated from the permissible short-term available-for-sale assets, we calculated the ratio of the value of those assets, as reflected on December 31, 2010, to

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<sup>106</sup> See Samsung's July 22, 2011, response at 30.

<sup>107</sup> See Notice of Final Determination of Sales at Less than Fair Value: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, 64 FR 38756, 38791 (July 19, 1999) in which the Department stated "[w]e disagree with USIMINAS that interest income earned on accounts receivable . . . should be included as an offset to interest expenses. Interest charged to customers relating to specific sales {is} more appropriately treated as sales revenue."

<sup>108</sup> See Samsung's June 27, 2011, submission Exhibit 14B at 40.

<sup>109</sup> See NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, and NTN Corporation v. United States, 905 F. Supp. 1083 (C.I.T. 1995).

the total value of SEC's available-for-sale assets and applied that ratio to the total interest income earned from available-for-sale assets. See Samsung Korea Final Cost Memo for further detail.

Comment 38: Samsung's Materials Purchased from Affiliated Parties

Samsung asserts that the Department should use its verified SG&A ratios (submitted after the preliminary determination) to revise its calculations made in the preliminary determination of the COP of Samsung's affiliated party transactions. Samsung provides its resulting proposed adjustment factor in Exhibit 7 of its case brief.

The petitioner alleges that Samsung's proposed adjustment factor is not reliable because it differs from the Department's calculations in the Samsung Korea Cost Verification report. Therefore, the petitioner maintains that the Department should continue to apply the adjustment factor calculated in the preliminary determination to Samsung.

Department's Position:

We agree with Samsung in part and have used the verified SG&A ratios submitted subsequent to the preliminary determination<sup>110</sup> to calculate the COP of the affiliated party transactions in question. We have based the resulting adjustment factor on the revised COP of all materials obtained from the affiliated party (see Samsung Korea Final Cost Calculation Memo).

We disagree with the petitioner that, because the adjustment factor presented in the verification report is different from the adjustment factor in Samsung's case brief, Samsung's adjustment factor and SG&A ratios cannot be relied upon. The adjustment factor shown in the cost verification report,<sup>111</sup> was a sample adjustment factor calculation for one type of material purchased from an affiliated party. Samsung's adjustment factor, calculated in the same manner as the Department's adjustment factor in the preliminary determination, is based on all of the materials purchased from the affiliated party during the POI.

However, we did not use Samsung's adjustment factor presented in Exhibit 7 of its case brief for the final determination because that adjustment was calculated using Samsung's reported financial expense ratio. As discussed above, the Department revised Samsung's financial expense ratio to exclude certain interest income.

Comment 39: Samsung's R&D Expenses

Samsung reported its R&D expenses incurred by SEC's Digital Appliance business. In the preliminary determination, we accepted these costs as reported.

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<sup>110</sup> See Samsung's November 2, 2011, submission at Exhibits 6 and 7.

<sup>111</sup> See Samsung Korea Cost Verification report at page 36.

The petitioner argues that is appropriate to calculate SEC's R&D ratio on a company-wide basis, rather than a business-specific basis (i.e., SEC's Digital Appliance business). The petitioner argues that the R&D efforts that support refrigerators are captured by other divisions such as SEC's semiconductor business. As a result of the cross-fertilization of such R&D efforts, the petitioner concludes that the appropriate basis for calculating SEC's R&D ratio is SEC's unconsolidated income statement. The petitioner points to DRAMs I at Comment 10 and DRAMs II at Comment 3 as evidence of the Department's practice in calculating a company-wide R&D ratio on the basis of cross-fertilization. The petitioner also asserts that the Department should increase the numerator of SEC's unconsolidated R&D expenses to include the increase to SEC's capitalized development expenses intangible asset account as reflected on its unconsolidated balance sheet.

The petitioner objects to Samsung's proposed calculation of its R&D ratio (discussed below) because the cost of sales information of Samsung Electronics Poland Manufacturing (SEPM), Samsung Electronics Malaysia (SEMA), Samsung India Electronics Limited (SIEL), and Samsung Suzhou Electronics Co. (SSEC) is not on the record of this proceeding. Therefore, the petitioner argues that the Department should calculate a uniform R&D ratio to be applied to Samsung's costs in this proceeding (and to Samsung Electronics Mexico's (SEM's) costs in the companion Mexican proceeding) using the sum of the R&D expenses incurred by SEC and SEM to include capitalized costs, divided by the sum of the cost of sales of the two entities.

Samsung asserts that if the Department continues to find it appropriate to allocate a portion of SEC's Digital Appliance business' R&D activities to SEM (see Preliminary Determination Mexico full cite), the Department should calculate the Digital Appliance business' R&D ratio by dividing the total R&D expenses incurred by the Digital Appliance business by the consolidated cost of sales of all entities included in that division (i.e., SEM, Samsung Gwangju, SEPM, SEMA, SIEL, and SSEC). Samsung states that the Department should then apply this ratio to Samsung's and SEM's respective per-unit COMs to determine the per-unit R&D expenses applicable to each entity.

Samsung also objects to the petitioner's argument that all of Samsung's R&D activities benefit all products equally. Samsung contends that the semiconductor cases cited by the petitioner relate to the allocation of R&D expenses on a semiconductor-wide basis rather than a product-specific basis (see, e.g., DRAMs I and DRAMs II). As such, Samsung concludes that the petitioner's reliance on these cases is misplaced because they do not relate to the issue of allocating semiconductor R&D expenses to non-semiconductor products or allocating R&D expenses incurred on non-subject merchandise to subject merchandise. Samsung also maintains that the difference in R&D activities among its business units is apparent. According to Samsung, the Digital Appliance division is not like its visual display, digital imaging, semiconductors, and telecommunications divisions, where new large-scale developments, cutting-edge technologies, and new products require large R&D investments. Furthermore, Samsung points out that the technologies of the visual display, digital imaging, and telecommunications divisions are unrelated to the merchandise under consideration. Samsung argues that semiconductors, for example, account for less than 0.3 percent of the total COM of

refrigerators, which shows that the cross-fertilization of semiconductor technology is insignificant to the total COM of the merchandise under consideration. As evidence to support its arguments, Samsung notes that the petitioner's own R&D ratio for appliances is insignificant in comparison to its total costs (i.e., R&D expenses are 3.30 percent of Whirlpool's costs).<sup>112</sup>

Samsung also disagrees with the petitioner's contention that it did not include certain capitalized R&D expenses in its reported R&D expenses. Samsung claims that it reported to the Department in its July 22, 2011, section D submission (at page 14) and September 27, 2011, submission (at page 4) that the company did not capitalize any R&D expenses during fiscal year 2010. Samsung also maintains that the Department verified that the Digital Appliance business did not capitalize R&D expenses in fiscal year 2010.

#### Department's Position:

We agree with Samsung and have revised Samsung's R&D ratio to reflect the total R&D expenses incurred by the Digital Appliance business divided by the consolidated cost of sales of all entities included in that business. We have applied this ratio to Samsung's and SEM's respective per-unit COM's to determine the respective per-unit R&D expenses (see Samsung Korea Final Cost Memo).

Section 773(f)(1)(A) of the Act does not explicitly address the treatment of R&D expenses in the calculation of a producer's/exporter's cost of production. The Department, over time, has established a practice of relying on R&D costs as maintained in a company's normal books and records<sup>113</sup> except in those instances where the record evidence shows that the normal records unreasonably allocate costs.<sup>114</sup>

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<sup>112</sup> See Samsung's submission dated October 20, 2011, at page 2.

<sup>113</sup> See Chlorinated Isocyanurates From Spain: Final Results of Antidumping Duty Administrative Review, 72 FR 64194 (Nov. 15, 2007), and accompanying Issues and Decision Memorandum at Comment 5, where the Department stated, "[i]n determining if expenses associated with R&D activities should be included in the reported costs, we look at whether these expenses relate specifically to individual products or are general in nature. Those expenses that can be differentiated by product are allocable to the cost of manufacturing of that product."

<sup>114</sup> See e.g., Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 61 FR 20216, 20218 (May 6, 1996), where the Department found that certain R&D costs could not be included in the COP of the subject merchandise because there was no record evidence of R&D cross-fertilization. In that case, the Department cited Micron Tech. v. United States, 832, 893 F. Supp. 21 (CIT 1995), affirmed, 117 F.3d 1386 (Fed. Cir. 1997), where the CIT held that expenses associated with R&D not directly related to the subject merchandise, and which do not provide an intrinsic benefit to the subject merchandise, should not be included in the COP. As a result, the court directed the Department to amend its calculation in the Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit or Above from the People's Republic of Korea, 58 FR 15467, 15472 (Mar. 23, 1993).

In the instant case, Samsung in its normal books and records assigns the R&D expenses specific to certain products to the business which manufactures those products. For example, R&D expenses incurred by Samsung related to its digital appliances (e.g., bottom-mount refrigerators, washing machines, and vacuum cleaners) are assigned to Samsung's Digital Appliance business<sup>115</sup> and are reflected in the income statement of that business.<sup>116</sup> Likewise, R&D expenses incurred by Samsung that are specific to other products (e.g., telephones and cameras) are allocated to the businesses that manufacture those products (i.e. telecommunications and digital imaging businesses) and are reflected in the income statements of those businesses.<sup>117</sup> As discussed at verification, Samsung does incur certain R&D expenses that are not product-specific.<sup>118</sup> In the normal course of business, Samsung allocates those general R&D expenses to all of its businesses.<sup>119</sup> In reporting its R&D expenses to the Department, Samsung relied on its normal books and records and calculated an R&D ratio for the Digital Appliance business. The R&D expenses included in the numerator of this ratio, as tested by the Department at verification,<sup>120</sup> include the R&D expenses specific to the Digital Appliance business as well as an allocated amount of the general R&D.

The petitioner argues that there is evidence of cross-fertilization in the instant case because each bottom mount refrigerator contains a micro-processor. As such, the petitioner concludes that all R&D expenses incurred by SEC, including the R&D specific to SEC's other businesses (e.g., telecommunications and digital imaging businesses), should be allocated equally among all the products produced by SEC.

As discussed in Comment 18, while the Department has in the past calculated a more expansive R&D expense rate such as in DRAMs from Korea I and DRAMs from Korea II, the petitioner's cites are unpersuasive as the courts have subsequently struck down the Department's theory of cross-fertilization in later segments of those proceedings.<sup>121</sup> See e.g., Hyundai Electronics v. United States 395 F. Supp. 2nd 1231 (CIT 2005) (Hyundai) and Hynix Semiconductor Inc., v. United States 424 F.3d 1363 (Fed. Cir. 2005) (Hynix).

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<sup>115</sup> See Samsung's November 2, 2011, submission at Exhibit 5 where Samsung identified those subsidiaries as Samsung Gwangju, SEM, SEPM, SEMA, SIEL, Thai Samsung Electronics (TSE), and SSEC.

<sup>116</sup> See e.g., Samsung Korea Cost Verification report at Verification Exhibit 5.

<sup>117</sup> Id.

<sup>118</sup> See id. Samsung Korea Cost Verification report at 37-38.

<sup>119</sup> See id. at Verification Exhibit 16.

<sup>120</sup> Id. at 37-40.

<sup>121</sup> With regard to antidumping procedures, cross-fertilization refers to the theory that R&D activities related to non-subject merchandise may also benefit or stimulate the development of subject merchandise.

In Hynix, the CAFC held that the record failed to provide substantial evidence of cross-fertilization, and, as a result, affirmed the respondent's normal books and records with regard to the allocation of R&D expenses. In reaching its conclusion, the CAFC held that simply citing a list of projects without proof of the underlying activities was paltry evidence of cross-fertilization. See Hynix 424 F. 3d at 1371. A review of Hyundai provides additional guidance on the evidentiary hurdle that must be cleared to disregard a company's normal books to reallocate costs based on the theory of cross-fertilization. The CIT stipulated that specific evidence must be provided to show how non-subject merchandise R&D activities directly impacted the development of subject merchandise. See Hyundai 395 F. Supp. 2d, at 1239. The CIT found that a mere recitation of a company's R&D projects, even R&D projects that list subject merchandise in the context of non-subject R&D, failed to provide substantial evidence of cross-fertilization. Id. at 1238-1239. Specifically, the CIT held that "simply because the word 'DRAM' is in a project does not provide substantial evidence that the R&D actually relates to DRAM development." Id. Furthermore, the CIT found that the introduction of subject merchandise technology into the design of non-subject merchandise still failed to provide "specific explanation of how these various advancements directly impact DRAM R&D." Id. Hence, while the court's decision suggests that cross-fertilization may exist in certain industries, the burden of proof is high. Upon failing to reach this burden of proof in the DRAMs cases, the Department was directed to rely on the companies' product-specific R&D expenses. See Hynix 424 F. 3d at 1371.

Consequently, the Department's subsequent practice has been to allocate R&D expenses to products consistent with the company's normal books (i.e., calculating product and/or division-specific R&D costs as they are calculated in the company's normal books and records), which in accordance with section 773(f)(1)(A) of the Act, is conditioned upon whether the company's books are in compliance with home country GAAP and reasonably reflect the costs associated with producing the merchandise under consideration.<sup>122</sup>

Thus, contrary to the petitioner's claims, the Department does not have a long-established practice of calculating a company-wide R&D expense rate, nor do we find that this case presents clear evidence of cross-fertilization. Rather, we note that the product lines under SEC's company-wide umbrella fall under a diverse range of production and R&D activities including, for example, mobile communications and semiconductors. While the petitioner concludes that R&D expenses incurred specifically related to mobile telephones, semiconductors, or cameras (i.e. products manufactured by SEC's telecommunications, semiconductor, and digital imaging businesses) should be allocated to the subject merchandise, there is no compelling evidence that technology advances in the mobile communications arena, for example, directly impacted the company's refrigerator developments. Thus, we do not find that the petitioner's arguments

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<sup>122</sup> See e.g., Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review, 74 FR 50774, (October 1, 2009), Issues and Decision Memorandum, at Comment 3, where the Department stated that the respondent "records its R&D expense specifically by division. Based on this information, we were able to verify the exact amount of R&D expense related to water treatment products (i.e., the merchandise under consideration). Accordingly, we allocated this amount to all water treatment products in accordance with our practice)."

provide substantial evidence that SEC's R&D activities for its other product lines (e.g., mobile communications, etc.) directly impacted SEC's product development with regard to bottom mount refrigerators.

Absent any other persuasive record evidence that the R&D activities of SEC's other businesses impart intrinsic value to bottom mount refrigerators, we have determined that the total value of the R&D expenses of SEC's other business units should not be included in the calculation of SEC's COP for bottom mount refrigerators.<sup>123</sup> Therefore, we have relied on the R&D expenses incurred by SEC's Digital Appliance business as the basis for SEC's R&D ratio (see Samsung Final Cost Memo at pages 3 and 4). We calculated the R&D ratio based on SEC's Digital Appliance business' total R&D expenses divided by the consolidated cost of sales of all the production entities within that business (i.e. Samsung Gwangju, SEM, SEPM, SEMA, SIEL, TSE, and SSEC). We used consolidated cost of sales because the R&D functions for the Samsung group as a whole are for the most part centrally-positioned with SEC. As such, the fact pattern of the current case supports the position that SEC's Digital Appliance business' related R&D activities benefitted all of its subsidiaries that also produced and sold its digital appliance products. Contrary to the petitioner's assertion, the cost of sales information for these subsidiaries was submitted by Samsung in its November 2, 2011, submission<sup>124</sup> and verified by the Department.<sup>125</sup>

We have not revised the numerator of SEC's R&D expense ratio to include an adjustment for the increase to SEC's capitalized development expenses as suggested by the petitioner. The petitioner points to footnote 12 accompanying SEC's balance sheet<sup>126</sup> as evidence that SEC capitalized certain R&D costs during the POI. That same footnote, however, shows that the increase in SEC's intangible assets account was related to intellectual property rights, development, and other expenses and that SEC amortized these capitalized costs during the POI. Furthermore, the footnote shows that a portion of the intangible assets' amortization was allocated to R&D expenses for the POI. Amortization expenses are included in the R&D expenses of each business unit, as appropriate.<sup>127</sup> Because the record evidence demonstrates that amortization of the R&D expenses associated with intangible assets related to the Digital Appliance business has already been included in the R&D expenses of the Digital Appliance business, we have determined that the petitioner's suggested adjustment is not warranted.

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<sup>123</sup> We note that under the Department's methodology, the R&D activities related to semiconductors would be assigned to the micro-processor and passed on to the down-stream product (i.e. the bottom mount refrigerator). As such, the COP of the bottom mount refrigerator would include the full cost of the micro-processor.

<sup>124</sup> See Exhibit 5.

<sup>125</sup> See Samsung Korea Cost Verification report at 38-39.

<sup>126</sup> See the petitioner's case brief at footnote 50 and Samsung's unconsolidated financial statements in the June 27, 2011, submission, Exhibit A-14 at 40.

<sup>127</sup> See e.g., Samsung Korea Cost Verification report, Exhibit 16 at 2.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination in the investigation and the final weighted-average dumping margins in the Federal Register.

Agree ✓

Disagree \_\_\_\_\_

Paul Piquado  
Paul Piquado  
Assistant Secretary  
for Import Administration

16 MARCH 2012  
(Date)