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

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Fresh Garlic from the People's Republic of China: Issues and
Decision Memorandum for the Final Results of the Fourteenth
Antidumping Duty Administrative Review

SUMMARY

We have analyzed the case briefs submitted by Jinan Yipin Corporation Ltd. (Jinan Yipin), Shenzhen Greening Trading Company Ltd. (Shenzhen Greening), Qingdao Xintianfeng Foods Co., Ltd. (QXF) and Weifang Hongqiao International Logistic Co., Ltd. (Hongqiao), and Interested Parties¹, and rebuttal brief by Petitioners,² in the antidumping duty administrative review (AR) of fresh garlic from the PRC. The Department of Commerce (Department) published the preliminary results for this review on December 8, 2009. See Fresh Garlic From the People's Republic of China: Preliminary Results of, and Intent To Rescind, in Part, the Antidumping Duty Administrative Review, 74 FR 64677 (December 8, 2009) (Preliminary Results). The period of review (POR) is November 1, 2007 through October 31, 2008 (POR 14). Following the Preliminary Results and analysis of the comments received, we have made no changes to the Preliminary Results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments by parties:

¹ Anqiu Friend Food Co., Ltd., Anqiu Haoshun Trade Co., Ltd., Jinxiang Dongyun Freezing Storage Co., Ltd., Juye Homestead Fruits and Vegetables Co., Ltd., Qingdao Tiantaixing Foods Co., Ltd., Qufu Dongbao Import & Export Trade Co., Ltd., Shandong Chenhe International Trading Co., Ltd., Shandong Longtai Fruits and Vegetables Co., Ltd., Shenzhen Fanhui Import and Export Co., Ltd., Shenzhen Sunny Import & Export Co., Ltd. and Weifang Shennong Foodstuff Co., Ltd., (collectively Interested Parties).

² The Fresh Garlic Producers Association: Christopher Ranch L.L.C.; The Garlic Company; Valley Garlic; and Vessey and Company, Inc. (Petitioners).

General Issues:

- Issue 1: Whether the Petitioners' Request for Review of Jinan Yipin was Deficient**
- Issue 2: Whether the Department Should Rescind its Administrative Review with Respect to Jinan Yipin and Shenzhen Greening**
- Issue 3: Whether the Requirement That a Party Timely Certify No-Shipments is Unfair and Arbitrary**
- Issue 4: Application of PRC-Wide Rate to Jinan Yipin and Shenzhen Greening**
- Issue 5: Rescission of Shenzhen Xinboda**
- Issue 6: Calculation of the Separate Rate Average and Per-Unit Rate**

Discussion of the Issues

Issue 1: Whether the Petitioners' Request for Review of Jinan Yipin was Deficient

On December 1, 2008,³ Petitioners filed a review request for 63 companies, including Jinan Yipin. On December 24, 2008, the Department published an initiation notice for POR 14, listing Jinan Yipin as a respondent in this review. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 73 FR 79055 (December 24, 2008). Jinan Yipin argues that the Petitioners' failed to make a reasonable attempt to properly serve Jinan Yipin with its request for review. Jinan Yipin states that the address that Petitioner provided in its request for review was more than seven years out of date, and that Petitioner should have been aware of this fact, as Jinan Yipin's filings in several earlier administrative reviews identified the company's current address. Further, Jinan Yipin contends that Petitioner incorrectly listed Grunfeld, Desiderio, Lebowitz, Silverman & Kladstadt LLP (Grunfeld) as the firm last representing Jinan Yipin. Jinan Yipin explains that during the last review in which it participated, it appeared pro se. Accordingly, Jinan Yipin argues that Petitioners' review request with regard to Jinan Yipin is deficient, as Petitioners did not make a "reasonable attempt" to serve the review request on Jinan Yipin, as required by section 351.303(f)(3)(ii) of the Department's regulations.

In addition, Jinan Yipin argues that the use of inaccurate and outdated service addresses cannot be deemed reasonable when the serving party has received actual notice of the subsequent changes. Moreover, Jinan Yipin argues it is the Department's established practice to rescind reviews in which there is inadequate information about the respondent's address, or Petitioner is unable to provide a proper address, citing Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082, 65083 (November 7, 2006) (Rebar from Turkey), Certain Frozen Warmwater Shrimp from Brazil; Partial Rescission of Antidumping Duty Administrative Review, 72 FR 48616, (August 24, 2007) (Shrimp from Brazil); and Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 FR 12088 (March 6, 2008) (Shrimp from Thailand).

³ We note that the deadline for requesting an administrative review for this POR was November 30, 2008, a Sunday. When a deadline falls on a weekend, the Department's practice is to use the next business day as the appropriate deadline. See Notice of Clarification: Application of Next Business Day Rule for Administrative Determination Deadlines Pursuant to the Act, 70 FR 24533 (May 10, 2005).

Moreover, Jinan Yipin argues that Petitioners failed to file their review request for Jinan Yipin pursuant to 351.213(b)(1) of the Department's regulations, which requires that a domestic interested party requesting a review of specific individual exporters or producers, must state why the requesting party desires the Secretary to review those particular exporters or producers. Jinan Yipin contends that while the regulation does not specify what reasons are sufficient to satisfy this requirement, the reason that is provided must have some validity given the particular circumstances and record information. Jinan Yipin maintains that the reason offered by Petitioners in its review request was Petitioners' stated "belief that the companies identified below may have produced and/or exported fresh garlic shipped to the United States during the period of review." Jinan Yipin argues that statement is inadequate, because it fails to indicate the basis for Petitioners' belief that the particular companies specified in its request exported subject merchandise during the POR, the regulation requires that the stated reasons be specific to the particular producers and exporters named. Thus, Jinan Yipin argues, there is no record evidence showing that Petitioners' alleged belief that Jinan Yipin made shipments of subject merchandise during the POR was plausible. Therefore, Jinan Yipin argues the Department should rescind the administrative review with regard to Jinan Yipin.

The Petitioners argue that, while Jinan Yipin claims that they sent their review request to an outdated address, Jinan Yipin has never affirmatively claimed to have not received that copy. Furthermore, the Petitioners note that Jinan Yipin has not claimed that it failed to learn of its inclusion in the administrative review as a company subject to review in the Initiation Notice, which was published in the Federal Register. As such, Petitioners argue that the Department should not rescind the review of Jinan Yipin on these grounds.

The Petitioners also contend that Jinan Yipin's argument regarding the timing of its legal representation can be easily rebutted. However, placing this rebuttal information on the record is not possible, because it would be considered new factual information and cannot be submitted without the Department's permission.

Department's Position: The Department properly initiated an AR of Jinan Yipin, and 62 other companies, based upon Petitioners' adequate and timely request for an AR of these companies. As Jinan Yipin notes, 19 CFR 351.213(b)(1) requires that a domestic interested party requesting a review must state why it desires the Secretary to review those particular exporters or producers. In its request, Petitioners stated that Jinan Yipin exported subject merchandise in the past and actively participated in several prior segments of this proceeding. Therefore, it was reasonable for the Petitioners to rely on that history as a basis for claiming that Jinan Yipin may have exported subject merchandise during the POR. Thus, Petitioners' stated reason for requesting an AR of Jinan Yipin meets the requirements set forth in 19 CFR 351.213(b)(1).

The Department also finds that Petitioners made a reasonable attempt to serve Jinan Yipin with its request for review of Jinan Yipin. While the record of this AR indicates that the address that Petitioner used for Jinan Yipin was out of date, Petitioners also served Grunfeld with their request. The Department notes that the most recent chronological submission placed on the record of any administrative review under this order by Jinan Yipin, other than the instant review, was submitted by Grunfeld on April 22, 2008 (during the 10th administrative review). The pro se submission referred to by Jinan Yipin in its brief was submitted on January 22, 2008.

Thus, the Department finds that Petitioners had reasonable cause to believe that Jinan Yipin may still be represented by Grunfeld for the current review, and, therefore, service of the review request at the offices of Grunfeld was a reasonable attempt to serve Jinan Yipin.

Moreover, notwithstanding the issues raised with respect to service, Jinan Yipin has not demonstrated substantial prejudice by Petitioners' alleged failure to serve its request for review directly on Jinan Yipin. See e.g., PAM S.p.A. et al, v. United States, 463 F.3d 1345, 1348-49 (Fed. Cir. 2006). The record of this AR indicates that Petitioners filed their request for review of Jinan Yipin with the Department on December 1, 2008. That is the earliest date that Jinan Yipin could reasonably be expected to have received service of this document by Petitioners. The Initiation Notice that named Jinan Yipin was published in the Federal Register on December 24, 2008, at which time Jinan Yipin received public notice of the review. Therefore, at most, Jinan Yipin was deprived of 23 days of notice that Petitioner had requested a review for the instant POR.

We note that that Jinan Yipin has argued that Rebar from Turkey, Shrimp from Brazil, and Shrimp from Thailand demonstrate that the Department's established practice is to rescind reviews in which there is inadequate information about the respondent's address, or Petitioner is unable to provide a proper address. However, in each of the three cases cited by Jinan Yipin, the "undeliverable" address prevented the Department from notifying the respondent of its requirements should it wish to participate in the review. That is not the case here. The Initiation Notice clearly stated that Jinan Yipin was subject to this administrative review, and also provided detailed instructions for Jinan Yipin to follow in the event it wanted to participate further in the review process. See Initiation Notice, at the "Notice of No Sales" and "Separate Rates" sections of the notice. The Department notes that in Huaiyang Hongda Dehydrated Vegetable Co. v. United States, 28 C.I.T. 1944, 1949 (Ct. Int'l Trade 2004) (Huaiyang Hongda), the court found that "prior involvement in antidumping duty proceedings concerning the same subject merchandise gives rise, a fortiori, to an interest in monitoring for publication of the annual notice of opportunity to request review." Therefore, Jinan Yipin clearly knew, or should have known, to monitor the Initiation Notice covering garlic reviews to determine whether a request for review of Jinan Yipin had been made for this POR. Further in Huaiyang Hongda, it was found that "publication in the Federal Register is sufficient to give notice of the contents of the document to a person subject to or affected by it." Id.

In Goldhofer Fahrzeugwerk GmbH & Co. v. United States, 885 F.2d 858 (Fed. Cir. 1989) (Goldhofer), the Federal Circuit concluded that a bulletin notice of liquidation alone satisfied minimum constitutional standards for due process because: 1) the form of notice did not rely on chance alone to attract the attention of the interested party; 2) the form of notice was designed to attract the attention of the interested party; and 3) the means of notice was reliable. Similar to the facts in Goldhofer, the Department's published Initiation Notice: 1) did not rely on chance alone to attract the attention of Jinan Yipin; 2) specifically listed Jinan Yipin and was, therefore, designed to attract the attention of Jinan Yipin and all other interested parties; and 3) was a reliable means of providing notice to Jinan Yipin of the Department's initiation of a review of Jinan Yipin and other named exporters and producers. The Federal Circuit further held that because in Goldhofer's case posting of a bulletin notice alone "was as certain to ensure actual notice" as mail notice, "mail notice was not constitutionally required." Id. at 863. Therefore, the

Initiation Notice was sufficient notice to Jinan Yipin. Thus, the Department finds that there is no cause to rescind Jinan Yipin's review due to Petitioners' alleged failure to serve its request for review directly on Jinan Yipin.

Issue 2: Whether the Department Should Rescind its Administrative Review with Respect to Jinan Yipin and Shenzhen Greening

Jinan Yipin and Shenzhen Greening each argue that the Department improperly applied the PRC-wide entity rate as adverse facts available (AFA) to it in the Preliminary Results. Rather, each company maintains that it is the Department's practice, pursuant to 19 CFR 351.213(d)(3), to rescind a review when the record indicates that a company had no shipments during the POR.

Jinan Yipin argues that U.S. Customs and Border Protection (CBP) data on the record of this review demonstrates that it had no shipments during the POR. See the February 11, 2009 letter to All Interested Parties: RE: 14th Administrative Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Re-Release of CBP Data for All Subject Merchandise Entries During the POR. Jinan Yipin notes that pursuant to 19 CFR 351.213(d)(3), the Department may rescind a review if it concludes with respect to a particular company that there were no entries, exports or sales of subject merchandise during the period of review. Jinan Yipin contends that the Department has a well established and consistent policy of rescinding a review at any point during the proceeding when the record demonstrates the producer or exporter had no reviewable entries during the POR, citing Carbazole Violet Pigment 23 from the People's Republic of China: Notice of Rescission of Antidumping Duty Administrative Review, 72 FR 71354, 71355 (December 17, 2007) (CVP 23) (rescinding a review requested by Trust Chem over 10 months after initiation after concluding that Trust Chem had no entries during the POR). In addition, Jinan Yipin contends that the Department has repeatedly stated that it would be improper to conduct a review where the record indicates that the respondent made no entries of subject merchandise during the POR because of the inability to assess any antidumping duties. See Stainless Steel Plate in Coils from Taiwan: Final Rescission of Antidumping Duty Administrative Review, 68 FR 63067, 63068 (November 7, 2003); Granular Polytetrafluoroethylene Resin from Japan: Notice of Rescission of Antidumping Duty Administrative Review, 70 FR 44088 (August 1, 2005); and Allegheny Ludlum Corp. v. United States, 346 F.3d 1368, 1372 (Fed. Cir. 2003) (upholding the Department's practice of rescinding reviews in which there were no entries during the POR).

Jinan Yipin argues that in previous cases, where the CBP shipment data for the POR demonstrated that an exporter had no shipments, it has been the Department's practice to rescind the review over objections by the petitioner, unless the petitioner could provide reasonable evidence that the respondent did, in fact, have reviewable entries during the POR, citing Stainless Steel Sheet and Strip in Coils From Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 7519 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 21. Moreover, Jinan Yipin argues that the Department deems the evidence contained in the CBP data sufficient to establish the lack of entries and does not require or seek any further evidence. Since CBP data on the record establishes that it had no entries during the POR, Jinan Yipin contends that it is unreasonable and arbitrary for the Department to subject Jinan Yipin to this review.

Shenzhen Greening also argues that because it had no entries during the POR, the Department must rescind its administrative review. Shenzhen Greening contends that the Department has placed CBP data of all shipments made during the POR, and that this CBP data shows that Shenzhen Greening had no entries during the POR. Shenzhen Greening claims that it is clear that the Department considers CBP data to constitute substantial evidence because the Department uses it to designate the mandatory respondents. Further, Shenzhen Greening argues, if the Department considers this CBP data to be substantial evidence for purposes of selecting mandatory respondents, then it must also consider the CBP data to be substantial evidence of whether a company had entries during the POR. Shenzhen Greening posits that the Department cannot rule simultaneously that the CBP data are sufficient for the designation of mandatory respondents, and also insufficient to determine which companies did not ship to the U.S. in the POR. Shenzhen Greening contends that such a decision on its face is arbitrary, capricious, unsupported by substantial evidence on the record, and not in accordance with law.

Petitioners argue that both Jinan Yipin and Shenzhen Greening have mischaracterized the Department's reliance on CBP data. Petitioners' contend that, in selecting mandatory respondents, the Department relies on CBP data as prima facie evidence of the ranking (by volume) of the exporters subject to a proceeding. Petitioners point out that, even when relying on CBP data in this manner, the Department requests that interested parties comment on or challenge that data within the deadline established by in the relevant initiation notice. Thus, Petitioners argue, the Department recognizes that CBP data are not a dispositive source of data on company-specific shipments. As such, Petitioners argue that is reasonable for the Department to decline to presume that the CBP data are completely accurate with respect to every entry of the subject merchandise during the POR. Therefore, Petitioners aver that the Department's use of the CBP data in both instances is reasonable, and its determinations based on its separate analyses of the data are supported by substantial evidence and otherwise in accordance with law.

Department's Position: The Department finds that there continues to be an insufficient basis for rescinding this review with respect to Jinan Yipin or Shenzhen Greening. Contrary to Jinan Yipin's and Shenzhen Greening's arguments, the Department has previously determined that the information from the CBP data queries alone is not sufficient to reliably conclude that there were no entries of subject merchandise from a company under review during the POR. Moreover, Jinan Yipin and Shenzhen Greening have mischaracterized the Department's finding that they should revert to the PRC-wide entity as AFA. The record of this review shows that both companies were named in the Initiation Notice and, thus, they are subject to this AR. As neither company timely certified that it had no shipments or demonstrated that it was entitled to a separate rate, the Department finds that each company is properly considered to be part of the PRC-wide entity for this review. In accordance with the Department's established NME methodology, a party's separate rate status must be established in each segment of the proceeding in which the party is involved. See Sigma Corp. v. United States, 117 F.3d 1401, 1405-06 (Fed. Cir. 1997) (affirming presumption of state control over exporters in non market economy cases).

Under 19 CFR 351.213(d)(3), the Department may rescind a review where there are no exports, sales, or entries of subject merchandise during the POR. Thus, as a threshold matter, the basis for rescinding an administrative review pursuant to 19 CFR 351.213(d)(3) differs from that of

rescinding a review based on withdrawal of review requests. Specifically, prior to rescinding a review pursuant to 19 CFR 351.213(d)(3), the Department must begin a factual examination and engages its resources to make that factual finding. In some cases, there is little controversy over the facts (*i.e.*, the company has filed a timely no-shipment certification, the CBP data indicates no shipments, any response from CBP to the Department's no shipments inquiry does not contain any contrary evidence of possible shipments, and no other party presents other information). In other cases, the evidence may be less clear and may require the Department to issue supplemental questionnaires, do further research into CBP data, allow time for parties to comment and submit further information, and ultimately consider and weigh potentially conflicting data and, where necessary or appropriate, scheduling and conducting verification of the respondent's claims of no shipments. See Certain Lined Paper Products from the People's Republic of China: Notice of Rescission, in Part, of Antidumping Duty Administrative Review, 74 FR 36457 (July 23, 2009). This can be a difficult and time consuming process.⁴

Thus, although CBP data queries are an important tool in our analyses, the Department has recognized that these same data are not always complete or conclusive. Thus, the Department does not rely solely on CBP data queries as a dispositive source of data on company-specific exports for purposes of determining whether a company had shipments. Moreover, as stated in the Initiation Notice, the Department requires that a company timely certify that it had no exports, sales, or entries during the POR. The Department considers rescinding the review only if the producer or exporter, as appropriate, submits a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the POR.⁵ The company's own certification is considered a necessary piece of evidence of no shipments, to be considered along with the CBP data. These submissions are subject to verification in accordance with section 782(i) of the Act. After receiving a timely, properly filed no-shipment certification, it is the Department's practice to confirm the respondent's certification by making a no-shipment inquiry with the CBP. As described in Garlic 13, it is only with this evidence on the record that the Department finds that it has a reliable basis upon which to rescind a review pursuant to 19 CFR 351.213(d)(3). All parties to this review, including Jinan Yipin and Shenzhen Greening, had an opportunity to provide a certification concerning their sales activity within 30 days of the

⁴ We note that the deadline for no shipment certifications is set to occur before the Department selects its mandatory respondents. At the point of this deadline, the Department does not know whether or not it will have difficult factual issues to resolve. The need for a timely no shipments certification is critical to the efficient allocation of the Department's resources and the orderly conduct of its proceedings. Based on information on the record of this review at that time, the Department selected eight mandatory respondents. Although none of the eight mandatory respondents selected by the Department ultimately participated fully in this review, this development does not somehow relieve Shenzhen Greening or Jinan Yipin of their obligation to timely certify no shipments. It is critical that parties submit their no shipment certifications early in the administrative review.

⁵ In the Initiation Notice for this administrative review, the Department stated that if "a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review, it should notify the Department within 30 days of publication of this notice in the Federal Register. The Department will consider rescinding the review only if the producer or exporter, as appropriate, submits a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the period of review." See Initiation Notice. The Initiation Notice provided Jinan Yipin a 30-day deadline within which it could provide the requested no-shipment certification, and in the event that Jinan Yipin required more time to meet this deadline, Jinan Yipin could have requested an extension to this deadline from the Department. However, Jinan Yipin failed to pursue either of these avenues, and did not contact the Department until January 11, 2010, after the issuance of the Preliminary Results, and almost a full year after the deadline provided for in the Initiation Notice.

publication of the Initiation Notice. As described in the Preliminary Results, eight companies timely submitted these certifications. Thus, Jinan Yipin's reliance on CVP 23 is misplaced, since, unlike the respondent in that review, it did not fully participate in the administrative review process. Rather, the record of this review shows that Jinan Yipin failed to provide the Department with a timely no-shipment certification, as was required by the Initiation Notice.

As noted above, the Department has determined that CBP data alone is not sufficient to determine whether there were any entries of subject merchandise from a company subject to the AR during the POR because it may not demonstrate conclusively that the company in question had no relevant sales or shipments of subject merchandise. See Rebar from Turkey and accompanying Issues and Decision Memorandum at Comment 22. For example, CBP data does not include information on entries which were not made electronically. Id. Therefore, it is our practice to rely on an interested party's timely no-shipments letter completed in response to the requirement announced in our Initiation Notice, as corroborated by CBP data obtained from both a CBP data query and a no-shipment inquiry sent to CBP, in order to rescind an administrative review with respect to the interested party. Id. While it is true that there have been a few rescissions of administrative reviews with respect to companies that did not respond to our questionnaire, if CBP data showed that the companies made no shipments of subject merchandise to the United States during the POR, as we stated in Rebar from Turkey, that is not our practice. See, also, Certain Cut-to-Length Carbon-Quality Steel Plate From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part, 75 FR 10207 (March 5, 2010) (Cut-to-Length from Korea), and the accompanying Issues and Decision Memorandum at Comment 2.

Moreover, we note that, because CBP data queries may not be complete or conclusive, we do not rely solely on CBP data queries as a dispositive source of data on company-specific exports for purposes of determining an antidumping duty margin. See Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review, 70 FR 69937 (November 18, 2005) (Brake Rotors from China), and the accompanying Issues and Decisions Memorandum at Comment 8. Therefore, it is the responsibility of the company subject to the review to comply with the requirement that they certify to the Department that it had no shipments of subject merchandise. Id. Based on the respondent's timely certified statement of no-shipments, we then send CBP a request to check all entries and we use CBP data queries to corroborate the respondent's no-shipment certification. See Allegheny Ludlum Corp. v. United States, 276 F. Supp. 2d 1344, 1354-56 (CIT 2003). We cannot use CBP data to corroborate the respondent's information if a respondent does not provide a response with respect to the existence or non-existence of shipments of subject merchandise during the POR.

We also disagree with Jinan Yipin's and Shenzhen Greening's claims that our reliance on CBP data queries in the respondent selection process somehow necessitates the conclusion that Jinan Yipin or Shenzhen Greening made shipments during the POR. Using CBP data queries to select respondents for individual examination is normally reliable evidence of the relative volume of shipments by the producers or exporters under review, and thus is an appropriate source of data for ranking and respondent selection purposes. However, CBP data is not sufficiently comprehensive to serve as a reliable basis for a conclusive determination that a particular

producer or exporter made no shipments or entries of subject merchandise during the POR. Thus, the Department reasonably distinguishes these findings and the proper role that CBP data serves in each.

Issue 3: Whether the Requirement That a Party Timely Certify No-Shipments is Unfair and Arbitrary

Jinan Yipin argues that the Department's policy, to rescind a review in which there are no entries, does not require that the respondent submit a letter independently certifying that it had no entries during the POR. Citing 19 CFR 351.213(d)(3), Jinan Yipin contends that there is no requirement that a producer or exporter submit a letter informing the Department that it had no entries during the POR. Instead, Jinan Yipin contends that, a decision to rescind a review (or to continue a review) must be supported by record evidence in the same manner that any other finding must be supported. Jinan Yipin argues that the Department has repeatedly rescinded reviews in which the record indicated that the respondent had no entries during the POR, notwithstanding the fact that the respondent wished to continue participating in the review and had not filed a "no-shipment" letter, citing Sixth Administrative Review of Honey From the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 66221 (November 7, 2008) (Honey from the PRC) (rescinding a review for a voluntary respondent after CBP data indicated the company had no entries in the POR); CVP 23; Granular Polytetrafluoroethylene Resin from Japan: Notice of Rescission of Antidumping Duty Administrative Review 70 FR 44,088 (August 1, 2005) (Granular Resin from Japan) (rescinding AGC's review over its objections when the record indicated AGC had no entries during the POR); and Polyethylene Retail Carrier Bags from Malaysia: Notice of Partial Rescission of the Administrative Review and Intent to Rescind the Administrative Review, 73 FR 24941, 24942 (May 6, 2008) (rescinding a self-requested review by Zihn Hin when CBP data indicated no shipments with an entry date within the POR).

Further, Jinan Yipin argues, while the Initiation Notice stated that the Department would only consider rescinding a review if a respondent filed a "no-shipment" letter within 30 days; there is no acceptable reason for imposing this additional requirement. Jinan Yipin explains that the Department has established a policy of relying upon CBP entry data to determine whether a particular exporter or producer had entries during the POR. Under this policy, Jinan Yipin alleges, the Department deems the evidence contained in the CBP data sufficient to establish the lack of entries and does not require or seek any further evidence. Jinan Yipin argues that in continuing the review of Jinan Yipin because it failed to provide a "no-shipment" letter within the 30-day deadline, the Department is disregarding record evidence (the CBP data) showing that Jinan Yipin had no shipments, and ignoring its established policy of rescinding reviews for companies that have no shipments.

Jinan Yipin argues that the CBP entry data already on the record undeniably shows that Jinan Yipin did not make any shipments of subject merchandise during this POR. Jinan Yipin points out that Petitioners were given an opportunity to comment on the CBP data and did not raise any questions about its accuracy with respect to Jinan Yipin's lack of entries. Further, Jinan Yipin contends there is also no other record evidence suggesting that Jinan Yipin had any entries of subject merchandise during the POR. Accordingly, Jinan Yipin states, the only reasonable

conclusion from the record as a whole is that Jinan Yipin did not make any entries during the POR, and the Department's well-established policy dictates that Jinan Yipin is ineligible to participate in this review in the absence of any entries made during the POR.

Shenzhen Greening argues that, with regard to no-shipment certification requirements, the Department has a double standard. Shenzhen Greening contends that the Department has imposed an additional burden on producers and exporters that did not sell, ship, or enter subject merchandise into the United States during the POR, as compared to those exporters that did make sales to the United States. Shenzhen Greening states that these non-exporting companies must affirmatively prove they had no shipments, while companies that did ship to U.S. are under no similar requirement independent of the CBP data. Shenzhen Greening argues that this additional requirement of a no-shipment certification is arbitrary, capricious, unsupported by substantial evidence, and not in accordance with law.

Further, Shenzhen Greening argues that the deadline imposed by the Department is arbitrary and has no nexus to the time actually needed by the Department to make a decision based on no sales. Typically, Shenzhen Greening explains, administrative reviews take 18 months to complete. However, the Department imposed this deadline at the end of month one. Shenzhen Greening states that it filed its entry of appearance and certification of no sales/shipments to the U.S. as soon as it was aware that it was included in the administrative review, on August 19, 2009. This was approximately four months prior to the preliminary results and approximately 10 months prior to the final results. Shenzhen Greening argues that, since the Department already had the CBP data on the record when Shenzhen Greening filed its certification, it would have taken merely a few minutes for the Department to corroborate Shenzhen Greening's submission. As such, Shenzhen Greening contends, the Department's 30-day deadline is needlessly early, and Shenzhen Greening's certification has not hampered the Department's decision-making process, nor prejudiced Petitioners, as Petitioners had four months to comment on Shenzhen Greening's submission before the preliminary results, in addition to their case brief.

Petitioners counter both Jinan Yipin's and Shenzhen Greening's arguments claiming that they have misrepresented the Department's use of CBP data. Specifically, Petitioners argue claim that given the potential for errors or omissions in the CBP data, and given an entity could have completed a sale or made a shipment that falls within the POR but does not appear in the CBP data, it is reasonable for the Department to require respondents for which a review is requested to submit a certification confirming the lack of any sales or entries of subject merchandise subject to the review.

Furthermore, Petitioners argue that Shenzhen Greening's claim regarding deadlines imposed by the Department is inconsistent with the administrative record. Specifically, the Petitioners state that they properly included Shenzhen Greening in their AR request, properly mailed Shenzhen Greening notice of its request, and the Department listed Shenzhen Greening as an included respondent in the Initiation Notice. Petitioners note that Shenzhen Greening does not deny these facts, and as such, Petitioners claim Shenzhen Greening was on notice that it was included in this administrative review at its earliest stages. Therefore, Petitioners argue, Shenzhen Greening had more than adequate time to file its certification of no sales/shipments.

Department's Position: The Department's clearly established requirement that a company named in an initiation notice who wishes to claim no-shipments must submit a certification to that effect within 30 days of initiation is in accordance with 19 CFR 351.213(d)(3). While 19 CFR 351.213(d)(3) does not specifically require a letter be submitted, it does make clear that the Secretary is the deciding authority on whether there are no entries, exports, or sales of subject merchandise. To this end, the Department has established requirements that are necessary to make such a finding. See, e.g., Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative Review and New Shipper Reviews, 74 FR 29174 (June 19, 2009) (Garlic 13 Final Results), and accompanying Issues and Decision Memorandum at Comment 11.

Under 19 CFR 351.213(d)(3), the Department may rescind a review where there are no exports, sales, or entries of subject merchandise during the POR. However, the Department requires that a company certify that it had no exports, sales, or entries during the POR. If an exporter subject to a review does not believe that it had any entries, exports or sales of the subject merchandise during the POR, it is incumbent on the exporter to so inform the Department. As explained in the Initiation Notice, a company wishing to establish its no-shipment status is expected to submit a letter to the Department, making its no-shipment claim, within 30 days of the publication of the Initiation Notice. See Initiation Notice, "Notice of No Sales" section.⁶ These submissions are subject to verification in accordance with section 782(i) of the Act. After receiving a timely, properly filed no-shipment certification, it is the Department's practice to confirm the respondent's certification not only through evaluating the CBP data query, but also by making a no-shipment inquiry with CBP.⁷ It is only with this evidence that the Department considers it has a reliable basis to rescind an AR pursuant to 19 CFR 351.213(d)(3). See, e.g., Garlic 13 Final Results.

In each of the above cases cited by Jinan Yipin, the respondent company was actively participating in the review and provided requested information to the Department in a timely manner. As neither Jinan Yipin nor Shenzhen Greening timely certified that they had no shipments of subject merchandise during the POR within the deadline provided in the Initiation Notice, the Department did not have the required evidence on the record to establish that Jinan Yipin and Shenzhen Greening had no shipments during the POR. Jinan Yipin and Shenzhen Greening had the opportunity to request an extension of time in which to file such a submission if more time was required, in accordance with 19 CFR 351.302. However, only after publication of the Preliminary Results did Jinan Yipin object to its inclusion in the administrative review and request permission to supplement the record. And Shenzhen Greening's untimely certification of no shipments was almost 7 months after the January 25, 2009 deadline, as established in the Initiation Notice. Accordingly, the Department lacked the necessary basis under which to establish no-shipments during the POR, and therefore does not have a basis on which to rescind These reviews pursuant to 19 CFR 351.213(d)(3).

⁶ The Initiation Notice covered six antidumping administrative reviews with the POR 11/1/2007 through 10/31/2009.

⁷ The Department's no-shipment inquiries for Jining Yongjia Trade Co. Ltd. and Qingdao Tiantaixing Foods Co. Ltd. can be found at on the CBP website, under messages #9153201 and #9134202, respectively. See <http://addcvd.cbp.gov/index.asp?ac=home>.

Further, regardless of the party's intention, we cannot allow a party to submit its response to our request for information with a complete disregard of the due date we establish in accordance with 19 CFR 351.301, and without requesting an extension of the established deadline.⁸ Allowing parties to submit responses to our requests for information at whatever time is most convenient would significantly impede our ability to meet our statutory deadlines and conduct administrative proceedings in a predictable manner. This would also compromise participation by other interested parties in our proceedings because we need such information from respondents early in each segment of each proceeding in order to explore non-CBP data information, e.g., manual entries, reseller entries, etc., and, if necessary, disclose the information to interested parties for review and comment before we make our preliminary decision.

Parties' adherence to our administrative deadlines is necessary for the Department to provide all interested parties with a reasonable timeframe in which to submit information and to complete the administrative review within the statutory deadline specified in section 751(a)(3)(A) of the Act. Because we are obligated to complete an administrative review within a statutory deadline, when the Department grants a request for an extension of time for an interested party to respond to a request for information, the Department informs the interested party that the Department's decision to grant an extension may affect the amount of time allowed to submit a response to any questions and/or requests for additional information. If the Department allows an interested party, such as Jinan Yipin or Shenzhen Greening, to disregard due dates established in accordance with 19 CFR 351.301 and 19 CFR 351.302 and submit its response to our request for information based upon the party's own timetable, we run the risk of wasting valuable time within the statutory timeframe, leaving us with inadequate time to analyze information on the record to complete the administrative review and compromising due process for all interested parties.

Further, we disagree with Jinan Yipin's contention that the Petitioners had some obligation to report any information concerning the presence or absence of Jinan Yipin entries in the CBP data. Complete information as to whether a respondent made shipments or entries of subject merchandise during the POR is the respondent's own information. Therefore, the respondent, not the Petitioners or any other parties, possesses the most reliable information on whether it made shipments of subject merchandise during the POR. As a result, the respondent has the burden to produce information regarding its shipments in response to our Initiation Notice. See NTN Bearing Corp. of America v. United States, 997 F.2d 1453, 1458 (NTN Bearing Corp.), and Zenith Electronics Corp. v. United States, 988 F.2d 1573, 1583 (Zenith Electronics Corp.) (stating that the burden of evidentiary production belongs to the party that possesses the necessary information). Jinan Yipin and Shenzhen Greening each failed to provide its information in a timely manner.

Issue 4: Application of PRC-Wide Rate to Jinan Yipin and Shenzhen Greening

Jinan Yipin argues that the Department's decision to apply the PRC-wide rate to Jinan Yipin as AFA was unreasonable and unsupported by the statutory provisions governing the use of AFA and legal precedent. As discussed above, Jinan Yipin argues that Petitioners' review request

⁸ Neither Shenzhen Greening or Jinan Yipin requested an extension of the deadline at issue.

indicated an incorrect and outdated address for Jinan Yipin, and that both Petitioners and the Department should have been aware of Jinan Yipin's correct address based upon filings made in POR 9 and POR 10. As such, Jinan Yipin maintains that it did not receive adequate notice that it was subject to this review. Furthermore, Jinan Yipin argues, the Department never attempted to give Jinan Yipin actual notice of this proceeding or its intention to impose AFA on Jinan Yipin. Rather, Jinan Yipin asserts that the only notice that it was subject to this review was through the Initiation Notice and the only notice that it was preliminarily subject to the PRC-wide rate was through the Preliminary Results.

Jinan Yipin explains that while constructive notice through Federal Register publication may be acceptable in some circumstances, the courts have stated that such notice is inadequate if a party's interest in the proceeding is more than "speculative," citing Williams v. Mukasey, 531 F.3d 1040, 1042-43 (9th Cir 2008). Furthermore, Jinan Yipin argues, the Supreme Court has stated that due process requires actual notice in proceedings that could adversely affect a party's interests when the party's address can be reasonably obtained, citing Menonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (Menonite) ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."); and Covelo Indian Cmty. v. Fed. Energy Regulatory Com., 895 F.2d 581, 587 (9th Cir. 1990) (noting that the Supreme Court has found "that only actual notice to interested parties is reasonable under the circumstances when such parties' names and addresses are reasonably ascertainable") citing Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 1345-48 (1988) and Menonite, 462 U.S. at 798-800.

According to Jinan Yipin, there is no question that its actual address was reasonably ascertainable because it was in the possession of both Petitioners and the Department. Furthermore, Jinan Yipin argues its interest in this proceeding is more than "speculative," since the Department considers Jinan Yipin to be subject to the review and has preliminarily applied total AFA to Jinan Yipin. Accordingly, Jinan Yipin contends, as established by the Supreme Court precedent cited above, due process required that Jinan Yipin be given actual notice of this proceeding. See Menonite, 462 U.S. at 798-800. In the absence of such proper notice, and in view of the record evidence as a whole as discussed herein, Jinan Yipin argues the preliminary AFA finding against it should be reversed.

In addition, Jinan Yipin argues that adverse inferences are only permitted when there is information missing from the record, citing Tung Fong Industrial Co. v. United States, 318 F. Supp. 2d 1321 (CIT 2004). Jinan Yipin contends that the record shows it was ineligible to be a respondent because it made no entries during the POR. Further, Jinan Yipin argues that, had it attempted to submit a separate rate certification, it would have been rejected on the basis that Jinan Yipin had no shipments during the POR. In fact, the separate rate certification explicitly states that the Department limits its separate rate consideration to firms that exported or sold subject merchandise to the United States during the POR. Thus, Jinan Yipin argues, the Department has made an adverse inference against Jinan Yipin for a failure to submit a separate rate certification that the Department would not have accepted. As discussed above, Jinan Yipin states that the Department has consistently found CBP entry data sufficient evidence to

demonstrate that a respondent made no entries, and the CBP data already on the record establishes this fact with respect to Jinan Yipin. Thus, Jinan Yipin alleges, there is no “missing” information on the record and it was improper for the Department to resort to an adverse inference.

Furthermore, Jinan Yipin argues that, even if there was a reasonable indication that the record contained missing information, the Department had a obligation pursuant to 19 U.S.C. § 1677m(d) to contact Jinan Yipin and notify the company that the existing record evidence was not satisfactory to rescind the review prior to applying an adverse inference. See, e.g., SKF USA Inc. v. United States, 29 CIT 969, 979-80 (2005); Citic Trading Co. Ltd. v. United States, 27 CIT 356, 370-71 (2003). In this instance, Jinan Yipin argues, the Department’s failure to contact Jinan Yipin is particularly troubling given the clear and undisputed evidence showing that Jinan Yipin had no entries and was, therefore, ineligible to participate in this review. See, e.g., Stainless Steel Wire Rods From India: Notice of Rescission of Antidumping Duty Administrative Review, 71 FR 40696 (July 18, 2006) and accompanying Issues and Decision Memorandum at Comment 1. Thus, Jinan Yipin argues, the Department improperly applied an adverse inference without even attempting to notify Jinan Yipin that information regarding its shipments was missing from the record.

Shenzhen Greening makes similar arguments against the Department’s AFA finding. Shenzhen Greening argues that because it had no shipments during the POR, the Department has no jurisdiction over Shenzhen Greening. Shenzhen Greening states that 19 U.S.C. 1673 of the Tariff Act of 1930 is based on in rem jurisdiction. That is, the U.S. government has authority over entries of merchandise into the United States to ensure that they are traded fairly. Shenzhen Greening contends that this is not in personam jurisdiction, and the government does not have authority over persons/companies that do not have said entries. Shenzhen Greening argues the opening paragraph of the statute confirms this:

“If –

- (1) The administering authority determines that a class or kind of foreign merchandise is being, or is likely to be sold in the United States at less than its fair value, and . . . then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.”

Id.

In the instant review, Shenzhen Greening argues, there is no sale/shipment/entry over which Commerce has jurisdiction. Accordingly, Shenzhen Greening explains, there is no “thing” (no “res”) over which Commerce has the authority to either assess an antidumping duty or change a cash deposit from a prior rate determined for Shenzhen Greening. As such, the Department has no choice but to rescind the administrative review of Shenzhen Greening.

As discussed above, Petitioners note that Jinan Yipin does not argue that it did not receive the copy of the AR, and, as such the review should not be dismissed. Furthermore, the Petitioners contend that Jinan Yipin’s no-shipment certification is its no-shipment claim on page 13 of its

case brief which constitutes untimely-filed factual information, and which should be rejected as such by the Department. Further, Petitioners argue that should the Department allow Jinan Yipin's request that it be treated as a no-shipment exporter, the Department should also allow the Petitioners to submit facts on the record that would rebut those claims.

With regard to Shenzhen Greening's claim that the Department does not have jurisdiction over it for the AR, Petitioners argue that the Department's jurisdiction over Shenzhen Greening is based on the exporter's status as an exporter of merchandise covered by an active, outstanding AD order which the agency is charged by U.S. law to administer and maintain. They claim that it is the AD order that provides the Department with jurisdiction over Shenzhen Greening. Second, Petitioners claim that, even under Shenzhen Greening's notion of the Department's jurisdiction, the exporter has only alleged that it had no POR exports of subject merchandise; the Department would thus have jurisdiction over Shenzhen Greening for purposes of the AR unless and until it was able to make a determination based on its standard procedures and on record evidence that Shenzhen Greening, in fact, made no such sales. As such, Petitioners argue that Shenzhen Greening does indeed fall under the Department's jurisdiction in the AR.

Department's Position: The Department's determination that Jinan Yipin and Shenzhen Greening are part of the PRC-wide entity is appropriate and supported by evidence on the record. As stated above in Issue 1, the Initiation Notice was sufficient notice to all interested parties of the initiation of the AR for Jinan Yipin and Shenzhen Greening, among many other producers and exporters. The Department stated in the Initiation Notice that "If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review, it should notify the Department within 30 days of publication of this notice in the Federal Register. The Department will consider rescinding the review only if the producer or exporter, as appropriate, submits a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the period of review." We note that both Jinan Yipin and Shenzhen Greening had an opportunity to provide a statement concerning their sales activity within 30 days of the publication of the Initiation Notice. Both failed to do so. Because these companies did not demonstrate that they had no shipments, any shipments that they may have made are properly subject to this review and Jinan Yipin's claim that it could not have submitted a separate rate certification is misplaced.

Moreover, with respect to Shenzhen Greening's argument that the Department does not have "jurisdiction" over Shenzhen Greening, we disagree. Because there is an antidumping duty order covering the subject merchandise and a request was received for an administrative review of Shenzhen Greening's entries, the statute mandates that the Department review and determine the amount of dumping for Greening's entries during the POR. See Section 751 of the Act. Because Shenzhen Greening possessed the most reliable information on whether it made any shipments during the POR, it bore the burden of not only certifying to the Department that it had no exports, sales, or entries of subject merchandise during the POR, but also ensuring that it filed its certification in a timely manner. See Brake Rotors from China, at Comment 8, and Cut-to-Length from Korea, at Comments 1 and 2. See also, NTN Bearing Corp., at 1458, and Zenith Electronics Corp., at 1583. Because the Department did not receive Shenzhen Greening's certification until August 19, 2009, nearly seven months after the deadline, Shenzhen Greening's submission was untimely.

Furthermore, the AFA determination in this case as to the PRC-wide entity is not based on Jinan Yipin's or Shenzhen Greening's failure to submit either a no-shipment certification or a separate rate certification. The determination that the PRC-wide entity failed to cooperate thus warranting application of an adverse inference, is based on the failure of several companies to respond to the Department's requests for information. As these companies also failed to submit any separate rate information, they were also presumptively considered to be part of the PRC-wide entity. The Department does not treat, or have any basis to treat, parts of the PRC-wide entity distinctly. It is each company's responsibility to monitor and participate in the proceeding in which it is involved.

With regard to Jinan Yipin's due process arguments, the Department finds that as Jinan Yipin's inclusion in the review was publicly stated in both the Initiation Notice and the Preliminary Results, and Jinan Yipin has subsequently entered into the proceeding of the instant review, Jinan Yipin has not been denied its due process solely because Petitioners delivered its service of the request for review of Jinan Yipin to the wrong address. Further, as explained above in the Department's Position on Comment 1, and pursuant to the decisions in Huaiyang Hongda and Goldhofer, the publication of the Initiation Notice served as sufficient notice to Jinan Yipin of its inclusion in the instant review. As such, the Department finds that there is no cause to rescind Jinan Yipin's review because of the incorrect address used by Petitioners in their service of documents to Jinan Yipin.

Issue 5: Rescission of Shenzhen Xinboda's Review

On October 21, 2009, the Department published Fresh Garlic from the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review, 74 FR 54029 (Rescission Notice). In the Rescission Notice, the Department rescinded the AR with respect to Shenzhen Xinboda Industrial Co., Ltd. (Xinboda), one of the selected mandatory respondents in this proceeding. On November 18, 2009, eleven PRC exporters/producers⁹ submitted comments on the Rescission Notice. In this letter, the Interested Parties argued that the Department should not rescind Xinboda's review from the perspectives of law and the Department's regulations and practices, transparency and predictability in the agency's implementation of laws and regulations, and economic efficiency. The Interested Parties reiterated these arguments in their case brief.

The Interested Parties argue that the Department's acceptance of Xinboda's withdrawal is contradictory to the Department's regulations and normal practice. The Interested Parties point out that the Department twice extended the deadline for withdrawal of review requests at the request of the Petitioners, and Xinboda still submitted its withdrawal request twenty-five days after the deadline. The Interested Parties argue that the Department's normal practice is to strictly enforce time limits in antidumping duty administrative reviews. However, the Interested Parties assert, in the instant review, the Department endorsed an overdue request by neglecting

⁹ These companies include Anqiu Friend Food Co., Ltd., Anqiu Haoshun Trade Co., Ltd., Jinxiang Dongyun Freezing Storage Co., Ltd., Juye Homestead Fruits and Vegetables Co., Ltd., Qingdao Tiantaixing Foods Co., Ltd., Qufu Dongbao Import & Export Trade Co., Ltd., Shandong Chenhe International Trading Co., Ltd., Shandong Longtai Fruits and Vegetables Co., Ltd., Shenzhen Fanhui Import and Export Co., Ltd., Shenzhen Sunny Import & Export Co., Ltd. and Weifang Shennong Foodstuff Co., Ltd., (collectively, "Interested Parties")

the deadline set by its own authority and gave the respondent an unrequested extension. The Interested Parties contend that allowing Xinboda to withdraw its review request after the deadline is contradictory to the Departments' regulations and normal practice, abuses its administrative power, and harms public trust in the Department's administrative authority.

Further, the Interested Parties argue that the Department's rationale for accepting Xinboda's withdrawal request -- that Petitioners had already timely withdrew their request for review of Xinboda -- is unsupported by the Department's regulations. The Interested Parties argue that 19 CFR 351.213(d)(1) states that the Secretary will rescind an administrative review if a party that requested a review withdraws the request. Interested Parties contend that it does not provide that when one party withdraws its request for review, all other review requests are also then withdrawn. In fact, the Interested Parties argue, each review request must be analyzed on its own merits, and, in turn, each request must be withdrawn in a timely manner for a review to be rescinded. Therefore, the Interested Parties surmise, the Department's decision to rescind Xinboda's review was arbitrary and not made in an open and transparent manner.

Finally, the Interested Parties argue that because mandatory respondents consume more public resources, leniency in time limits should not be freely and unreasonably given. The Interested Parties note that section 777A(c)(2) of the Act allows the Department to limit its examination to a sample of exporters or producers when a large number of exporters or producers are involved in a review. The Interested Parties contend that this section of the Act was put in place to preserve public resources, and that the Department has an obligation to use public resources efficiently, especially under the current economic situation. As such, the Interested Parties argue that the Department's decision to accept Xinboda's withdrawal request after exceeding the deadline (including extended deadlines) is unwarranted.

The Petitioners respond by arguing that they withdrew their request for a review of Xinboda in a timely manner, and that the regulations provide discretion for the Department to extend the deadline for withdrawing review requests in each case. Petitioners argues that, given that they (Petitioners) had already timely withdrawn their request for review of Xinboda, it was entirely reasonable for the Department to extend the deadline to allow Xinboda to also withdraw its request for review.

Department's Position: The Department's decision to rescind this review with respect to Xinboda was consistent with 19 CFR 351.213(d)(1). As the Department noted in the Preliminary Results in addressing the Interested Parties' concerns, both Petitioners and Xinboda withdrew their respective requests for review of Xinboda. Although Xinboda's withdrawal was filed after the deadline, the Department decided to accept its withdrawal, given that Petitioners timely withdrew their request for review of Xinboda and several other companies. See Preliminary Results; see also Fresh Garlic from the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review, 74 FR 54029 (Oct. 21, 2009). Moreover, in addition to the relevant parties' lack of interest in continuing a review of Xinboda, the Department had not expended significant resources in its review of that company. As such, the Department's decision to rescind this review with respect to Shenzhen Xinboda was consistent with 19 CFR 351.213(d)(1).

Issue 6: Determination of Separate Rate

Hongqiao Weifang (Hongqiao) and Qingdao Xintianfeng (QXF) each timely filed their separate rate paperwork and were assigned a separate rate in the Preliminary Results. However, Hongqiao and QXF each maintain that the Department should use a different calculation methodology for determining the applicable separate rate.

Hongqiao and QXF state that section 735(c)(5)(B) of the Act states that if the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section 776, the administrative authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated. This includes averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated. Hongqiao and QXF also state that, as noted by the Department, “{T}he Statute and the Department’s regulations do not directly address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act.” See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 73 FR 52273 (September 9, 2008) (Vietnam Shrimp 3) and the accompanying Issues and Decisions Memorandum, at pages 18-19, where, “generally we {the Department} have looked to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents we {the Department} did not examine in an administrative review.” In this case, Hongqiao and QXF state, the Department determined that “a reasonable method for determining the margin for the separate rate companies in this review is the average of the margins, other than those which are zero, de minimis, or based on total facts available, that we found for the most recent period in which there were such margins.” Id., at 19.

The parties explain that, in the Preliminary Results, the Department brought forward the most recently calculated separate rate (i.e., the “separate rate” from Garlic 13 which was a simple average¹⁰ of two calculated company-specific rates). Hongqiao and QXF argue that a better method would be to use a simple average of all the calculated company-specific rates from every segment covered in the POR of Garlic 13 (i.e., November 1, 2006 to April 30, 2007).

Essentially, Hongqiao and QXF argue that the Department should use a simple average of company-specific rates for the companies covered by the AR plus the companies for which NSRs were conducted covering the same POR.

Further, Hongqiao and QXF argue that the Department’s method of calculating the separate rate per-unit assessment rate is erroneous. Hongqiao and QXF maintain that the Department erred in its use of the per-unit assessment rate from the 13th administrative review. Hongqiao and QXF contend that this method is not consistent with the calculation methodology described in 13th review Per-Unit Memorandum for separate-rate companies (which was put on the record of the current proceeding on November 30, 2009). See Memorandum from Nicholas Czajkowski, Case Analyst, Office 6, Re: Final Results of the Administrative Review of Fresh Garlic from the People’s Republic of China: Separate Rate Companies and PRC-Wide Entity – Per-Unit

¹⁰ The Department uses a weighted-average of company-specific rates when there are more than two company-specific rates.

Assessment Rates (June 8, 2009) (Per Unit Memorandum). Hongqiao and QXF argue that the Department can correct this error by dividing the total value of the entries made by responding separate rate companies by the total quantity of these same companies to arrive at an average unit value (AUV), and multiplying the AUV by the calculated separate rate, to arrive at the per-unit assessment for the responding separate rate companies.

The Petitioners argue that the Department reasonably exercised its discretion in selecting a separate rate margin for the qualifying exporters in the preliminary results. Therefore, Petitioners argue, the calculation method used in the Preliminary Results should be affirmed.

Department's Position: The Department has determined that it is appropriate to continue to apply the calculated per-unit separate rate from the most recently completed segment of this proceeding (i.e., Garlic 13) to Hongqiao, QXF and the other separate rate companies. As discussed above, the Department has not calculated any company-specific cash deposit rates in the instant review. Thus, there is insufficient data from the instant POR with which the Department could calculate a separate rate. Moreover, neither Hongqiao nor QXF received their own company-specific rate in Garlic 13, rather entries from Hongqiao and QXF are subject to separate rates calculated in Garlic 11 and Garlic 12, respectively. Under these circumstances, the Department assigns the calculated separate rate from the most recently completed segment of the proceeding at issue. See, e.g., Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews, 75 FR 12726 (March 17, 2010) and Vietnam Shrimp 3.¹¹ The Department has previously determined that, in situations where there are no calculated rates in the administrative review to apply to the separate rate companies, “a reasonable method is to assign to non-reviewed companies in this review the most recent rate calculated for the non-selected companies in question, unless we calculated in a more recent segment a rate for any company that was not zero, de minimis, or based entirely on FA.” See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 74 FR 47191 (September 15, 2009). Further, in Vietnam Shrimp 3, the Department has found this same methodology to be “reasonable because it is reflective of the commercial behavior demonstrated by exporters of the subject merchandise during a recent period of time.” See Vietnam Shrimp 3.

Furthermore, as a practical matter, even when the PORs for NSRs overlap with the POR of an AR, the Department does not normally use NSR rates as part of the separate rate calculation in an AR. Moreover, when calculating a separate rate using data from more than two companies, the Department calculates a weighted-average separate rate based on each company's volume. We prefer to weight average the rates if doing so would not reveal BPI, so that the average makes use of the volume data underlying each company's ad valorem rate. The methodology for recalculating the ad valorem rates suggested by Hongqiao and QXF would be highly distortive since, as parties are well aware, the combined volume of five NSR companies that Hongqiao and QXF suggest should be included would undoubtedly account for a miniscule proportion of the total volume of sales made by the seven companies under discussion.

¹¹ In Vietnam Shrimp 3, the Department did not calculate any final rates above de minimis and brought forward the most recently calculated separate rate.

We also disagree with Hongqiao's and QXF's position that the Department somehow erred when it brought forward the per-unit cash deposit and assessment rate for separate rate companies from the Garlic 13 Final Results. We note that the Department calculated per-unit cash deposit and assessment rates in Garlic 13 and did not alter or revise these rates. As such, the per-unit cash deposit rate and assessment rate applicable to Hongqiao and QXF is identical to the per-unit cash deposit and assessment rate calculated in Garlic 13.

Finally, we note that Hongqiao's and QXF's suggested methodology for calculating a per-unit rate also relies on data from multiple PORs (i.e., the company-specific ad valorem rates from Garlic 13 and the import data from the instant POR). Thus, this proposed methodology would employ elements of data not directly relevant to one another and would not result in a more accurate per-unit separate rate. Moreover, the per-unit separate rate resulting from Hongqiao's and QXF's suggested methodology would not reflect the commercial behavior demonstrated by exporters of the subject merchandise during a recent POR. See Vietnam Shrimp 3. In contrast, the per-unit cash deposit and assessment rates calculated in Garlic 13 and brought forward to this review relied exclusively on data from a single POR. Thus, all elements of that data (i.e., CBP import volumes, values and company-specific ad valorem rate) were directly relevant to one another. Therefore, the Department continues to find it appropriate to bring forward the per-unit separate rate from Garlic 13.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of review and the final dumping margins in the Federal Register.

AGREE_____ DISAGREE_____

Paul Piquado
Acting Deputy Assistant Secretary
for Import Administration

Date