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MEMORANDUM TO: Carole A. Showers
Acting Deputy Assistant Secretary
for Import Administration

FROM: Edward C. Yang /i/ EY
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Administrative Review of Certain Cut-to-Length Carbon-Quality
Steel Plate from the Republic of Korea for the Period of Review
February 1, 2008, through January 31, 2009

Summary

We have analyzed the comments filed in the administrative review of the antidumping duty order on certain cut-to-length carbon-quality steel plate (CTL plate) from the Republic of Korea (Korea) for the period of review (POR) February 1, 2008, through January 31, 2009. We recommend that you approve the positions described in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments by parties:

1. *Acceptance of Untimely Response*
2. *Rescission of Review Based on the CBP Data*
3. *Alleged New Factual Information*

Background

On March 24, 2009, in accordance with 19 CFR 351.221(c)(1)(i), the Department of Commerce (the Department) initiated the administrative review of the antidumping duty order on CTL plate from Korea produced and/or exported by Dongkuk Steel Mill Co., Ltd. (DSM), Daewoo International Corporation (Daewoo), Hyosung Corporation (Hyosung), Hyundai Mipo Dockyard Co., Ltd. (Hyundai Mipo), and JeongWoo Industrial Machine Co., Ltd. (JeongWoo), for the POR. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 74 FR 12310, 12312 (March 24, 2009) (*Initiation Notice*). In the *Initiation Notice*, the Department stated that a company with no shipments during the POR may submit a no-shipments letter to the Department within 30 days from the publication of the *Initiation Notice*. See *Initiation Notice*, 74 FR at 12310-11.

On March 16, 2009, the Department obtained data from U.S. Customs and Border Protection (CBP data) concerning the status of entries of subject merchandise during the POR. On March

31, 2009, we released letters to interested parties for solicitation of comments on selecting respondents for individual examination. See the March 31, 2009, letters to DSM, SSAB NAD, ArcelorMittal USA Inc., and Nucor Corporation (Nucor). See also the April 3, 2009, memorandum to the File entitled “Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: March 31, 2009, Letters and CBP Data” (Respondent-Selection Letter Memo). On April 1, 2009, and April 3, 2009, for purposes of selecting respondents for individual examination in this review, the Department released CBP data to interested parties which have access to business-proprietary information under the administrative protective order. See the April 1, 2009, memorandum to the File entitled “Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: CBP Data” and the Respondent-Selection Letter Memo. On April 8, 2009, DSM withdrew its request that the Department review its sales of subject merchandise.¹

On May 7, 2009, for purposes of selecting a respondent for individual examination to replace DSM in this administrative review, we issued a memorandum in which we decided to request Daewoo, Hyosung, Hyundai Mipo, and JeongWoo to provide information on their sales of subject merchandise. See the May 7, 2009, memorandum to Laurie Parkhill entitled “Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Issuance of Quantity-and-Value Questionnaires” (Q&V Issuance Memo). On May 7, 2009, we issued and sent *via* Federal Express (FedEx) a quantity-and-value questionnaire (Q&V questionnaire) to Daewoo, Hyosung, Hyundai Mipo, and JeongWoo. See the May 7, 2009, cover letter for each of the four companies and the May 12, 2009, memorandum to the File entitled “Certain Cut-to-Length Carbon Quality Steel Plate from the Republic of Korea: Release of Quantity-and-Value Questionnaire” (Q&V Release Memo). We confirmed that Hyundai Mipo and JeongWoo signed for and received the Q&V questionnaire on May 11, 2009, and Hyosung signed for and received the Q&V questionnaire on May 12, 2009.² See Q&V Release Memo. Hyosung also received the Q&V questionnaire by facsimile machine on May 11, 2009. See the October 8, 2009, letter from the Department to Hyosung (October 8, 2009, letter to Hyosung). The due date for the responses to our questionnaire was May 18, 2009. On May 20, 2009, Daewoo submitted a letter stating that it had no shipments of subject merchandise during the POR.³ We did not receive responses from Hyosung, Hyundai Mipo, or JeongWoo.

On September 24, 2009, we published *Certain Cut-to-Length Carbon-Quality Steel Plate From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Administrative Review in Part*, 74 FR 48716 (September 24, 2009), as

¹ On June 5, 2009, we rescinded the review in part with respect to CTL plate from Korea produced and/or exported by DSM. See *Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 27015 (June 5, 2009).

² The person who signed for and received the FedEx package of the Q&V questionnaire for Hyosung is Mr. Hyun Dong Choi, whose name appears on the May 7, 2009, cover letter of the Q&V questionnaire as an addressee for Hyosung. Mr. Choi’s name also appears on Hyosung’s corporate websites (one website in English and the other website in Korean) as the contact person for Steel & Metal Products PU II. See the February 1, 2010, memorandum to the File entitled “Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Hyosung Corporation’s Contact Information” (Hyosung Contact Memo).

³ We extended the due date for Daewoo pursuant to its timely request for an extension of time.

corrected in *Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Correction to the Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind Administrative Review in Part*, 74 FR 51834 (October 8, 2009) (collectively, *Preliminary Results*). Because Hyosung, Hyundai Mipo, and JeongWoo did not provide responses to our Q&V questionnaire, we relied upon adverse facts available (AFA) to determine their antidumping rates, pursuant to section 776(a)(2) of the Tariff Act of 1930, as amended (the Act). The Department applied an AFA rate of 32.70 percent to Hyosung, Hyundai Mipo, and JeongWoo for the *Preliminary Results*. See *Preliminary Results*, 74 FR at 48717-19.

We invited parties to comment on the *Preliminary Results*. On October 1, 2009, Hyosung sent us *via* facsimile machine its response to the Q&V questionnaire; the letter was dated May 26, 2009. On October 8, 2009, we issued a letter to Hyosung in which we rejected Hyosung's faxed untimely response to the Q&V questionnaire. In it, we identified the filing regulations that Hyosung did not follow for its faxed untimely response to the Q&V questionnaire and we stated, in part, as follows:

Because Hyosung did not submit its response to our Q&V questionnaire in accordance with our regulations, we will not consider Hyosung's faxed response as "received" for purposes of this administrative review. We will not use Hyosung's untimely faxed response to our Q&V questionnaire in our decision for the final results of review.

See the October 8, 2009, letter to Hyosung at 2. Hyosung received this letter on October 8, 2009, by facsimile machine and on October 12, 2009, by FedEx. See the October 13, 2009, memorandum to the File entitled "Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Release of a Letter to Hyosung Corporation."

On October 26, 2009, the Department received a case brief from Hyosung. On November 2, 2009, the Department received a rebuttal brief from Nucor. Because Hyosung's case brief contained untimely filed new factual information and Nucor's rebuttal brief cited the untimely filed new factual information Hyosung included in its case brief, we rejected and returned Hyosung's case brief and Nucor's rebuttal brief on January 6, 2010, and requested that Hyosung and Nucor resubmit their case and rebuttal briefs by January 13, 2010, and January 19, 2010, respectively.

On January 8, 2010, Hyosung submitted its revised case brief. In its January 8, 2010, case brief, Hyosung removed most of the new factual information the Department had rejected but it still contained new factual information. On January 19, 2010, Nucor submitted its revised rebuttal brief. In its revised rebuttal brief, Nucor identified several of Hyosung's statements in the revised case brief as new factual information and requested that the Department reject Hyosung's case brief.

On January 26, 2010, we rejected and returned the revised case and rebuttal briefs for Hyosung and Nucor, respectively, because the revised case brief contained the new factual information and the revised rebuttal brief addressed the new factual information. We allowed Hyosung and Nucor to resubmit their revised case and rebuttal briefs which did not include the new factual

information by the close of business on January 28, 2010. Hyosung and Nucor resubmitted their revised case and rebuttal briefs, respectively, within the specified due date omitting the new factual information we identified in our January 26, 2010, rejection letters. These resubmitted briefs are the final case and rebuttal briefs Hyosung and Nucor submitted respectively for this administrative review. No other parties submitted either a case brief or a rebuttal brief.

On January 14, 2010, we extended the due date for the final results of this administrative review to February 22, 2010. See *Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Extension of the Final Results of Antidumping Duty Administrative Review*, 75 FR 2107 (January 14, 2010). As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, we have exercised our discretion to toll deadlines for the duration of the closure of the Federal Government from February 5 through February 12, 2010. Thus, all deadlines in this segment of the proceeding have been extended by seven days. The revised deadline for the final results of this administrative review is now March 1, 2010. See Memorandum to the Record from Ronald Lorentzen, DAS for Import Administration, regarding “Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm,” dated February 12, 2010.

Discussion of the Issues

1. Acceptance of Untimely Response

Comment 1: Hyosung requests that the Department rescind the administrative review with respect to Hyosung based on its response to the Q&V questionnaire, which it dated May 26, 2009, and faxed to the Department on October 1, 2009. Citing 19 CFR 351.301(c)(2), Hyosung argues that the Department “may request any person to submit factual information at any time during a proceeding.” Citing 19 CFR 351.302(b), Hyosung argues further that, unless precluded by statute, the Department “may, for good cause, extend any time limit established by this part.” Hyosung insists that, although the Department stated in the *Preliminary Results* that, according to Hyosung, “Hyosung’s response was untimely,” the Department has ample authority to accept Hyosung’s response under these two regulatory provisions and use Hyosung’s response as a basis to rescind the administrative review with respect to Hyosung.

According to Hyosung, after the *Preliminary Results* were published, Hyosung learned from a newspaper that the Department had applied an AFA rate of 32.70 percent to Hyosung because the Department never received Hyosung’s response to the Q&V questionnaire. Hyosung claims that it sent the response promptly, which, according to Hyosung, the Department received on October 1, 2009. Hyosung argues that, although the Department’s position is that Hyosung’s response was untimely, this was not due to Hyosung’s willful failure in order to obtain a favorable result. Hyosung claims that the fact that it sent the response to the Q&V questionnaire on October 1, 2009, undermines the basis for the Department’s application of an AFA rate. Hyosung contends that it is clear that it attempted to cooperate with the Department’s request for information and that there is absolutely no evidence that it was seeking to benefit from not participating in the review. Hyosung insists that the Department accept Hyosung’s response to the Q&V questionnaire and use the information in the response as a basis to rescind the administrative review with respect to Hyosung.

Nucor contends that sections 776(a) and (b) of the Act and the Department's precedents support the continued application of AFA for Hyosung in the final results. According to Nucor, section 776(a) of the Act states that the Department may use the facts otherwise available in reaching a determination in which an interested party (1) withholds information the Department requested, (2) fails to provide information in a timely manner or in the form requested, (3) impedes a proceeding significantly, or (4) provides information that cannot be verified. Moreover, Nucor explains, section 776(b) of the Act allows the Department to use adverse inferences wherever a respondent fails to act to the best of its ability in responding to the Department's request for information. Citing the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-316, Vol. 1, 103d Cong. (1994), reprinted in 1994 U.S.C.C.A.N. 4040 (SAA), Nucor asserts that the Department has discretion to apply adverse inferences to a party "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully" and that the Department should consider "the extent to which a party may benefit from its own lack of cooperation." Nucor argues that, because Hyosung did not respond to the Department's request for information while knowing that its noncompliance could result in the application of an AFA rate, Hyosung failed to act to the best of its ability in responding to the Department's request for information. Therefore, Nucor claims, an AFA rate is appropriate for Hyosung.

Citing *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), and the accompanying Issues and Decision Memorandum (I&D Memo) at Comment 8 (*Brake Rotors from China*), Nucor argues that the burden rests with the respondent to ensure that its submissions to the Department are sent and received in a timely manner because it is the respondent's responsibility to report to the Department that it has not made any shipments of subject merchandise. Nucor explains that Hyosung was well aware of the due date for submitting a response to the Q&V questionnaire and the consequences for not responding in a timely manner. According to Nucor, the Department stated in the Q&V questionnaire as follows:

If we do not receive your response by the date and time listed in the attached letter, we may reject it, consider it untimely filed, and not consider it in this proceeding.

Nucor explains that, although the Department confirmed that Hyosung received on May 12, 2009, the Q&V questionnaire which stated this warning, the Department did not receive Hyosung's submission until October 1, 2009, which was more than four months after the May 18, 2009, deadline, more than two months after the Department's regulatory deadline (July 18, 2009) for respondents to submit new factual information in an administrative review for purposes of issuing the final results, and a week after the publication of the *Preliminary Results*. Nucor contends that the Department lacks authority to accept Hyosung's deficient response and that the Department should reject Hyosung's untimely new factual information as the Department's regulations require.

Nucor states that it is improper for Hyosung to rely on 19 CFR 351.301(c)(2) and 19 CFR 351.302(b) to assert that the Department has ample authority to accept Hyosung's deficient

submission and to argue that the Department may request any person to submit factual information at any time during a proceeding and, unless precluded by statute, extend any established time limit for good cause. Nucor argues that, while the Department may extend a specific time limit for good cause, Hyosung neglects to mention that a party must request in writing an extension of time to submit the information and state the reasons for the extension request before the expiration of the applicable time limit. In addition, Nucor contends, the Department's regulations also require that an extension request be granted in writing.

Nucor also contends that Hyosung failed to file its submission in the manner as provided by the Department's regulations. Nucor explains that the Department's Q&V questionnaire provided Hyosung with clear, detailed instructions for filing its response, including the manner in which the filing was to be submitted, the number of copies of the submission to be made, and the address to which Hyosung should submit its response. Nucor states that the Department instructed in boldface print on the cover letter of the Q&V questionnaire as follows:

If, after examining the questionnaire, you conclude that your company and its affiliates did not have any U.S. sales or shipments during the review period identified above, please submit a statement to that effect, following the instructions for filing the response in Enclosure 2. *If you do not submit such a statement for the administrative record in this review, we may conclude that your company has not been responsive to this questionnaire and may proceed on the basis of the facts otherwise available, which may include an adverse inference . . . when determining the company's antidumping duty margin.* (Emphasis added by Nucor.)

Nucor claims that the May 19, 2009, letter from the Department to Daewoo provides even further notice of the Department's filing requirements. Nucor explains that, in its May 19, 2009, letter, the Department informed Daewoo of several deficiencies associated with Daewoo's May 18, 2009, request for a two-day extension to respond to the Q&V questionnaire. According to Nucor, these deficiencies include several of the same deficiencies at issue with Hyosung's submission, *i.e.*, submitting the extension-request letter *via* facsimile machine, submitting the extension-request letter not at the specified address by the required due date, and not including required information in the extension-request letter. Moreover, Nucor states that the Department made clear in the May 19, 2009, letter that a "response by facsimile message only by that date will not be considered a timely response."

Nucor argues that, when Hyosung sent its response to the Q&V questionnaire to the Department on October 1, 2009, it was, as the Department stated in its October 8, 2009, letter to Hyosung, not filed in accordance with the Department's regulations because Hyosung failed to (1) submit its response to the appropriate address, (2) respond in a timely manner, (3) submit the required number of copies of the response and serve all interested parties with copies of the response, (4) specify certain required information, (5) translate documents, and (6) include the required certification of accuracy by a company official or a certificate of service. Nucor claims that the Department's regulations prohibit Hyosung's use of a facsimile machine to submit its response to the Q&V questionnaire.

Nucor argues that the Department rejected Hyosung's response to the Q&V questionnaire and applied the AFA rate for Hyosung appropriately because the Department did not receive Hyosung's response to the Q&V questionnaire until months after the initial due date and until one week after the publication of the *Preliminary Results* and because Hyosung did not file its response to the Q&V questionnaire in accordance with the Department's regulations.

Nucor argues that, because Hyosung sent its response to the Q&V questionnaire more than four months after the initial due date for the response to the Q&V questionnaire and a week after the publication of the *Preliminary Results*, Hyosung's assertion that the Department's application of an AFA rate does not prevent Hyosung from obtaining a more favorable result by not responding to the Q&V questionnaire is flawed. Nucor asserts that, based upon the timing of Hyosung's submission of its Q&V response after the publication of the *Preliminary Results*, Hyosung was able to make a calculated decision about whether it could lower its margins by responding to the Q&V questionnaire. Nucor claims that Hyosung's attempt to game the system justifies the Department's application of an AFA rate to Hyosung. Nucor contends that the Department's application of an AFA rate to Hyosung prevents Hyosung from benefiting from its failure to cooperate to the best of its ability in this review. Nucor explains that, if a respondent such as Hyosung believes that it can reduce its antidumping duty margin by refusing to cooperate with the Department's request for information, it will have every incentive to do so. Nucor requests that, in light of the deficiencies in Hyosung's response to the Q&V questionnaire, the Department continue to reject Hyosung's untimely response to the Q&V questionnaire for the final results.

Department's Position: We have rejected Hyosung's untimely response to the Q&V questionnaire and applied AFA to Hyosung for the final results.

Section 776(a) of the Act states that the Department shall use the facts otherwise available in reaching a determination in which necessary information is not on the record or an interested party (1) withholds information the Department requested, (2) "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," subject to, *inter alia*, section 782(e) of the Act, (3) impedes a proceeding significantly, or (4) provides information that cannot be verified as provided in section 782(i) of the Act. Section 782(e) of the Act provides that, for the completion of the administrative review, we shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements we established if, *inter alia*, the information is submitted by the deadline established for its submission and the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements we established with respect to the information.

Section 776(b) of the Act states that, if we find that an interested party has failed to cooperate by not acting to the best of its ability to comply with our request for information, we may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

In this administrative review, Hyosung impeded the proceeding significantly because it did not respond to our request for information until more than four months after the due date for the

response to the Q&V questionnaire. Hyosung bears the burden of not only submitting its response to the Q&V questionnaire but also ensuring that it filed its response in a timely manner. It is the respondent's responsibility to respond to our request for information. See *Brake Rotors from China* and the accompanying I&D Memo at Comment 8. See also *NTN Bearing Corp. of America v. United States*, 997 F.2d 1453, 1458 (Fed. Cir. 1993) (*NTN Bearing Corp. of America*), and *Zenith Electronics Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) (*Zenith Electronics Corp.*), in which the U.S. Court of Appeals for the Federal Circuit stated that the burden of evidentiary production belongs to the party that possesses the necessary information. (Indeed, the Q&V questionnaire was a second chance we provided for Hyosung to submit information regarding its sales activity. Because we stated in the *Initiation Notice* that a company with no shipments during the POR may submit a no-shipments letter to us within the 30 days from the publication of the *Initiation Notice*, Hyosung had an initial opportunity to provide a statement concerning Hyosung's sales activity within 30 days of the publication of the *Initiation Notice*.)

We sent the Q&V questionnaire to Hyosung on May 7, 2009. Hyosung received the Q&V questionnaire on May 11, 2009, *via* facsimile machine and again on May 12, 2009, *via* FedEx. See Q&V Release Memo and Hyosung Contact Memo. The due date for Hyosung's response to the Q&V questionnaire was May 18, 2009. In the Q&V questionnaire, we stated as follows:

If we do not receive your response by the date and time listed in the attached letter, we may reject it, consider it untimely filed, and not consider it in this proceeding.

Because we did not receive Hyosung's response until October 1, 2009, which is more than four months after the May 18, 2009, deadline, more than two months after our regulatory deadline (July 18, 2009) for respondents to submit new factual information in an administrative review for purposes of issuing the final results in accordance with 19 CFR 351.301(b)(2), and a week after the publication of the *Preliminary Results*, Hyosung withheld information we requested in the Q&V questionnaire and thus "failed to provide such information by the deadlines for submission of the information in the form and manner requested."

In short, we find that Hyosung failed to cooperate to the best of its ability with our request for information. The Q&V questionnaire states that, if we do not receive Hyosung's response by the specified due date, we may reject Hyosung's response, consider it untimely filed, and not consider it in this proceeding. We find that Hyosung's untimely response to the Q&V questionnaire which Hyosung submitted more than four months after the May 18, 2009, deadline does not demonstrate a good-faith effort to cooperate to the best of its ability with our request for information.

We disagree with Hyosung's assertion that it attempted fully to cooperate with our requests for information. In fact, Hyosung disregarded the deadlines set forth in the *Initiation Notice* and our Q&V questionnaire and Hyosung has not demonstrated that it made any attempt to contact us to request an extension of those deadlines or indicate otherwise that it needed additional time to provide information. Moreover, we disagree with Hyosung's claim that there is absolutely no evidence that it was seeking to benefit from not participating in the review. We disagree with

this claim because Hyosung acknowledges that it did not respond to our request for information until after publication of the *Preliminary Results*. See, e.g., Hyosung's final case brief at 11. This delay allowed Hyosung to assess the potential outcome of the review and determine whether it would be worthwhile to participate in the review. In short, Hyosung acted without regard for our requests for information and corresponding administrative deadlines and the timing of Hyosung's response provided the company with sufficient time to evaluate whether participation would be beneficial.

We may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA at 870. The SAA also instructs us to consider, in employing adverse inferences, "the extent to which a party may benefit from its own lack of cooperation." *Id.* Moreover, "affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference." See *Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27340 (May 19, 1997). Regardless of the party's intention, if we 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, we would establish a precedent that an interested party may establish its own due date to respond to our request for information. We decline to allow such a practice here because it 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 earlier in relevant 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. Allowing parties to submit responses to our requests for information at whatever time is most convenient for them would amount to relinquishing our authority to establish due dates for submissions and it would thus impair our ability to satisfy the statutory timeframe in which to complete an administrative review.

Parties' adherence to our administrative deadlines is necessary for us 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. For example, because we are obliged to complete an administrative review within the statutory deadline, when we grant a request for an extension of time for an interested party to respond to our request for information, we inform the interested party that our decision to grant an extension may affect the amount of time that we are able to afford it to submit a response to any questions and/or requests for additional information. See, e.g., the May 19, 2009, letter to Daewoo in which we stated, "Finally, our decision to grant the two-day extension in this instance may affect the amount of time that we are able to afford you to submit a response to any questions and/or requests for additional information." If we allow an interested party, such as Hyosung, to submit its response to our request for information based upon the party's own timetable in complete disregard of the due date we establish in accordance with 19 CFR 351.301 and 19 CFR 351.302, 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.

We disagree with Hyosung's reliance on 19 CFR 351.301(c)(2) and 19 CFR 351.302(b) to assert

that we should have accepted Hyosung's untimely response to the Q&V questionnaire. While we may extend a specific time limit within our statutory authority for good cause, 19 CFR 351.302(c) states that, "before the applicable time limit specified under section 351.301 expires, a party must request an extension" which must be in writing. Therefore, Hyosung should have requested, in writing, an extension of time to respond to our Q&V questionnaire and state the reasons for the extension request before the expiration of the applicable time limit we established in accordance with 19 CFR 351.301(c)(2)(ii). In addition, we must grant an extension in writing. See 19 CFR 351.302(c). See also the May 19, 2009, letter to Daewoo in which we granted Daewoo's request for an extension of time to respond to our Q&V questionnaire.

Hyosung also failed to file its response to the Q&V questionnaire in the form and manner specified in our regulations and explained in the Q&V questionnaire. See section 776(a)(2)(B) of the Act which states that, if a party fails to provide information by the deadlines for submission of the information or in the form and manner requested, subject to section 782(c)(1) and (e), we shall, subject to section 782(d), apply facts available. Enclosure 2 of the Q&V questionnaire provided Hyosung with clear, detailed instructions for filing its response, including the manner in which the filing was to be submitted, the number of copies of the submission to be made, and the address to which Hyosung should submit its response. As we stated in our October 8, 2009, letter to Hyosung, Hyosung not only faxed its response to the Q&V questionnaire in an untimely manner but also failed to follow the form and manner specified in Enclosure 2 of the Q&V questionnaire in its response to the Q&V questionnaire.

Specifically, Hyosung failed to (1) submit its response to the appropriate address, (2) respond in a timely manner, (3) submit the required number of copies of the response and serve all interested parties with copies of the response, (4) specify certain required information such as case number, total number of pages of the letter, type of review, period of review, the section of the Act which covers this administrative review, the office conducting this review, and a marking indicating that this is a public document, (5) translate documents, and (6) include the required certification of accuracy by a company official or a certificate of service. Also, Hyosung did not comply with our request to submit its response to the address we specified in the Q&V questionnaire and instead faxed the response to us on October 1, 2009. Because Hyosung faxed its response improperly and in an untimely manner, it was appropriate for us to reject Hyosung's response to the Q&V questionnaire and apply facts available pursuant to section 776(a)(2)(B) of the Act. Moreover, Hyosung did not notify us of any difficulties with submitting the information requested in the requested form and manner, together with a full explanation and suggested alternative forms, pursuant to section 782(c)(1) of the Act. As we stated above, we issued the October 8, 2009, letter to Hyosung in which we rejected Hyosung's faxed untimely response to the Q&V questionnaire and identified the filing regulations that Hyosung did not follow for its faxed untimely response to the Q&V questionnaire.

Because Hyosung failed to cooperate by not acting to the best of its ability, in order to prevent Hyosung from obtaining a more favorable result by failing to cooperate than if it had cooperated fully, we applied the AFA rate of 32.70 percent to Hyosung for the final results of this administrative review pursuant to the statutory authority provided in sections 776(a) and (b) of the Act.

2. *Rescission of Review Based on the CBP Data*

Comment 2: Hyosung states that the Department's record shows that Hyosung had no exports to the United States during the POR. Hyosung states that the Department's March 31, 2009, letter to parties with access to business-proprietary information under the administrative protective order reaffirmed what it had stated in the *Initiation Notice* that it intends to select respondents for individual examination based on CBP data. Hyosung states that the Department selected DSM as the sole respondent for individual examination in this review based solely on CBP data which indicated that DSM accounts for a certain percentage of the total volume of imports of subject merchandise from the five named respondents. According to Hyosung, no party objected to or disagreed with the use of CBP data to select respondents or filed any comments questioning the accuracy or completeness of CBP data. Hyosung argues on page 2 of its final case brief that, while "the Department has the discretion to corroborate CBP data by means of Q&V questionnaires," the Department has relied on CBP data alone in prior cases as sufficient evidence to demonstrate that a company made no shipments and rescinded administrative reviews on that basis.

Hyosung cites several past cases in which the Department has relied on CBP data solely as the basis for rescinding a review for a company with no shipments during the POR. According to Hyosung, the Department confirmed with CBP data that companies which did not submit a no-shipments letter did not have entries of subject merchandise during the POR and rescinded the reviews for those companies in *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not To Revoke in Part*, 69 FR 64731, 64732 (November 8, 2004) (*Rebar from Turkey 2002-03*), and *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part*, 70 FR 67665 (November 8, 2005) (*Rebar from Turkey 2003-04*).

Hyosung also cites *Certain Frozen Warmwater Shrimp from Brazil: Notice of Rescission of Antidumping Duty Administrative Review*, 73 FR 33976 (June 16, 2008) (*Shrimp from Brazil*), in which, according to Hyosung, the Department rescinded the review apparently based on CBP data alone. According to Hyosung, in *Shrimp from Brazil*, the Department reviewed CBP data that showed no entries of subject merchandise during the POR, released CBP data to interested parties and invited comments, and sent a "No-Shipment Inquiry" to CBP to confirm that there were no shipments of entries of subject merchandise during the POR. Hyosung explains that, because the Department received no information from CBP to contradict the results of its data query that there were no shipments or entries of subject merchandise during the POR, the Department rescinded its review in *Shrimp from Brazil*.

In addition, Hyosung cites *Certain Preserved Mushrooms from Chile: Final Rescission of Antidumping Duty Administrative Review*, 65 FR 43292 (July 13, 2000) (*Mushrooms from Chile*), in which, according to Hyosung, the Department rescinded the administrative review with respect to a company that did not respond to the Department's questionnaire because CBP data showed that the company had not imported subject merchandise during the POR. Hyosung concedes that, in *Mushrooms from Chile*, the basis for the rescission of review for the non-responsive company was that the same dumping margin would apply to the company regardless

of whether the Department applied the AFA rate or rescinded the review. Hyosung acknowledges that *Mushrooms from Chile* states that the Department's normal practice would be to apply an AFA rate to a non-cooperative respondent but Hyosung contends nonetheless that *Mushrooms from Chile* still provides an example in which the Department rescinded a review for a non-responsive company which had no entries during the POR.

Accordingly, Hyosung claims, once DSM's review request was withdrawn, it would have been appropriate for the Department to terminate the review in its entirety based on CBP data which shows the status of entries or no entries of subject merchandise during the POR. Hyosung also argues that, upon DSM's withdrawal of its review request, the Department should have asked the petitioners, to which CBP data had already been supplied, whether they had any information concerning CBP data and, if the petitioners responded negatively, the Department should have terminated the entire review with respect to all other suppliers.

Hyosung reiterates that, based on precedent, the Department could have rescinded the review with respect to Hyosung based solely upon CBP data that showed Hyosung's status of entries or no entries of subject merchandise during the POR. While Hyosung recognizes that, in *Brake Rotors from China*, the Department stated that it will not rely on CBP data as a "dispositive source of data on company exports," Hyosung contends that the Department apparently relied on CBP data as a dispositive source of data on company exports when it selected DSM as the sole respondent for individual examination based on CBP data alone.

Citing *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1374 (Fed. Cir. 2003), *Certain Frozen Warmwater Shrimp from the People's Republic of China: Rescission of the Second Administrative Review*, 72 FR 61858 (November 1, 2007), *Certain Corrosion-Resistant Carbon Steel Flat Products from France: Notice of Rescission of Antidumping Duty Administrative Review*, 71 FR 16553 (April 3, 2006), and *Stainless Steel Plate in Coils from Taiwan: Final Rescission of Antidumping Duty Administrative Review*, 68 FR 63067 (November 7, 2003), Hyosung states that it is the Department's consistent and longstanding practice, supported by substantial precedent, to require entries of subject merchandise during the POR upon which to assess antidumping duties. Hyosung states that, consistent with its practice, the Department should rescind a review when record evidence indicates that respondents had no entries of subject merchandise during the POR. Hyosung argues that, consistent with this practice and precedent, the Department should rescind the administrative review with respect to Hyosung because the Department knows that Hyosung had no entries of subject merchandise during the POR.

Citing *D&L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997), quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990), Hyosung argues that the continued application of the AFA rate of 32.70 percent to Hyosung would not serve "the basic purpose of the statute – determining current margins as accurately as possible" but results instead in an artificially high dumping margin being applied to a company that the Department knows had no entries of subject merchandise during the POR. Hyosung explains that the final AFA rate will serve as the cash-deposit rate for Hyosung going forward unless and until it participates in an administrative review, which will require entries of subject merchandise Hyosung has never exported to the United States.

Hyosung comments that administrative reviews are expensive and complex for all parties and that, once the Department has record evidence that a company had no exports or entries of subject merchandise during the POR, the Department is obligated to act based on that evidence when there is no good cause or contrary evidence from the petitioners. Hyosung states that no such contrary evidence exists in this administrative review and that this administrative review does not involve complex issues or responses to be dissected and analyzed. Hyosung states further that there is no verification in this administrative review. Hyosung argues that, because there are no shipments to be reviewed in this segment of the proceeding and because Hyosung did not export or enter CTL plate to the United States during the POR, rescission of the review with respect to Hyosung is the proper course of action.

Nucor disagrees with Hyosung's contention that the Department should have rescinded this review with respect to Hyosung based solely upon CBP data that showed Hyosung's status of entries or no entries of subject merchandise during the POR. Citing *Brake Rotors from China*, Nucor argues that it is the Department's practice to use CBP data to corroborate or contradict a respondent's reported data and that the Department's precedent contradicts Hyosung's assertion. Nucor states that, in *Brake Rotors from China* and the accompanying I&D Memo at Comment 8, the Department stated:

{R}espondents' certified questionnaire responses and statements are its primary sources of information in antidumping proceedings while data from CBP may either corroborate or contradict a respondents' reported data. However, the Department is cautious of relying solely on CBP data as a dispositive source of data on company-specific exports. Accordingly, it is the responsibility of the respondent to report to the Department that it has not made any U.S. shipments that are subject to review.

Moreover, Nucor quotes from the Q&V Issuance Memo, which states:

When CBP data may not be useful in making respondent-selection decisions, the Department has often requested that the companies listed in the *Initiation Notice* provide the quantity and value of the sales of subject merchandise during the POR.

Citing the Q&V Issuance Memo, Nucor explains that the Department concluded that CBP data on the record provided inconclusive information. Nucor argues that the Department decided properly against relying on CBP data exclusively as a dispositive source of data on company-specific exports. Nucor asserts that the Department's request to Hyosung for information concerning its sales of subject merchandise was appropriate and consistent with the Department's precedent.

Nucor argues that *Mushrooms from Chile* supports the application of an AFA rate to Hyosung in this administrative review. Nucor states that, in *Mushrooms from Chile*, the Department stated that its normal practice in accordance with section 776(b) of the Act is to use AFA when a respondent has not responded to a request for information and thus has failed to cooperate to the best of its ability. Nucor explains that, in *Mushrooms from Chile*, the Department rescinded the

review for the non-responsive company not because CBP data showed conclusively that this company had no shipments, but because the AFA rate would have been the same as the margin that the Department applied after it rescinded the review. Nucor explains further that, in *Mushrooms from Chile*, the Department's decision to rescind the review with respect to the non-responsive company was due to this unusual circumstance, which is absent in this administrative review with respect to Hyosung. Nucor states that, unlike in *Mushrooms from Chile*, in this case applying the AFA rate to Hyosung results in an antidumping duty margin of 32.70 percent while rescinding this review with respect to Hyosung would result in an antidumping duty margin of 0.98 percent, the all-others rate.

Department's Position: Under our current practice, we do not rescind a review on the basis of CBP data alone. See *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 71 FR 65082 (November 7, 2006), and the accompanying I&D Memo at Comment 22 (*Rebar from Turkey 2004-05*), and *Brake Rotors from China* and the accompanying I&D Memo at Comment 8. We have determined that CBP data alone is not sufficient to determine whether there were entries of subject merchandise from a reviewed company during the POR because it may not demonstrate conclusively that the company in question had no relevant sales or shipments of subject merchandise. *Id.* For example, CBP data does not include information on entries which were not made electronically. *Id.* Therefore, it is our current practice to rely on an interested party's no-shipments letter in response to our request for information, as corroborated by CBP data, in order to rescind an administrative review with respect to the interested party. *Id.* While it is true that there have been 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 2004-05*, that is not our practice. See, e.g., *Rebar from Turkey 2002-03* and *Rebar from Turkey 2003-04*.

Because CBP data may not be complete or conclusive, we do not rely solely on CBP data as a dispositive source of data on company-specific exports for purposes of determining an antidumping duty margin. See *Brake Rotors from China* and the accompanying I&D Memo at Comment 8. Therefore, it is the respondent's responsibility to comply with our request for information and report to us that it has not made any shipments of subject merchandise. *Id.* Based on the respondent's certified statement of no shipments, we may use CBP data to corroborate the respondent's certified no-shipment letter. See *Allegheny Ludlum Corp. v. United States*, 276 F. Supp. 2d 1344, 1354-56 (CIT 2003). If a respondent does not provide a response to our request for information with respect to the existence or non-existence of shipments of subject merchandise during the POR, we cannot use CBP data to corroborate the respondent's information because there is no information from the respondent to corroborate. Therefore, in *Rebar from Turkey 2004-05*, we applied an AFA rate to all companies for which sufficient evidence existed to show that they received our questionnaire but did not respond to our questionnaire.

We find that *Mushrooms from Chile* also supports our decision to apply the AFA rate to Hyosung for the final results. In *Mushrooms from Chile*, we stated that it is our normal practice under section 776(b) of the Act to use AFA when a respondent has not responded to our request

for information and thus has failed to cooperate to the best of its ability. See *Mushrooms from Chile*, 65 FR at 43293. In *Mushrooms from Chile*, we rescinded the review for the non-responsive company because we faced the “unusual circumstance” that rescission resulted in the same rate as an AFA rate. *Id.* The instant case is distinguishable because Hyosung’s cash-deposit rate would be 0.98 percent if we rescind this review for Hyosung and 32.70 percent if we continue to apply the AFA rate to Hyosung for the final results. In short, we do not face the same “unusual circumstance” presented by *Mushrooms from Chile* and there is no basis to deviate from our normal practice of applying AFA to a non-responsive company, *i.e.*, Hyosung.

We disagree with Hyosung that we should have requested that the petitioners report any information concerning the CBP data and, if the petitioners responded negatively, then we should have terminated the entire review with respect to Hyosung as well as all other non-responsive companies to which we applied the AFA rate. We disagree because the information on whether a respondent made shipments or entries of subject merchandise during the POR is the respondent’s own information. Therefore, the respondent, not the petitioner 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 Q&V questionnaire. See *NTN Bearing Corp. of America*, 997 F.2d at 1458, and *Zenith Electronics Corp.*, 988 F.2d at 1583 (stating that the burden of evidentiary production belongs to the party that possesses the necessary information).

We disagree with Hyosung’s assertion that our conclusion based on CBP data in regards to respondent selection entails necessarily the conclusion as to whether Hyosung had made shipments or no shipments during the POR. Although it is our normal practice to use CBP data to select respondents for individual examination, CBP data is not a reliable source of data in making a conclusive determination for purposes of determining whether to rescind an administrative review or whether the respondent made no shipments or entries of subject merchandise during the POR.

Although in *Shrimp from Brazil* we determined to rescind the review on the basis of CBP data, in this administrative review we determined that the CBP data we have on the record are inconclusive for purposes of determining whether Hyosung made no shipments of subject merchandise during the POR and, thus, we find that it is not appropriate to rely on CBP data alone in determining whether we should rescind this review with respect to Hyosung. Hyosung is the party which has the most accurate information as to whether it made shipments of subject merchandise during the POR. Our determination is consistent with our decision in *Rebar from Turkey 2004-05*.

As discussed above, our record indicates that Hyosung received our Q&V questionnaire in two forms on May 11, 2009, and May 12, 2009. Hyosung failed to respond to our Q&V questionnaire within the specified due date, which was May 18, 2009, and withheld its response to our Q&V questionnaire until October 1, 2009. Unlike Daewoo, Hyosung did not even request an extension of time to respond to our questionnaire. Because Hyosung did not provide information in response to our Q&V questionnaire, Hyosung has failed to meet the burden to make necessary information in its possession available on the record. Because it is our practice not to rely on CBP data alone in making a determination on whether a company made shipments

of subject merchandise during the POR, we continue to conclude that a response to a Q&V questionnaire was required from Hyosung and that Hyosung did not act to the best of its ability by providing a timely and properly filed response to our request for information. Therefore, we have continued to apply the AFA rate to Hyosung for the final results of this review.

3. *Alleged New Factual Information*

Nucor requests that the Department reject Hyosung's final case brief, contending that it includes new factual information. Nucor identifies on page 6 of Hyosung's final case brief Hyosung's references to its response dated May 26, 2009, as new factual information. Nucor alleges that, on page 6 of Hyosung's final case brief, Hyosung states that, "{a}lthough the Department stated in the *Preliminary Results* that it did not receive Hyosung's response, the Department has the authority to accept Hyosung's response" and contends that this is referring to the existence of an earlier submission, *i.e.*, the alleged May 26, 2009, response that was not received by the Department, given that Hyosung's faxed response to the Q&V questionnaire was not received by the Department until one week after the *Preliminary Results*, which is therefore new factual information. Finally, Nucor identifies on pages 10 and 11 of Hyosung's final case brief Hyosung's "reference to a response that was not received by the Department (*i.e.*, Hyosung's alleged May 26, 2009 response to the Q&V questionnaire)" as new factual information.

Nucor also alleges that, in addition to referring to new factual information, Hyosung did not provide an interested-party certification or a counsel's certificate in its final case brief. Nucor requests that, for these reasons, the Department reject Hyosung's final case brief and apply AFA to Hyosung for the final results.

Hyosung did not respond to Nucor's allegations.

Department's Position: Based on record evidence, we find that the statements Nucor identified do not constitute improperly filed new factual information. Because we acknowledged in our October 8, 2009, letter to Hyosung that its response to our Q&V questionnaire was dated May 26, 2009, Hyosung's reference to this date does not constitute untimely and improperly filed new factual information.

Hyosung's characterizations of its response to the Q&V questionnaire as a document that we "did not receive" on page 6 and "the Department has not received" on pages 10 and 11 of its final case brief do not constitute an untimely and improper introduction of new factual information. We stated in the *Preliminary Results* that we did not receive a response to our Q&V questionnaire from Hyosung. See *Preliminary Results*, 74 FR at 48717. In the *Preliminary Results*, we also stated that Hyosung did not provide its response to our Q&V questionnaire and that Hyosung failed completely to respond to our Q&V questionnaire. See *Preliminary Results*, 74 FR at 48717-78. Thus, this information was already on the record of this administrative review and Hyosung's inclusion of this information in its final case brief does not constitute new factual information.

Also, because Hyosung's final case brief does not contain new factual information, we do not find that an absence of an interested-party certification or a counsel's certificate in Hyosung's

final case brief constitutes one of the reasons to apply an AFA rate to Hyosung in the final results. See 19 CFR 351.309(c).

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of the review and the final dumping margins for Hyosung, Hyundai Mipo, and JeongWoo in the *Federal Register*.

Agree X

Disagree

/s/ Carole A. Showers

Carole A. Showers
Acting Deputy Assistant Secretary
for Import Administration

March 1, 2010

(Date)