

publication of the clarification. SSCI contends that such action by the Department imposes a hardship because the service centers could not anticipate it and avoid the consequences. In its rebuttal comments, SSCI comments on the retroactive effect further, arguing that the sales the Department analyzes in a future review will capture sales and entries that have already taken place. SSCI cites *Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988), to support its conclusion that a retroactive examination of sales is not supported by law.

*Response:* This clarification will be applicable only to entries for which the anniversary month for requesting an administrative review is May 2003 or later. For example, if the anniversary month of an order is June, the clarification will apply for the first time to entries made during the period of review for which parties may request a review in June 2003 which, in most cases, will be the period June 1, 2002, through May 31, 2003. This does not impose a hardship for parties to the proceeding because they have the opportunity during the anniversary month to decide whether to request a review of those earlier sales.

The purpose of this clarification is to provide all parties with the methodology the Department will use to determine the proper assessment rate for subject merchandise when resellers are in the chain of commerce between the producer and the sale to a customer for importation into the United States in order to provide parties with the opportunity to make an informed determination about whether to request a review of a reseller. The holding in *Bowen* is not on point because this methodology does not "retroactively" apply duties to the subject entries. Rather, duties are owed on imports of the subject merchandise and the question is one of the proper rate to be applied. This notice provides parties the opportunity to understand how the Department will determine the proper assessment rate early enough so that a party may request an administrative review of the reseller if it chooses to do so. The fact that the subject merchandise may have entered before the publication of this clarification is immaterial because interested parties will be informed of the methodology the Department will use to determine the proper assessment rate, regardless of the cash-deposit rate in effect at the time of entry, and because an interested party will have the opportunity to request an administrative review of the reseller if it believes that the deposit and possible

final assessment rates do not reflect the reseller's pricing practices.

*Comment 8:* Several parties offer alternative approaches for the Department to consider. One suggestion is that under 19 CFR 351.107(c) the Secretary should establish a combination rate for non-producing exporters with multiple supplying producers. Such cash-deposit rates, they contend, which would then be finalized in accordance with the appropriate producer's rate, would be based on each combination of reseller and producer. Another proposal observes that, although not specifically provided in the regulations, the Department could also apply cash-deposit requirements and final duties based on the trade-weighted average rate assessed on each producer that supplied to the reseller, i.e., if a reseller is exporting merchandise that is produced by three different producers, then the cash deposit and final rate should be the weighted average of the specific rates found for all three producers. SSCI contends that the Department could calculate the reseller's export price or constructed export price by taking the reseller's resale price, adjusted for selling, general, and administrative expenses, movement costs, and further-manufacturing costs, compared to the reseller's purchase price from the producer. In SSCI's scenario, the reseller's rate would be determined based on the producer's rate plus any difference found. The final alternate proposal, also from SSCI, is to calculate a reseller-specific rate using a constructed-value method starting with the reseller's purchase price plus the reseller's general expenses and profit.

*Response:* We considered a number of possible alternatives for this clarification but found none that better represent the reality of the reseller's selling practices. Further, each proposal assumes that the Department has information about the reseller. In fact, this clarification addresses liquidation of entries involving a reseller about which there is *no* information on the record of a review. Nevertheless, we have examined the merits of each of the proposals.

While 19 CFR 351.107(c) addresses the possibility of combination rates for deposit purposes, the underlying assumption is that the Department has information about the non-producing reseller and its supplier(s). Therefore, the type of situation we are addressing in this clarification would not fit into that regulation. The second proposal creates a specific reseller rate which is based on the producer's selling practices, not those of the reseller.

Therefore, this would not be a realistic reflection of the resellers' pricing practices and would continue to be distortive. Further, there is no description of how we would create that rate, given that we would have none of the required information, and in what context, given that the situation we are addressing exists outside the realm of an administrative review. The third and fourth proposals would require the calculation of a rate for a specific reseller based somewhat on the reseller's information. If the Department is requested to review a reseller and establish a rate for that reseller, the Department will conduct an administrative review in accordance with the established administrative-review procedures under 19 CFR 351. Moreover, the basic premises of the third and fourth proposals are flawed. Both assume we know the identity of the reseller prior to liquidation and that we can conduct an administrative review of its exports. On the contrary, we do not know whether a reseller has sales unless such sales are reported by the producer or by the reseller itself in a review. The existence of U.S. sales by a reseller for which the reviewed producer did not have knowledge only comes to light after all entries covered by the review have been liquidated, which occurs after the final and conclusive results of review. For these reasons, these proposals are not administrable.

*Comment 9:* Micron Technology comments that application of the all-others rate to resellers which have not been individually reviewed is, in many cases, appropriate. It contends, however, that the uniform application of the all-others rate to an independent reseller, as proposed by the Department, creates an asymmetry between the position of the foreign producers and exporters and the domestic industry. Micron contends that, when the all-others rate is higher than the producer's rate, the reseller may request a review to receive a separate rate but, in those cases where a reviewed producer/exporter is also the producer of the goods which are exported by an independent reseller and the exporter/producer's rate is higher than the all-others rate, the reseller will not request a review. Furthermore, Micron asserts, this policy would provide an incentive to resellers not to make themselves known to petitioners so that they will not be able to request a review of the resellers. Therefore, this party argues, the assessment rate for resellers which are exporting goods that are manufactured by a producer which has