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DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

Docket No. 120411407-2407-01

RIN: 0625-AA91

Modification of Regulations Regarding the Definition of Factual Information and Time Limits for Submission of Factual Information

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: The Department of Commerce (the Department) proposes to modify its regulations which define “factual information” and establish time limits for the submission of factual information in antidumping (AD) and countervailing duty (CVD) proceedings. The modifications to the definition of factual information, if adopted, will more clearly describe the types of information that can be submitted by a person or placed on the record by the Department in a segment of a proceeding. The modifications to the time limits in which such information may be submitted or placed on the record, if adopted, will enable the Department to efficiently determine what type of information is being submitted and whether it is timely filed, and to provide sufficient opportunity for the Department to review submissions of factual information.

DATES: To be assured of consideration, comments must be received no later than [INSERT DATE **45** DAYS AFTER THE PUBLICATION OF THIS NOTICE IN THE FEDERAL REGISTER].

ADDRESSES: All comments must be submitted through the Federal eRulemaking Portal at <http://www.regulations.gov>, Docket No. ITA-2011-XXXX, unless the commenter does not have access to the internet. Commenters who do not have access to the internet may submit the original and two copies of each set of comments by mail or hand delivery/courier. All comments should be addressed to Paul Piquado, Assistant Secretary for Import Administration, Room 1870, Department of Commerce, 14th Street and Constitution Ave., NW, Washington, DC 20230. The comments should also be identified by Regulation Identifier Number (RIN) 0625-AA91.

The Department will consider all comments received before the close of the comment period. The Department will not accept comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. All comments responding to this notice will be a matter of public record and will be available for inspection at Import Administration's Central Records Unit (Room 7046 of the Herbert C. Hoover Building) and online at <http://www.regulations.gov> and on the Department's Web site at <http://www.trade.gov/ia/>.

Any questions concerning file formatting, document conversion, access on the Internet, or other electronic filing issues should be addressed to Andrew Lee Beller, Import Administration Webmaster, at (202) 482-0866, e-mail address: webmaster-support@ita.doc.gov.

FOR FURTHER INFORMATION CONTACT: Joanna Theiss at (202) 482-5052 or Charles Vannatta at (202) 482-4036.

SUPPLEMENTARY INFORMATION:

Background

The Department proposes to modify two regulations related to AD and CVD proceedings: the definition of factual information, 19 CFR § 351.102(b)(21), and the time limits

for the submission of factual information, 19 CFR § 351.301. Currently, 19 CFR § 351.102(b)(21) defines factual information as: “(i) initial and supplemental questionnaire responses; (ii) data or statements of fact in support of allegations; (iii) other data or statements of facts; and (iv) documentary evidence.” The Department proposes modifying this definition in order to create distinct descriptive categories of factual information that can be submitted in a segment of a proceeding.

The proposed rule identifies five categories of factual information, which are summarized as follows: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR § 351.408(c) or to measure the adequacy of remuneration under 19 CFR § 351.511(a)(2); (iv) evidence placed on the record by the Department; and (v) evidence other than factual information described in (i) – (iv). The proposed definition does not change the types of information that can be submitted in a segment of a proceeding; rather, it will allow for more accurate classification of factual information than the current definition.

Currently, 19 CFR § 351.301 sets forth the time limits for submission of factual information, including general time limits, time limits for certain submissions such as responses to questionnaires, and time limits for certain allegations. The Department proposes to modify 19 CFR § 351.301 so that, rather than providing general time limits, there will be specific time limits based on the type of factual information being submitted, in accordance with the proposed changes to 19 CFR § 351.102(b)(21). This will enable the Department to review and analyze the factual information at the appropriate stage in the proceeding, based on the Department’s experience in administering the AD and CVD laws, rather than being required to review large amounts of factual information on the record of a proceeding when it is too late to adequately

examine, analyze, conduct follow-up inquiries regarding and, if necessary, verify the information. This modification will also provide clarity to persons concerning the deadlines for submissions of certain factual information in a segment of a proceeding, including the submission of factual information to rebut, clarify, or correct factual information that is already on the record.

The Department also proposes to require any person, when submitting factual information, to specify under which subsection of proposed § 351.102(b)(21) the information is being submitted and if the information is submitted to rebut, clarify, or correct factual information already on the record, in order to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. This will enable the Department and interested parties to efficiently identify the factual information and to analyze it in accordance with the purpose for which it is being submitted.

Classification

Executive Order 12866

This proposed rule has been determined to be not significant for purposes Executive Order 12866.

Initial Regulatory Flexibility Analysis (IRFA)

Pursuant to Section 603 of the Regulatory Flexibility Act, the Department has prepared the following IRFA to analyze the potential impact that this proposed rule, if adopted, would have on small entities.

Description of the Reasons Why Action is Being Considered

The policy reasons for issuing this proposed rule are discussed in the preamble of this document, and not repeated here.

Statement of the Objectives of, and Legal Basis for, the Proposed Rule; Identification of all Relevant Federal Rules which may Duplicate, Overlap, or Conflict with the Proposed Rule

This proposed rule is intended to alter the Import Administration's regulations for AD and CVD proceedings; specifically, to change the definition of factual information and the deadlines for submitting information in AD and CVD proceedings.

The proposed rule would alter several deadlines for submitting factual information in a segment of a proceeding. Information submitted to rebut, clarify, or correct factual information would generally have a deadline of 10 days from the date that the factual information is served on the interested party or filed with the Department, except that information submitted to rebut, clarify, or correct information in an initial questionnaire response would be due 14 days after the initial response is filed with the Department. Factual information voluntarily provided to support allegations regarding market viability and the basis for determining normal value would be due 10 days after the respondent interested party files the response to the relevant section of the questionnaire. Factual information provided to support an allegation of an upstream subsidy would be due 60 days after the preliminary determination.

Deadlines for submissions of factual information to value factors of production and to measure the adequacy of remuneration will be imposed or shortened, as appropriate, but this is expected to have a beneficial impact on small entities that participate in AD and CVD proceedings because they will have the opportunity to review and comment on the Department's preliminary analysis of the information, which is not the case under current regulations.

The legal basis for this rule is 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.*; and 19 U.S.C. 3538. No other Federal rules duplicate, overlap, or conflict with this proposed rule.

Number and Description of Small Entities Regulated by the Proposed Action

The proposed rules will apply to all persons submitting information to the Department in AD and CVD proceedings. This could include exporters and producers of merchandise subject to AD and CVD proceedings and their affiliates, importers of such merchandise, domestic producers of like products, and foreign governments.

Exporters and producers of subject merchandise are rarely U.S. companies. Some producers and exporters of subject merchandise do have U.S. affiliates, some of which may be considered small entities under the appropriate Small Business Administration (SBA) small business size standard. The Department is not able to estimate the number of exporters and producer domestic affiliates that may be considered small entities, but anticipates, based on its experience in these proceedings, that the number will not be substantial.

Importers may be U.S. or foreign companies, and some of these entities may be considered small entities under the appropriate SBA small business size standard. The Department does not anticipate that the proposed rules will impact a substantial number of small importers because importers of subject merchandise who are not also producers and exporters (or their affiliates) rarely submit factual information in the course of the Department's AD and CVD proceedings, and those that do tend to be larger entities.

Some domestic producers of like products may be considered small entities under the appropriate SBA small business size standard. Although it is unable to estimate the number of producers that may be considered small entities, the Department does not anticipate that the number affected by the proposed rule will be substantial. Frequently, domestic producers that bring a petition account for a large amount of the domestic production within an industry, so it is unlikely that these domestic producers will be small entities.

In sum, while recognizing that exporter and producer affiliates, importers, and domestic producers that submit information in AD and CVD proceedings will likely include some small entities, the Department, based on its experience with these proceedings and the participating parties, does not anticipate that the proposed rule would impact a substantial number of small entities.

Description of the Projected Reporting, Recordkeeping, and other Compliance Requirements of the Proposed Rule

The proposed rules will require persons submitting factual information to the Department to specify under which subsection of the proposed definition the information is being submitted. If it is being submitted to rebut, clarify, or correct factual information already on the record, the person will be required to identify the information already on the record that the factual information seeks to rebut, clarify or correct. This will not amount to a significant burden as the submitter should already be aware of the relevant subsection pursuant to which it is submitting factual information; in addition, all of the required information should be readily available to any person submitting factual information to the Department.

Description of any Significant Alternatives to the Proposed Rule that Accomplish the Stated Objectives of Applicable Statutes and that Minimize any Significant Economic Impact of the Proposed Rule on Small Entities

As required by 5 U.S.C. § 603(c), the Department's analysis considered significant alternatives. The alternatives which the Department considered include: (1) the preferred alternative of modifying the definition of factual information and modifying the time limits, as described in this proposed rule; (2) maintaining the existing definition of factual information and the time limits for the submission of factual information; (3) modifying the definition of factual

information but maintaining all time limits; and, (4) modifying the definition of factual information and extending the time limits.

The Department does not anticipate that the first, preferred alternative will have a significant economic impact on small entities. The changes to the definition of “factual information” do not impose any significant burden on the parties in AD or CVD proceedings; the changes do not alter the types of information that may be submitted, but merely re-categorizes them into more logical groupings than the current definition. The changes to the deadlines for submitting factual information are also not expected to have a significant economic impact on small entities. Although some deadlines are shortened, these are either not expected to have a significant impact on small entities or will actually have a positive impact. For example, for the submission of factual information in support of allegations, or to rebut, clarify, or correct factual information, in the Department’s experience the parties submitting these allegations or rebuttals/clarifications/corrections will possess the relevant information with sufficient time to submit them before the information would be due.

By contrast, shortening the time limits for the submission of factual information to value factors of production will have a beneficial impact on any small entities that are participating in an AD proceeding, because it will provide them with an opportunity to review and comment on the Department’s preliminary analysis of this information. Because the time limits currently permit such information to be submitted after the Department issues its preliminary calculations, parties wishing to assess the significance of this information would need to undertake their own analysis of the often voluminous information submitted. Such analysis of the often voluminous information may be particularly burdensome for small entities. In addition, parties continue to have a significant amount of time to gather this type of information in advance of the time limit

because the Department accepts only publicly available information pursuant to this provision. Further, establishing a time limit for the submission of factual information to measure the adequacy of remuneration under § 351.511(a)(2), where the current regulation does not include any time limit, will provide certainty to parties, including those who wish to submit factual information to rebut, clarify or correct the factual information submitted under this provision.

Under alternative two, the Department determined that maintaining the definition of factual information and the time limits provision would not serve the objective of the proposed rules to permit the Department and interested parties adequate opportunity to review and analyze submissions of factual information in an efficient manner. If the Department were to maintain the current rules, then persons would still be able to submit large amounts of factual information on the record of an AD or CVD segment very close to the Department's statutory deadlines for making certain determinations, thus limiting the Department's ability to consider, analyze and, if applicable, verify the information submitted. The current definition and time limits also do not provide sufficient clarity to persons participating in an AD or CVD proceeding, because the current rules do not require persons submitting information to identify the type of information which is being submitted. Although this alternative was considered, it was not adopted because it does not serve the Department's objectives of creating certainty for participants in AD and CVD proceedings.

The Department also considered modifying the definition of factual information without modifying the time limits provision, listed as alternative three. This alternative would serve the objective of the proposed rules to identify more clearly the types of factual information which are submitted in AD and CVD proceedings, but does not serve the goal of enabling the Department to efficiently examine factual information at an appropriate stage in the proceeding.

For instance, the Department determined that continuing to allow factual information in an AD or CVD investigation “seven days before the date on which verification of any person is scheduled to commence,” 19 C.F.R. § 351.301(b)(1), would run counter to the objectives of the proposed rules because the Department often does not have sufficient opportunity to review adequately submissions of factual information when they are submitted at this stage of the proceeding. In addition, maintaining the time limits for, for instance, the submission of factual information to value factors could deprive persons of the opportunity to comment on the Department’s preliminary analysis of these submissions in their case briefs. The changes to the definition to more clearly describe the types of factual information which is submitted in an AD and CVD proceeding, without a corresponding modification to the time limits provision, would not serve the objectives of the Department and, thus, has not been adopted.

Finally, as alternative four, the Department considered extending the time limits for the submission of factual information, but this alternative has not been adopted. The Department is required to make certain determinations for AD and CVD proceedings within prescribed statutory deadlines. The current regulations sometimes do not provide the Department with a sufficient opportunity to examine and analyze submissions of factual information before those statutory deadlines, and in some instances deprive parties of the opportunity to comment on the submissions of factual information in their case briefs. An extension of time limits would exacerbate the problem, which the proposed rules seek to address. Therefore, this alternative has not been adopted.

Paperwork Reduction Act

This rule does not require a collection of information for purposes of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 *et seq.*).

List of Subjects in 19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Cheese,
Confidential business information, Countervailing duties, Freedom of information,
Investigations, Reporting and recordkeeping requirements.

Paul Piquado
Assistant Secretary
for Import Administration

____ July 2, 2012 _____
Date

For the reasons stated, 19 CFR Part 351 is proposed to be amended as follows:

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

1. The authority citation for 19 CFR part 351 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.*; and 19 U.S.C. 3538.

2. In § 351.102, revise paragraph (b)(21) to read as follows:

§ 351.102 Definitions.

(b) Definitions.

(21) Factual information. “Factual information” means:

- (i) Evidence, including statements of fact, documents, and data submitted either in response to initial and supplemental questionnaires, or, to rebut, clarify, or correct such evidence submitted by any other interested party;
- (ii) Evidence, including statements of fact, documents, and data submitted either in support of allegations, or, to rebut, clarify, or correct such evidence submitted by any other interested party;
- (iii) Publicly available information submitted to value factors under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2), or, to rebut, clarify, or correct such publicly available information submitted by any other interested party;
- (iv) Evidence, including statements of fact, documents and data placed on the record by the Department, or, evidence submitted by any interested party to rebut, clarify or correct such evidence placed on the record by the Department; and

(v) Evidence, including statements of fact, documents, and data, other than factual information described in (i) - (iv) of this section, in addition to evidence submitted by any other interested party to rebut, clarify, or correct such evidence.

3. In § 351.301, revise paragraph (a), (b) and (c), and remove paragraph (d) to read as follows:

§ 351.301 Time limits for submission of factual information.

(a) *Introduction.* This section sets forth the time limits for submitting factual information, as defined by § 351.102(b)(21). The Department obtains most of its factual information in antidumping and countervailing duty proceedings from submissions made by interested parties during the course of the proceeding. Notwithstanding paragraph (b) of this section, the Secretary may request any person to submit factual information at any time during a proceeding or provide additional opportunities to submit factual information. Section 351.302 sets forth the procedures for requesting an extension of such time limits, and provides that, unless expressly precluded by statute, the Secretary may, for good cause, extend any time limit established in the Department's regulations. Section 351.303 contains the procedural rules regarding filing (including procedures for filing on non-business days), format, translation, service, and certification of documents. In the Secretary's written request to an interested party for a response to a questionnaire or for other factual information, the Secretary will specify the following: the time limit for the response; the information to be provided; the form and manner in which the interested party must submit the information; and that failure to submit the requested information in the requested form and manner by the date specified may result in use of the facts available under section 776 of the Act and § 351.308.

- (b) *Submission of factual information.* Every submission of factual information must be accompanied by a written explanation identifying the subsection of § 351.102(b)(21) under which the information is being submitted.
- (1) If an interested party states that the information is submitted under subsection § 351.102(b)(21)(v), the party must explain why the information does not satisfy the definitions described in § 351.102(b)(21)(i)-(iv).
- (2) If the factual information is being submitted to rebut, clarify, or correct factual information on the record, the submitter must provide a written explanation identifying the information which is already on the record that the factual information seeks to rebut, clarify, or correct, including the name of the interested party that submitted the information and the date on which the information was submitted.
- (c) *Time limits.* The type of factual information determines the time limit for submission to the Department.
- (1) *Factual information submitted in response to questionnaires.* During a proceeding, the Secretary may issue to any person questionnaires, which includes both initial and supplemental questionnaires. The Secretary will not consider or retain in the official record of the proceeding unsolicited questionnaire responses, except as provided under § 351.204(d)(2), or untimely filed questionnaire responses. The Secretary will reject any untimely filed or unsolicited questionnaire response and provide, to the extent practicable, written notice stating the reasons for rejection (see § 351.302(d)).
- (i) Initial questionnaire responses are due 30 days from the date of receipt of such questionnaire. The time limit for response to individual sections of the questionnaire, if the Secretary requests a separate response to such sections, may be less than the 30

days allotted for response to the full questionnaire. In general, the date of receipt will be considered to be seven days from the date on which the initial questionnaire was transmitted.

(ii) Supplemental questionnaire responses are due on the date specified by the Secretary.

(iii) A notification by an interested party, under section 782(c)(1) of the Act, of difficulties in submitting information in response to a questionnaire issued by the Secretary is to be submitted in writing within 14 days after the date of the questionnaire or, if the questionnaire is due in 14 days or less, within the time specified by the Secretary.

(iv) A respondent interested party may request in writing that the Secretary conduct a questionnaire presentation. The Secretary may conduct a questionnaire presentation if the Secretary notifies the government of the affected country and that government does not object.

(v) *Factual information submitted to rebut, clarify, or correct questionnaire responses.*

Within 14 days after an initial questionnaire response and within 10 days after a supplemental questionnaire response has been filed with the Department, an interested party other than the original submitter is permitted one opportunity to submit factual information to rebut, clarify, or correct factual information contained in the questionnaire response. Within seven days of the filing of such rebuttal, clarification, or correction to a questionnaire response, the original submitter of the questionnaire response is permitted one opportunity to submit factual information to rebut, clarify, or correct factual information submitted in the interested party's rebuttal, clarification or correction. The Secretary will reject any untimely filed rebuttal, clarification, or correction submission and provide, to the extent practicable, written notice stating the

reasons for rejection (see § 351.302). If insufficient time remains before the due date for the final determination or final results of review, the Secretary may specify shorter deadlines under this section.

(2) *Factual information submitted in support of allegations.* Factual information submitted in support of allegations must be accompanied by a summary, not to exceed five pages, of the allegation and supporting data.

(i) *Market viability and the basis for determining normal value.* Allegations regarding market viability in an antidumping investigation or administrative review, including the exceptions in § 351.404(c)(2), are due, with all supporting factual information, 10 days after the respondent interested party files the response to the relevant section of the questionnaire, unless the Secretary alters this time limit.

(ii) *Sales at prices below the cost of production.* Allegations of sales at prices below the cost of production made by the petitioner or other domestic interested party are due within:

(A) In an antidumping investigation, on a country-wide basis, 20 days after the date on which the initial questionnaire was issued to any person, unless the Secretary alters this time limit; or, on a company-specific basis, 20 days after a respondent interested party files the response to the relevant section of the questionnaire, unless the relevant questionnaire response is, in the Secretary's view, incomplete, in which case the Secretary will determine the time limit;

(B) In an administrative review, new shipper review, or changed circumstances review, on a company-specific basis, 20 days after a respondent interested party files the response to the relevant section of the questionnaire, unless the relevant

questionnaire response is, in the Secretary's view, incomplete, in which case the Secretary will determine the time limit; or

(C) In an expedited antidumping review, on a company-specific basis, 10 days after the date of publication of the notice of initiation of the review.

(iii) *Purchases of major inputs from an affiliated party at prices below the affiliated party's cost of production.* An allegation of purchases of major inputs from an affiliated party at prices below the affiliated party's cost of production made by the petitioner or other domestic interested party is due within 20 days after a respondent interested party files the response to the relevant section of the questionnaire, unless the relevant questionnaire response is, in the Secretary's view, incomplete, in which case the Secretary will determine the time limits.

(iv) *Countervailable subsidy; upstream subsidy.* A countervailable subsidy allegation made by the petitioner or other domestic interested party is due no later than:

(A) In a countervailing duty investigation, 40 days before the scheduled date of the preliminary determination, unless the Secretary extends this time limit for good cause; or

(B) In an administrative review, new shipper review, or changed circumstances review, 20 days after all responses to the initial questionnaire are filed with the Department, unless the Secretary alters this time limit.

(C) Exception for upstream subsidy allegation in an investigation. In a countervailing duty investigation, an allegation of upstream subsidies made by the petitioner or other domestic interested party is due no later than 60 days after the date of the preliminary determination.

(v) *Other allegations.* An interested party may submit factual information in support of other allegations not specified in subsections (i)-(iv). Upon receipt of factual information under this subsection, the Secretary will issue a memorandum accepting or rejecting the information and, to the extent practicable, will provide written notice stating the reasons for rejection. If the Secretary accepts the information, the Secretary will issue a schedule providing deadlines for submission of factual information to rebut, clarify or correct the factual information.

(vi) *Rebuttal, clarification, or correction of factual information submitted in support of allegations.* An interested party is permitted one opportunity to submit factual information to rebut, clarify, or correct factual information submitted in support of allegations 10 days after the date such factual information is served on an interested party.

(3) *Factual information submitted to value factors under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2).*

(i) *Antidumping or countervailing duty investigations.* All submissions of factual information to value factors of production under § 351.408(c) in an antidumping investigation, or to measure the adequacy of remuneration under § 351.511(a)(2) in a countervailing duty investigation, are due no later than 30 days before the scheduled date of the preliminary determination;

(ii) *Administrative review, new shipper review, or changed circumstances review.* All submissions of factual information to value factors under § 351.408(c), or to measure the adequacy of remuneration under § 351.511(a)(2), are due no later than 30 days before the scheduled date of the preliminary results of review; and

(iii) *Expedited antidumping review.* All submissions of factual information to value factors under § 351.408(c) are due on a date specified by the Secretary.

(iv) *Rebuttal, clarification, or correction of factual information submitted to value factors under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2).* An interested party is permitted one opportunity to submit arguments or publicly available information to rebut, clarify, or correct such factual information submitted pursuant to § 351.408(c) or § 351.511(a)(2) 10 days after the date such factual information is served on the interested party. An interested party may not submit additional, previously absent-from-the-record alternative surrogate value information under this subsection. Additionally, all factual information submitted under this subsection must be accompanied by a written explanation identifying what information already on the record of the ongoing proceeding the factual information is rebutting, clarifying, or correcting. Information submitted to rebut, clarify, or correct factual information submitted pursuant to § 351.408(c) will not be used to value factors under § 351.408(c).

(4) *Factual information placed on the record of the proceeding by the Department.* The Department may place factual information on the record of the proceeding at any time. An interested party is permitted one opportunity to submit factual information to rebut, clarify, or correct factual information placed on the record of the proceeding by the Department by a date specified by the Secretary.

(5) *Factual information not directly responsive to or relating to paragraphs (1) – (4).* This subsection applies to factual information other than that described in § 351.102(b)(21)(i)-(iv). The Secretary will reject information filed under this subsection that satisfies the definition of

information described in § 351.102(b)(21)(i)-(iv) and that was not filed within the deadlines specified above. All submissions of factual information under this subsection are required to clearly explain why the information contained therein does not meet the definition of factual information described in § 351.102(b)(21)(i)-(iv), and must provide a detailed narrative of exactly what information is contained in the submission and why it should be considered. The deadline for filing such information will be 30 days before the scheduled date of the preliminary determination in an investigation, or 14 days before verification, whichever is earlier, and 30 days before the scheduled date of the preliminary results in an administrative review, or 14 days before verification, whichever is earlier.

- (i) Upon receipt of factual information under this subsection, the Secretary will issue a memorandum accepting or rejecting the information and, to the extent practicable, will provide written notice stating the reasons for rejection.
- (ii) If the Secretary accepts the information, the Secretary will issue a schedule providing deadlines for submission of factual information to rebut, clarify or correct the factual information.