

**GEORGETOWN UNIVERSITY LAW CENTER
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INTERNATIONAL TRADE UPDATE 2002

January 31, 2002
Washington, DC

**ITA Verification in Title VII Cases:
A Petitioner's-Eye View**

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ITA Verification in Title VII Cases: A Petitioner's-Eye View

The sole purpose of verification is to confirm the accuracy of information already submitted on the record. Verification is not intended to be an opportunity for respondents to argue their position, nor is it intended to be an opportunity for submission of new factual information. New information will be accepted at verification only when the need for that information was not evident previously, when that information makes minor corrections to information already on the record, or when that information corroborates, supports, or clarifies information already on the record.

- Memorandum to Import Administration Staff from Acting Assistant Secretary for Import Administration (Jan. 25, 1993)

I. Introduction

This panel is supposed to include “do’s and don’ts” for verification -- which makes good sense for those of you who plan to advise respondents or serve as ITA investigators. But from a Petitioner’s perspective, what are the “do’s and don’ts” for verification?

Petitioners’ representatives do not participate in verification -- certainly not in the same manner as others involved in a case. Once we have commented (as we occasionally get to do) on verification outlines, the verification process is largely invisible to us until we see verification reports, at which point we normally are scrambling to piece together case briefs. Some may see this as a silver lining in an otherwise dreadful process. But it has its own set of problems.

Discussions of ITA verification often feature laments about remote and smoggy industrial locations, delayed travel reimbursements, limited television channels, and the like. One also hears complaints about demanding investigators and “gotcha!” tactics. Sometimes folks on our side of the fence find it necessary to point out that respondents control the basic data in Title VII cases, know its implications, and determine what gets presented, how, when, and to whom.

Set out below are some systemic concerns about verification from a Petitioner’s standpoint. These are ways -- some small, some large, some obvious, some not -- that Petitioners can be disadvantaged by the process as it currently operates. We have selected three sub-topics: (1) overall philosophy of verification; (2) role of respondent counsel, and (3) acceptance of new information at verification.

II. Overall Approach -- Checklist or Tactical

Verifications are conducted with one overriding goal: confirming the accuracy of information previously placed on the record by respondents. Verification deters parties from submitting inaccurate information, and underpins ITA’s ability to administer the trade laws.

This universally accepted premise does not mean that all verifications are alike. Far from it. An individual's approach toward verification can dramatically affect the process and the resulting decisions. There are many different styles, but one important dividing line separates what we might call the "checklist" and "tactical" models.

Under the former model, a verifier's task is minimally fulfilling the statutory requirement that information relied upon in a final determination be "verified." The focus is on helping respondent officials get through the checklist, finding some plausible (e.g., not obviously hand-written in haste) source for each of the key numbers affecting calculations, and collecting a suitably heavy pile of verification exhibits. Verification reports reflecting this approach tend to repeat phrases like "verified without exception."

The second model treats verification more like an accuracy test. Almost never does a respondent score 100%. Some perform poorly and receive below average scores; others perform well, but not perfectly. Verifiers in this model want to get through the agenda, but along the way they want to look under a few rocks. They may occasionally even ask a question to which they (gasp!) already know the answer. They may also be heard to say something like, "let me go with you when you get that source document, see where you get it from."¹ They are not playing, as is sometimes charged, a game of "gotcha!" but they do have a tactical rather than a checklist approach. They tend to operate from a plan which includes alternative courses of action depending upon responses from company officials. This approach requires planning and frequent re-evaluating both before and during verification.

Verifiers in this group also tend to care who answers particular questions. While the main response preparer figures prominently at any verification, a verifier addressing such items as a company's record keeping process can and often should seek out different individuals. This is true even if -- we would say especially if -- those individuals are not keenly focused on the possible margin implications of the answers they may give. Careful verifiers also realize that their reports must document for ITA decision makers (as well as for parties not present at verification) the context and relevance of each piece of evidence discussed, so that it can be meaningfully assessed by distant readers and a determination reached as to whether particular information provided to the agency can be considered verified.

III. Role of Respondent Counsel

Much of the AD/CVD process is carefully designed to ensure fairness and equal treatment. Both petitioners and respondents can submit factual information; both get to review and comment on record evidence; we get equal page limits (if any apply) in briefing and equal time in hearings.

¹ Surprise sales, meaning sales identified on the opening day of verification, are an important component of verification. The element of surprise is a standard and altogether valid investigative technique. These additional sales serve to broaden a (necessarily) limited number of sample transactions. They also serve as a useful check on spin and manipulation, as the company being verified has no time to derive explanations for problems, data anomalies and inconsistent source documentation. ITA's *Antidumping Manual* recognizes the importance of surprise selections.

The great exception is respondent counsel's unlimited advocacy opportunities during verification. This is not some sort of conspiracy theory. It is simple human nature. There you are, in some utterly remote corner of the world. There's only one decent hotel. It makes sense to share cabs to and from the company offices where verification sessions are held. Maybe you meet up for dinner afterwards. Maybe you are even on the same flights in and out. During the work days, you both have a rather lengthy and not terribly pleasant task to get through together (the verification outline). The fact is, we all normally come to identify with the people we spend time with.

In short, the circumstances exist in which verification could serve as a week-long "captive audience" opportunity for respondent lawyers to urge upon ITA's investigators their side of every disputed issue in the case. It goes without saying that Petitioners are afforded no such opportunity. The manner in which verification is conducted, and reports drafted, can either ameliorate or worsen this inequality.

We can stipulate that respondent counsel's participation can make verification more efficient and makes sense for that reason. Still, lawyers are by definition advocates, principally focused (and rightly so) on securing for their clients the lowest possible margins. A seemingly factual intervention by counsel during verification may serve two purposes. What is the boundary between information and advocacy? Is it even possible to deliver facts at a dumping or CVD verification without some sort of spin? Can verifiers reliably distinguish the two? Always?

And how are Petitioners to know who said what? Is there even a record of what statements recorded at verification come from officials and which ones come from counsel? One of respondents' favorite tricks is to make self-serving statements X, Y, and Z at verification, which are then reproduced in the verification reports as simply that -- statements which were made -- and then to claim indignantly in their briefs that "the ITA *verified* X, Y and Z." This is bad enough when the self-serving and conclusory statement is made by a company official, but truly outrageous when the statement comes from a litigator. Sometimes, it is impossible to tell who said what. But some verifiers are more careful about this than others, separately identifying in their reports the statements of company/government officials and those made by the lawyers. This kind of detail is always helpful and much appreciated.

IV. Acceptance of New Factual Information

A particular area of concern is the introduction of new information at verification. ITA's regulations set forth deadlines for the submission of new factual information. See 19 C.F.R. §351.301(b)(1)-(2). Too often, however, ITA verifiers confront respondents who seek to submit changes to the record at verification -- generally with a claim that the changes only became evident when preparing for verification. Petitioners' concern is that these modifications in fact represent strategic decisions by respondent companies to address case issues.

This is an area where ITA might usefully develop some more detailed guidelines -- for the benefit of both parties and verifiers, and with the possible side effect of reducing litigation over what constitutes "new" information.

ITA officials have an extensive list of items to examine at verification. When changes are presented on the first day of verification, the natural instinct is to accept them and quickly turn to the verification agenda items. As Title VII cases contain countless pieces of information that go together to formulate the margin calculation, it is quite difficult at the beginning of a verification to determine whether proposed changes are “minor” and, therefore, in principle acceptable. The record of even a simple case is simply too large to permit verifiers to determine at a glance the full ramifications of accepting new information.

Meanwhile, once verification begins, Petitioners have almost no ability to express their views on the nature of proposed changes. New information may impact other areas of a response, or even conflict with other areas of a response -- requiring revised verification procedures or even verification of new items. Under a normal 5 day verification schedule, however, changes presented at verification cannot be rebutted; by the time Petitioners can react to any proposed changes, verification has been concluded. Moreover, at the time of verification, some consider that the agency record is closed to Petitioners, which if true means we have no ability to introduce rebuttal information in response to new information put forward by respondents.²

What is a “minor” correction? Most verification agendas provide that changes presented at verification must be “minor” in order for the new information to be acceptable. This often leads respondents to use large denominators (i.e., total turnover) in an attempt to depict particular changes as minor. A verifier needs to be wary of such techniques. For example, what if the change relates to a pre-selected item, and the respondent company is significantly changing the sales price or submitted cost for a number of products. A 5-10% change in a pre-selected item is not a minor correction. Yet, when the change is expressed as a percentage of the company’s total sales (or cost-of-sales), the small ratio has the appearance of a minor correction.

A related problem is the absence of any uniform requirement for the presentation of changes. If a change affects only specific sales, the number of sales affected should be indicated. Moreover, the change should be expressed as a percentage of the sales value or cost of manufacturing of the individual sale in order to properly ascertain whether a correction is minor. Some offices within ITA require detailed quantification indicating the number of observations affected and the range of impact on those observations.

In instances where a limited number of sales have a significant impact on the margin, changes affecting only one sale or one product should not be considered minor.

How to verify an amount after deciding not to accept a proposed change? Assume a respondent’s submitted amount for a particular item is 10. At the beginning of verification, the

² In a CVD case now pending before ITA, the government respondent deflected several ITA questions on the distribution of benefits under a particular subsidy program by stating “{T}his question is not readily answerable The {government} will undertake to provide responsive information at verification.” A variant on this tactic, which one also sees from time to time, is “we don’t see how the information you are requesting could be relevant given our understanding of ITA’s methodology ... but if you insist, we will try to furnish responsive information at verification.” (This one is not an actual quote but is an accurate encapsulation.) If tolerated by ITA, this kind of tactic can completely defeat Petitioners’ right to comment on and rebut information submitted by respondents on key issues in a case, as well as ITA’s ability to analyze information prior to verifying it.

company presents a proposed change, now claiming that the correct amount is 7. On day 3 of verification, the verifier had planned to examine the originally submitted amount of 10. How should a verifier deal with this dilemma?

A verifier needs to alter the information gathering techniques when aware that a respondent is attempting to put new factual information on the record. When proffered information is rejected, that fact needs to be documented -- and the verifier needs to be careful not to accept the rejected information inadvertently in an exhibit. Further, any discussion of the rejected information should contain sufficient context so that facts available can be applied on a reasonable basis.

Certain offices within ITA are highly sensitive to accepting data changes during verification, and correctly limit their information gathering. This approach should be adopted across all offices.

Deadline for submitting minor changes provided at verification. Recent verification agendas have specified different deadlines for the submission of minor corrections. Some agendas have specified that the information should be submitted on the record within 2 days of presentation at verification. Other agendas have specified that changes should be submitted within 2 days of the completion of verification. The appropriate date is within 2 days of presentation at verification. In other words, a change presented on Monday morning at 10:00 am should be submitted on the record no later than Wednesday morning at 10:00 am. See verification guidance memorandum, block-quoted above, at ¶3.

Even with this written guidance, apparently some verifiers have modified these filing deadlines by allowing a later due date through instructions provided at verification.

Submitting this information as soon as possible (the second day after presentation) provides for an open and fair proceeding. Petitioners have at least a small window of opportunity to recommend verification changes or rejection of new factual information.