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Notice of Inquiry
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DELIVERY BY HAND

James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Attn: Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, DC 20230

Attn: Ms. Elizabeth C. Seastrum; Mr. Philip J. Curtin

Re: Certification and Submission of False Statements to Import Administration During Antidumping and Countervailing Duty Proceedings; Notice of Inquiry

Dear Mr. Jochum:

These comments are filed in response to the Department's Notice of Inquiry, 69 Fed. Reg. 3562 (Jan. 26, 2004), concerning procedures for investigating and potentially imposing sanctions against persons who certify and submit false statements to the Department in the course of antidumping or countervailing duty proceedings. On behalf of the many U.S. companies and workers that our firm represents in such proceedings, we appreciate the opportunity to express our views on this extremely important subject.

I. INTRODUCTION

We strongly support the Department's interest in continuing to improve its enforcement of the antidumping and countervailing duty laws and protect the integrity of its administrative processes. As is explained more fully below, we suggest several changes that would satisfy both those concerns, but none would require any change to the current statute. The changes we suggest, moreover, would add transparency to the agency process and make more clear to participants the consequences of failure to follow the statute and regulations.

In considering the agency's request for comments, we believe that the Department first should address certain "big picture" issues and make decisions on those, because they affect the scope and overall direction of the Department's plans. Once decisions concerning these issues have been made, particular processes can be developed to be used to implement the plans. This approach will allow both the Department and the public a more meaningful opportunity to address the process-related issues, rather than attempting to address those as part of the general comments and recommendations that may or may not ultimately be adopted. In keeping with this approach, we have suggested specific language for new regulations in certain areas, but have not proposed specific regulatory language regarding the processes that may be used for implementation. We would appreciate an opportunity to comment and make recommendations on the process issues at an appropriate time.

Further, we ask that the Department consider holding a conference or public hearing once the agency has reviewed the initial responses, so that the public and Commerce can further discuss these important issues.

II. CERTIFICATIONS

We recommend several changes to the Department's current forms for certification by counsel and their clients. Because these certifications are so important as a first line of defense against false reporting of information to the agency, we believe that the administrative process can be further strengthened by the changes we recommend.

A. Clarifying Language

Any person who submits false information to the Federal government in an administrative proceeding can be charged with falsifying, concealing, and covering up a material fact; making materially false, fictitious, or fraudulent statements or representations; making or using false writings or documents when knowing them to contain materially false, fictitious, or fraudulent statements or entries under 18 U.S.C. § 1001. This statute states in relevant part:

Sec. 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

While counsel can be expected to know of this statute, representatives of individual companies that are parties to the action may not always be aware of the law. The proposed

changes to the certifications for both counsel and participating parties would ensure that all parties submitting certifications are aware of these statutory obligations and resultant civil and criminal sanctions for fraudulent submissions as a potential consequence.

B. Certifications From Appropriate Individuals

For the company certification, we suggest that the required language identify not only the name and title of the individual providing the certification, but also include a statement that this person is in a position to know whether the information being submitted is complete and accurate. This is similar to the certification required by the Bureau of Customs and Border Protection for reimbursement under the Continued Dumping and Subsidy Offset Act, which goes further than the ITA's present certification by requiring the individual signing the submission to have personal knowledge and specific authority to make the certification.¹

C. Suggested Certification Forms

To implement these suggestions, we offer the following proposed new certification forms. The words in italics are new.

1. Company Certification

I, [name], currently employed by [name of company] *in the capacity of [title]* , certify that (1) I have read the attached submission, (2) *I am competent, because of my position with the company and professional background, to know that the information contained in this*

¹ The CDSOA certification "must be executed and dated by a party legally authorized to bind the domestic producer and it must state that the information contained in the certification is true and accurate to the best of the certifier's knowledge and belief under penalty of law, and that the domestic producer has records to support the qualifying expenditures being claimed." Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 67 Fed. Reg. 44,722, 44,723 (July 3, 2002) (notice of intent to distribute offset for Fiscal Year 2002).

submission is complete and accurate, and (3) the information contained in this submission is, to the best of my knowledge and belief under penalty of law (including but not limited to 18 U.S.C. § 1001), complete and accurate.

2. Counsel or Other Representative Certification

I, [name], of [law or other firm], counsel or representative to [person], certify *under penalty of law (including but not limited to 18 U.S.C. § 1001)* that (1) I have read the attached submission, and (2) based on the information made available to me by [person], I have no reason to believe that this submission contains any material misrepresentation or omission of fact.

III. AGENCY REGULATIONS

To complement the changes to the certification forms proposed above, we recommend the Department's adoption of the following suggested regulations. The proposed language of the regulations is appended at Attachment 1.

A. Clarify that All Information Provided to the Agency – Oral and Written Submissions – is Subject to Penalty of Law

First, subsection 351.303(g) should be clarified by including language informing parties and their representatives that statements made to the agency, both written and oral, are made under penalty of law, including but not limited to 18 U.S.C. § 1001, as discussed above.

B. Clarify that Parties' Representatives' Statements and Certifications are Subject to Not Only Lawyers' Ethics Rules but Agency Rules as Well

In addition, the regulations should include language informing legal counsel that their representation is not only subject to the rules of the bar(s) in which they are admitted to practice but also is subject to the standards of conduct and care of the agency, and that violations of these standards can result in disciplinary action by the agency, including disbarment from practice before the agency.

Many Federal regulatory agencies have regulations imposing disciplinary sanctions for violations of standards of conduct, including the Securities and Exchange Commission, Federal Trade Commission, Commodity Futures Trading Commission, Federal Communications Commission, Department of Transportation's Surface Transportation Board, and Department of Agriculture. Some agencies have their own specific standards of conduct in addition to canons of ethics adopted by state or Federal bar organizations.

We believe it is not necessary for the Department to adopt separate standards of conduct from those already adopted by state and Federal bars. It would be beneficial, however, to make clear by agency regulation that these standards of conduct must be adhered to by practitioners before the agency, and that there can be sanctions for violations of the standards of conduct.²

The regulations should also set forth a brief description of the process followed by the agency for investigating allegations of a violation of standard of conduct, and include a list of possible sanctions, including disbarring the attorney from an individual proceeding, disbarring the attorney from appearing before the agency for a period of time, and referral of a disciplinary matter to the attorney's state and Federal bar(s).

C. Regulations Should Identify Point of Contact for Fraud Inquiries and Describe Process for Initiating Inquiry

Next, the regulations should briefly set forth two procedural matters: (1) identifying the office within the ITA (we recommend the Chief Counsel's Office) that will be the point of contact for receiving allegations of fraud and conducting an appropriate inquiry and follow-up as

² If the Department already has adopted standards of conduct, these might be repeated in the regulation; if no standards of conduct have been adopted already, the new regulation could state that its standards of conduct are the same as those required by the attorney's state bar membership.

necessary with other agencies, and (2) describing the process to be followed by persons who have information concerning potential fraud for follow-up by the agency.

Concerning the recommendation that the office designated to handle these matters be the Chief Counsel's Office, it is paramount that fraud and related allegations be investigated by attorneys. For example, it would not be appropriate for the staff that handles Administrative Protective Orders to carry out these inquiries. The APO staff are neither part of the Chief Counsel's Office nor are licensed attorneys, and their specialized role within the present administrative process lies outside the scope of the skills required to handle allegations of fraud or other malfeasance. Moreover, even within the Chief Counsel's office, we recommend that any attorneys investigating allegations of fraud and other malfeasance receive specific training (perhaps by the Department's Inspector General's Office) in investigative techniques, due process, and related areas of law that are not currently within the typical responsibilities of their positions.

D. Regulations Should Clarify that Parties Will Not be Permitted to Retrieve Proprietary or Public Information Submitted in a Proceeding and that No Information Will be Returned to the Submitter When a Fraud Inquiry is Pending

Further, we recommend that the ITA adopt a regulation to make clear that the agency will not allow a party suspected of fraud to retrieve from the ITA the information it has submitted for the administrative record and thus prevent the agency from pursuing a fraud inquiry. There is no statutory provision to our knowledge that requires the agency to return to a party information it submits in the course of a proceeding.

Particularly where an allegation of fraud or other malfeasance has been made, the ITA must preserve the record by retaining all information submitted by that party or any other

relevant persons. Indeed, even when a party makes a timely withdrawal from an administrative review, if there is an outstanding allegation of fraud to be investigated, the ITA should retain the information in the record until the fraud allegation is investigated fully, a determination made, and the matter is closed. Without these safeguards, the ITA will have no ability to preserve the integrity of its proceedings or address fraudulent submissions.

E. Referrals to Others for Further Investigation (Civil and/or Criminal) and Sanctions

Under current law, the ITA has limited tools of its own to bring to bear on persons who submit false information in the course of its proceedings. The strongest tool that presently is applied to parties is application of adverse facts available (“AFA”) under Section 776(b) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677e(b). While this may be a deterrent to some extent, it can vary from proceeding to proceeding and company to company in its results. In more than a few cases, application of total adverse facts available has had little or no deterrent effect at all, because the margin applied as AFA is so small as to be considered just a cost of doing business.

Moreover, when a party to an ITA proceeding submits false information, in virtually all cases this action by definition constitutes customs fraud, as the false information leads to a reduction in duties to be collected. Thus, the Bureau of Customs and Border Protection has a strong interest and responsibility to investigate potential fraud that occurs in connection with ITA proceedings.

Third, the ITA has no power to conduct criminal investigations or to impose criminal penalties upon persons submitting false information, although other agencies to which ITA can

refer a matter of this sort can take such actions, and we believe this inter-agency coordination is an important component to a comprehensive solution.

We do not believe that current law needs to be changed to address these issues. Rather, we recommend that the ITA state in its regulations that when an allegation of fraud is made it will not only begin its own review, as appropriate, but will also make appropriate referrals to the Office of the Inspector General of the Department of Commerce (“IG”), the Bureau of Customs and Border Protection, and the U.S. Justice Department. By making appropriate referrals, the ITA can complement its investigatory and regulatory powers. In this way, the Department can facilitate recourse to investigative tools such as subpoena power (as the IG has under 5 U.S.C. App. § 6(a)(4)), authority to impose penalties and additional duties on imports (as Customs has), as well as criminal investigations that can be conducted by the Justice Department.

Finally, in conjunction with appeals of agency determinations to the U.S. Court of International Trade, we recommend adoption of a regulation providing that the ITA will inform the court if during the course of a remand proceeding it discovers evidence of fraud, misrepresentation, or other misconduct so that the court may determine what action, if any, is necessary under U.S. CIT R. 60(b)(3). That rule provides that “the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding” for various reasons, including “fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.” By referring any such evidence to the court, the agency will protect the integrity of both the court and the agency proceedings by ensuring that appropriate sanctions can be imposed by the court when necessary.

We appreciate this opportunity to present our comments. Please contact us if you have any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kathleen W. Cannon". The signature is fluid and cursive, with the first name being the most prominent.

DAVID A. HARTQUIST
PAUL C. ROSENTHAL
JEFFREY S. BECKINGTON
MICHAEL J. COURSEY
ROBIN H. GILBERT
KATHLEEN W. CANNON
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Attachment

ATTACHMENT 1

I. PROPOSED REVISED 19 C.F.R. § 351.303(g)

Existing regulatory language with proposed amendments is presented below. Proposed additional language is presented as underlined and bolded text. Deleted language is presented as struck-through and bolded text.

Sec. 351.303 Filing, format, translation, service, and certification of documents.

* * *

(g) *Certifications*. A person must file with each submission containing factual information the certification in paragraph (g)(1) of this section and, in addition, if the person has legal counsel or another representative, the certification in paragraph (g)(2) of this section:

(1) For the person's officially responsible for presentation of the factual information:

I, (name and title), currently employed by (person) **in the capacity of (position title)**, certify that (1) I have read the attached submission, (2) **I am competent, because of my position with the company and professional background, to know that the information contained in this submission is complete and accurate, and (3) (2)** the information contained in this submission is, to the best of my knowledge **and belief under penalty of law (including but not limited to 18 U.S.C. § 1001)**, complete and accurate.

(2) For the person's legal counsel or other representative:

I, (name), of (law or other firm), counsel or representative to (person), certify **under penalty of law (including but not limited to 18 U.S.C. § 1001)** that (1) I have read the attached submission, and (2) based on the information made available to me by (person), I have no reason to believe that this submission contains any material misrepresentation or omission of fact.

II. PROPOSED NEW 19 C.F.R. § 351.303(h)

The following proposed provision addresses the standards of conduct and care required of all persons appearing before the Department, to be codified as 19 C.F.R. § 351.303(h):

Sec. 351.303 Filing, format, translation, service, and certification of documents.

* * *

(h) *Standards of Conduct and Care Applicable to Parties and Practitioners Appearing Before the Department.*

1. *Applicable Standards of Conduct and Care.* Practitioners and parties appearing in proceedings before the Department shall abide by the highest standards of conduct and care when certifying submissions and submitting information and argument to the Department. In making and certifying the accuracy, completeness and truthfulness of any submission presented to the Department, attorneys shall abide by the highest standards of conduct and care applicable to them under the requirements of any and all bars and bar associations of which they are members. Other professionals appearing before the Department, such as Certified Public Accountants or Certified Financial Analysts, shall abide by the highest standards of conduct and care applicable to them under the canons or requirements of the professional organization(s) governing and/or regulating their professional activities. Other persons appearing before the Department, such as parties appearing pro se or who rely upon foreign consultants, shall exercise the maximum degree of care reasonably possible to ensure the accuracy, completeness and truthfulness of their submissions. All persons are reminded that failure to comply with these requirements can lead to prosecution and penalties pursuant to the laws of the United States, including 18 U.S.C. § 1001.

2. *Violations of Standards of Conduct and Care.* Violations of the required standards of conduct and care shall be addressed in accordance with the procedures described in subsection (i) below. Where the required standards of conduct and care are not observed, the Department will impose appropriate sanctions. Possible sanctions include, but are not limited to, the following, which may be imposed individually or jointly as warranted:

- Informal or formal letter of reprimand
- Formal censure

- Temporary or permanent disbarment from appearance and practice before the Department
- Referral to appropriate professional authorities (*i.e.*, bar associations or other professional associations)
- Referral to the Department of Commerce's Office of the Inspector General
- Referral to the United States Bureau of Customs and Border Protection
- Referral to the United States Department of Justice

III. PROPOSED NEW 19 C.F.R. § 351.303(i)

The following proposed regulation addresses procedures for investigating alleged violations of required standards of conduct and care and allegations of fraud, to be codified as 19 C.F.R. § 351.303(i):

Sec. 351.303 Filing, format, translation, service, and certification of documents.

* * *

(i) *Procedures for Reporting and Investigating Allegations of Violations of Standards of Conduct and Care and Allegations of Fraud Upon the Department.*

(1) *Procedures for Presenting Allegations for Consideration.* Allegations of violations of required standards of conduct and care, or of fraudulent or false statements made to the Department, may be reported by any person with knowledge of the activities at issue. Such allegations shall be reported to the Department's Office of Chief Counsel.

(2) *Determination of Sufficiency of Allegations and Transmittal to Office of the Inspector General; Reconsideration.* The Assistant Secretary for Import Administration, with the advice of the Office of Chief Counsel, shall determine whether the allegation made under subparagraph (1) presents a prima facie case of the violation described. If it does, the Office of Chief Counsel shall transmit the allegation to the Office of the Inspector General of the Department of Commerce for further investigation. If it does not, the party presenting the allegation may supplement or amend the allegation and resubmit it for reconsideration.

(3) *Referral to Other Entities For Additional Investigation.* When an allegation made under this section is deemed to present a prima facie case of the events described therein, the Office of Chief Counsel in addition to referring the matter to the Office of the Inspector General may, depending on the circumstances presented in the allegation, also refer the matter to other appropriate agencies, including but not limited to the Bureau of Customs and Border Protection and the Department of Justice.

IV. PROPOSED NEW 19 C.F.R. § 351.303(j)

The following proposed regulation requires the Department to retain all versions of submissions presented by a party or parties that are relevant to an allegation that required standards of conduct and care, or of fraud upon the Department have been violated, until the completion of all inquiries related to the allegation. Codification is proposed at 19 C.F.R. § 351.303(j):

(j) *Retention of all submissions and related materials pending completion of inquiries.* When an allegation under this section is pending that counsel, representatives of a party or parties, or a party or parties have violated required standards of conduct and certified and submitted false statements, no materials submitted by the counsel, representatives, party or parties at issue shall be removed or returned by the International Trade Administration from the record of any relevant proceeding(s) until the completion of all inquiries and any other related proceedings.