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Docket No. 031120285-3285-01
Import Administration, International Trade Admin., Department of Commerce

VIA HAND DELIVERY
Assistant Secretary for Import Administration
James J. Jochum
Attn: Import Administration
Central Records Unit, Room 1870
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

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

Dear Mr. Assistant Secretary:

On behalf of Kaye Scholer LLP, Willkie Farr and Gallagher LLP, Weil, Gotshal, and Manges LLP, and Hogan and Hartson LLP, whose attorneys practice before the Department of Commerce, we file these comments in response to the Department of Commerce's ("Department") January 26, 2004 notice proposing regulations that would establish procedures that the agency would follow "when it has reason to believe that a person has certified and submitted false statements, or engaged in a scheme to certify and submit false statements, in the course of an antidumping or countervailing duty proceeding." *See Notice of Inquiry*, 69 Fed.

Reg. 3562 (Jan. 26, 2004). While we appreciate the importance of assuring accuracy and the avoidance of impropriety in Import Administration proceedings, we object to the promulgation and/or implementation of any regulations that increase the burdens imposed on respondents and their counsel in antidumping and countervailing duty proceedings.

In the over twenty years since the Department assumed responsibility for implementation of the trade laws from Treasury, it has never seen the need, before now, to promulgate regulations to address instances of fraud and misrepresentation by the companies and lawyers that appear before it. There has certainly been no indication of a flood of incidents necessitating such drastic and far reaching regulations. The Department has neither asserted nor established any statutory authority for these proposed regulations. Nor do we believe any such authority currently exists.

As the vast majority of antidumping and countervailing duty cases before the Department are conducted by attorneys (and non-legal professionals supervised by attorneys), it is our position that the codes of professional responsibility and the requirements of the Bar associations in which trade lawyers are members have always and continue to provide ample incentives and protections to ensure the integrity of the Department's administrative process. In the rare case that a fraud is committed upon the Department by a lawyer practicing before it, the appropriate response by the Department is to refer the matter to one or all of the Bar associations with which that attorney is associated.[1] The Department is, of course, also protected by general anti-fraud

[1] In its January 26, 2004 notice, the Department concedes that it has, in the past, "referred allegations of fraud regarding these certifications to the Department of Commerce's Office of Inspector General or to U.S. Customs and Border Protection for appropriate disposition." *Notice of Inquiry,* 69 Fed. Reg. at 3563. The Department does not explain, however, why this course of action now is insufficient.

legislation (including 18 U.S.C. § 1001 and 31 U.S.C. § 3729), which applies to any person (lawyer or otherwise) submitting false and misleading statements to the government.[2] To the extent that the Department, nevertheless, decides to impose its own procedures to address cases of fraud, the requirements should be no more stringent than those already imposed on legal professionals, as a prerequisite to their admission to the practice of law, and should apply equally to representatives of domestic parties and representatives of foreign producers.

Under the American Bar Association Model Rules of Professional Conduct, which are representative of the rules of most state Bar associations in the country, including the D.C. Bar, "in the course of representing a client, a lawyer, shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . . ." Model Rules of Professional Conduct Rule 4.1. Under Rule 8.4, conduct "involving dishonesty, fraud, deceit or misrepresentation" is defined as "professional misconduct." "Fraud," in turn, is defined as "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." Model Rules of Professional Conduct, Preamble, Scope, and Terminology.

[2] 18 U.S.C. § 1001 creates civil and/or criminal liability for "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. . . ." 31 U.S.C. § 3729 is known as the "False Claims Act"--creating liability for "any person" who " knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." *See also* 19 U.S.C. § 1592 (providing penalties for fraud, gross negligence, and negligence with respect to merchandise entered or attempted to be entered into the commerce of the United States).

Given these rules, the Department's existing regulation requiring attorneys to certify that they have read factual submissions submitted on behalf of their clients and "have no reason to believe that the submission contains any material misrepresentations or omission of fact" is, as a practical matter, superfluous. *See generally* 19 U.S.C. § 1677m(b); 19 C.F.R. § 351.303(g)(1); 19 C.F.R. § 351.303(g)(2). Irrespective of that certification, a lawyer that practices before the Department, and any other tribunal, "shall not" knowingly "offer evidence that the lawyer knows to be false."[3] Model Rules of Professional Conduct Rule 3.3.

The rules of professional responsibility also protect the Department from the potential misconduct of those supervised by the attorneys practicing before the Department--including nonlawyer economists and accountants and foreign lawyers. For instance, Rule 5.3 of the Model Rules requires that a lawyer and its law firm "make reasonable efforts to ensure" that a nonlawyer employed or retained by or associated with that lawyer or law firm conducts him or herself in a manner "compatible with the professional obligations of the lawyer." The Rule further provides that the lawyer shall be held responsible for "conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the

[3] Lawyers, in fact, have an affirmative obligation to prevent the submission of fraudulent or misleading information by their clients. *See* Model Rules of Professional Conduct Rule 1.2 (Criminal, Fraudulent and Prohibited Transactions). "A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required." *Id.* This obligation further enhances the reliability of the information submitted to the Department by parties represented by counsel.

conduct at time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[4] *Id.* at Rule 5.3. Accordingly, it should be very rare, indeed, that the Department would need to resort to a separate regulatory scheme to sanction an attorney (or non-lawyer supervised by an attorney) for violating these fundamental codes of ethics to which all lawyers are bound.

The current professional ethics rules regulating attorney conduct are "not designed to provide a basis for civil liability." Model Rules of Professional Conduct, Preamble. To the contrary,

> the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

One obvious risk to the creation of an additional set of regulations is that opposing counsel would turn to those regulations as procedural weapons--as explicitly admonished in the rules of professional conduct. To the extent that the Department does create additional regulatory

[4] The D.C. Bar has confirmed its adherence to these obligations and, in particular, the requirement that a D.C. lawyer be held accountable for the behavior of any foreign lawyers with which the D.C. lawyer may be associated. In Opinion No. 278, the D.C. Bar confirmed that while a D.C. Bar member, with other members of his firm, may join in a partnership to practice law with a lawyer licensed to practice in another country exclusively, such relationships are permissible "only to the extent that they do not impair the D.C. Bar member's ability and obligation to uphold ethical standards. For example, when a D.C. lawyer practices law in association with others, he or she must ensure that all individuals involved in providing legal services adhere to fundamental ethical requirements. . . ." www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opin278.pdf.

requirements, it must also create a system for preventing and sanctioning abuse of the rules themselves.

The creation of additional regulations for attorney conduct is not only unwarranted given the absence of statutory authority and the existing rules for professional conduct but also because the Department already has a built-in mechanism for ensuring the reliability of the information it receives from foreign respondents--verification. This process has the added benefit of ensuring the Department's ability to further regulate the conduct of the non-lawyer representatives and companies that appear before it. Verification is, of course, also authorized by law. *See* 19 U.S.C. § 1677m(i).

The fundamental purpose of verification is to verify the completeness and accuracy of submitted factual information. *See* 19 C.F.R. § 351.307. If a respondent refuses to participate in the verification process or if, over the course of the verification, the Department is not satisfied that the information submitted is accurate and complete, the Department has ample authority and discretion to impose facts available and/or adverse inferences. *See* 19 U.S.C. § 1677m(d)-(f); 19 C.F.R. § 351.307(b)(v)(B)(4); 19 C.F.R. § 351.308. In many cases, this authority essentially provides the Department with the ability to exclude a producer from the U.S. market--an obvious and proven disincentive (to both lawyers and their clients) to engaging in dishonest behavior in the context of antidumping and countervailing duty proceedings.

Responses to the Department's specific questions follow.

(1) Are the current certification requirements sufficient to protect the integrity of IA's administrative processes? If not, should the current certification statements, as required by IA's regulation, be amended or strengthened? If so, how? For example, should the submission be identified more precisely, and the name of the company and date be more precise? Should the standard of knowledge be stronger or more precise? (Please propose language.) Does the statutory provision need to be amended or strengthened? If so, how? (Please propose language.) If the current certification requirements are sufficient, please comment why and whether improvements in existing procedures may be made.

As discussed above, the current certification requirements are sufficient to protect the integrity of the Department's administrative processes. In most antidumping and countervailing duty cases, law firms file submissions on behalf of their clients--thereby providing the Department with the protections of the obligations of professional responsibility.

Verification provides the Department with the unique opportunity to further ensure the required accuracy and completeness and to punish the rare company, law firm, and/or representative involved in dishonest behavior--in the form of adverse inferences and, in exceptional circumstances, referral to the Bar for disciplinary action. The Department is, of course, also free to pursue legal action against any individual engaged in fraud against the government. *See, e.g.,* 31 U.S.C. § 3729 ("False Claims Act"--creating liability for "any person" who " knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government"); 18 U.S.C. § 1001 (creating civil and/or criminal liability for "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. . . ."); 19 U.S.C. § 1592 (prohibiting any person, "by fraud, gross negligence, or negligence" from entering, introducing or attempting to enter or introduce "any merchandise into the commerce of the United States by means of--(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or (ii) any omission which is material . . . . "). *See also Notice of Inquiry*, 69 Fed. Reg. 3563 (describing the Department's prior practice of referring such matters to the Department of Commerce's Office of Inspector General or to U.S. Customs and Border Protection).

(2) Should IA promulgate regulations establishing procedures for its investigations of allegations of fraud or false statements, including administrative sanctions against persons found to have committed fraud during antidumping or countervailing duty proceedings?

As discussed, the Department already has an effective procedure in place for investigating and sanctioning false statements--verification. In the rare case that the Department discovers that a company or representative has engaged in fraudulent behavior, that will be discovered during the course of verification and sanctioned first through the use of adverse facts available. Additional sanction can, of course, be had by referring the case to the Office of Inspector General or to the relevant Bar associations, as discussed above.[5]

[5] We do not dispute the distinction between companies that are simply failing verification or unable to meet the Department's standards or requests and those that appear to affirmatively be committing fraud against the government, a crime. Irrespective of the proposed regulations, the Department is simply not equipped, legally or professionally, to conduct the sophisticated type of investigation that would be required to prosecute a case of fraud against the government. Other agencies, however, such as the Department of Justice, have been delegated that power and do have the necessary range of assets and expertise.

The verification procedure and ramifications of a "failed" verification do not, however, address the conduct of domestic parties. In contemplating the introduction of additional protections, the Department must consider and ensure the equal application of any such rules to domestic representatives. False and/or fraudulent statements by domestic parties must also be susceptible to investigation, scrutiny, and sanction to ensure the evenhandedness of this or any other proposed regulatory scheme.

For instance, given that the major submission by petitioners is the petition itself and that the Department and the International Trade Commission neither permit the submission of pre-initiation comments nor verify any aspect of the petition, there is substantial room for false and misleading statements in the petitions themselves. Were the Department to establish a new set of rules directed at the content of the information filed with the Department, we would suggest that the Department include, at a minimum, a pre-initiation comment period on the quality and reliability of the information contained in the petition and flexibility to verify that information prior to initiation. And, of course, any new regulation in these areas that may be adopted by the Department must apply equally to all submissions in an investigation or review, whether from respondents or petitioners, by lawyers or otherwise.

(3) What should be the definition or scope of the terms ``fraud'' or ``false statements'' as they may relate to any regulations which IA may promulgate? Should there be a requirement of actual knowledge, or would a lesser intent requirement suffice? Should there be a standard for materiality, and what should it be? Must the regulations be limited to written materials certified and submitted to the Department, or may oral statements, such as at verifications, be covered as well?

The Department is not empowered to sanction either professionals or company officials beyond what is contemplated by its statutory authority. The only requirement contained in the Tariff Act with respect to certifications of factual information in antidumping and countervailing

duty proceedings before the Department is that "{a}ny person providing factual information to the administering authority or the Commission in connection with a proceeding under this subtitle on behalf of the petitioner or any other interested party shall certify that such information is accurate and complete *to the best of that person's knowledge*." 19 U.S.C. § 1677m(b) (emphasis added). Similarly, under the ABA Model Rules of Professional Conduct, "fraud" or "fraudulent" "denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." Model Rules of Professional Conduct, Preamble, Scope, and Terminology. "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question." *Id.* Actual knowledge is, therefore, a prerequisite to any finding of wrongdoing.

Equally, if the Department promulgates these proposed regulations, the behavior being sanctioned must be material and beyond what can easily be addressed merely by the imposition of adverse facts available on the attorney's client--the practical effect of which is, quite often, the attorney's loss of future representation of that client (even where the imposition of facts available is no reflection of the attorney's performance). Most importantly, the Department must establish clear statutory authority to "disbar" an attorney from practice before the Department for violating a statement of accuracy.

(4) Who should be subject to these regulations? Should they cover only fraud or false statements committed by attorneys and other professionals appearing before the agency, or should they also cover the foreign and domestic companies subject to IA's determinations?

Again, attorneys and certain other professionals practicing before the Department are already "policed" by ethics committees, Bar associations, and the courts themselves. The creation of additional rules to govern lawyers' behavior would be redundant and, quite frankly,

insulting to the trade Bar given how rarely this targeted misconduct actually occurs. The Department already has ample discretion to sanction misappropriate conduct by foreign companies through the imposition of facts available.

(5) What should be the standard for initiation of an investigation?

Given the seriousness of the allegations involved in these matters and the ramifications to an attorney implicated, we feel quite strongly that issues of attorney misconduct not be investigated by the Department at all. They should, instead, be referred to another appropriate government agency or state Bar association for the courts and/or other licensed practitioners (rather than Department administrators) to decide.

The complexity of the issues involved in regulating attorney conduct is evidenced by the Department's questions below concerning due process requirements and the avoidance of conflicts of interest. As tested alternatives are already available to regulate attorney conduct and instances of fraud upon the Department by lawyers are extremely rare, the creation of an entirely new regulatory scheme is unwarranted and seemingly unlawful. Were the Department able to establish statutory authority for this proposal, for purposes of questions 6-12, we would urge the Department to consult with the D.C. and other state Bar associations before drafting any new rules to address attorney conduct and to research thoroughly attorney disciplinary proceedings and the due process requirements addressed therein.

(6) Should IA conduct any such investigation, or should another unit outside IA but within the Department conduct the investigation? If within IA, should a special unit be established, or should the existing APO unit assume this task? If outside IA but within the Department, where should the responsibility be placed?

See Question 5, above.

(7) Should there be discovery? What rules would govern discovery, and

who would adjudicate any disputes that arise during discovery? Should the Department and the suspected individual have the right to compel witnesses and production of documents?

See Question 5, above.

(8) Should any adjudicatory proceedings include a hearing? Who would preside at a hearing? Would this person be the final decision-maker in the proceeding? What rules would govern a hearing? If there is no hearing, who would be the decision-maker?

See Question 5, above.

(9) What type of remedial sanctions should be imposed upon a finding that a person committed a fraud? Is disbarment from practice before the agency an appropriate remedy in some cases? What type of sanction would apply to non-attorneys or to company officials?

See Question 5, above.

(10) Should the regulations establish a procedure for an appeal within the Department? Who would hear such appeals?

See Question 5, above.

(11) Should the regulations contain a procedure by which disbarred persons may seek reinstatement? What standards should govern adjudications of reinstatement?

See Question 5, above.

(12) Should final adjudicatory decisions be confidential or public?

See Question 5, above.

(13) Please provide any additional views on any other matter commenters would like to raise, including the necessity of regulations and what these regulations should address, as well as comments on whether any statutory changes are needed. References to the recently amended statutory and regulatory procedures for certification at the Securities and Exchange Commission, pursuant to sections 302 and 906 of the Sarbanes-Oxley Act of 2002, might be useful, as well as any other agency enforcement schemes which might be instructive.

The referenced Securities and Exchange Commission rules do not address attorney conduct. Those rules were designed to ensure that company officials, not their outside counsel, certify the accuracy of the company's financial reports. *See generally* www.sec.gov/rules/final/33-8124.htm; www.sec.gov/rules/final/33-8238.htm. Liability for false certification is limited to "general antifraud standards and our {the Commission's} authority to seek redress against those who cause or aid or abet securities law violations." *Id.* Unlike the regulations suggested by the Department of Commerce, the referenced Securities and Exchange Commission regulations were mandated by an unambiguous Congressional directive (in the Sarbanes-Oxley Act of 2002).[6]

Congress has entrusted the Department of Commerce with limited authority to regulate and sanction attorney conduct with respect to the adherence of administrative protective orders. *See* 19 U.S.C. §1677f. This authority is, however, quite specific and limited to "prohibited acts" with respect to protective orders. 19 U.S.C. § 1677f(f). The Department's broader authority to prescribe regulations, 5 U.S.C. § 301, is insufficient to justify the breadth of the regulations proposed in the Department's notice, particularly considering the seriousness of the due process concerns implicated.

Please contact us should you have any questions regarding this matter.

Respectfully submitted,

[6] Like the SEC (and the courts), the International Trade Commission has also been specifically empowered by Congress to sanction certain types of conduct, including false factual certifications. *See, e.g.,* 19 U.S.C. §§ 1333, 1335, and 1337; 19 C.F.R. § 210.4. Similar authority has not been delegated to the Department.

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