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PUBLIC DOCUMENT

The Honorable David M. Spooner
Assistant Secretary of Import Administration
U.S. Department of Commerce
Central Records Unit
14th Street, N.W.
Washington, D.C. 20230

Attn: APO Regulations

Re: The Commerce Department's Document Submission and APO Procedures Proposed Rule Change and Request for Comments: 72 Fed. Reg. 680 (Jan. 8, 2007)

Dear Mr. Spooner:

The following comments are in response to the Commerce Department's (the "Department") request for comments regarding its proposed rule amending its Administrative Protective Order ("APO") procedures. The proposed rule amending the APO procedures was published in the *Federal Register* January 8, 2007. See Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures; Proposed Rule, 72 Fed. Reg. 680 (Dep't Commerce Jan. 8, 2007) ("Proposed Rule"). The Department's proposed rule is intended to improve its APO procedures and clarify certain aspects of its regulations. We are filing our comments on our own behalf, given the rule's impact on our interests as attorneys and the interests of all of our clients.

Summary

Our comments are limited to only three of the various amendments the Department proposes. We make the following points:

- **The proposed addition to the regulations defining the term "interested party," should not result in requiring the filing of additional APO applications for the affiliated parties of respondent exporters/producers. Thus, we urge the Department not to require affiliated respondent parties to file separate APO applications.**
- **We support the Department's proposal to place an APO on the record within "five business days" of the request to initiate a new shipper review, scope request, or changed circumstance review ("CCR"). Fundamental fairness demands that the Department grant the parties' access to the proprietary information submitted in these types of proceedings before initiation occurs.**
- **The Department proposes that entries of appearance be filed separately from APO applications. We do not believe that it is necessary for the Department to require that the entry of appearance be a separate filing. Therefore, we urge the Department to reconsider this requirement.**

We address each of these points in more detail below.

I. The Department's Attempt To Define The Term "Interested Party" Should Not Require Multiple APO Applications For Affiliated Parties

In its proposed rules the Department notes that section 351.102(b) currently does not define the term "interested party." The Department claims that this has caused some confusion and difficulty in processing APO applications. Currently, the application only provides three options for a party to select: "petitioner," "respondent," or "other." The confusion occurs when a party selects "other." If the applicant selects "other" they must identify the section of the Department's regulations that defines the party's status, but the Department's regulations do not define the term "interested party." In addition, the Department claims that there is often confusion as to whether the party should be classified as an importer or one of the other categories of interested parties under the statute. See Proposed Rule, 72 Fed. Reg. at 681. To solve this problem the Department has added a definition of "interested party" to section 351.102(b) of its regulations and now requires the party to identify on the APO application the precise subparagraph of section 351.102(b) that applies to the party.

In the proposed rule, the Department states that its definition of "interested party" follows the definition provided for in section 771(9) of the Tariff Act of 1930 (the "Act"). The Department notes, however, that its "interested party" definition is different in that it places "importer" in its own category, so that a party that is an importer can be clearly identified on the APO application.

While as a general matter defining "interested party" and requiring the party to be more precise in identifying its status on its APO application is useful, in practice the Department's proposal may prove problematic. In a recent new shipper review, the Department required our exporter client's affiliated importer to file a separate APO application. We do not recall having to do this previously in other cases involving affiliated importers, and were told this was consistent with the Department's new APO regulations. However, we wonder if the Department has fully considered the ramifications of its proposal. Such a requirement would presumably lead to the filing of APO applications for all of a respondent's affiliates, if they have interested party status. This appears to us to be overkill. If an importer is affiliated with the foreign producer, the parties' interests in the proceeding are aligned, and they are normally represented by the same counsel. By entering an appearance on behalf of a respondent it should be understood to include any and all affiliated parties of the respondent. Otherwise the APO process can become unwieldy and burdensome. Only in those instances where the importer is participating in a review independent of a foreign producer and is represented by different counsel is it

appropriate to require the importer to file a separate entry of appearance and APO application.

Moreover, the Department's new procedures and practice elevates the definition of "importer interested party" in section 351.102(b)(29) above its definition of "respondent interested party" in section 351.102(b)(42). In section 351.102(b)(42) the Department defines the term "respondent interested party" as an interested party "described in subparagraph (A) or (B) of section 771(9) of the Act." Section 771(9)(A) of the Act defines interested party to include:

> **A foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise.[1]**

It is instructive that the Act groups the foreign manufacturer, producer, exporter, and the United States importer all under one subheading. The Department's own regulations recognize the significance of this grouping by including all four party types under a single definition of "respondent interested party." Thus, when a party identifies itself as a respondent party in its entry of appearance and APO application, it is by definition including all affiliated producers, exporters and U.S. importers.

From this perspective, the Department's new procedures and practices for importers can only have practical effect in those situations where the importer is participating in the proceedings independent of the other respondent interested parties and is represented by different counsel. Otherwise, the Department's new practice and procedure adds a significant administrative burden for respondent interested parties with affiliated importers. For example, under the proposed rule importers are now required to submit documentary evidence (generally in the form of a 7501 Customs Entry Form) confirming their status as an "interested party." If an importer is affiliated with the foreign

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[1] **19 U.S.C. § 1677(9)(A).**

manufacturer and both are represented by the same counsel and participating collectively in the proceeding, this additional requirement is unnecessary. Consequently, the Department's new procedures for importers must only apply to those importers that are participating independent of other respondent parties and are represented by different counsel. Any other interpretation of the new procedures for importers would conflict with the definition of "respondent interested party" and impose unnecessary additional burdens on respondent parties.

The Department's new procedures and practice for importers also requires the respondent party to make a decision regarding its affiliation with various U.S. importers at the very beginning of the proceeding even before the first questionnaire response is submitted and before the Department has ruled on affiliation. A respondent may seek to argue that an importer is not affiliated at the beginning of a proceeding, only later to find that the Department disagreed. In the meantime, in order to comply with the Department's demands, the respondent will seek the importer's cooperation, and file the importer's information as its own, in the event the Department finds them affiliated. Whether actually deemed affiliated or not, the information being submitted is aimed at complying with the respondent/exporter's responsibility under the terms of the Department's questionnaire, not some separate requirement of the importer. Given its submission on the respondent/exporter's behalf, the exporter's APO application should be sufficient. Protection of the importer's confidential information is a private matter

between the exporter and importer governed by their private agreement and by counsel's ethics rules.

Finally, and with all due respect, the Department appears to have lost sight of the purpose of the APO application, which is to permit interested parties' counsel to see confidential business proprietary information of other parties in order to adequately represent their clients' interests. If counsel already has APO access by virtue of representation of the exporter, it is not clear what is served by filing an additional APO application for that exporter's affiliates.

II. The New Requirement To Place An APO On The Record Within Five Business Days Of A Request To Initiate New Shipper Reviews, Scope Reviews, And Changed Circumstance Reviews Is Long Over Due

We support the Department's proposed amendment to section 351.305(a) of its regulations to place an APO on the record within five days of the request for initiation of a new shipper review, scope review, and changed circumstance review ("CCR"). The Department's current regulation only distinguishes between investigations and any other segments of a proceeding.[2] As a result, the Department will deny a party access to business proprietary information in a review proceeding until the review is initiated. The initiation stage of new shipper reviews, scope reviews, and CCRs, however, are much more complicated than other reviews. and involve a substantial analysis of the sufficiency of the request to initiate. It is fundamentally unfair to deny an interested party that is the subject of a proceeding access to business proprietary information, which they otherwise have a right to access, simply because of the timing of initiation. The Department's proposed rule recognizes the problem and attempts to address it by modifying the existing regulation.

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[2] **"The Secretary will place an administrative protective order on the record within two days after the day on which a petitioner is filed or an investigation is self-initiated, or five days after initiating any other segment of a proceeding." 19 C.F.R. § 351.305(a).**

III. Parties Filing APO Applications Should Not Need To File Separate Entries of Appearance In Order To Be Placed On The Public Service List

The Department proposes to amend sec 351.103(d) of its regulations to require parties to file a formal entry of appearance to be included on the service list for a particular segment of a proceeding. Proposed Rule, 72 Fed. Reg. 680, 686-7. The proposed regulation requires the party to identify the name of the interested party and the name of the firm representing the interested party in the segment of the proceeding. The preamble to the proposed regulation states that while this has generally been a practice of many parties, the Department believes it necessary to codify this practice. The Department goes on to state in the preamble that the entry of appearance must be a separate filing and that this "will help ensure that Department officials update the public service list when a party begins participating in an administrative proceeding." Id., at 681.

While we generally have no objection to formalizing the requirement to file an entry of appearance, the Department should reconsider the requirement that the submission be a separate filing. While separately filing an entry of appearance may assist the Department in identifying the parties to include on the public service list, it is inefficient and burdensome for the parties to require a separate filing. Normally, when a segment of a proceeding begins, the parties file their respective APO applications with an accompanying cover letter that also requests that an entry of appearance be made on behalf of the interested party. Requiring the parties to separate the filing into two distinct submissions waists private and public resources and unnecessarily increases the administrative burden on the parties. If should not be difficult for the Department to discern that a party seeks to

be placed on the public service list -- anyone seeking APO access should obviously be placed on the public service list as well.

The Department's requirement for separately filing an entry of appearance appears to apply more appropriately to those parties who do not seek access to confidential business proprietary information. The party merely wishes to monitor the proceeding without incurring the additional obligations of the APO. In these situations, the party should be required to file an entry of appearance to be included on the public service list. To accomplish this, however, the Department merely should require parties to enter an appearance; it should not also require a separate filing by those seeking APO access.

Moreover, given the additional "interested party" requirements discussed above, the entry of appearance takes on added significance and should not be a separate filing from the newly revamped APO application (Form ITA-367). The Department's proposed rule change requires a greater degree of specificity when identifying the appropriate interested party on the APO application. At the same time, the Department is requiring a similar but different level of specificity in the entry of appearance by requesting the party to identify the name of the interested party, how that party qualifies as an interested party, and the name of the firm representing the interested party. The Department is also requiring that the parties certify to the factual information contained in the letter of appearance (i.e., the name of the interested party, and how the party qualifies as an interested party).

The revised Form-ITA-367 requires the parties to indicate the appropriate subparagraph of section 351.102(b)(29) that identifies the appropriate status of the party. Revised section 351.102(b)(29) defines the term "interested party." Essentially, by requiring a party to identify the type of interested party under the definition in section 351.102(b)(29) on Form ITA-367, the Department is requiring the party to categorize how the party qualifies as an interested party in the APO application as well. The parties must

certify to the accuracy of this characterization in the entry of appearance, but in a separate filing this same characterization does not require a similar certification in the APO application. Not only is this treatment of identical information inconsistent, it is also burdensome to require the parties to make multiple filings of similar information. The Department should simply require the parties to file the entry of appearance and APO application together with a single certification for the entire submission.

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For the foregoing reasons, we ask that the Department revise its proposed rule based on the above comments.

Respectfully submitted,

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