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November 22, 2004

Mr. James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Units
Room 1870
14th and Constitution Avenues
Washington, DC 20230

RE: Notice of Proposed Rulemaking Concerning Certification of Factual Information During Antidumping and Countervailing Duty Proceedings

Dear Mr. Jochum:

On September 22, 2004, Import Administration published a Notice of Proposed Rulemaking and Request for Comments concerning its proposed modifications to the certification requirements of both companies and their legal counsel to Import Administration during antidumping and countervailing duty proceedings. 69 Fed. Reg. 56738 (Sept. 22, 2004). Although we recognize the obligation for parties to submit accurate and complete information, the proposed revisions to the certification statements are overly burdensome and excessively broad in their potential application. For the reasons given below, therefore, we suggest that Import Administration's proposals be revised to address these concerns.

A. The Proposed Revisions to the Company Certification Are Overreaching and Impose Indefinite and Undefined Burdens on Foreign Respondents

Under the proposed regulation, the relevant company official would be required to certify as follows:

I am aware that this certification is deemed to be continuing in effect, such that I must notify Import Administration, in writing, if at any point in this segment of the proceeding I possess knowledge or have reason to know of

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any material misrepresentation or omission of fact in this submission or in any previously certified information upon which this submission relies.

69 Fed. Reg. at 56740. Although most companies strive to report accurate data, it is inevitable that errors will be discovered during the administrative process. As a result, this provision raises three concerns: First, it is not clear how quickly the certifying official must notify Import Administration of the “misrepresentation or omission of fact.” In our experience, it has often been far more efficient to identify inadvertent errors discovered during the course of the review in supplemental questionnaire responses, rather than identify errors as soon as they are discovered. This new provision casts doubt on whether this appropriate and time-efficient conduct remains permissible.

Second, the proposed language fails to articulate when and how Import Administration will determine that parties have failed to meet their ongoing obligation to correct errors discovered during the administrative process. The text above could be read to suggest that any error discovered by Import Administration during verification will lead to a full scale inquiry concerning whether the errors constituted “material misrepresentation or omission of fact” as to which the certifying official “[had] reason to know” – regardless of whether she actually did know – prior to verification. As a practical matter, such inquiries would be extremely burdensome for Import Administration to administer. Moreover, such inquiries would be a draconian and incommensurate response, when in the vast majority of instances, the errors discovered during verification are inadvertent and discovered for the first time during verification. Verifications are stressful experiences at the best of times, a condition that should not be exacerbated by the threat that errors discovered during that process may have punitive repercussions.

In addition, the proposed language provides no guidance as to the standard or burden of proof that will be applied by Import Administration in determining whether the obligations contained in the certification are satisfied. If the burden of proof is placed on the certifying official, that individual will be placed in the position of proving a negative, namely that she did not know of the “misrepresentation or omission of fact.” Further, the proposed language not only requires that the certifying official not possess any knowledge of the “misrepresentation or omission of fact” but also that she has no reason to know of any material “misrepresentation or omission of fact.” In other words, the proposed language establishes both a subjective and objective burden on the company official, and thus there is a real danger that inadvertent errors will be identified by Import Administration as impermissible conduct on the ground that the certifying official should have known of the misrepresentation or omission of fact, whether or not she actually did know.

Finally, the requirement that the certification list all individuals who had significant responsibility for preparation of “all or part” of each separate submission is unduly burdensome. The typical questionnaire contains 150 to 200 pages of instructions requiring detailed information on a variety of matters. Preparation of the responses often requires the work of

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numerous individuals in the company as well as outside attorneys and consultants. The proposed requirement to list each individual who was responsible for each part of the response unnecessarily adds to the burden of submitting questionnaire responses under tight deadlines. The certifying officer is responsible for the accuracy and completeness of the entire submission. Under current practice, if Import Administration has questions about specific sections of a response, those questions will be answered during the verification by individuals who prepared those sections. Listing each such individual in each questionnaire response would not assist the Department and would add nothing to the accuracy of the response.

B. The Proposed Modifications to the Representative Certification are Excessive and Contrary to an Attorney's Ethical Obligations to the Client

Per the Department's proposed revisions to the certification requirements, legal counsel representing a party in an antidumping or countervailing duty proceeding would be required to include the following language in his/her certification statement accompanying the submission of factual information to Import Administration:

Based on the information made available to me and knowledge acquired by me in my role as advisor, preparer or reviewer of the submission, *and after a reasonable inquiry under the circumstances*, I certify that to the best of my knowledge, the submission is accurate and complete.

69 Fed. Reg. at 56741 (emphasis added). This language suggests that not only must the attorney review the data submitted by her client to ensure that it is accurate and facially complete, but she must also engage in some further investigation as to the accuracy and completeness of the data provided by her client. However, the proposed revisions to the regulations provide no guidance as to what would be a reasonable level of investigation. The phrase "a reasonable inquiry" could easily be interpreted to require an independent review by counsel of the sources of information from which the client obtained the data submitted to the Import Administration. Given the myriad locations in which major exporters conduct their business, the huge volume of data that often must be reported in response to the Department's lengthy questionnaires, and the tight statutory time frames for conducting the proceedings, it is simply infeasible for legal counsel to be expected to visit the necessary locations from which a client obtained the data, and to manually verify all of the data that is to be reported to Import Administration. To require such an effort would in many cases make it cost prohibitive for parties to employ legal counsel in an antidumping or countervailing duty proceeding, an inappropriate result that we do not believe Import Administration would intend.

Furthermore, the Representative Certification, in a similar manner to the Company Certification, requires legal counsel to inform Import Administration if, "at any point in this segment of the proceeding [the attorney] possess[es] knowledge or ha[s] reason to know of a

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material misrepresentation or omission of fact in this submission or in any previously certified information upon which this submission relies.” *Id.* Not only is this language flawed for the same reasons discussed above with regard to the Company Certification, but it also potentially requires an attorney to violate her ethical obligations to the client. Specifically, it could place an attorney in the untenable position of either breaching ethical obligations to maintain the confidentiality of information secured pursuant to the attorney-client relationship, or contravening Import Administration’s ongoing certification obligations.

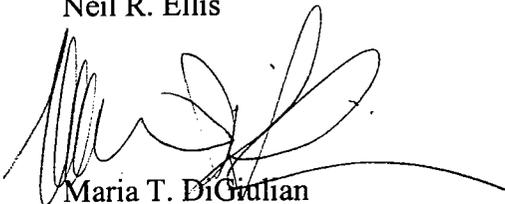
For example, if an attorney discovers information during the course of an antidumping proceeding, and the client specifically instructs the attorney not to disclose the information to the Import Administration, the proposed language would nonetheless require the attorney to disclose the information or risk violating the certification. However, such disclosure would violate Rule 1.6 of the District of Columbia Rules of Professional Conduct, which requires attorneys to preserve the confidentiality of information protected by the attorney-client privilege. Those same rules provide for no exception that would permit the type of disclosure envisaged by Import Administration in the revised certifications. On the contrary, a violation of Rule 1.6 could result in the disbarment of the attorney. Although this type of situation may be rare, we assume that it was not Import Administration’s intent to place legal counsel in this “Catch 22” position.

In conclusion, although we strongly support Import Administration’s efforts to ensure the accuracy of data reported by all parties to antidumping and countervailing duty proceedings, it is imperative that revisions to the certifications do not impose excessive or conflicting burdens on reporting parties or their legal counsel.

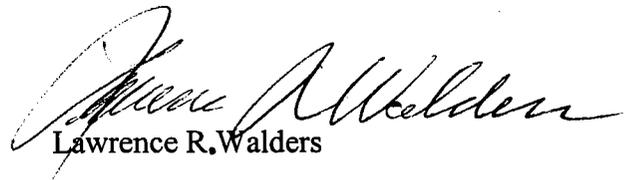
Respectfully submitted,



Neil R. Ellis



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