

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

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IMPORT ADMINISTRATION

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

Dear Mr. Jochum:

On September 22, 2004 (68 FR 56738), the Department published a Notice of Proposed Rulemaking that would, among other things, change the certifications that company officials are required to make with respect to written submissions of factual information to the Department in the context of antidumping and countervailing duty proceedings. On behalf of NSK Ltd. and the NSK Group of companies, who participate in antidumping duty proceedings before the Department, we are submitting these comments on the Department's proposed certification changes as they would impact certifying companies. As explained below, the proposed certifications impose undue burdens and vague requirements and, accordingly, the provisions discussed below should be revised or omitted.

OBJECTIONABLE PROVISIONS OF THE PROPOSED RULES

Those With "Significant Responsibility" Must Be Named

Under the proposed regulations, the person officially responsible for presenting factual information to the Department would have to certify, among other things, the following:

I certify that I had sole or substantial responsibility for preparation (or supervision of the preparation) of this submission and have a reasonable basis to formulate an informed judgment as to the accuracy and completeness of the information contained in this submission. If I supervised the

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preparation of this submission, I list below those other individuals with significant responsibility for preparation of part or all of the submission.

NSK has no objection to a certification that requires the company official to "have a reasonable basis to formulate an informed judgment as to the accuracy and completeness of the information contained in this submission." Such a certification is completely consistent with a supervising company official's obligation to not make representations to a government agency which he knows or believes are inaccurate or incomplete.

However, the Department's proposal would also require that all other individuals with significant responsibility in preparing part or all of the submission be named. This requirement is vague and burdensome. There are no guidelines by which to determine what is considered "significant responsibility." Further, the proposal fails to account for the realities of how complex antidumping duty questionnaire responses are prepared. For a company the size of NSK, a dedicated team of specialists works to gather the required information. In doing so, however, they interact with, and obtain data from, numerous people in sales, accounting, finance, production and other areas of the company. It is totally unclear whether those with "substantial responsibility" is limited to the core team, or extends to every individual who supplies or verifies any information used in the response. If the latter is intended, the proposal is overbroad and burdensome. If the former is intended – that is, substantial responsibility is limited to those whose primary function is to prepare the response, then the proposal should be amended to clarify the limited scope.

Criminal Sanctions

The proposed certification also requires that the person officially responsible for presentation of the factual information certify that he/she is "aware that U.S. law imposes criminal sanctions (including, but not limited to, 18 U.S.C. 1001) on individuals who knowingly make misstatements to the U.S. government." By characterizing 18 USC § 1001 as applying to "knowing misstatements", the proposal over-reaches. The statute reads:

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 -

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(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.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

Thus, the statute deals first and foremost with “material” matters – it is not violated simply by a knowing mis-statement, where such mis-statement is not material.

Moreover, subsection (b) excludes from the scope of subsection (a) representations made in the context of a judicial proceeding as well as those communications made to Congress that do not constitute administrative filings and which are not furnished pursuant to a duly authorized investigation. The exception for representations in judicial proceedings were created to avoid chilling advocacy in the judicial forum, and because there were already statutes addressing and punishing those who willfully mislead the judicial or legislative branch.¹ See H.R. REP. NO. 104-680, at 4-5 (1996).

The rationales for the exemption created by 18 USC § 1001(b) apply equally to statements made by a party or a party's counsel, in proceedings before the Department, which are quasi-judicial in nature. First, in antidumping proceedings, the parties appear as advocates before the Department, which ultimately must sort out the parties' conflicting contentions. Thus, the Department must be careful to avoid chilling zealous advocacy. Second, under the WTO Antidumping Agreement, the US has agreed on the consequences to interested parties who fail to cooperate with investigating authorities. Article 6.8 and Annex II of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) authorize the use of “facts available” in

¹ For example, perjury (18 U.S.C. §1621) and obstruction of justice (18 U.S.C. §1505).

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cases where the interested party refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes the investigation. Pursuant to this authority, the Department has been given the necessary power to sanction those who appear before it. The application of the criminal sanctions in 18 USC § 1001 thus represent a remedy beyond what the Agreement permits. Accordingly, acknowledgement of the threat of criminal sanctions should not be included as part of the certification rule.

Certification as Part of Official Records

The proposed certification further requires the company official to affirm that the original, signed certification "will be maintained as part of the company's official records and will be available for inspection by Department of Commerce officials during any verification." While NSK is not theoretically opposed to maintaining the original, signed certification, NSK submits that the Department's use of the phrase "official records" unduly complicates the matter. Further, there is no indication how long the original certification should be maintained -- by "any verification", does the Department mean that the certification needs to be maintained until the order is sunset? If the Department means only for the period of review in question, it should say so. As written, however, the proposed regulation is very ambiguous in stating what exactly is required by the certifying official for the company.

In sum, the Department's proposed certification requirements impose undue burdens and vague requirements on the company officials required to certify submissions of factual information to the Department in trade remedy proceedings. In particular, the requirements that the company's certifying official name those with "significant responsibility" in preparing the submission, acknowledge the threat of criminal sanctions and maintain original certification papers until an indefinite time should be revised to be more clear, or omitted altogether.

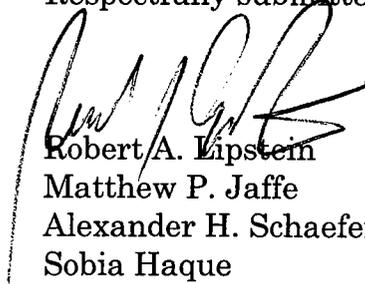
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Please do not hesitate to contact the undersigned if you have any questions regarding this submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "R. Lipstein", written over the printed name.

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