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December 7, 2004

Mr. James J. Jochum  
Assistant Secretary for Import Administration  
U.S. Department of Commerce  
Central Records Unit, Room 1870  
14th Street & Constitution Avenue, N.W.  
Washington, D.C. 20230

**Re: Comments on Certification of Factual Information to Import Administration  
During Antidumping and Countervailing Duty Proceedings**

Dear Mr. Jochum:

Hogan & Hartson LLP hereby respectfully comments on proposed amendments to the Department of Commerce's requirements for certification of factual information submitted in antidumping and countervailing duty proceedings. <sup>1/</sup> We do not attempt to address each of the new requirements proposed by the Department, such as identification of the specific submission to which a certification pertains, or retention of original certifications. Instead, we focus our comments on what we consider to be the key issues raised by the Department's proposed rulemaking.

**Introduction**

In its Notice of Proposed Rulemaking and Request for Comments (the "Notice"), the Department suggests that the current certification requirements are insufficient "to protect the

<sup>1/</sup> Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings, 69 Fed. Reg. 56,378 (proposed Sept. 22, 2004) (to be codified at 19 C.F.R. § 351.303(g)). The Department has indicated that it will accept and consider comments submitted as of today's date.

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integrity” of the Department’s administrative processes and, therefore, that amended requirements are needed. <sup>2/</sup> The text of the Notice, however, does not provide any further explanation as to the issues the Department seeks to resolve by its proposed certification requirements. We are not aware of – and the notice makes no reference to – any significant or recurring problems involving the certifications that underlie the Department’s proposed amendments. If such problems exist, the Department should disclose them, so that the causes can be identified and analyzed, and appropriate remedies fashioned. The Department should, at a minimum, lay out the issues for comment before imposing burdensome new requirements.

For these reasons, we cannot be sure if the shortcomings of concern to the Department can be addressed by revisions to the certification process, or whether these problems instead raise an enforcement issue. We accordingly question whether amended certification requirements would provide the Department with the increased protection it seeks. To the contrary, if the issue is the intentional submission of false information, the additional certification requirements might not provide any greater assurance of completeness and accuracy, and likely would not alter the behavior of companies or their representatives who would knowingly submit false information. Perhaps the Department could better address its concern with strengthened enforcement rather than revised certification requirements.

With that perspective, we focus our comments on five key issues.

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<sup>2/</sup> Id.

**1. Amended Certification Requirements Would Not Better Protect — and Could Hinder — the Integrity of the Department's Processes**

To the extent that the Department's proposed rulemaking stems from a concern regarding the submission of false information, the Department might want to focus on strengthened enforcement, rather than revised certification requirements. The current certification requirements already obligate both companies and their representatives to certify the accuracy and completeness of information submitted to the Department. That certain companies or their representatives may nevertheless submit false or inaccurate information reflects neither an inherent problem with the current certification regime nor a need to revise the certification requirements. Rather, such intentional misconduct, if it exists, highlights the need for rigorous enforcement of the current certification regime by the Department.

The Department currently has ample authority to handle instances in which a company or its representative is believed or known to have submitted false information. Specifically, under 18 U.S.C. § 1001, criminal sanctions are to be imposed on persons who knowingly make false statements to the U.S. Government. Moreover, attorneys are bound by enforceable rules of professional responsibility that prohibit them from knowingly submitting false information to a tribunal. With these requirements already in place, the Department has significant ability to protect the integrity of its processes without making a single modification to its current certification regime. In fact, the Department should consider whether imposing additional certification requirements, based on questionable statutory authority (as outlined below), might in fact hinder its ability to deal with those (presumably rare) instances where a

party or its counsel intentionally submit false information: the Department might inadvertently provide such persons with an opportunity to challenge the Department's certification requirements as statutorily invalid.

**2. The Governing Statute Defines and Circumscribes the Department's Authority to Require Certifications**

The requirement for the certification of factual information was first established by Section 1331 of the Omnibus Trade and Competitiveness Act of 1988. Section 1331 requires that:

Any 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. <sup>3/</sup>

These certification requirements (with only minor modifications) have remained in effect in antidumping and countervailing duty proceedings since 1988.

The statutory language, on its face, specifies the nature of the certification to be rendered: first, that the certification be provided by the "person providing factual information," and second that the person certify "to the best of that person's knowledge." <sup>4/</sup> Congress thus spoke to the details of the certification process on the face of the statute. The Department's proposal seeks to expand this obligation in two ways: first, to require certifications from persons

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<sup>3/</sup> Section 1331 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1207 (1988). This statutory provision was subsequently redesignated, without amendment, as Section 782(b) of the Act by Section 231 of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

<sup>4/</sup> 19 U.S.C. § 1677m(b).

who arguably do not fall within the class of “persons providing factual information,” and second, to impose duties of “reasonable inquiry” and “continuing effect” in some instances.

These additional obligations expand upon those imposed by Congress. Under normal principles of statutory interpretation, Congress may be presumed to have considered the scope of the obligations, weighing those obligations against other considerations, such as tight time limits imposed upon submissions, and set forth its intent on the face of the statute. By going beyond the balance established by Congress, the Department risks a finding that its further obligations are inconsistent with the law. In other words, the Department is taking a risk that its certifications will be thrown out by a court if the Department seeks to enforce them.

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### **3. The Department’s Proposed “Reasonable Inquiry” Requirement**

The proposed certification for “representatives,” including lawyers, includes new language: the obligation to conduct an “inquiry reasonable under the circumstances.” This language is vague, which makes it difficult to determine whether any real change lies behind the wording.

Counsel who conduct themselves in accordance with applicable ethics rules will justifiably contend that they already are performing an inquiry that is “reasonable under the circumstances” before signing the existing certification. The Department’s notice gives no indication that the new language is intended to require steps beyond those that prudent counsel already take. At the same time, any contention that this language is intended to impose sweeping new requirements for factual verification is undercut both by the language of the statute, which

asks only for a certification “to the best of {the signer’s} knowledge,” and by the overall statutory scheme, particularly the imposition of strict filing deadlines.

The Department’s proposal thus raises the core issue that has been left unaddressed in this rulemaking: is the Department’s concern that some companies or their counsel have submitted false information? If so, then the Department should be focused on enforcement, not on certification language. Alternatively, does the Department seek to impose broad new obligations upon counsel? The motive for such action would seem unjustified in light of the existing certification requirement and bar rules, and the action itself could exceed the Department’s statutory authority.

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**4. The Department’s Proposed Requirement to Impose a Continuing Obligation on Representatives**

The Department’s proposed regulation seeks to impose a continuing obligation on a representative to bring to the Department’s attention any instance in which he or she “possess{es} knowledge or {has} reason to know of a material misrepresentation or omission of fact. . .” at any point during a particular proceeding. <sup>5/</sup> In proposing such a requirement, the Department risks creating a serious conflict with the District of Columbia Rules of Professional Conduct (the “D.C. Rules”), which govern the conduct of many, if not most, counsel appearing before the Department in these proceedings.

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<sup>5/</sup> See *id.* at 56,741.

Under the D.C. Rules, attorneys are prohibited from knowingly making false statements or assisting their clients in fraudulent conduct. <sup>6/</sup> The rules relating to candor toward the tribunal impose specific and clear duties on lawyers in order to avoid conduct that undermines the integrity of the adjudicative process – the very same conduct that seems to have prompted the Department’s rulemaking. First, if an attorney is aware at the outset that information to be submitted to a tribunal is false, the D.C. Rules prohibit the attorney from submitting such information and require his or her withdrawal from the case if the client cannot be dissuaded from the planned misconduct. <sup>7/</sup> Moreover, the D.C. Rules specifically require that “a lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly reveal the fraud to the tribunal unless compliance with the duty would require disclosure of information otherwise protected under Rule 1.6 {Confidentiality of Information}.” <sup>8/</sup> Any person — the Department included — who knows or believes that an attorney has violated these rules may seek to challenge the attorney’s alleged misconduct and enforce the rules of professional responsibility before the Office of Bar Counsel, which has been specifically designated for this purpose.

The certification requirements set forth in the Department’s proposed regulation thus would duplicate an obligation already imposed on all lawyers. Perhaps more importantly, the requirements would, under certain circumstances, raise the possibility of a direct conflict with the D.C. Rules. Specifically, while the D.C. Rules require attorneys to disclose previous

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<sup>6/</sup> D.C. Rules of Professional Conduct Rule 3.3(a) (2002).  
<sup>7/</sup> See *id.* at Rules 1.2(e), 1.16(a)(1), and 1.16(b)(1).  
<sup>8/</sup> *Id.* at Rule 3.3(d).

fraud perpetrated on a tribunal, they direct the attorney not to do so if such disclosure would violate attorney-client confidentiality. <sup>9/</sup> In such instances, the attorney is obligated to call upon the client to rectify the fraud, but is prohibited from disclosing the fraud over the objections of the client. <sup>10/</sup>

The D.C. Rules do provide an exception to the aforementioned general rule: an attorney may reveal client confidences “when ... required by law or court order.” <sup>11/</sup> While this exception might permit some of the disclosures the proposed rule seeks, it would do so only if the Department has the statutory authority to promulgate the rule. Such authority is questionable at best. <sup>12/</sup> Therefore, there is a serious risk that bar disciplinary authorities could conclude that the exception would not apply in the circumstances the Department envisions. In that event, lawyers acting in the utmost good faith would find themselves facing a conflict of obligations that cannot be resolved.

The D.C. Rules strike a clear and definitive balance between an attorney’s duty of candor toward a tribunal and his or her duty of confidentiality to the client. The Department has not set forth, and we cannot find, a statutory basis or an evident policy rationale that would support a different balancing of these obligations in the context of antidumping and countervailing duty proceedings.

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<sup>9/</sup> Id.

<sup>10/</sup> Id. Under such circumstances, the attorney would likely need to withdraw from the representation. As a practical matter, such withdrawal would therefore signal to the Department that something is amiss.

<sup>11/</sup> Rule 1.6(d)(2)(A).

<sup>12/</sup> See Section 2, supra.

**5. The Department's Proposed Requirement Regarding Designation of Persons Responsible for Submissions**

The Department has included in its proposed rules a requirement that companies and their representatives indicate the name of those individuals with "significant responsibility for preparing specific portions of each submission to the Department, in addition to the name and title of supervisory personnel." <sup>13/</sup> It is difficult to discern from the text of the Notice the Department's purpose in imposing such a requirement, but we assume it is intended to permit more traceability and to impose more accountability. The Department might be assisted by more traceability in the instance where information is compiled by outside consultants or third parties who are not directly involved in the proceeding at issue. For example, if a small, cash basis business must retain an accounting firm to report its accounts on an accrual basis for the Department's purposes, then it is reasonable for that firm to be identified. Similarly, if a petition makes allegations about import pricing in the U.S. market and the petitioners themselves are not the source of the information, then the Department, faced with assessing the credibility of the information, reasonably should know the identity of the source.

But the Department's proposal goes far beyond those reasonable goals. For example, the Department's proposed regulations would create an additional requirement to list on the certification all persons who had significant responsibility with respect to a particular section of a submission. This could impose a significant burden in many instances, a burden that could be difficult to meet consistent with tight deadlines. To the extent these additional persons

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<sup>13/</sup> 69 Fed. Reg. at 56,739.

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are subject to the supervision of the certifying individual, the requirement also would provide no additional assurance regarding the accuracy and truthfulness of the submission. In fact, given the possibility of staff turnover in accounting and marketing departments, or in law firms, the Department might find that the lower-level professionals are not even available at later stages of the investigation. The Department therefore arguably would be better off relying on the company's and the law firm's established lines of authority.

### **Conclusion**

We strongly support the Department's goal of protecting the integrity of its antidumping and countervailing duty proceedings and of holding all participants – petitioners and respondents alike – to high standards of conduct. We question, however, whether the proposed rule would significantly advance this goal. A truthful certification of accuracy under the current regulations provides the Department with a significant enforcement tool. Refinements with respect to specification of proceedings and the identification of additional parties may make it better. But if the Department's concern is submission of false information, then better enforcement, not additional certifications, is the answer. We respectfully request that those of us who currently adhere to high standards not bear additional burdens in a flawed effort to address instances where these standards are not met.

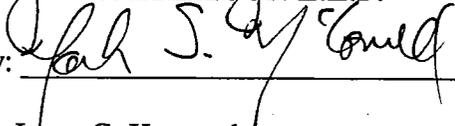
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Please do not hesitate to contact the undersigned should you have any questions regarding this matter.

Respectfully submitted,

**HOGAN & HARTSON L.L.P.**

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