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MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: Christian Marsh *CM*
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination of
the Antidumping Duty Investigation of Xanthan Gum from Austria

Summary

We have analyzed the comments of the interested parties in the antidumping duty investigation of xanthan gum from Austria. As a result of this analysis, we have made changes to the weighted-average dumping margin calculated for Jungbunzlauer Austria AG (“JBL Austria”). We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum.

Background

On January 10, 2013, the Department of Commerce (“the Department”) published in the Federal Register the preliminary determination and postponement of final determination in the antidumping duty investigation of xanthan gum from Austria.¹ The Department extended the final determination until May 28, 2013. The period of investigation (“POI”) is April 1, 2011, through March 31, 2012.

On March 4, 2013, we issued a post-preliminary analysis where the Department considered the use of an alternative comparison methodology based on a differential pricing analysis.² Based on the results of the differential pricing analysis, we continued to base JBL Austria’s weighted-average dumping margin on the standard average-to-average methodology.

¹ See Xanthan Gum from Austria: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 78 FR 2251 (January 10, 2013) (“Preliminary Determination”), and accompanying Decision Memorandum for Preliminary Determination of Antidumping Duty Investigation: Xanthan Gum from Austria from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, dated January 3, 2013.

² See Memorandum from Christian Marsh, Deputy Assistant Secretary Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, concerning, Less Than Fair Value Investigation of Xanthan Gum from Austria: Post-Preliminary Analysis and Calculation Memorandum, dated March 4, 2013 (“Post-Preliminary Analysis Memorandum”).



We invited parties to comment on the Preliminary Determination. On March 12, 2013, we received comments from JBL Austria (the respondent) and from CP Kelco U.S. (“Petitioner”). On March 18, 2013, we received rebuttal comments from Petitioner and from the respondent. The Department did not receive any post-preliminary comments.

Determination of the Comparison Method

As noted above, the Department preliminarily determined that application of an alternative calculation methodology was not appropriate for JBL Austria and, accordingly, continued to apply the average-to-average method. For this final determination, the Department has applied the differential pricing analysis described in its Post-Preliminary Analysis Memorandum to determine the appropriate comparison method. Based on the results of the differential pricing analysis, the Department finds that while the existence of a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among purchasers, regions, or time periods,³ the average-to-average method can appropriately account for such differences.⁴

Discussion of the Issues

Comment 1: Whether the Department should apply total adverse facts available (“AFA”) to JBL Austria because it misreported the grade for the majority of its U.S. and comparison market sales

Petitioner:

- The Department should apply total AFA because JBL Austria misreported the grade characteristic for the majority of its U.S. sales and comparison market sales and there is insufficient evidence on the record of to reclassify the products correctly .
- JBL Austria based its reporting of the grade characteristic not on actual physical characteristic but rather on internal material codes (reported as product codes). As a result, an adverse inference is warranted because JBL Austria was aware that its specifications were based on its internal material codes which differed from the reporting requirements set by the Department for the product characteristics.⁵

³ See Memorandum to the File, concerning “Final Determination Margin Calculation for Jungbunzlauer Austria AG” dated May 28, 2013 (“Final Calculation Memorandum”).

⁴ See *id.*

⁵ See JBL Austria’s Rebuttal Comments on Product Characteristics, dated July 24, 2012, at 7.

- It is the respondents' burden to place the required information on the record so that the Department may calculate an accurate dumping margin⁶ and failing to act to best of one's ability in responding to requests for information merits an adverse inference.⁷
- In the alternative, should the Department decide not to apply total AFA then the Department should apply partial AFA using one of two alternatives: (1) either assign the highest individual home market net price within each control number ("CONNUM") to all sales within that CONNUM; or (2) apply the grade with the highest net price in the third country to all U.S. and comparison market transactions.

JBL Austria

- JBL Austria contends that the application of total AFA is not warranted because it neither failed to cooperate nor failed to respond to the Department's requests. While its original reporting of CONNUMs may constitute an error, it was not due to a failure to cooperate.
- At the cost verification, JBL Austria admitted that it did not report the grade characteristic for its food and consumer products in accordance with the Department's questionnaires, instead it relied on its internal grade descriptions.
- However, the cost and sales verification reports demonstrate that the Department reviewed and accepted numerous reclassified CONNUMs and material codes and verified the accuracy of the grade reporting.
- JBL Austria states that there is sufficient information on the record to reclassify its reported grades and to calculate a margin. Specifically, the Department can reclassify the reported grade code "4" for food products to grade code "2" (consumer product) and the reported grade "2" for consumer products to grade "1" (pharmaceutical products).
- Contrary to Petitioner's claim, JBL Austria reported its CONNUMs based on actual physical characteristics as reflected on the certificate of analysis because the material codes reflect the actual physical characteristics of the product.

Department's Position:

We agree with Petitioner that, given the facts presented, we should apply partial AFA. We disagree with the two alternative partial AFA methods suggested by Petitioner, because these two methods will affect all of JBL Austria's sales and CONNUMs. Instead, the Department is applying partial AFA only to those sales where information is not on the record to reclassify the grade characteristic.

Section 776(a) of the Act provides that the Department will apply "facts otherwise available" if, inter alia, necessary information is not available on the record or an interested party: 1)

⁶ See Chia Far Indus. Factory Co., Ltd. v. U.S., 28 C.I.T. 1336, 1362, 343 F. Supp. 2d 1344, 1366 (CIT 2004).

⁷ See Section 776(b)(2) of the Tariff Act of 1930, as amended ("Act").

withholds information that has been requested by the Department; 2) fails to provide such information within the deadlines established, or in the form or manner requested by the Department; 3) significantly impedes a proceeding; or 4) provides such information, but the information cannot be verified. Because JBL Austria failed to provide the correct grade classification for the majority of its U.S. sales and comparison market sales in the form or manner requested by the Department within the established deadlines, we have determined to apply partial facts otherwise available in accordance with section 776(a) of the Act. Additionally, section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information.⁸ Furthermore, “affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.”⁹

For the final determination, where appropriate, we have relied on JBL Austria’s reclassified grade characteristic information that is on the record. However, to the extent that we do not have information on the record for a certain number of sales to reclassify the grade characteristic, we applied AFA as described below. We have determined that, pursuant to section 776(b) of the Act, the application of adverse inferences is warranted as partial AFA because JBL Austria failed to act to the best of its ability and did not report the grade characteristic and CONNUMs as requested by the Department in the original or supplemental questionnaire responses.

We agree with Petitioner that JBL Austria should have been aware that the grade specifications based on its internal codes differed from the reporting requirements set by the Department for the grade characteristic.¹⁰ During the cost verification, company officials explained that they erroneously reported JBL Austria’s grade classification of xanthan gum relying on JBL Austria’s internal material codes, instead of using the Department’s reporting requirements as included in the Department’s August 7, 2012, letter. As shown in Exhibit A-29 of JBL Austria’s August 14, 2012 Section A response (“Section A response”), JBL Austria’s product specification for its various food grade products reflect some “not to exceed” levels of total plate count (“TPC”) parameter which determines the grade characteristic. However, the Department’s requirements for reporting the grade characteristic classified products with TPC “not to exceed” 1,000 cfu/g as consumer products, and products with TPC “not to exceed” 500 cfu/g as pharmaceutical products.¹¹ At the cost verification, the company provided the Department with a CONNUM reclassification detail for material codes produced during the POI which includes the information necessary to correct the grade classifications. The Department’s cost verifiers obtained certificates of analysis for selected products. Certificates of analysis for certain other material codes produced prior to the POI were provided as part of sales traces at the sales verification, as well as part of earlier sample documentations in questionnaire responses submitted to the

⁸ See Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India, 70 FR 54023, 54025-26 (September 13, 2005); Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 FR 55792, 55794-96 (August 30, 2002).

⁹ See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27340 (May 19, 1997); see also Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) (“Nippon”).

¹⁰ See JBL Austria’s Rebuttal Comments on Product Characteristics, at 7.

¹¹ See Exhibit A-28 of the Section A response, which lists all material codes and the short descriptions of xanthan gum produced by JBL Austria.

Department. As to Petitioner's point that the Department did not accept the grade characteristic revisions as a minor correction at any of the verifications, we note that the Department did in fact accept JBL Austria's revision of the grade characteristic at the cost verification.¹² For the vast majority of sales, all relevant information (including the appropriate grade) is on the record. Due to the business proprietary nature of certain information, further details of this analysis are contained in the Memorandum to the File from Karine Gziryman, Senior Financial Analyst, Office 4, "Antidumping Duty Investigation of Xanthan Gum from Austria: Proprietary Discussion of Issues Contained in the Issues and Decision Memorandum," dated May 28, 2013 ("Final Proprietary Memo").

The Department reviewed these revised grade characteristics at the cost verification. Based on the specifics of the production process of xanthan gum, the material code is assigned to each batch based on the actual characteristics based on production. The actual characteristics of the product for each batch, including the TPC parameter, are listed on the certificates of analysis along with a material code and product description based on the quality analysis of the material. During the course of this investigation, JBL Austria submitted and the Department reviewed 60 certificates of analysis for 25 material codes (three of these material codes were of non-subject merchandise, 17 of these material codes were revised at the cost verification and five of these material codes were not presented by JBL Austria within the revision of CONNUMs presented at the cost verification).¹³ Our review of the TPC characteristic for all of the certificates of analysis on the record for the 17 material codes (as shown on 46 certificates of analysis) match the grade revisions that were presented at the cost verification. Thus, record evidence supports the revisions based on the actual TPC listed on the certificates of analysis.¹⁴ As shown on the certificate of analysis, this product is appropriately classified as pharmaceutical grade material (GRADE=1), rather than food grade (GRADE=4) as originally reported. See, e.g., Exhibit 11 of the Section A response (Certificate of Analysis reflecting a TPC). See also line 8 of the CONNUM Reclassification Detail at CVE 6," and Final Proprietary Memo.

Further, we agree with JBL Austria, that at the cost verification, it presented and the Department examined that there were certain material codes in the "Food Normal family group" with certain requirements.¹⁵ See Final Proprietary Memo. These material codes constitute special cases, rather than the norm. The Department noted in its cost verification report that these reclassified products reflected the actual TPCs.¹⁶ Specifically, the Department explained: "For selected material item codes originally classified as food grade xanthan gum (GRADE = 4), we reviewed Certificates of Analysis for shipments of these products. We noted for each selected material item code that the actual certified TPC corresponded to the TPC as shown on the CONNUM Reclassification Detail, and that these products were appropriately classified as pharmaceutical

¹² See Memorandum from Angie Sepulveda, Senior Accountant, and Stephanie Arthur, Senior Accountant, U.S. Department of Commerce, to Neal Halper, Director, Office of Accounting, U.S. Department of Commerce, regarding Verification of the Cost Response of Jungbunzlauer Austria AG in the Antidumping Duty Investigation of Xanthan Gum from Austria, dated February 20, 2013 ("Cost Verification Report") and cost verification exhibit ("CVE") 6.

¹³ See Final Calculation Memorandum, at attachment 2 (spreadsheet showing the location of these certificates on the record).

¹⁴ See Cost Verification Report at CVE 6.

¹⁵ See id. at 18.

¹⁶ See id. at 18.

grade (GRADE = 1) material.”¹⁷ Thus, contrary to Petitioner’s assertion, JBL Austria reported its CONNUMs based on actual physical characteristics because its material codes reflect the actual physical characteristics of the product. Moreover, at the sales and cost verifications, the Department confirmed that the revision of the reported grades were based on the actual certificates of analysis.¹⁸

We agree with Petitioner that the product specification sheets alone are not reflective of the grade of material. However, we disagree with Petitioner that JBL Austria reported its grade specifications based on the product specifications. As explained above, JBL Austria reported all of the grades for the products that the Department reviewed at verification within the selected sales transactions based on the actual TPC listed on the certificates of analysis, which are created for individual batches of xanthan gum. In addition, the record contains numerous other certificates of analysis that show the actual TPC of the respective products and these certificates of analysis agree with JBL Austria’s reported grades.¹⁹ Therefore, record evidence supports JBL Austria’s assertion that the grades of the material codes and the respective CONNUMs were reported based on the actual chemical composition of xanthan gum listed on the certificate of analysis which are issued for each batch of xanthan gum production. With regard to the Department’s statement in the sales verification report that the revisions to grade submitted at the cost verification “were based solely on the maximum allowable plate count stated on its product specification sheets,”²⁰ the Department notes that this statement was intended to read “were based solely on the TPC stated on the certificate of analysis.” For additional detail see Final Proprietary Memo. As explained and demonstrated above, the Department examined the grade revision based solely on the actual TPC shown on the certificates of analysis without discrepancy.

Additionally, we disagree with Petitioner that there is not sufficient information on the record to determine whether the industrial products are classified properly. According to Petitioner, JBL Austria, in its rebuttal comments on product characteristics, suggested that the product characteristics for “industrial” grade include a TPC of less than 10,000 cfu/g. However, Petitioner argues the certificates of analysis for JBL Austria’s grades reported as industrial do not contain the actual TPC listed. Contrary to Petitioner’s assertion, JBL Austria states that “Unlike oilfield grade xanthan gum, which has no maximum TPC, some customers who buy technical grade xanthan gum require a TPC maximum of 10,000 cfu/g.”²¹ This statement is made by JBL

¹⁷ See *id.* at 18, see also *id.* at 17 where the Department stated: “...we reviewed Certificates of Analysis accompanying the shipments of these products. We noted for each selected material item code that the actual certified TPC corresponded to the TPC as shown on the CONNUM Reclassification Detail.”

¹⁸ See Memorandum to the File through Robert Bolling, Program Manager, AD/CVD Operations, Office 4, concerning, Verification of the Questionnaire Responses of Jungbunzlauer Austria AG, dated February 19, 2013, (“Sales Verification in Austria Report”) at verification exhibits (“VE”) 17- 20. See also Memorandum to the File through Robert Bolling, Program Manager, AD/CVD Operations, Office 4, concerning, Verification of the Questionnaire Responses of Jungbunzlauer Ladenburg GmbH, dated February 19, 2013 (“Sales Verification in Germany Report”), at VEs 4, 14, 16-18. See also Memorandum to the File through Robert Bolling, Program Manager, AD/CVD Operations, Office 4, concerning, Verification of the Sales Response of Jungbunzlauer Inc. in the Antidumping Investigation of Xanthan Gum from Austria, dated March 4, 2013 (“CEP Sales Verification Report”), at VE 6. See also Cost Verification Report at 16-18.

¹⁹ See Final Calculation Memorandum at attachment 4 (spreadsheet listed all certificates of analysis on the record).

²⁰ See Sales Verification in Austria Report at 20.

²¹ See JBL Austria’s Rebuttal Comments on Product Characteristics, at5-6.

Austria regarding some but not all of customers buy technical (same as industrial according to the Department's grade classification) grade of xanthan gum. Moreover, at the sales verification, the Department confirmed that the certificate of analysis for industrial grade does not contain information regarding TPC.²² The Department also confirmed at the verification that there was no record evidence that contradicted JBL Austria's claim that it "did not maintain records in the ordinary course of business that specified the plate count (TPC) for industrial grade xanthan gum produced by JBL Austria. Company officials further explained that because industrial grade is a relatively low quality product, its customers do not require documentation specifying the product to be industrial grade."²³ Therefore, the fact that the certificates of analysis on the record for industrial grade of xanthan gum do not show the TPC characteristic is in agreement with JBL Austria's books and records, and contrary to Petitioner's assertion, JBL Austria has properly classified its industrial grades of xanthan gum.

Further, we disagree with Petitioner that JBL Austria failed to correctly report the grade for a large majority of its sales. As explained above, at the cost verification, JBL Austria provided and the Department accepted its new reporting of its grade classifications.²⁴ However, JBL Austria did not provide a revision of grades for certain material codes which were sold but not produced during the POI. As stated above, the record contains the certificates of analysis for some material codes that were not revised during the cost verification. However, the record does not contain revisions for all material codes which were sold, but not produced during the POI and the necessary information for these material codes is not on the record. For additional analysis, see Final Proprietary Memo.

As explained by the Federal Circuit "{b}efore making an adverse inference, Commerce must examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information. Compliance with the "best of ability" standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping."²⁵ The errors contained in JBL Austria's reported grade characteristic are the result of both inattentiveness and carelessness. Consistent with the guidance from the Federal Circuit, we did not require perfection from JBL Austria and recognized that sometimes mistakes occur. At verification, we accepted JBL Austria's revisions to incorrectly reported codes to the extent that JBL Austria provided them. However, JBL Austria failed to provide revised information for certain of the material codes, while providing such information for other material codes. Therefore, the Department finds that JBL Austria has failed to cooperate to the best of its ability with respect to reporting these material codes by failing to follow the instructions in the Department's questionnaire and by failing to fully correct its reported information after becoming aware of the problem. Accordingly, we find that an adverse inference is warranted with respect to sales with misreported grade characteristic that were not corrected.

²² See Sales Verification in Germany Report at VE 14.

²³ See Sales Verification in Austria Report at 26.

²⁴ See Cost Verification Report at CVE 6.

²⁵ See Nippon, 337 F.3d at 1382.

Due to the business proprietary nature of certain details regarding what information is on the record, see Final Proprietary Memo.

Lastly, we agree with Petitioner that “the respondent must provide Commerce with the most accurate, credible, verifiable information” and “that the burden of creating an adequate record lies with the respondents.”²⁶ We also agree with Petitioner that in the instant investigation, JBL Austria was aware that grade specifications they provided in their questionnaire responses were based on their internal material codes which differed from the reporting requirements set by the Department in its original questionnaire. Despite this knowledge, JBL Austria continued to report its grade specifications based on its internal material codes. Only at the cost verification did JBL Austria correct its reporting with regard to grade characteristic, which was five months after we issued our original questionnaire. With regard to Petitioner’s comments regarding the Department’s statement on page 20 of the Sales Verification in Austria Report that the “revisions were based solely on the maximum allowable plate count stated on its product specification sheets” the Department clarifies that it inadvertently referenced “certificate of analysis” as “product specification sheets.” Also the Department clarifies that the statement “Should be 2 based on spec. sheet” on page 26 of the Sales Verification in Austria Report was intended to read “Should be 1 based on certificate of analysis.” During the sales verifications (*i.e.*, in three locations - Austria, Germany and U.S.), as well as at the cost verification in Austria, the Department reviewed and confirmed that all revisions to grade characteristic as shown in CONNUM Reclassification Detail in CVE 6 agreed with the certificates of analysis.²⁷

Pursuant to section 776(a)(2)(A) and (B) of the Act, we find that JBL Austria failed to provide requested information, and failed to provide information in the form and manner requested by the Department by the established deadlines on numerous occasions. In the Department’s August 7, 2012 letter to JBL Austria, the Department requested JBL Austria to report product characteristics when replying to the Department’s original questionnaire dated July 10, 2012, as specified in Attachment 1. JBL Austria should have been fully aware that grade specifications based on its internal product codes differed from the standards set by the Department for the product characteristics used in the Department’s model match criteria. In fact, before the Department had selected the applicable product characteristics, JBL Austria provided its comments on the differences between its internal product grade specifications and the grade characteristic suggested by the Department.²⁸ Despite this knowledge, JBL Austria nonetheless reported its grade characteristic and CONNUMs based on its internal material codes and specifications, instead of reporting the information in the form and manner requested by the Department. Additionally, during the course of this investigation, JBL Austria revised its U.S. market and comparison market databases several times, affording it several opportunities to correct its grade characteristic reporting error and provide the Department with revised sections B, C, and D databases to comply with the Department’s reporting requirements. Furthermore, when JBL Austria had the opportunity to revise and resubmit its grade characteristic and CONNUMs during the cost verification, it still did not provide the complete revision for all material codes and respective CONNUMs. Instead, JBL Austria only provided the revisions for

²⁶ See Chia Far Industrial Factory Co., Ltd. v. United States.

²⁷ See Sales Verification in Austria Report, at VE 17- VE 20. See also Sales Verification in Germany Report, at VEs 4, 14, 16-18. See also CEP Sales Verification Report, at VE 6. See also Cost Verification Report at 16-18.

²⁸ See JBL Austria’s Rebuttal Comments on Product Characteristics.

material codes that were produced during the POI, and failed to provide revisions for the material codes which were not produced but were sold in the U.S. market and the comparison market during the POI.

Pursuant to section 776(a)(2)(A) of the Act, we find that JBL Austria withheld requested information. Specifically, JBL Austria failed to report its grade characteristic in a manner that was consistent with the Department reporting requirements, even though JBL Austria possessed the correct information and had numerous opportunities to provide the correct information. Additionally, pursuant to section 776(a)(2)(B) of the Act, we find that JBL Austria failed to provide information in the manner requested by the Department. Specifically, JBL Austria had numerous opportunities to correctly report its grade characteristic in accordance with the Department requirements which it was fully aware of, but never provided the correct grade information until verification, which was after the preliminary determination.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”²⁹

We find that JBL Austria did not act to the best of its ability in the instant investigation, within the meaning of section 776(b) of the Act, because it failed to initially correctly respond to the Department’s questionnaire for reporting its grade characteristic, had multiple opportunities to correctly report its grade characteristic in accordance with the Department reporting requirements, of which it was fully aware, and when JBL Austria had an opportunity to revise all CONNUMs at the cost verification, it did not provide complete revised information regarding all CONNUMs sold in the U.S. market and the comparison market during the POI. For those reasons, we have determined that the application of an adverse inference pursuant to section 776(b) of the Act is warranted in selecting from the facts otherwise available with respect to the material codes for which JBL Austria did not report its grade characteristic in accordance with the Department’s reporting requirements.³⁰ For the detailed analysis of how the Department applied partial AFA see Final Calculation Memorandum.

Comment 2: Whether the Department should apply AFA because JBL Austria withheld information regarding its possible affiliations

Petitioner’s Comments:

- The Department should apply AFA to JBL Austria because it failed to act to the best of its ability within the meaning of the Act due to its failure to provide complete responses to the Department’s questions regarding affiliation.

²⁹ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994) at 870.

³⁰ See *Nippon*, 337 F.3d at 1382-83.

- Although JBL Austria claimed that Austrian law prohibited the disclosure of confidential information concerning the customers and lending activities of its affiliate, Bank Gutmann AG, the law permits disclosure with consent; application of AFA for failure to seek waivers is supported by Canadian Softwood Lumber.³¹

JBL Austria's Comments:

- JBL Austria provided the requested information regarding its affiliations, and that information confirms the absence of any affiliations with its suppliers and customers.
- The Department's verification confirmed the accuracy of the affiliation information reported by JBL Austria, and supports the Department's preliminary finding that there is no basis to conclude that JBL Austria is affiliated with any of its suppliers or reportedly unaffiliated customers.

Department's Position:

The Department finds that JBL Austria has provided all necessary information regarding its affiliations and, accordingly, there is no basis to apply facts available, or draw an adverse inference. As discussed below, the Department's review of the administrative record developed in this investigation supports a finding that JBL Austria has fully disclosed its affiliates in accordance with the Department's instructions, and the Department determines that JBL Austria has reported the proper arm's-length prices for its reported input costs, foreign comparison market sales, and U.S. sales. Thus, JBL Austria's reporting of information has not impeded the Department's analysis of the issue, nor hindered the Department's ability to calculate an accurate margin.

In its response to the Department's initial questionnaire and numerous supplemental questionnaire responses,³² JBL Austria submitted the relevant information regarding its connections and relationships with legal entities that were needed to determine whether JBL Austria was affiliated with any of its suppliers of inputs or reportedly unaffiliated customers ("downstream customers"). Specifically, JBL Austria reported, *inter alia*, the following information: (1) the names of JBL Austria's officers, directors, and shareholders, and those person's affiliations; (2) the names of Bank Gutmann's officers, directors, and shareholders, and those persons' affiliations; (3) certain shareholding information which has not been disclosed to the public³³; (4) the names of the officers, directors and shareholders of the largest U.S. customers during the POI; (5) the names of the officers, directors and shareholders of the largest German customers during the POI; and (6) the names of the officers, directors and shareholders of JBL Austria's top five suppliers of material inputs during the POI.³⁴ In the Preliminary

³¹ See Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada, 69 FR 33204 (June 2004) ("Canadian Softwood Lumber") (unchanged in final determination, see Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada, 69 FR 75917 (December 2004)).

³² See, e.g., JBL Austria's submissions dated September 24, 2012, November 29, 2012, December 11, 2012, December 18, 2012 and December 31, 2012.

³³ For further details regarding this proprietary information, see Final Proprietary Memo at Comment 2.

³⁴ See JBL Austria's December 11, 2012 submission at 6-7.

Determination, the Department examined this information and found no basis to conclude that JBL Austria was affiliated with any of its suppliers of inputs used to produce xanthan gum or the customers that JBL Austria identified as unaffiliated downstream customers.³⁵ Thus, the record demonstrates that JBL Austria supplied the necessary information to allow the Department to conduct an affiliation analysis pursuant to section 771(33) of the Act.

Although JBL Austria and Bank Gutmann officials stated that Austrian banking law prevented the disclosure of certain information concerning the clients and lending activities of Bank Gutmann, the Department finds that JBL Austria, nevertheless, submitted sufficient information regarding Bank Gutmann to determine that JBL Austria was not affiliated with its suppliers or downstream customers through the bank. First, the record contains necessary information concerning the officers, directors, and shareholders of Bank Gutmann, and the Department's examination of this evidence indicates there is no basis to conclude that Bank Gutmann is owned or controlled by the suppliers or customers of JBL Austria. Second, the record contains complete information concerning the subsidiaries of Bank Gutmann, and there is no indication that Bank Gutmann owns or controls the suppliers or downstream customers of JBL Austria. Although JBL Austria failed to disclose that, during the POI, Bank Gutmann held an ownership interest in Company A³⁶ until verification, the Department's examination of the POI financial statements of this company, and all other companies examined by the Department during verification³⁷ indicates that these companies held no interest in JBL Austria during the POI. Moreover, there is no record evidence that contradicts company officials' claims that all these companies were neither customers nor suppliers of JBL Austria.³⁸ Further, as noted in the Department's Austrian sales verification report, while JBL Austria failed to disclose Bank Gutmann's ownership interest in Company A, it had nevertheless identified this company in its disclosure of all companies that could be considered by the Department to be potential affiliates of JBL Austria.³⁹ Because JBL Austria identified Company A as a potential affiliate prior to the preliminary determination, the Department was able to consider and determine whether this company was, in fact, affiliated with the suppliers or downstream customers of JBL Austria. Accordingly, the Department finds that JBL Austria's initial failure to disclose Bank Gutmann's ownership interest in Company A to be a harmless omission because the initial absence of this information did not hinder the Department's ability to determine whether these companies were affiliated with the suppliers or downstream customers of JBL Austria.

The Department finds that JBL Austria submitted sufficient information regarding its affiliate, Bank Gutmann and, thus, the Department was able to conduct its affiliation analysis without collecting additional information that may be protected from disclosure, without consent, under Austrian banking law. Although, as indicated above, JBL Austria provided a great deal of public information regarding Bank Gutmann, JBL Austria asserted that it was not able to provide information regarding Bank Gutmann's debt financing relationships because "{i}n accordance

³⁵ See Memorandum through Robert Bolling, Program Manager, AD/CVD Operations, Office 4, to Abdelali Elouaradia, Director, AD/CVD Operations, Office 4, concerning, Affiliation Analysis for Jungbunzlauer Austria AG, dated January 3, 2013 ("Preliminary Affiliation Memorandum"). See also Final Proprietary Memo at Comment 2.

³⁶ For further details regarding this proprietary information, see Final Proprietary Memo at Comment 2.

³⁷ See *id.*

³⁸ See Sales Verification in Austria Report at 9-10.

³⁹ See Sales Verification in Austria Report at 10. See also Final Proprietary Memo at Comment 2.

with the {Austrian Bank Act}, information about Bank Gutmann's dealings with its clients cannot be disclosed."⁴⁰ Further, at verification, a Bank Gutmann official stated that the bank was not able to disclose any confidential information regarding the bank's lending activities because "Austrian banking secrecy rules prevented the disclosure of the identity of the recipients of loans made by Bank Gutmann."⁴¹ The Department notes that Section 38 of the Austrian Bank Act states that:

{c}redit institutions, their members, members of their governing bodies, their employees as well as any other person acting on behalf of credit institutions, must not divulge or exploit secrets which are revealed or made accessible to them exclusively on the basis of business with customers.⁴²

The Austrian Bank Act, therefore, imposes a duty on credit institutions such as Bank Gutmann to protect the information obtained from its customers in its business dealings with them. While it appears that the Austrian Bank Act permits banks to disclose such information with the express written consent of its customers,⁴³ the record evidence indicates that Bank Gutmann has a large number of customers⁴⁴ and based on a consideration of the statutory deadlines for completing this investigation and the effort required to solicit numerous customer waivers, the Department has not directed Bank Gutmann officials to seek such waivers in the instant investigation. The information regarding Bank Gutmann's lending activities that it stated was protected by Austrian law was not necessary to the Department's affiliation analysis in the instant investigation. While the Department may consider debt financing relationships in determining whether affiliation exists between two entities, the mere existence of a lender/debtor relationship does not create affiliations between otherwise unaffiliated parties within the meaning of section 771(33) of the Act or the Department's regulations.⁴⁵ Rather, debt financing must place one party in a position to legally or operationally control the other party. In other words, evidence that Bank Gutmann provided a loan to a customer or supplier of JBL Austria would not have created an affiliation without an additional finding that the loan created a relationship of control. Moreover, record evidence indicates that Bank Gutmann's principle activities involve wealth

⁴⁰ See JBL Austria's December 18, 2012 submission at 1.

⁴¹ See Sales Verification in Austria Report at 9.

⁴² See JBL Austria's November 29, 2012 submission at Attachment 3.

⁴³ Article 38(2) of the Austrian Bank Act states that the "obligation to maintain banking secrecy does not apply...if the customer grants his/her express written consent to the disclosure of secrets." See JBL Austria's November 29, 2012 submission at Attachment 3.

⁴⁴ Bank Gutmann's 2011 annual report states the following: "We have a well-diversified client base of more than 860. No single client accounted for more than a few percent of annual revenues." See JBL Austria's November 29, 2012 submission at Attachment 3.

⁴⁵ Section 351.102(b)(3) of the Department's regulations defines affiliated persons and affiliated parties as having the same meaning as in section 771(33) of the Act and states that: "In determining whether control over another person exists, within the meaning of section 771(33) of the Act, the Secretary will consider the following factors, among others: corporate or family groupings; franchise or joint venture agreements; *debt financing*; and close supplier relationships. The Secretary *will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.* The Secretary will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control." (Emphasis added).

management.⁴⁶ Further, while Petitioner urged the Department to compel Bank Gutmann to seek waivers to disclose confidential customer information, the record lacks any analysis that indicates that JBL Austria's suppliers or downstream customers sold inputs or purchased xanthan gum at prices that were not determined by market forces (*i.e.*, that purchases and sales were not arm's-length transactions set between unaffiliated parties). Thus, in consideration of these facts, the Department finds no basis to conclude that JBL Austria was affiliated with its downstream customers or suppliers through relationships created by Bank Gutmann's customer relationships and lending activities. The Department notes, however, that should this investigation result in the issuance of an antidumping order, the Department may consider examining Bank Gutmann's customer relationships and lending activities further in a future administrative review if additional evidence is presented that suggests such an examination is warranted.

For the foregoing reasons, the Department finds that JBL Austria has provided all information needed to determine that it properly identified all of its affiliated parties, and the application of AFA with respect to its affiliations is not warranted.

Comment 3: Repacking Costs

JBL Austria's Comments:

- The Department's sales verification report stated incorrectly that JBL Austria sales from warehouses located in the U.S. and Germany (which serves as the foreign comparison market) were repackaged in these warehouses.
- JBL Austria's questionnaire responses indicate that it incurred no U.S. repacking cost, and thus it did not report any U.S. repacking costs.
- JBL Austria's German sales affiliate, Jungbunzlauer Ladenburg GmbH, did not repackage xanthan gum that entered its warehouse in Germany, and the only packing costs are incurred by JBL Austria at the plant in Austria.

Petitioner did not comment on this issue.

Department's Position:

The Department agrees with JBL Austria. We found no evidence that JBL Austria failed to fully report all appropriate packing costs to the Department in accordance with the instructions in the Department's questionnaire. Therefore, the Department has not included repacking expenses in its final margin calculation for JBL Austria because JBL Austria did not incur such expenses.

⁴⁶ As noted in the Preliminary Affiliation Memorandum, according to its (publically available) 2011 annual report, "Bank Gutmann is an Austrian private bank specializing in asset management for private clients, foundations, trusts, and institutional investors." See Preliminary Affiliation Memorandum at 1 (citing JBL Austria's November 29, 2012 submission at Attachment 2).

Recommendation

We recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of this investigation in the Federal Register and notify the International Trade Commission of our determination.

Agree Disagree

Ronald K. Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

May 28, 2013

Date