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DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

RIN 0625-AA66

Docket No.: 0612243022-3538-03

Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Final Rule.

SUMMARY: The Department of Commerce (“the Department”) is amending the regulation which governs the certification of factual information submitted to the Department by a person or his or her representative during antidumping (“AD”) and countervailing duty (“CVD”) proceedings. The amended regulation is intended to strengthen the current certification requirements. For example, the amendment revises the certification in order to identify to which document the certification applies, to identify to which segment of an AD/CVD proceeding the certification applies, to identify who is making the certification, and to indicate the date on which the certification was made. In addition, the amendments are intended to ensure that parties and their counsel are aware of potential consequences for false certifications.

DATES: This Final Rule is effective [insert 30 days after the date of publication in the Federal Register]. This rule will apply to all investigations initiated on the basis of petitions filed on or after [insert 30 days after the date of publication in the Federal Register], and other segments of

AD/CVD proceedings initiated on or after [insert 30 days after the date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 782(b) of the Tariff Act of 1930, as amended (“the Act”), requires that any person providing factual information to the Department during an AD/CVD proceeding must certify the accuracy and completeness of such information. See 19 U.S.C. 1677m(b).

Department regulations set forth the specific content requirements for such certifications. See 19 CFR 351.303(g) (2003). The Department recognized that the certification requirements and the language of the certification did not address certain important issues. For example, the certification language did not require the certifying official to specify the document or the proceeding for which the certification was submitted, or even the date on which the certification was signed.

Therefore, on January 26, 2004, the Department published a notice of inquiry in the Federal Register, requesting comments regarding whether the certification requirements in place were sufficient to protect the integrity of Import Administration’s (“IA”) administrative processes and, if not, whether the current certification statements should be amended or strengthened and, if so, how. See Certification and Submission of False Statements to Import

Administration During Antidumping and Countervailing Duty Proceedings, 69 FR 3562 (January 26, 2004) (“Notice of Inquiry”).

Based on the comments received in response to the Notice of Inquiry, the Department published a notice in the Federal Register, proposing to amend the regulation governing the certification of factual information submitted to the Department. See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings-Notice of Proposed Rulemaking and Request for Comment, 69 FR 56738 (September 22, 2004) (“Notice of Proposed Rulemaking”). In that notice, the Department proposed specific boilerplate language for the certifications and requested comments on the proposed amendment. The Department received 16 submissions in response to the Notice of Proposed Rulemaking through December 7, 2004. The submissions included a wide variety of positions. Some commenters were opposed to the amendments, others supported the amendments, and many provided general recommendations for amending the certification requirements, as well as comments suggesting specific changes in the text of the certifications.

On February 10, 2011, the Department published the interim final rule implementing changes to the certifications, addressing all of the prior comments, and providing parties another opportunity to comment. See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Interim Final Rule, 76 FR 7491 (February 10, 2011) (“Interim Rule”). The Department decided to address all prior comments and implement the changes through an interim final rule because it had been several years since comments were last received on the proposed changes to the certification requirements and to afford parties an additional opportunity to comment on these regulations.

The Department provided an opportunity for parties to file comments and rebuttal comments on the Interim Rule. See Interim Rule, 76 FR at 7491. Because some parties encountered technical difficulties in filing comments electronically during the rebuttal comment period, the Department reopened the public comment period for the submission of rebuttal comments. See Interim Final Rule on Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings: Reopening of Rebuttal Comment Period, 76 FR 39770 (July 7, 2011).

In total, the Department received 13 submissions of affirmative and rebuttal comments on the Interim Rule. Some of the comments discussed the appropriateness of requiring foreign governments and their officials to submit certifications as required by the Interim Rule. In order to analyze fully and address these comments and to obtain public views on this aspect of the Interim Rule, the Department published a supplement to the Interim Rule. This supplemental interim final rule sought public comment, and at the same time also allowed foreign governments the option to submit certifications in the format that was in use prior to the Interim Rule or in the format provided in the Interim Rule, until such time as a final rule is published. See Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings: Supplemental Interim Final Rule, 76 FR 54697 (September 2, 2011) (“Supplemental Rule”). The Department received four submissions in response to the Supplemental Rule. All comments responding to the Interim Rule and the Supplemental Rule received within the deadlines are available for review at Import Administration’s Central Records Unit (Room 7046 of the Herbert C. Hoover Building), and the Federal eRulemaking Portal at www.Regulations.gov, search Docket ITA-2010-0007.

Below, the Department provides a summary, organized by subject, of all of the timely submitted comments on the Interim Rule and the Supplemental Rule, and the Department's responses. After analyzing and carefully considering all comments, as well as questions and issues raised by parties to AD and CVD proceedings since the Interim Rule became effective, the Department is further refining the rule and the certification language as discussed and set forth below.

ANALYSIS OF COMMENTS

1. Dating of the Certification

The certification format provided in the Interim Rule and the Supplemental Rule requires the certifier to identify the specific submission to which the certification pertains by title and date. See Interim Rule, Comment 4.

One commenter argued that the Department should amend the certification language to eliminate the date of the specific submission, since frequently certifications will need to be signed before the specific date on which the filing will take place is known.

Response: The Department is continuing to require that the certifications be dated; however, the Department is making some modification to the date required in the text of the certification to address the issues raised by the commenter regarding the difficulties encountered in completing the certification. The Department is providing some flexibility by allowing submissions to be identified in the certification by either the filing date or the due date. We find that requiring a date as an identifier distinguishes among the numerous submissions filed by a party that are similar in nature, such as supplemental questionnaire responses. Similarly, requiring a date as an identifier makes clear that documents which are filed in parts or in separate volumes, but respond to the same questionnaire, are part of the same submission. We

also find that eliminating the date of the submission in the text of the certification would undermine our efforts to strengthen the regulation because it could permit a “blank check” certification that could simply be copied and attached to each supplemental questionnaire response. Requiring a date ensures that the signer is aware of the specific submission that he or she is certifying and for which he or she is responsible, while also providing a strong link between the certification and its submission. However, we recognize that submissions may be completed in advance of the filing date of the submission and, as a result, certifications could be obtained in advance and that the precise date on which the filing will take place may not be known at the time the certification is signed or could subsequently change for unanticipated reasons. For this reason, the Department will allow the identifier date to be either the due date of the submission or the actual date the submission is filed. Accordingly, we have modified the text of the company and government certifications to read as set out in the regulatory text of this rule.

2. Specification of Enforcement Procedures and Specification of Sanctions

In the Interim Rule the Department did not specify the enforcement procedures that would be available in the event of a possible violation of 18 U.S.C. 1001, although some commenters had proposed that the Department do so. These proposals included suggestions such as establishing and specifying the procedures for conferring with the Department’s Office of Inspector General and law enforcement agencies; formulating guidelines that permit the Department to maintain records to be used in any investigation of misconduct; and drafting regulations for the investigation of factual information found to be false, inaccurate or incomplete, similar to those outlined for violations of administrative protective orders. The Department concluded in the Interim Rule that such procedures were not necessary because

certification violations would continue to be referred to the appropriate offices, such as the Office of Inspector General, and that those offices would employ their normal procedures for handling possible violations of 18 U.S.C. 1001. See Interim Rule, Comment 6. The Department also declined to adopt specific sanctions because it does not have the authority or resources to create independent sanctions for false certifications and because sanctions will be determined by the offices to which the Department refers alleged certification violations under 18 U.S.C. 1001. See Interim Rule, Comment 7. Nevertheless, the Department reserved the right to protect its administrative process through appropriate steps in the event that a party is found to have violated 18 U.S.C. 1001, and also reserved the right to refer matters to bar associations when it determined that the circumstances warrant such a referral. Id.

One commenter noted that by themselves, the changes to the language of the certifications will not be sufficient to deter some parties and their representatives from certifying factual submissions that they know or should know to be false. Accordingly, additional steps should be taken to ensure that those requirements are actually enforced and that any misconduct is reported to the appropriate government authorities. Furthermore, the commenter suggested that certification violations be referred to the appropriate bar association and contends that such referrals would be consistent with the Department's current practice under 19 CFR 354.18, which provides that the Department will refer an administrative protective order (APO) violation to the ethics panel or other disciplinary body of the appropriate bar or other professional associations if sanctions are imposed by the Department for the APO violation. The commenter takes issue with the Department's decision in the Interim Rule not to undertake this practice because it would result in excessive expenditures of Department resources. See Interim Rule, Comment 7. According to the commenter, the relevant bar association would use its own

resources to investigate allegations of wrongdoing. Moreover, such referrals are consistent with the Department's decision in the Interim Rule that it would refer violations to other offices better equipped to handle such matters, and would prevent leaving violations of the certification requirement unsanctioned because the Department's Office of Inspector General or federal prosecutors are unwilling to pursue enforcement. As such, the commenter argues the certification should contain a statement that the representative is aware that any misconduct involving false certifications may be referred to the bar association. Finally, the commenter suggested that the Department consider prohibiting any representative found in violation of the certification requirements from appearing before the agency, consistent with the Department's regulation for APO violations under 19 CFR 354.3(a)(1). Another commenter agreed with these suggestions and urged the Department to outline the enforcement procedures.

Other commenters state that the Interim Rule does not elaborate on the enforcement procedures the Department intends to follow in the event that it identifies misconduct, the factors that it will consider, or the standards that it will apply in determining whether a matter should be referred to the Department's Office of Inspector General or to the U.S. Department of Justice. These commenters also state that it is not apparent whether the Department's Office of Inspector General or the U.S. Department of Justice would require that a signatory make any particular inquiry as a basis for signing a certification.

A different commenter provided its own published article that proposes licensing requirements for those practicing before Import Administration and the International Trade Commission (ITC). The proposed licensing requirement would provide the agencies with the ability to monitor and police the ethical behavior of the practitioners who appear before them, both attorneys and non-attorneys. The article recommends a new regulatory structure in the form

of an agency-developed and agency-administered licensing system applicable to those who practice before the agencies (attorneys and non-attorneys alike) to ensure ethical behavior. It further argues that representing clients before the U.S. trade agencies is engaging in the practice of law and addresses the inapplicability of the government agency exception to the unauthorized practice of law rule. Finally, the article submitted by this commenter recommends that the agencies promulgate appropriate regulations in the form of a licensing system, which would bring the agencies within the government agency exception.

One commenter rejects this licensing proposal, stating that it is beyond the scope of the new certification requirements, and noting that the Department has already rejected the establishment of such enforcement procedures.

Response: As explained in the Interim Rule, the amended certifications serve to clarify and strengthen already existing obligations regarding the submission of information to the Department. The consequences of false certifications were also addressed in the Interim Rule, which explained that such violations would be referred to the appropriate authorities who are better equipped to handle such matters. Therefore, we do not think it is necessary to provide comprehensive enforcement procedures or to elaborate on the factors that the Department will consider in determining whether a matter should be referred to the Department's Office of Inspector General or the U.S. Department of Justice. Further, the Department will, on a case-by-case basis, evaluate instances of possible material false statements or information as circumstances may differ from one case to another. See Administrative Review of Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results, Partial Rescission of Sixth Antidumping Duty Administrative Review and Determination Not To Revoke in Part, 77 FR 53856 (September 4, 2012), and accompanying IDM at Comment 3

(stating that the Department would consider the circumstances of the case and whether it was appropriate to refer the matter to the Office of Inspector General). We also are not addressing here the bases for which the Department's Office of Inspector General or the U.S. Department of Justice will handle such violations, as these authorities will follow their own procedures.

With regard to referring matters to bar associations, although the Interim Rule indicated that it was not the Department's general practice to become involved in proceedings before bar associations regarding allegations of attorney misconduct, the Department reserved the right to refer such matters to bar associations. We will therefore consider on a case-by-case basis whether to refer allegations of attorney misconduct if it is determined that the circumstances warrant such a referral. Additionally, since the issuance of the Interim Rule, the Department has also separately issued a final rule to strengthen its regulations with respect to the accountability of attorneys and non-attorney representatives. See Regulation Strengthening Accountability of Attorneys and Non-Attorney Representatives Appearing Before the Department (78 FR 22773, April 17, 2013) (Attorneys/Representatives Accountability Regulation). That final rule implemented a provision at 19 CFR 351.313 that deals more specifically with attorney and non-attorney representative misconduct, sets a good cause standard, and addresses possible sanctions, including reprimand, suspension, or disbarment of the representative from practice before the agency. Thus, the Department will take necessary steps as provided under that regulation.

We have not considered the proposal of an agency-administered licensing system within the context of this rulemaking because the purpose of amending 19 CFR 351.303(g) is to clarify and strengthen already existing obligations. Additionally, the Department has previously recognized that although some agencies require certain non-attorney practitioners to enroll before them (for instance, ATF), trade remedies is not a regulated industry warranting such

enrollment. See Attorneys/Representatives Accountability Regulation, 78 FR at 22777. As such, we have determined that the development of a new licensing system is outside the scope of this rulemaking.

3. Requirement to Retain Signed Original Certifications

The certification language provided in the Interim Rule and in the certification itself requires the signer to file a copy of the signed certification with the relevant submission to the Department and retain the original for a five-year period commencing with the filing of the submission. See Interim Rule, Comments 8 and 14.

One commenter stated that the requirement to maintain the original certification for a five-year period creates an unnecessary record-keeping burden and is impractical with respect to attorneys who do not work in a firm's Washington, D.C. office. Two commenters supported the use of an electronic signature, thereby allowing an electronically signed certification to serve as original certification. The use of verifiable electronic signatures would alleviate concerns about record-keeping; would facilitate the Department's move toward electronic documentation; and would ensure and preserve the integrity of documents, thereby reducing the burden on companies and law firms. Furthermore, under the Electronic Signatures in Global and National Commerce Act ("ESign Act"), Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. 7001 et seq.), electronic records satisfy regulations or rules which require "original" documents. Thus, the Department should either allow electronically signed records or clarify that pursuant to the ESign Act, electronic records satisfy the proposed recordkeeping requirement of 19 CFR 351.303(g). According to these commenters, deeming electronically signed certifications to be original certifications would conform to current and evolving practice before federal courts and agencies.

Another commenter noted that in order to account for the potential that litigation could exceed the five-year retention period, the Department's final rule should clarify that original certifications be retained for five years or until the entry of a final judgment in all appeals concerning that proceeding, whichever is greater.

Another commenter responded that the Department should explain that this requirement does not detract from a company's authority to instruct its attorney that he or she should retain the certifications of the company, in the context of his or her representation of the company. This would clarify that it is not intended to constrain the scope of the representation activities that are agreed upon between the attorney and his or her client.

Response: We have fully considered the feasibility of accepting electronic signatures and we are unable to do so for certification purposes at this time. Although the Department moved to an electronic system, the Import Administration Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS), for the filing of submissions as of August 5, 2011, this system is being implemented in phases and cannot currently handle electronic signatures for certification purposes. The only form of electronic signature currently compatible with IA ACCESS is the use of the filer's unique username and password combination as the filer's signature. While the unique username and passwords assigned to each IA ACCESS user allow for the filer of a submission to electronically sign the submission, the filer may only electronically sign the documents contained therein that would otherwise bear his or her own hand-written signature. In other words, the representative's electronic signature would not extend to the company/government official's certification that is included in the submission because the company/government official would not also be using his or her own unique IA ACCESS username and password.

Second, we considered whether companies or government officials, otherwise represented by an attorney or non-attorney representative, could file their certification via IA ACCESS separately from the submission they would be certifying, but we have concluded that this option is unfeasible because it could lead to difficulties in tracking and linking certifications to submissions and also in ensuring the timely receipt of these certifications. We also considered the use of third-party service providers that authenticate signatures, which would allow the representative and his or her company/government client to sign their respective certifications electronically. However, because the Department has not fully implemented IA ACCESS, it is unable to determine at this time which third-party services that authenticate signatures will be compatible with its system.

For all these reasons, the Department has decided that at this time, it cannot accept electronic signatures for certification purposes from any party and the Department will continue to require a handwritten signature on certifications and the retention by the certifier of the signed original certifications. We will evaluate the feasibility of electronic signatures as we implement future phases of IA ACCESS. The proper format and procedures for the submission of electronic documents are defined in the IA ACCESS Handbook on Electronic Filing Procedures (IA ACCESS Handbook). Therefore, should electronic signatures become a viable option, the Department will announce these changes on the IA ACCESS website at <http://iaaccess.trade.gov>, and in the IA ACCESS Handbook. Until changes are announced in the IA ACCESS Handbook, the Department will continue to require a handwritten signature on certifications and the retention by the certifier of the signed original certifications. See also Comment 18 below (further discussing electronic signatures).

With regard to record-keeping requirements, the Interim Rule requires the original certification to be retained for a period of five years from the date of filing a submission. We have not modified that requirement to facilitate prosecution pursuant to 18 U.S.C. 1001 in the event that a party makes a material false statement during the course of the proceeding. However, we have moved the language regarding retention from the text of the certification to the text of the regulation itself in order to make the record-keeping requirements explicit and to make the placement of this requirement more consistent with the placement of other procedural requirements in this rule (i.e., in the text of the regulation rather than the text of the certification). See also Comment 12b, infra. Further, we do not find it necessary to extend the record-keeping requirement beyond five years or until final judgment in cases of litigation because the statute of limitations to prosecute under 18 U.S.C. 1001 expires at the end of five years and the original certifications could be gathered and maintained by the U.S. Government during the course of any litigation for which the original certifications are necessary.

Original certifications must be maintained so that they can be physically examined, if requested, at verification and so that they can be obtained from the certifier because, for example, the Department is contemplating referring a possible certification violation to the Department's Office of Inspector General or the U.S. Department of Justice. As noted earlier, the Department will continue to consider the possibility of permitting electronic signatures and, should the acceptance of electronic signatures for certification purposes become feasible at a later date, maintenance of the original signed document may become redundant, and the Department may remove this record-keeping requirement at that time.

In the Interim Rule, the Department requested that companies and governments, rather than legal counsel, maintain their own original certifications so as to avoid implicating attorney-

client privilege. See Interim Rule at Comment 8. The Department has reconsidered the issue of who should maintain the original certification, and now clarifies that the record-keeping requirement only requires that a company or government, and its representative, retain the original certification for a five-year period following the filing of the submission. This requirement does not specify where, or the manner in which, the original certification should be maintained, nor does it prohibit a company or government from authorizing its representative to maintain the original certifications on behalf of its client. To make this requirement clearer, we have revised the language in the regulation, replacing the word “retain” with “maintain.” The company or government, and its representative, can develop their own policies and practices for maintaining the original certification. Notwithstanding the policy or practice selected by the company or government, the company or government must make the original available upon request by the Department at verification or, at any other time, upon request by the Department or any other appropriate agency, such as the Department’s Office of Inspector General or the U.S. Department of Justice. However, it should be noted that the certifier is the person ultimately responsible for his/her own certification and must produce the certification upon the Department’s request, regardless of the arrangements made to maintain the original certification.

4. Requirements To List on Certifications Other Individuals with Significant Responsibility for Preparation of Part or All of the Submission

In the Interim Rule the Department did not adopt the proposal to include within the certification a list of all individuals with significant responsibility for preparing part or all of the submission. See Interim Rule, Comment 10.

One commenter stated that including in the certification the identification of the individuals who had significant responsibility for compiling and submitting factual information

or manipulating data would help to ensure that the submission does not omit important facts known or reasonably available to the party making the submission. This will ensure that the obligations of accuracy and completeness are taken seriously, and will be a useful check during any verification of the information. Furthermore, the mere listing of significant contributors is not likely to detract from the obligation held by the person who actually signs the certification.

Two other commenters recommended that the Department eliminate ambiguity by requiring all organizations and individuals that were involved in the preparation and submission of factual information to file their own certification in order to hold those organizations and individuals accountable. As an example, this would include outside accounting or consulting firms that assisted a company or government in the preparation of a submission. This would prevent parties that are submitting inaccurate or incomplete information in their submissions from claiming that certifications listing only the company/government official were not misleading because they had relied on an outside party. One commenter added that this would give the certification process more transparency and increase the likelihood of ethical behavior and due diligence. The other commenter claims that this requirement would not be burdensome and would eliminate ambiguity.

One of these commenters believes that the Department erred in not adopting a requirement that the certification list all individuals with “significant responsibility” for preparing part or all of the submission in the Interim Rule and recommends that the Department adopt this requirement. According to the commenter, the Department vastly over-estimated the number of people who “significantly” contribute to a submission, which on most occasions, is probably an additional two or three people who actually contribute in a significant way. The other commenter also suggests requiring a certifying official to identify any outside parties who

participated in the preparation or submission of factual information. Failure to enact this requirement would prevent the Department from holding fraudulent parties accountable, while requiring the identification of all parties involved in the preparation of a submission would ensure that they take greater care and act more ethically. This party claims that while the term “significant responsibility” is not clearly defined, the vagueness of the definition is more than outweighed by the value of a transparent process.

One commenter agreed with the Department that the requirement to identify and list all persons with significant responsibility for compiling and submitting information in a submission is overly burdensome and unnecessary. The commenter argues that one company official should be held responsible for the information contained in the submission, and that this individual, along with the attorneys responsible for submitting the information, should be required to sign the certification. While the Department is correct to demand that an individual or individuals be designated as assuming responsibility for the accuracy of each submission, the commenter argues that it should be up to the company or government to make the determination as to which individual or individuals should assume that responsibility.

Response: The Department provided its reasoning in the Interim Rule for not adopting a requirement that the certification list all individuals with significant responsibility for preparing part or all of the submission. See Interim Rule at Comment 10. Among the reasons are the ambiguity created regarding who is primarily responsible for the accuracy and completeness of the entire submission, the attendant requirement to define what constitutes “significant responsibility” and “part ... of a submission,” e.g., one piece of information, two pieces of data, and the additional administrative burden that would be created by such a requirement. Moreover, the mere listing of significant contributors without their signatures on the certification

does not enhance the objective of the certification requirement, i.e., to ensure that the factual information contained in the submission is complete and accurate and that the person whose signature appears on the certification can be held responsible by the Department for the completeness and accuracy of the information in the submission. In addition, multiple company/government certifications or a list of all the persons responsible for preparing the submission would likely diminish accountability. It could be difficult to hold a person(s) responsible in the event that a material false statement had been made in the submission because that person could argue that any inaccuracies or incompleteness were attributable to another person listed on the certification or another person who also certified. See also Interim Rule, Comment 9.

Further, the Department does not agree that it is appropriate to adopt a requirement that all organizations or outside accounting or consulting firms assisting a company or government in the preparation of a submission provide a certification. The parties to the proceeding before the Department are the parties that are accountable and responsible for the information submitted to the Department.

5. Requirement To Identify on the Certification Legal Counsel or Representatives that Supervised the Advising, Preparing, or Review of the Submission or Other Individuals with Significant Responsibility for Advising, Preparing, or Reviewing the Submission

In the Interim Rule, the Department decided not to require representatives to list within the certification the other individuals with significant responsibility for advising, preparing, or reviewing part or all of the submission. See Interim Rule, Comment 15.

One commenter argued that the Department should require all legal counsel involved in the preparation of factual information to file a certification. This would allow the Department to understand precisely who was involved in the preparation of the submission, and to act

accordingly. Alternatively, the Department should require that legal counsel's certification identify all law firms or other representatives involved in the preparation of the submission. This would address the frequent use of foreign as well as U.S. attorneys in the preparation and submission of information, as well as instances involving multiple U.S. counsel in the preparation of submissions for parties.

Another commenter agreed with this approach because it recognizes that complex submissions required by the Department require input from many sources. The commenter notes that a potential alternative to the Department's requirement is to adopt the ITC's practice of requiring a single certification that also allows for the identification of additional "contact persons" for different sections of the submission.

Response: For the same reasons stated in Comment 4, supra, the Department is not adopting the proposal to require representatives to list within the certification the other individuals with significant responsibility for advising, preparing, or reviewing part or all of the submission. For a certification to be effective there must be a primary representative to hold accountable for the accuracy and completeness of the overall submission so certified. It is important that the information, as a whole, be evaluated by the representative for accuracy and completeness. Further, if there were several representatives certifying the same submission, it could be difficult for the Department to hold any one person responsible for the submission because that person could seek to attribute any inaccuracy or incompleteness to another certifier. Thus, we find that any benefits gained by knowing which particular portions of a submission were prepared or supervised by particular representative are outweighed by the loss of accountability for the submission as a whole if the Department were to permit multiple certifications in the usual circumstance.

The Department recognizes that there are exceptional cases in which it will be necessary for more than one representative to certify a submission,¹ such as submissions that are filed jointly by multiple law firms or representatives, on behalf of multiple interested parties. In such instances, the Department expects the representatives to work together to ensure the accuracy and completeness of the entire submission, rather than providing a certification that applies only to a specified portion of the submission.² Further, in instances where a “lead” interested party has been designated to certify on behalf of multiple interested parties,³ the Department will also consider the certification of the representative of the “lead” interested party and the representative of the party whose specific information is contained in the submission, to be sufficient for purposes of the representative certification.

6. Whether Representative Certifications Are “Continuing in Effect”

In the Interim Rule, the Department did not adopt the proposal requiring the signer to certify that he or she is aware that the certification is deemed to be continuing in effect, such that the signer must notify the Department in writing, if at any point during the segment of the proceeding he or she possesses knowledge or has reason to know of any material misrepresentation or omission of fact in the submission or in any previously certified information upon which the submission relied. See Interim Rule Comment 16; see also Interim Rule Comment 12.

One commenter stated that the Department should amend its proposal to require the representative of a party to certify that he or she is aware that the certification is deemed to be

¹ In exceptional cases the Interim Rule permitted a very limited number of individuals to be responsible for the accuracy and completeness of the entire submission. See Interim Rule, Comment 15, footnote 4.

² Id.

³ See Comment 21 infra, allowing a “lead” interested party to certify on behalf of multiple interested parties when the submission does not contain factual information that belongs to any particular interested party.

continuing in effect. The signer of the certification should also be required to take appropriate remedial measures if at any point during the segment of the proceeding he or she possesses knowledge or has reason to know of any material misrepresentation or omission of fact in a previously certified submission. Although the Department has already noted that the obligation to report material misrepresentations or omissions of fact already exists, this commenter believes that the certification itself should include language that warns counsel to abide by this obligation.

Response: The obligation to report material misrepresentations or omissions of fact already exists, as explained in the Interim Rule. See Interim Rule, Comment 12. This requirement is implicit in the certification requirement found in section 782(b) of the Act and in the verification requirements found in section 782(i) of the Act. 19 U.S.C. 1677m(b) & (i); see also 19 CFR 351.307(b). Additionally, the Department noted that this obligation should be interpreted in a manner consistent with a representative's professional responsibilities. See Interim Rule, Comment 16 (discussing the D.C. Rules of Prof'l Conduct, R. 4.1 prohibiting an attorney from knowingly making false statements to a third person in the course of representing a client; D.C. Rules of Prof'l Conduct, R. 3.3 prohibiting an attorney from offering evidence to a tribunal that the attorney knows is false); see also Attorneys/Representatives Accountability Regulation discussed earlier in Comment 2, supra. As such, we do not think it is necessary for the certification itself to include additional language to remind counsel of this obligation.

7. Requirement To Make "An Inquiry Reasonable under the Circumstances"

In the Interim Rule the Department did not adopt the proposal requiring representatives to make an inquiry reasonable under the circumstances before certifying that the submission is accurate and complete. See Interim Rule, Comment 17.

One commenter argued that the regulation should be amended to require that company officials and attorneys conduct “an inquiry reasonable under the circumstances.” For attorneys signing certifications, this would include the due diligence required by the rules of professional responsibility, such as Rule 3.3 of the ABA Model Rules of Professional Conduct. It is important to emphasize the attorney’s duty in the certification in the same manner that the Interim Rule reminds signatories of the applicability of 18 U.S.C. 1001. For company officials, who may not be bound by any professional rules of conduct, the certification should inform the official of the reasonable inquiry standard and that endorsing a certification indicates that the official is responsible for presenting the information, supervised the collection and presentation of the information, or exercised due diligence in reviewing the information presented through a review of company books and records beyond the information in the submitted document.

Another commenter argues that, should the Department include this type of requirement, it should provide guidance in order to set expectations for what is required to meet the “reasonable inquiry” or “due diligence” standard. The commenter suggests minimum standards. It should be expected that an attorney signing a certification will have examined worksheets, a sample of the original sources for the data included in a questionnaire response, and other submissions from the same company in other proceedings before the Department, the ITC, or U.S. Customs and Border Protection (CBP). Likewise, company officials, when certifying to the accuracy of information, should be held accountable for reading the submission and all supporting exhibits and attachments, and should be expected to possess knowledge of the underlying records from which the data were obtained. Another commenter agrees and suggests that the Department also outline the enforcement procedures it intends to follow in the event that

it identifies misconduct related to certifications. Notifying the individuals that signed certifications of such procedures would deter false certifications.

Another commenter recommended that the Department revert to its original proposal and require representatives to make an “inquiry reasonable under the circumstances” before certifying the submission, and argues that such a requirement would be in accordance with the ethical guidelines already required by bar associations for counsel. Adding this language to the regulations would not add a burden that is not already present for attorneys. According to this commenter, even when foreign lawyers or consultants assist in preparing submissions, attorneys admitted to practice in the United States have an ethical obligation to make reasonable inquiries, by providing some meaningful level of investigation and due diligence, in order to prohibit the misrepresentation of facts by others. A reasonable, diligent inquiry should, according to this commenter, include a duty to investigate, and an obligation to conduct some form of due diligence into the veracity of a client’s facts before certifying to the truth of those facts. Such an inquiry should require some investigation beyond taking the client at his or her word. Without an inquiry or investigation, an attorney is merely certifying that a client conveyed a fact, and that there was no cause to question it, which results in a certification that lacks credibility. The Department must, according to the commenter, be able to distinguish between an affirmative misrepresentation and the negligent failure to investigate, and must make efforts to eliminate both. As it stands, the Interim Rule only deters intentional misrepresentations, therefore creating an incentive for attorneys to be negligent. In addition, the commenter argues that by not requiring a reasonable inquiry, the certification “advantages” non-attorney representatives who are not bound by legal ethical rules.

One commenter supports the Department’s rejection of the proposed requirement to make an “inquiry reasonable under the circumstances,” stating that difficulties can arise from the reasonable inquiry proposal and citing the Department’s decision to reject similar proposals in the Interim Rule. See Interim Rule Comment 17. This commenter had previously pointed out that difficulties can arise from an “inquiry reasonable under the circumstances” as a result of language barriers, differing cultural and legal environments that reduce the ability of the U.S. attorney to verify data that the respondent company official has already certified as accurate and complete, and the fact that an attorney’s ability to bring independent resources to the client’s representation depends on the client’s financial resources.

Response: The Department is not amending the certification itself to require that company officials and attorneys conduct an “inquiry reasonable under the circumstances.” As explained in the Interim Rule, the correct standard to place on representatives in AD/CVD proceedings through the certification process is that which exists in the Act. According to section 782(b) of the Act, any person providing factual information to the Department must certify that the “information is accurate and complete to the best of that person’s knowledge.” This standard necessarily incorporates some review or inquiry by the certifying official. Accordingly, it is not necessary to incorporate that requirement explicitly into the language of the regulation. The standard in the certification is intended to be read in conjunction with any ethical obligations that a representative would already have as a result of professional rules such as rules of professional conduct. See Interim Rule, Comment 16.

8. Requirement That All Factual Information Being Submitted Is Consistent with That Provided to Any Other Agencies of the U.S. Government

Some commenters suggest that the company certification include language that the submission is consistent with information submitted to other U.S. Government agencies. This would require that counsel review the underlying company accounts and records, and be held responsible for reviewing other submissions from the same company in other proceedings before the Department, the ITC, CBP, or other government agencies. One commenter added that counsel should be prepared to review submissions from other proceedings, or to other U.S. Government agencies, and ensure that later submissions are not inconsistent with previously certified documents.

Response: We have not adopted the suggestion to include language in the certification to indicate that the factual information contained in the submission is consistent with information submitted to other U.S. Government agencies. The purpose of the Department's certification regulation is to ensure that the information submitted to the Department is "accurate and complete" to the best of the certifier's knowledge, as required by section 782(b) of the Act. While it is expected that information will be consistent across submissions made to other agencies, such submissions are governed by the regulations of those agencies and are outside the Department's authority. Generally, the Department does not have the resources to gather and compare submissions made before other government agencies to identify inconsistencies and the Department cannot reasonably request that another agency confirm that information submitted to it and the Department is consistent. However, if specific evidence is provided in a proceeding indicating that there is an inconsistency between information provided to the Department and information provided to another agency, the Department may investigate such inconsistencies.

9. Requirement That Parties Certify Information They Did Not Prepare

One commenter argued that the Department should clarify that while certifications of information provided by or relating to a company's or government's own information should be certified by that party and its representative, a company or government is not in a position to certify the accuracy of another party's information. This is because submissions rebutting or commenting on the proprietary information filed by another party, such as questionnaire responses, often contain factual information that only the representative of the submitter can review under an APO. Therefore, a company or government should not be required to sign a certification for a submission addressing information that it did not supply and about which it has no knowledge. Only the representative that prepared the information should certify as to its accuracy.

Another commenter further noted that representatives for petitioners frequently submit factual information that is drawn from research of publicly available sources or collected by market researchers in order to clarify, rebut, or correct an opposing party's business proprietary information (BPI), which is released only to the company's representatives under APO. In these instances, the commenter argues, it is neither useful nor appropriate for company or government officials to certify to the accuracy of such externally sourced information, as stated under the Interim Rule, because such officials have no role in preparing or supervising preparation of the submission of factual information that is not their own. The Interim Rule currently requires that company officials certify to the accuracy of information that the Department's APO rules prohibit them from viewing. Accordingly, the commenter suggests that the Interim Rule be amended to clarify that the certification requirement for company officials applies only to factual information generated by the company or its affiliates. Where factual information is compiled

by the representative, the certification requirement should apply only to the representative, and not to the company or government that has no role in the compilation of the information.

Another commenter elaborated further that only when a company has provided its own BPI should there be an obligation to submit any certification. This is pursuant to the Department's standard APO and its normal practice in situations where company officials do not have access to another company's BPI. Moreover, although the Department has already clarified that no certifications by either the representative or the company official are required when counsel is placing another party's information on the record, it should expand on this statement. The commenter also adds that the same should apply with respect to the submission of published materials, such as government publications, other published statistical data, audited financial statements, and other information found on the Internet or in printed publications, that are neither the party's nor the attorney's own.

Response: The regulation, at 19 CFR 351.303(g), currently states that a person must file with each submission containing factual information the certification provided in paragraph (g)(1). In addition, if the person has legal counsel or another representative, the certification provided in paragraph (g)(2) must also be filed. During the course of a proceeding various types of information are submitted by parties, such as a party's own factual information, information collected from third parties or public sources, surrogate value information, or another party's business proprietary information. Since implementing the Interim Rule, numerous parties have raised questions with respect to third party information and/or publicly obtained information and whether certifications are or should be required for such submissions. Since the implementation of the Interim Rule, the Department has also issued a final rule amending 19 CFR 351.102(b)(21), which defines the term "factual information," and 19 CFR 351.301, which

establishes time limits for filing factual information. See Definition of Factual Information and Time Limits for Submission of Factual Information, 78 FR 21246 (April 10, 2013) (Factual Information Rule). This rule identifies five categories of factual information and requires that the submitter specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted. Id., 78 FR at 21247. Thus, a submission that contains factual information, as defined by the Factual Information Rule, must be certified by the company/government and its legal counsel or representative, if any. Section 351.102(b)(21)(iii) of the regulation specifies that “factual information” includes “{p}ublicly available information submitted to value factors under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2), or, to rebut, clarify, or correct such publicly available information submitted by any other interested party....” Id., 78 FR at 21254. We note that surrogate value information falls clearly within the definition of factual information under the Factual Information Rule and therefore must be certified. The purpose of requiring company/government certifications even with submissions of factual information that have been obtained from public sources or compiled by a representative is that the company/government must take ultimate responsibility for the information that has been provided to the Department on its behalf. In doing so, it should be recognized that the signer is certifying to the “best of {his/her} knowledge,” as underscored by the language in the certification. Requiring company/government certifications for submissions containing third party public information, or information compiled by a representative, also prevents parties from submitting information that they know may contain inaccurate facts or which the certifier knows has been superseded by revised information.

With regard to submissions containing another party’s business proprietary information and to which a company/government has no access under APO regulations, we recognize the

difficulties faced by parties in providing certifications. To eliminate ambiguity about what information the party is certifying in such submissions, the Department will require that the company/government certifications for such submissions be included in the public version of the document. We will not require that the company/government certifications be included in business proprietary documents filed under the one-day lag rule or the final business proprietary document involving another party's BPI. Although the public version of such documents would contain blanks or ranged data in place of the proprietary information, in certifying to the "best of {its} knowledge," the company/government is certifying only the public information contained therein, and is informing the Department that it is aware of the submission filed on its behalf.

Furthermore, the Department will require that submissions containing both a company/government's own information and third party business proprietary information be certified. However, because we recognize that a company may only be able to certify the public information and its own business proprietary information that it has provided, we have modified the text of the certification to make clear that a party is certifying only all of the public and all of its own business proprietary information that it provides to the Department. When a submission contains both a company/government's own information and third party business proprietary information, the company/government certification must be included in the public version of the document. The company/government official's certification will serve to certify the accuracy and completeness of its own BPI and the public information contained in the submission because the Department considers the proprietary document and corresponding public version to constitute a single submission, see infra Comment 15. Accordingly, we have modified the text of the company and government certifications in 19 CFR 351.303(g)(1) to read as set out in the regulatory text of this rule.

The counsel or representative's certification must be included in all versions of the document, i.e., the public version, the final business proprietary document, and the one-day lag version. The counsel/representative does not need a newly dated certification in instances where a final proprietary document is submitted after a one-day lag version is filed; the same certification can be included in the final business proprietary document and the corresponding public version.

In the Interim Rule, the Department provided a limited exception to the counsel/representative certification requirement, stating that “{i}f, however, counsel is placing another party's information on the record, no certification is required.” Contrary to the arguments made by some of the commenters, this limited exception does not pertain to all third party information, but rather only to instances in which counsel or the representative moves third party information from the record of one segment of a proceeding to the record of another segment. See Interim Rule, Comment 16 and footnote 3. However, in order to comply with the legal requirement in section 782(b) of the Act that all factual information is certified by the person providing the information to the Department, to avoid confusion, and to remain consistent with the Department's definition of factual information as provided in the Factual Information Rule, the Department is removing this exception. Therefore, all submissions containing factual information must be certified, including submissions containing information being moved from the record of one segment of a proceeding to the record of another segment.

10. Applicability of Certification Rule to Procedural Submissions

One commenter argues that company and attorney certifications for extension requests and other similar procedural matters should not be required because such submissions do not

constitute the submission of factual information. According to this commenter, requiring company and attorney certifications for procedural submissions, such as routine requests to extend submission due dates, fails to advance the objectives of the certification requirement. The Department should expressly disclaim this requirement. Whatever factual information may be referenced in extension requests does not constitute the submission of factual information with respect to the Department's consideration of whether dumping or subsidization is taking place, and the Department does not rely on such submissions in making final determinations or in issuing the results of administrative reviews.

Response: After considering the comments, the burden on parties to complete and file certifications, and other aspects of this issue, the Department has decided to create a narrow exception to the certification requirement for procedural submissions. Some examples of procedural submissions are: requests for extension of time limits for questionnaire responses or other submissions, hearing requests, requests for review, letters of appearance, corrections to a previous submission that has been certified (as these will be deemed to be covered by the certification included in the earlier submission to which they belong), requests to extend preliminary and final determinations/results, requests for verification, requests for alignment with a parallel proceeding, and many APO filings.⁴ Some examples of non-procedural submissions are: questionnaire responses, deficiency comments, surrogate value information, and other factual information placed on the record. To the extent that a factual submission also is procedural in nature, e.g., a questionnaire response that also contains a request to extend a final determination, a certification is required.

⁴ See Comment 22 infra (discussing APO filings that are procedural in nature).

While procedural submissions do contain factual information (e.g., the reason the company or attorney/representative needs an extension of time to submit a questionnaire response), we agree that such information is not relevant to our analysis of dumping or subsidization, and could reasonably be considered outside the ambit of factual information necessary for certification purposes. The Department has also adopted this exemption to lessen the administrative burden on both the parties and the Department that results from the certification process. For example, in the preamble to the APO Procedures regulation we stated that the certification requirements would apply to letters of appearance. See Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures, 73 FR 3634, 3636-37 (January 22, 2008) (“APO Procedures”). In this final rule, we have determined that the certification requirements will only apply to submissions of factual information. Because letters of appearance are primarily procedural in nature and are not factual information as defined in 19 CFR 351.102(b)(21) and the Factual Information Rule, the certification requirements will not apply to letters of appearance. However, to the extent that the Department requires additional factual information to substantiate an interested party’s status, a certification may be required.

11. Frequently Asked Questions

Because these new certification requirements will be administered by different Department personnel in different cases, there will likely be questions about the application of the certification requirements in various contexts. In order to ensure consistency, one commenter requested that the Department create a page on its website to post frequently asked questions (“FAQs”) and answers.

Response: The Department will develop a list of frequently asked questions and answers, and post it on Import Administration's website at <http://ia.ita.doc.gov/tlei/index.html>.

12. Government Certification

The Interim Rule required all company and foreign governments participating in AD/CVD proceedings to provide certifications with submissions of factual information. See Interim Rule, Comment 13. Because some comments received in response to the Interim Rule contested the appropriateness of requiring foreign governments and their officials to submit certifications that included a reference to criminal sanctions under U.S. law, the Department issued the Supplemental Rule in September 2011. The Supplemental Rule allowed foreign governments the option of submitting certifications in either the format that was in use prior to the effective date of the Interim Rule, which does not contain reference to U.S. criminal law, or in the format provided in the Interim Rule, until such time as the comments were analyzed and a final rule was published. Further, in the Supplemental Rule, the Department also invited public comment on the appropriateness of requiring foreign governments to submit the certifications provided for in the Interim Rule, which are summarized and responded to immediately below. See Supplemental Rule.

12a. Reference to U.S. Criminal Law (18 U.S.C. 1001)

One commenter stated that the Department should re-evaluate the language contained in the certification and determine whether it is appropriate to require foreign government officials to sign a certification that says that they may be held personally liable and subject to criminal sanctions. The commenter argued that this certification language is not appropriate for foreign government officials, and noted that the Department should be concerned that other governments may impose similar requirements on U.S. Government officials.

Another commenter has strongly opposed any changes to the Department's certification requirements as they apply to foreign governments and foreign government officials. According to this commenter, the Department's longstanding certification requirements are sufficient to allay any concerns that the Department may have regarding the veracity of information that is submitted to it. The commenter adds that no justification exists for concluding that those certification requirements are insufficient because the Department has not demonstrated the existence of significant or recurring problems involving certifications that underlie the Department's proposed and interim rule changes, particularly with regard to any submissions made by foreign governments. Further, the commenter contends that the Department's longstanding certification requirements and verification process should be sufficient to ensure that the information is reliable because they allow the Department to impose a remedy, in response to behavior which may be improper, in the form of adverse inferences in the use of facts available, which can result in serious consequences for respondents in investigations.

Two commenters have argued that it is a settled principle of international law that sovereign nations are independent and equal and are not subject to the jurisdiction and imposition of penalties, criminal or civil, by another sovereign nation. Further, they argue that international law recognizes that individual officials of sovereign governments, acting in their official capacities in performing acts attributable to that foreign sovereign government, are immune from suit or criminal prosecution for acts they perform as representatives of their governments. According to these commenters, this is an undisputed principle of customary international law and the law of nations based upon core aspects of sovereignty applicable in common law, civil law and other judicial systems, and is reflected in the primary international agreements among sovereign nations, including the United Nations Convention on Jurisdictional

Immunities of States and Their Property. They also assert that these international principles are also reflected in U.S. law under the Foreign Sovereign Immunities Act (FSIA) (codified, in part, at 28 U.S.C. 1602-1611), and in U.S. common law, which recognizes that foreign government officials are entitled to immunity when they perform acts as the representatives of their governments and those actions are attributable to the foreign state, including instances when a foreign government official signs a document in the name of the foreign government. As such, both these commenters object to the Department's proposal to include language in government certifications that refers to additional purported legal penalties or liability or includes any reference to 18 U.S.C. 1001.

One of the commenters stated that it is inappropriate and unacceptable for the Department to impose on foreign governments a requirement that it certify to obligations and potential liability from which foreign governments and their officials are immune. According to the commenter, a government should be presumed to provide accurate information in good faith, thereby making the additional provisions and assurances that apply to certifications by governments entirely unnecessary. The commenter adds that the relevant WTO agreements, under Article 12.7 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), already provide the consequences when parties fail to comply with member countries' requests for information. The commenter argues that the Department's new certification requirements, as they apply to governments, exceed the U.S. Government's authority, as a signatory to the SCM Agreement, to impose consequences for a government's failure to provide necessary factual information within a reasonable period of time. The commenter notes that verifications carried out by the Department, consistent with its authority under Articles 12.5 and 12.6 of the SCM Agreement, are sufficient to ensure the reliability of the

information supplied by interested parties. Further, the commenter states that the Department's authority to apply adverse facts available, consistent with Article 12.7 of the SCM Agreement, is the instrument for responding to any deficiencies found in the accuracy of any information submitted.

The commenter further argues that the Department's proposed additional certification requirements go beyond the authority granted by the U.S. Congress in the applicable statutory provision first established by Section 1331 of the Omnibus Trade and Competitiveness Act of 1988, and now section 782(b) of the Act. The commenter argues that the Department's attempt to expand the certification obligation violates the specific requirements of the U.S. statute and clear Congressional intent. The commenter notes that its own certification requirements have proved to be reasonable, effective, and fully consistent with WTO Member obligations under the SCM Agreement and applicable international law, even though the commenter considers that requirement to be less onerous than either the one proposed under the Interim Rule or the previous longstanding U.S. certification requirements.

Another commenter objected to these arguments, stating that the principles of foreign sovereign immunity do not compel or warrant the withdrawal of the Department's revised certifications for foreign government officials, as the revised certification does not trigger any infraction of foreign sovereign immunity. Rather, the commenter asserts that the Department's proposed certification for foreign government officials does not expand, but only clarifies, the legal obligations that already exist under the Act, and the Department's regulations, ensuring that the importance of the accuracy of submitted factual information is explicitly conveyed in detail to parties. The commenter states that the proposed certification language, which specifies that the certifier is aware of criminal sanctions under U.S. law, does not address whether or how

violations would be adjudicated or enforced and thus does not change any of the legal rights or arguments that may apply when a foreign government official signs the certification. As such, argues the commenter, the new certification for foreign government officials does not infringe upon any foreign government official's sovereign immunity.

This commenter also disagreed with the interpretation of certain SCM Agreement provisions, concluding that WTO member states have ceded their sovereignty regarding a fellow member state's ability to gather "accurate" and "necessary" information within the meaning of Articles 12.7 and 12.5 of the SCM Agreement. The commenter states that these provisions of the SCM Agreement allow the member states some leeway to ensure the "accuracy" of information submitted by foreign government officials. The commenter concludes that implementing a certification requirement for foreign government officials is a valid attempt to secure "accurate" information, as called for in Article 12.5 of the SCM Agreement.

This commenter also considers comments made by other parties regarding jurisdiction of foreign government officials to be incomplete. The commenter argues that the notion of foreign sovereign immunity is not absolute and, for instance, where a foreign government is confronted with a claim arising out of activities (such as commercial transactions) of the kind that are conducted by private persons, such immunity may not be available. This commenter also asserts that the U.N. Convention on Jurisdictional Immunities of States and Their Properties, which, though not yet entered into force, essentially codifies customary international law, also describes several exceptions to the general rule of a foreign state's immunity from a forum state's jurisdiction to adjudicate. The commenter also argues that there are exceptions to the FSIA's general rule that foreign states shall be immune from the jurisdiction of U.S. courts.

Another commenter argues that the Department should require foreign governments and their officials to certify the accuracy of information presented to the Department to the same extent, and in the same manner, that is required of company officials. In a CVD investigation, the commenter argues, foreign governments acting as respondents often submit information that is not available publicly, yet is necessary to the investigation, and this information is provided equal weight as factual information provided by companies in the Department's analysis. Even if sovereign immunity were to apply in some instances, the commenter argues that it should not excuse foreign government officials from certifying the accuracy of their statements to the Department. The commenter contends that in promulgating its final rule the Department should require the same certification for both company and foreign government officials.

Response: The Department disagrees that the requirements provided for in the government certification, as revised in the Interim Rule, exceed the authority granted by section 782(b) of the Act. In requiring government officials to file certifications, the Department is complying with section 782(b) of the Act, which requires that all persons submitting information on behalf of an interested party in an AD or CVD proceeding must certify that the information is accurate and complete to the best of that person's knowledge. As we explained in the Interim Rule, the amendments to the certifications were consistent with the legal obligations set out in the Act, served to identify more specifically the document to which a certification applies, and included a warning to make plain the consequences that already exist in the law for providing false statements, including false certifications. Moreover, the consequences for making false statements to the U.S. Government were always implicit under the previous certification requirement, and exist regardless of whether the Department's certifications explicitly cite to 18 U.S.C. 1001. See Interim Rule, 76 FR at 7493.

Nevertheless, in light of the concerns expressed by commenters, and after consulting with officials at the U.S. Department of State, the Office of the U.S. Trade Representative, and the U.S. Department of Justice, the Department has made changes to its revised certification and created a government-specific certification that does not include a reference to U.S. criminal law. The Department will, however, continue to require that foreign governments and their officials sign a certification that identifies more specifically the document to which the certification applies. The changes to the certification are intended to allay concerns over potential or inadvertent waiver of sovereign immunity, while contributing to the goal of strengthening the certifications in order to encourage accurate and complete submissions. We note that the changes to the government certification are not intended to change any of the potentially applicable consequences or penalties for providing false statements to the U.S. Government that already exist in the law. Further, the changes to the government certification are not intended to alter any of the legal provisions or any of the potentially applicable legal defenses (e.g., foreign sovereign immunity) that may apply when a foreign government official signs a certification for purposes of the Department's AD and CVD proceedings.

12b. Recordkeeping Requirements

One commenter finds the requirement that foreign governments maintain original certifications to be objectionable and burdensome based on the principles of foreign sovereign immunity, and doubts whether such a requirement could serve any legitimate purpose. Another commenter contends that a requirement that foreign governments maintain original certifications for a period of five years is neither problematic for foreign government officials nor in violation of a country's foreign sovereign immunity.

Response: We have not changed our position on requiring foreign governments to maintain original certifications for a period of five years from the filing of the document. This requirement is consistent with the requirement that companies, attorneys or representatives maintain the original certifications for a five-year period. See Comment 3, supra. However, we have moved this language from the text of the certification to the text of the regulation itself in order to make the recordkeeping requirements explicit and to make the placement of this requirement more consistent with the placement of other procedural requirements in this rule. We have also replaced the word “retain” with “maintain” in the text of the regulation, in order to make clearer that a foreign government, and its representative, can develop their own policies and practices for maintaining the original certification, so long as the original is readily available upon request by the Department, or another appropriate agency such as the Department’s Office of Inspector General or the U.S. Department of Justice. However, it should be noted that the government of the certifying foreign government official is ultimately responsible for its official’s certification and must produce the certifications upon the Department’s request, regardless of the arrangements made to maintain the original certification.

Further, in an attempt to reduce the recordkeeping burden, the Department looked into the possibility of maintaining electronic copies of certifications instead of the original signed documents. However, until the Department has a system in place to accept electronic signatures, the original signed document must be maintained. The Department may modify the regulation at a later date to remove the recordkeeping requirement should electronic signatures become acceptable for use with the Department’s electronic filing system. See Comment 3, supra.

Other Issues

Since the Interim Rule became effective, the public has raised a number of questions and administrative issues with respect to various aspects of certifications in the context of ongoing AD and CVD proceedings. The Department provides clarification and guidance on these issues below:

13. What Constitutes Factual Information

The definition of factual information is provided in 19 CFR 351.102(b)(21). The Department has amended the definition of factual information in the recently published Factual Information Rule. The regulation identifies five categories of factual information. Further, that regulation requires any person, when submitting factual information, to specify under which subsection of section 351.102(b)(21) the information is being submitted. See id., 78 FR at 21247. Therefore, submissions identified as containing factual information, as defined by the Factual Information Rule and 19 CFR 351.102(b)(21), must include the required certifications.

14. Old Versus New Factual Information

The Act requires that any person providing factual information to the Department certify the accuracy and completeness of that information. The Act does not distinguish between factual information previously submitted to the Department (i.e., “old”) or factual information submitted for the first time (i.e., “new”). See section 782(b) of the Act. Further, it would be an additional burden on parties as well as the Department to assess the content of each submission to determine whether the submission contained “old” or “new” factual information. The Department will require certifications for information deemed to be “factual information” under 19 CFR 351.102(b)(21), regardless of whether it was previously submitted.

15. What Constitutes a Submission

For certification purposes, a “submission” is a document and/or data, whether comprised of a single part or several parts, that is identified by a single title and date, and which is accompanied by a certification which identifies such document. For certification purposes, the proprietary document and its corresponding public version constitute a single “submission.” The Department will deem missing pages, inadvertent omissions or errata filed within a reasonable period of time of the original submission to be covered by the certification(s) of the original submission to which these pages pertain so long as the party clearly identifies the submission to which such information belongs.

16. Date of Signature on Certification

Some parties have inquired about whether the date of signature, i.e., the date the certification is signed, must be the same as the date on which the submission is filed or the date on the cover letter of the submission. The Department clarifies that the date of signature must be the actual date on which the person signs the certification, regardless of the filing date or the due date of the submission. The Department recognizes that company/government certifications will likely be signed prior to the date of filing. Therefore, it is not required that the date of signature match any other date. See also Comment 1 supra.

17. What Constitutes a Signature

Since implementing the Interim Rule, questions have arisen regarding what is an acceptable signature. The Department clarifies that the signature should be signed in ink and be in the certifier’s own handwriting. Governments or entities that use a seal, emblem or stamp may continue to do so. However, the use of such devices should be in addition to the handwritten signature of the certifier and not as a substitute for the signature. Further, the

certifier may sign in his or her own language, with the expectation, as articulated in the certification itself, that the certifier understands and accepts the obligations expressed therein.

18. Electronic Signatures

The Department is unable to permit electronic signatures at the present time, as explained in Comment 3, supra. A scanned copy of a signature, regardless of its format, does not constitute a signature for certification purposes as it could allow for manipulation of the certification process because, for example, persons other than the certifying official may have access to the data file with the signature and may simply attach the signature to the submission. This could allow company officials to claim that they are not responsible for false statements or omissions in a submission because they did not sign the certification or authorize the use of their scanned signature. The Department will continue to evaluate the feasibility of accepting electronic signatures within the parameters of IA ACCESS. Should the Department identify an electronic signature process that is compatible with IA ACCESS, and adopt such a process, the Department will announce this change on the IA ACCESS website at <http://iaaccess.trade.gov>, and in the IA ACCESS Handbook. Until such time, a certifier must sign in the certifier's own handwriting and maintain the original certification for a five-year period from the date of filing. The company/government may provide a copy of the certification to legal counsel/representative for purposes of filing the submission with the Department.

19. Who Can Certify for a Company

As stated in the certification template, the certifier is a person "currently employed by" the company. For purposes of the certification requirement, the Department considers "employed by" to mean a person performing work under an employer-employee relationship. An "employee" is a person in the service of another where the employer has the power or right to

control and direct the employee with respect to what work will be done and how it will be done, and the employee receives payment or other compensation for services from the employer. In this regard, an “employee” of the party submitting factual information is to be distinguished from an independent contractor(s) or agent(s) of the party. The certifier(s) must be employed by the party submitting the factual information at the time the submission is made to the Department and the certifier(s) must have prepared or supervised the preparation of the submission. The Department may require proof of employment from the employer. See Hebei Foreign Trade and Advertising Corp. v. United States, 807 F. Supp. 2d 1317, 1321 (CIT 2011) (quoting Final Results of Redetermination Pursuant to Court Remand (Dep’t Commerce July 26, 2011) (Consol. Court No. 09–00524)) (discussing in more detail the requirement that an employee certify submissions).

In instances where the person that prepared or otherwise supervised the preparation of a submission is unable to certify due to an extenuating circumstance, the Department may allow, on a case-by-case basis, this responsibility to be assumed by another official in the company, government, or firm. The company/government/firm must explain such circumstances in its cover letter to the submission indicating the reasons why the person that prepared or otherwise supervised the preparation of a submission is unable to certify the specific submission.

20. Case and Rebuttal Briefs

We will not require certification for case and rebuttal briefs, as these documents are limited, consistent with 19 CFR 351.309, to written arguments based on submissions containing factual information that would already have been accompanied by the appropriate certifications.

21. Allowing One Interested Party To Certify on Behalf of Other Interested Parties when Counsel/Representative Represents Several Interested Parties in a Proceeding

At times, several interested parties are represented by a single law firm/representative in a proceeding. Some law firms/representatives have expressed concern about the requirement of obtaining certifications from each of the interested parties they represent whenever a submission is filed, stating that it impedes the filing process, particularly in time-sensitive filings. Recognizing that it could be cumbersome for counsel/representative to obtain certifications from each of the interested parties it represents, the Department has decided to allow one interested party to certify on behalf of all the interested parties represented by the same counsel/representative, provided that all of the interested parties agree in writing to such an arrangement. If all parties are in agreement, the designated counsel/representative must file an initial letter identifying the “lead” party who will certify on behalf of all of the other interested parties. In addition, this initial letter must contain certifications from each of the parties that will be represented. We note that a union, association, or coalition (i.e., interested parties within the meaning of section 771(9) (D), (E), (F) or (G) of the Act) is not required to provide with the initial letter additional certifications from their constituent members, because the union, association, or coalition itself is the interested party. Further, in subsequent filings during a proceeding, the Department will not accept a certification solely from the “lead” party if the submission contains any information that belongs to another of the member interested parties. In such instances, both the lead party and the party(ies) whose information is contained in the submission must certify the information by including certifications in the public version of the document. See Comment 9, supra, with regard to submissions containing several parties’ BPI. Similarly, if a union, association, or coalition files a submission containing information that belongs to any of its constituent members or provides information in a submission on a

disaggregated basis, then those individual constituent members must also certify the submission by including a certification in the public version of the document.

Where there is more than one representative/law firm representing multiple parties, the representative certifications must be from the “lead” interested party’s representative and the representative of the party whose specific information is contained in the submission. See Comment 5 supra, with regard to multiple law firms.

22. APO Applications and other APO-Related Administrative Filings

An APO application contains a certification within the application itself and thus does not require an additional representative certification pursuant to 19 CFR 351.303(g). Other APO-related filings, such as certifications of destruction, requests for removal of authorized applicants from the APO service list, disposition and transfer of documents and address changes, are more procedural in nature and thus also do not require certification. See Comment 10 supra (explaining that procedural submissions do not require a certification).

23. Handling of Deficiencies in Certifications

If the Department determines that a certification contains inaccuracies or deficiencies, it will usually provide two business days from the time the Department notifies the party for the party to correct and resubmit the certification. This time limit is consistent with other regulations, such as 19 CFR 351.304(d), for nonconforming submissions.

24. Representative Certifications and Designation as “Counsel” or “Representative”

Since implementing the Interim Rule, questions have arisen regarding whether a representative must specify, within the representative certification, whether they are serving as “counsel” or “representative” to the interested party. In addition, questions have arisen regarding

whether foreign attorneys may appear as attorneys in Department proceedings and use the “counsel” designation in the representative certification.

The Department recently addressed similar questions in promulgating 19 CFR 351.313. See Attorneys/Representatives Accountability Regulation, 78 FR at 22774, 22777. In its final rule, the Department explained that “an attorney, who is eligible to practice pursuant to the rules of the bar of the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, who is not currently under suspension or disbarment, may practice as an attorney before the Department.” Id. at 22774. The Department also noted that “a foreign attorney, not licensed in the United States, a U.S. possession or territory, may not appear as an attorney in Department proceedings and may only appear as a non-attorney representative....” Id. at 22777. Finally, section 351.313 of the Department’s regulations provides that “‘{a}ttorney’ pursuant to {§ 351.313} and ‘legal counsel’ in § 351.303(g) have the same meaning. ‘Representative’ pursuant to {§ 351.313} and in § 351.303(g) has the same meaning.”

Consistent with the Attorneys/Representatives Accountability Regulation and 19 CFR 351.313, the Department clarifies that for certification purposes, a person may use the “counsel” designation only if s/he is a member of the bar of the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia. Foreign attorneys who are not licensed in the United States, a U.S. possession, or territory must use the “representative” designation for certification purposes.

Accordingly, the Department has modified the text of the representative certification in 19 CFR 351.303(g)(2) as set out in the regulatory text of this rule to allow for representatives to select the appropriate designation.

Classification

Executive Order 12866

This Final Rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Chief Counsel for Regulation at the Department of Commerce has certified to the Chief Counsel for Advocacy, Small Business Administration, that this final rule would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published with the Interim Rule and is not repeated here. No comments were received regarding the economic impact of this rule. As a result, the conclusion in the certification memorandum for the Interim Rule remains unchanged and a final regulatory flexibility analysis is not required and one has not been prepared.

Paperwork Reduction Act

This rule does not contain a collection of information for purposes of the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 et seq.).

Executive Order 13132

It has been determined that this rule does not contain federalism implications warranting the preparation of a federalism assessment.

List of Subjects in 19 CFR Part 351

Administrative practice and procedure, Antidumping duties, Business and industry, Confidential business information, Countervailing duties, Investigations, Reporting and recordkeeping requirements.

Paul Piquado
Assistant Secretary for
Import Administration

July 8, 2013 _____
Date

For the reasons stated above, 19 CFR part 351 is amended as follows:

PART 351 - ANTIDUMPING AND COUNTERVAILING DUTIES

1. The authority citation for 19 CFR part 351 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 et seq.; and 19 U.S.C. 3538.

2. Section 351.303(g) is revised to read as follows:

§ 351.303 Filing, document identification, format, translation, service, and certification of documents.

* * * * *

(g) *Certifications.* Each submission containing factual information must include the following certification from the person identified in paragraph (g)(1) of this section and, in addition, if the person has legal counsel or another representative, the certification in paragraph (g)(2) of this

section. The certifying party must maintain the original signed certification for a period of five years from the date of filing the submission to which the certification pertains. The original signed certification must be available for inspection by U.S. Department of Commerce officials. Copies of the certifications must be included in the submission filed at the Department.

(1) For the person(s) officially responsible for presentation of the factual information:

(i) COMPANY CERTIFICATION *

I, **(PRINTED NAME AND TITLE)**, currently employed by **(COMPANY NAME)**, certify that I prepared or otherwise supervised the preparation of the attached submission of **(IDENTIFY THE SPECIFIC SUBMISSION BY TITLE) due on (DATE) OR filed on (DATE)** pursuant to the **(INSERT ONE OF THE FOLLOWING OPTIONS IN {}): {THE (ANTIDUMPING OR COUNTERVAILING) DUTY INVESTIGATION OF (PRODUCT) FROM (COUNTRY) (CASE NUMBER)} or {THE (DATES OF PERIOD OF REVIEW) (ADMINISTRATIVE OR NEW SHIPPER) REVIEW UNDER THE (ANTIDUMPING OR COUNTERVAILING) DUTY ORDER ON (PRODUCT) FROM (COUNTRY) (CASE NUMBER)} or {THE (SUNSET REVIEW OR CHANGED CIRCUMSTANCE REVIEW OR SCOPE RULING OR CIRCUMVENTION INQUIRY) OF THE (ANTIDUMPING OR COUNTERVAILING) DUTY ORDER ON (PRODUCT) FROM (COUNTRY) (CASE NUMBER)}**). I certify that the public information and any business proprietary information of **(CERTIFIER'S COMPANY NAME)** contained in this submission is accurate and complete to the best of my knowledge. I am aware that the information contained in this submission may be subject to verification or corroboration (as appropriate) by the U.S. Department of Commerce. I am also aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make material false statements to the U.S. Government. In addition, I am aware that, even if this submission may be withdrawn from the record of the AD/CVD proceeding, the U.S. Department of Commerce may preserve this submission, including a business proprietary submission, for purposes of determining the accuracy of this certification. I certify that a copy of this signed certification will be filed with this submission to the U.S. Department of Commerce.

Signature: _____

Date: _____

* For multiple person certifications, all persons should be listed in the first sentence of the certification and all persons should sign and date the certification. In addition, singular pronouns and possessive adjectives should be changed accordingly, e.g., "I" should be changed to "we" and "my knowledge" should be changed to "our knowledge."

(ii) **GOVERNMENT CERTIFICATION ****

I, **(PRINTED NAME AND TITLE)**, currently employed by the government of **(COUNTRY)**, certify that I prepared or otherwise supervised the preparation of the attached submission of **(IDENTIFY THE SPECIFIC SUBMISSION BY TITLE) due on (DATE) OR filed on (DATE)** pursuant to the **(INSERT ONE OF THE FOLLOWING OPTIONS IN { } : {THE (ANTIDUMPING OR COUNTERVAILING) DUTY INVESTIGATION OF (PRODUCT) FROM (COUNTRY) (CASE NUMBER)} or {THE (DATES OF PERIOD OF REVIEW) (ADMINISTRATIVE OR NEW SHIPPER) REVIEW UNDER THE (ANTIDUMPING OR COUNTERVAILING) DUTY ORDER ON (PRODUCT) FROM (COUNTRY) (CASE NUMBER)} or {THE (SUNSET REVIEW OR CHANGED CIRCUMSTANCE REVIEW OR SCOPE RULING OR CIRCUMVENTION INQUIRY) OF THE (ANTIDUMPING OR COUNTERVAILING) DUTY ORDER ON (PRODUCT) FROM (COUNTRY) (CASE NUMBER)})**. I certify that the public information and any business proprietary information of the government of **(COUNTRY)** contained in this submission is accurate and complete to the best of my knowledge. I am aware that the information contained in this submission may be subject to verification or corroboration (as appropriate) by the U.S. Department of Commerce. In addition, I am aware that, even if this submission may be withdrawn from the record of the AD/CVD proceeding, the U.S. Department of Commerce may preserve this submission, including a business proprietary submission, for purposes of determining the accuracy of this certification. I certify that a copy of this signed certification will be filed with this submission to the U.S. Department of Commerce.

Signature: _____

Date: _____

** For multiple person certifications, all persons should be listed in the first sentence of the certification and all persons should sign and date the certification. In addition, singular pronouns and possessive adjectives should be changed accordingly, e.g., “I” should be changed to “we” and “my knowledge” should be changed to “our knowledge.”

(2) For the legal counsel or other representative:

REPRESENTATIVE CERTIFICATION ***

I, **(PRINTED NAME)**, with **(LAW FIRM or OTHER FIRM)**, **(INSERT ONE OF THE FOLLOWING OPTIONS IN { } : {COUNSEL TO} or {REPRESENTATIVE OF}) (COMPANY NAME, OR GOVERNMENT OF COUNTRY, OR NAME OF ANOTHER PARTY)**, certify that I have read the attached submission of **(IDENTIFY THE SPECIFIC SUBMISSION BY TITLE) due on (DATE) OR filed on (DATE)** pursuant to the **(INSERT ONE OF THE FOLLOWING OPTIONS IN { } : {THE (ANTIDUMPING OR COUNTERVAILING DUTY) INVESTIGATION OF (PRODUCT) FROM (COUNTRY)**

**(CASE NUMBER)} or {THE (DATES OF PERIOD OF REVIEW) (ADMINISTRATIVE OR NEW SHIPPER) REVIEW UNDER THE (ANTIDUMPING OR COUNTERVAILING) DUTY ORDER ON (PRODUCT) FROM (COUNTRY) (CASE NUMBER)} or {THE (SUNSET REVIEW OR CHANGED CIRCUMSTANCE REVIEW OR SCOPE RULING OR CIRCUMVENTION INQUIRY) OF THE (ANTIDUMPING OR COUNTERVAILING) DUTY ORDER ON (PRODUCT) FROM (COUNTRY) (CASE NUMBER)}). In my capacity as (INSERT ONE OF THE FOLLOWING OPTIONS IN { }:
{COUNSEL} or {ADVISER, PREPARER, OR REVIEWER}) of this submission, I certify that the information contained in this submission is accurate and complete to the best of my knowledge. I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make material false statements to the U.S. Government. In addition, I am aware that, even if this submission may be withdrawn from the record of the AD/CVD proceeding, the U.S. Department of Commerce may preserve this submission, including a business proprietary submission, for purposes of determining the accuracy of this certification. I certify that a copy of this signed certification will be filed with this submission to the U.S. Department of Commerce.**

Signature: _____

Date: _____

*** For multiple representative certifications, all representatives and their firms should be listed in the first sentence of the certification and all representatives should sign and date the certification. In addition, singular pronouns and possessive adjectives should be changed accordingly, e.g., “I” should be changed to “we” and “my knowledge” should be changed to “our knowledge.”

[FR Doc. 2013-17045 Filed 07/16/2013 at 8:45 am; Publication Date: 07/17/2013]