KOZIK & WOELKE PLC
Attorneys and Counselors at Law

March 22, 2012

Office of Information and Regulatory Affairs
Office of Management Budget

Attention: OMB Desk Officer for Customs and Border Protection, Department of Homeland Security

Re: Federal Register Notice and Request for Comments Regarding Information Collection Activities: NAFTA Regulations and Certificates of Origin

This letter is response to request for comments published in the Federal Register of February 21, 2012, in particular, the collection of information by way of paper Certificates of Origin (Customs Form 434). The Federal Register notice requested comments on ways to enhance the quality, utility, and clarity of the information that is collected and ways to minimize the burden of collecting such information. The comments below discuss the background to the NAFTA and potential methods for improving the information collection process for NAFTA Certificates of Origin and for minimizing the burden to exporters, importers and the government in connection with the collection and use of such information. More efficient procedures are needed, particularly procedures that support electronic commerce.

Background to NAFTA Negotiations and Drafting of Uniform Regulations

At the time of the NAFTA negotiations and the drafting of the Uniform Regulations, I was in house legal counsel for Chrysler Corporation and worked closely and advised the American Automobile Manufacturers Association (AAMA) on many issues that came up during the NAFTA negotiations and during the drafting process for the Uniform Regulations. The process of drafting the Uniform Regulations was a unique experience, as the customs authorities for the three NAFTA parties worked closely with industry groups on the numerous drafts of the Uniform Regulations before the final draft was made public. Issues in each new draft were openly discussed and the AAMA and its sister organizations worked closely. This was a win-win for the customs authorities of the three NAFTA parties and to their importers, because it resulted in a draft set of regulations that was published in a timely manner in the U.S., Canada and Mexico, but also in a form that was close to a finished set of regulations acceptable to the import community in these countries at the time it was published as a draft.

An issue that was raised by the AAMA was the burden that would be required to collect and maintain copies of NAFTA Certificates of Origin (see p. 11, para. 2, heading number 3. Exporter's Certificate of Origin of the written testimony of Stephen Collins, Director, Economic and International Affairs, American Automobile Manufacturers Association of May 4, 1993 before the Commerce, Consumer and Monetary Affairs Subcommittee of the House Committee on Government Operations - a copy is attached). During the NAFTA negotiations, the AAMA suggested a origin certification process that was similar to the procedures used by the European Union and the European Free Trade Association countries for their preferential trade agreements, which was not unlike the certification process that was used in the Automotive Products Trade Agreement between the U.S. and Canada. The European procedure is discussed below. This is the same procedure that is used in the European Union - Mexico free trade agreement. The procedure is simple, does not create additional paperwork and lends itself for use in e-commerce.

It is unfortunate that at the time of the NAFTA negotiations there were political issues which made it difficult to include such a process into the NAFTA agreement. When the NAFTA agreement was being negotiated, the U.S. Customs Service's management was being criticized by the Government Accounting Office for not adequately enforcing U.S. trade laws. (see p. 19 GAO Testimony), there was fear that fraud would increase in connection with false claims for duty free NAFTA imports into the U.S. , the customs authorities of the three NAFTA parties did not have any real experience working with one another on the scale contemplated by NAFTA, and each may have distrusted the other's customs authority. John Simpson, then Deputy Assistant Secretary for Regulatory, Tariff and Trade Enforcement, U.S. Department of the Treasury testified at the same House subcommittee hearing described above stating that the Certificate of Origin requirements were intended to ensure proper administration and enforcement by the customs authorities of the parties (see p. 3 copy attached). For these and other reasons, the NAFTA entry requirements may have been more rigorous and onerous then, particularly requiring a complex paper certification with hand written signatures, as is necessary or reasonable today.

NAFTA Uniform Regulations

When the final version of the NAFTA was completed, the Certificate of Origin was still under development and the Uniform Regulations were still being drafted. The AAMA and its sister associations in Canada and Mexico also worked with their respective customs authorities on drafting of the Uniform Regulations and commenting on a draft of the Certificate of Origin and various drafts before actual draft regulations were published. During this process, the AAMA again raised the issue of the amount of paper and manual record keeping that would result from the requirement for the Certificate of Origin that it mentioned in the testimony to the House Commerce

Subcommittee and sought an alternative to a hard copy paper Certificate of Origin during the drafting of the Uniform Regulations. As a result, the Uniform Regulations (see 19 CFR Section 181.22 (b) (1) (1996) provide for alternative formats and contemplates a medium other than paper would be acceptable. The pertinent language in Section 181.22 (b)(1) providing for other formats or media is: "*in a computerized format or such other medium or format as is approved by the Office of Field Operations, U.S. Customs Service*". No other formats have ever been approved by Customs other than the limited alternatives provided for in Customs Directive 3810-14A.

Customs Directive 3810-14A

In 2005 Customs issued a directive (3810-14A) which provided limited alternatives to the official Customs Form 434. It describes two alternatives, one is described as an Alt 434 Certificate and the other is described as a computer generated Alt 434 Certificate. These alternative procedures do little to reduce the paperwork burden associated with NAFTA Certificates of Origin. Only the computer generated Alt 434 Certificate provides any opportunity to reduce paper, but it is limited by its very conditions. Only exporters and importers that have highly integrated business systems that can share detailed information about product costs (likely related parties) and provide other information required by Customs may use this alternative, and not all that are approved to use the alternative may be able to use it without printing paper Certificates of Origin for presentation to Customs. And, before the alternative may be used, the records, systems of the exporter and importer, as well as the NAFTA products and NAFTA certification, must be reviewed and the NAFTA certification process by Customs. Some importers have found such approval difficult to obtain for products that have a Regional Value Content requirement.

Opportunities to Eliminate Paper Documentation

Today, unlike when NAFTA was being negotiated, commercial transactions can be completed without any paper. Buyers can electronically transmit purchase orders to suppliers that contain terms, clauses, specifications, prices, and various other information and data. When the seller receives the electronic data, its systems can read it, and respond to the buyer's systems provide notice of the shipment and invoice the buyer electronically, and the buyer can make payment electronically.

The law has kept pace with commerce, but the NAFTA Certificate of Origin requirements have not. The Federal e-Sign Act and Uniform Electronic Transactions Act adopted by various states, recognize that a party may sign a record by use of an electronic symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

EU – Mexico Free Trade Agreement

In 2000, the European Union and Mexico entered into a free trade agreement. The agreement contains requirements for preferential duty treatment of goods based on rules or origin, and requirements for supporting declarations of origin. The origin declaration and proof documentary requirements for exporters who make frequent shipments are much less burdensome than the U.S. requirements for a NAFTA Certificate of Origin. In the case of exporters that make frequent shipments for which preferential duty treatment is claimed, the exporter may apply to the appropriate authority in its country for approval to use a declaration as proof of origin on its invoice. When approved, the exporter is provided with an approval number to use on its invoices (see Annex III, Sections 20 and 21 of Decision Nr.2/2000 of the EC-Mexico Joint Council of 23 March 2000 - http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc_111727.pdf).

If such a procedure were implement for NAFTA, exporters who make frequent shipments could greatly reduce the amount of paper NAFTA Certificates of Origin furnished to U.S. importers, which would result in a commensurate amount of paper manually collected, reviewed, catalogued and stored by U.S. importers. It would also lend itself to an electronic environment that could eliminate all paper. In an electronic environment, it may also be possible for importers to use computer systems to more efficiently verify aspects of the origin declarations that in a paper environment must be done manually. Such a process would be consistent with electronic customs entry filing, and could eliminate customs requests for production of certificates of origin, as the certificate or origin would be evidenced in the approval number contained in the invoice data.

Other Mexico Trade Agreements

It is my understanding that Mexico has other free trade agreements, e.g. with Japan and Columbia, that incorporate proof of origin declarations similar to the procedure covered by the European Union - Mexico free trade agreement. In the case of the agreement with Columbia, the proof of origin declaration process is entirely electronic.

Conclusion

Today, the NAFTA Certificate of Origin documentary requirements are antiquated and inconsistent with modern commerce. The Parties have had nearly 20 years of experience with NAFTA, and hopefully through this experience have developed a confidence that will allow more efficient methods of providing certifications of origin. Arguably, 19 CFR Section 181.22 (b) (1) already provides the authority to allow the electronic transmission of Certificates of Origin from an exporter to importer with electronic signatures recognized by the e-Sign Act and Uniform Electronic Transactions Act.

However, a better and more efficient process for exporters, importers, and possibly Customs, would be to modify the Certificate of Origin along the lines of the document process used by the European Community and Mexico in its free trade agreements, but in a way that provides for fully electronic documentation, which Mexico and Columbia are already doing. Article 501 (1.) of NAFTA, contemplates that Parties might wish to revise the Certificate of Origin, permits it to be revised by agreement, and Article 513 provides a forum by which this could be carried out. Circumstances have changed, commerce has changed, and the customs authorities of the Parties have had nearly 20 years experience working together on NAFTA matters. The NAFTA Certificate of Origin requirements should take into consideration this experience and present day commercial practices and use this as an opportunity to reduce the paperwork and associated burden in connection with NAFTA Certificates of Origin for all involved.

Sincerely,

O'Neil L. Woelke

Email: nwoelke@kozikwoelke.com
Tel: 248.462.4637

6632 Telegraph Road
No. 279
Bloomfield Hills, Michigan 48301