

INTERNATIONAL TRADE AND HOMELAND SECURITY ALERT

10+2 IMPORTER SECURITY FILING UPDATE: CBP ISSUES INTERIM FINAL RULE FOR CARGO ARRIVING IN U.S. PORTS BY VESSEL; LIMITED PUBLIC COMMENT PERIOD CLOSES JUNE 1, 2009

THE INTERIM FINAL RULE MODIFIES PREVIOUS NOTICE OF PROPOSED RULEMAKING AND PROVIDES FOR FLEXIBLE ENFORCEMENT PERIOD AND STRUCTURED REVIEW

In the November 25, 2008 *Federal Register*, the Bush administration, through the Department of Homeland Security and U.S. Customs and Border Protection (CBP), implemented legislative requirements contained in the SAFE Port Act of 2006 and the Trade Act of 2002. Specifically, CBP published an Interim Final Rule (IFR) establishing the Importer Security Filing (ISF) and Additional Carrier Requirements for cargo arriving in U.S. ports by vessel, the so-called “10+2 Rule” (“the Rule”). In addition to various modifications to the Notice of Proposed Rulemaking (NPRM) published in the *Federal Register* on January 2, 2008 (73 Fed. Reg. 90), the IFR announced that CBP will “show restraint in enforcing the rule, taking into account [compliance] difficulties that importers may face”; provided, however, that importers make a good faith effort to comply with the new requirements “to the extent of their current ability.” The policy of enforcement restraint will last for one year and will apply to all aspects of the Rule. In addition, the IFR announced that CBP intends to “conduct a structured review of the elements, including an evaluation of any specific compliance difficulties that the trade may be encountering with respect to these elements.” CBP invites comments from the public regarding six of the required data elements: Container stuffing location; Consolidator (stuffer); Manufacturer (or supplier); Ship to party; Country of origin; and Commodity HTSUS number. Comments are due by June 1, 2009.

FLEXIBLE ENFORCEMENT AND STRUCTURED REVIEW

In addition to other modifications to the NPRM, the IFR provides a delayed enforcement date, some data element flexibility and additional review of data elements that may present compliance difficulty for importers. To that end, the IFR establishes—

- A compliance date of one year from the effective date of the rule

- Flexibility with respect to the submission timing of the following data elements: **Container stuffing location** and **Consolidator (stuffer)**. The ISF Importer (defined under the regulations as the “the owner, purchaser, consignee, or agent such as a licensed customs broker”) must submit these elements as early as possible, and in any event no later than 24 hours prior to arrival in a U.S. port (or upon lading at the foreign port if that is later than 24 hours prior to arrival in a U.S. port).
- Flexibility with respect to interpretation of the following data elements: **Manufacturer (or supplier)**; **Ship to party**; **Country of origin**; and **Commodity HTSUS number**. While these elements must be filed 24 hours prior to lading, the IFR provides for a range of acceptable responses in the initial filing based on facts available to the importer at the time and in lieu of a single specific response (which may become known to the importer only at a later time). CBP provides the following examples—
 - “The ISF Importer could identify the manufacturer as being one of three typically used manufacturers, with more precision to be provided in subsequent ISF updates.”
 - “The ISF Importer could submit the identity of the importer, consignee, or the facility where the goods will be unladen in the event that the ship to party is unavailable (e.g., “to order” shipments).”
 - “If the ISF Importer is, in good faith, unable to determine whether the country where the final stage of production of an article took place is the country of origin, the ISF Importer may provide the country where the final stage of production of the article took place in lieu of the country of origin, and update the ISF submission as soon as more accurate data are available.”
- A structured review of ISF data elements. CBP will conduct a review and evaluation of elements that present compliance difficulties for the trade community. In addition, CBP may conduct reviews of particular importers to determine the feasibility of submitting all 10 data elements 24 hours prior to lading. CBP indicates that its review will “cover a range of enterprises, from small to large, and will include both integrated and nonintegrated supply chains.”

NEW IMPORTER REQUIREMENTS UNDER THE IFR

The IFR requires the ISF Importer to transmit an ISF to CBP “no later than 24 hours before cargo is laden aboard a vessel destined for the United States.” However, with respect to foreign cargo remaining on board (FROB), the ISF is required any time prior to lading.

- The party that “causes the goods to enter the limits of a port of the United States” is required to file an ISF, at the lowest Bill of Lading level, for each such shipment.
- The ISF Importer may designate an authorized agent to file the ISF on its behalf. For purposes of filing the ISF, a designated agent must have access to the Automated Broker Interface (ABI) or Automated Manifest System (AMS). ISFs are required to be transmitted through a CBP-approved electronic data interchange system, which currently includes only ABI and AMS.
- In the event that there are changes to the information filed under the ISF, or if more accurate information becomes available, the party who filed the ISF must update the filing before the goods arrive within the limits of a United States port.

- As a general matter, ISFs must consist of 10 data elements. **The 10 ISF elements are:** (1) Seller; (2) Buyer; (3) Importer of record number/Foreign trade zone applicant identification number; (4) Consignee number(s); (5) Manufacturer (or supplier); (6) Ship to party; (7) Country of origin; (8) Commodity Harmonized Tariff Schedule of the United States (HTSUS) number; (9) Container stuffing location; and (10) Consolidator (stuffer). In addition, the following three data elements must be linked to one another at the line item level: the Manufacturer (or supplier); Country of origin; and Commodity HTSUS number.
- As a general matter, for shipments consisting entirely of FROB and shipments consisting entirely of goods intended to be transported in-bond as an immediate export (IE) or transportation and export shipment (T&E), the ISF must consist of five elements. **The five elements are:** (1) Booking party; (2) Foreign port of unloading; (3) Place of delivery; (4) Ship to party; and (5) Commodity HTSUS number.

NEW CARRIER REQUIREMENTS UNDER THE IFR

In addition to the existing carrier requirements, the IFR requires carriers to submit (1) a vessel stow plan for vessels destined for the United States; and (2) daily Container Status Messages (CSM) for certain events relating to any cargo destined for the United States.

Vessel Stow Plan:

- For voyages of a duration longer than 48 hours, carriers are required to transmit the stow plan, so that CBP receives it no later than 48 hours after the carrier's departure from the last foreign port. For voyages of a duration of less than 48 hours, CBP must receive the stow plan prior to the vessel's arrival at the first port in the United States.
- Vessel stow plans may only be submitted through a CBP-approved electronic data interchange system, which currently includes AMS, secure file transfer protocol (SFTP), or e-mail. Stow Plan submissions are required to include certain enumerated standard information relating to the vessel and each container laden on the vessel.

Container Status Messages:

- Carriers are required to submit a CSM when any of the required events occurs (e.g., when the booking relating to a container that is destined to arrive within the limits of a port in the United States by vessel is confirmed), provided that the carrier already creates or collects that CSM in its equipment tracking system. The IFR does not require carriers to create or collect any CSM data other than those it already creates or collects.
- Carriers are required to submit CSM information no later than 24 hours after the message is entered into the carrier's equipment tracking system.

ADDITIONAL MODIFICATIONS TO NPRM

In addition to the flexible enforcement provisions and the structured review of compliance feasibility issues, the IFR modified the NPRM in other ways as well:

- The liquidated damages amount for violations of the ISF requirements have been modified from the value of the merchandise, as previously proposed, to \$5,000 for each violation.

- The NPRM proposed requiring carriers to provide the “Hazmat-UN code.” Under the IFR, carriers may provide any Hazmat code, if applicable.
- The IFR adds a section covering ISF bonds.
- A section has been added requiring powers of attorney (POA) to be in English and retained for five years from revocation (along with the revocation letter).
- The IFR removes the requirement that break bulk cargo be included on vessel stow plans.

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