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CBP advance trade data proposal

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Starting off the new year with some fireworks, on January 2, 2008 the US Customs and Border Protection (CBP) published its Notice of Proposed Rulemaking (NPRM) regarding importer security filing and additional carrier requirements. Informally, this proposal is referred to as either "advance trade data" or the "10+2 rule". Whatever it is called, the proposal represents a sea change for CBP and the affected industries.

Since time immemorial, CBP has relied on information provided by the carrier to make initial determinations regarding imported cargo. The ship's master or agent would file the manifest with CBP (nee Customs Service) upon arrival. The ship was then allowed to unlade the cargo and issues such as customs duties got sorted out from there. Things changed radically following the horrific terrorist attacks of September 11, 2001.

Soon after 9-11, CBP began requiring carriers to provide cargo manifest information well prior to the ship's arrival. For containerized cargo, manifest information was required at least 24 hours prior to loading the cargo onto the ship bound for the United States. The purpose was to provide CBP and its foreign counterparts time to conduct non-intrusive examinations if they so desired. For other cargoes, except for bulk liquids and solids (e.g., petroleum, coal, wheat), additional information was also required so that CBP could determine whether to closely examine the cargo upon arrival in the United States.

The problem with the earlier approaches was that it relied solely on hear-say. The carrier almost never knows with any certainty what is actually being transported. Containerized cargo is generally sealed before it arrives on the pier. The carrier is largely prohibited from breaking the seal – and time would not permit unloading a container just so the master can verify the contents. Much break-bulk cargo is also crated or otherwise inaccessible to view. Thus, in most cases, the carrier can merely pass along to CBP the information that has been provided to it by the shipper.

Such a system hardly provides significant security. A terrorist, for example, would be unlikely to declare on the manifest that he is shipping a weapon of mass destruction (WMD) to the United States. Besides, there is no Harmonized Tariff Schedule (HTS) number for a WMD.

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Therefore, CBP partnered with various members of the trade community to improve the quality of information regarding imports by sea. It vetted the proposal through the Departmental Advisory Committee on Commercial Operations of Customs and Border Protection and Related Homeland Security Functions (more familiarly called the Commercial Operations Advisory Committee or COAC). Unfortunately, as discussed below, the COAC recommendations were largely ignored.

As proposed in the January 2 edition of the Federal Register, importers would be required to submit the following ten (10) trade data elements at least 24 hours prior to loading of cargo bound for the United States:

- a. Manufacturer name and address.
- b. Seller name and address.
- c. Container stuffing location.
- d. Consolidator name and address.
- e. Buyer name and address.
- f. "Ship to" name and address.
- g. Import of record number.
- h. Consignee number.
- i. Country of origin of goods.
- j. Commodity Harmonized Tariff Schedule (HTS) – first six digits.

In addition, carriers would be required to submit the following two (2) pieces of information:

1. Container status messages (consisting of five data elements).
2. Vessel stow plan (consisting of nine data elements).

The COAC was generally supportive of the original plan for receipt of additional trade data by the CBP, but counseled that there were a number of practical and economic problems. Foremost among the economic problems was the requirement inherent in the reporting system that various parties to the importation share what was previously confidential commercial information. The COAC also recommended that the advance trade data requirement be aligned with those of the World Customs Organization (WCO) SAFE Framework and be consistent with applicable ISO standards. Currently, in many cases, an importer obtains the merchandise from a middleman and sometimes does not know the actual manufacturer. The CBP proposal would require that the importer (or other entity that files the advance trade data) have access to a variety of detailed information.

The European Shippers' Council (ESC), among others, has strongly objected to the CBP proposal, asserting that it is inconsistent with the WCO SAFE Framework. The ESC is asking the European Commission to get involved and put pressure on the CBP to reconsider its proposal.

In the meantime, CBP has adopted the position that it should work with the WCO to amend the SAFE Framework so as to be consistent with the CBP advance trade data proposal. This is curious, since the CBP (as the US representative to the WCO) voted in favor of the SAFE Framework less than a year ago. CBP is taking the same basic position as regards the ISO standards, contending that those standards should be aligned with the proposed rule.

The proposed rulemaking is based, in large part, on two pieces of legislation. The SAFE Port Act of 2006 directs CBP to require submission of additional data elements for improved high-risk targeting of imported cargoes. This provision also directs that the regulations adhere to the parameters established in the Trade Act of 2002. The Trade Act directed that cargo data requirements, to the maximum extent possible, be placed on the party most likely to have direct knowledge of that information and that the requirements take into account the existence of competitive relationships among the parties on which requirements to provide particular information are imposed.

The proposed rule is a move in the right direction as regards obtaining information from a party with direct knowledge of the facts. It fails miserably as regards accounting for existence of competitive relationships. The CBP also is disingenuous as regards aligning the rule with provisions of the WCO SAFE Framework and the ISO standards. To vote in favor of the SAFE Framework and then contend that the Framework should be changed to be consistent with the proposed rule is not acting in good faith.

Unfortunately, it appears that this rulemaking is on a fast track and that the various comments and criticisms will have little impact. The official CBP analysis of its proposal states that the projected effective date of the regulation is April 1, 2008. How appropriate!