ROANOKE TRADE
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Border Security Regulations Branch
Office of International Trade
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, NW. (Mint Annex)
Washington, DC 20229

Subject: Customs and Border Protection, Department of Homeland Security
Notice of Proposed Rulemaking (NPRM)
Federal Register – January 2, 2008
(FR Vol. 73, No. 1, page 90 et seq, RIN 1651-AA70)
Importer Security Filing and Additional Carrier Requirements
Docket ID: USCBP-2007-0077

Dear Sir/Madam:

Roanoke Trade Services, Inc. is an insurance agent and broker specializing in international trade and transportation related surety and insurance services and is also a Carnet Service Provider for the United States Council for International Business (USCIB). As such, Roanoke Trade is the provider of a significant proportion of all customs bonds and Carnets written in the U.S. We are hereby submitting for the docket our comments relating to Importer Security Filing and Additional Carrier Requirements, also commonly referred to as "10+2." In formulating our comments, we have drawn on our 30 plus years experience as carnet providers and over 70 years of in-depth experience in all aspects of the customs bond business. We have also given careful consideration to input received via consultation with our customs broker and importer clients and various trade organizations.

Roanoke Trade is fully supportive of CBP's efforts to improve import security, and is committed to being a positive and constructive contributor to such efforts. There can be no endeavor more important than achieving security goals for the protection of our shores in a manner consistent with vital international trade. We begin with this premise, and are presenting our comments and questions for clarification on 10+2 in an effort to make it a more effective security tool for all concerned.

Bonds/Liquidated Damages – Importer ISF Responsibilities

We were surprised that no surety, surety agent or their associations were informed during CBP's consultation with the trade that there would be a bonding provision related to ISF within the NPRM. We feel certain that if there had been such involvement, the resulting document would have better reflected the commercial realities of the long-established customs bonding model. The NPRM specifies changes to 19 C.F.R. § 113.62, 113.64 and 113.73 creating a contractual obligation to comply with ISF requirements and specifying liquidated damages (LD) equal to the value of the goods in the event of default.

The NPRM also apparently imposes the same responsibilities and consequences of default upon Filers. (Under the proposed regulations the "Importer" as defined in 19 C.F.R. § 149.1(a) is ultimately responsible for the timely, accurate, and complete submission of the ISF as set forth in 19 C.F.R. § 149.2(a). In addition, 19 C.F.R. § 149.5(a) requires any ISF *Filer* to "possess a basic importation and entry bond containing all the necessary provisions of Sec. 113.62." The proposed compliance language and LD provisions make no apparent distinction between "Importers" and "Filers.")

We submit that the final rules should not use bonds/LD/bonded penalties as an enforcement mechanism in connection with Importer (as defined in the proposed rules) responsibility for ISFs. Following are several reasons why bonds/LD should not play a part in ISF enforcement.

1. The collection of monetary assessments (such as fines, penalties, or LD) does not accomplish the purpose (stated in the NPRM) of "help(ing) prevent terrorist weapons from being transported to the United States."

    a) Customs bonds/LD provisions/bonded penalties are a highly effective means of protecting the revenue and of ensuring compliance in many areas (e.g., FDA, marking/labeling, quota/visa, TIBs). These devices are not, however, effective for security enforcement purposes in connection with Importers and Filers. Whereas sureties can (and have) develop(ed) effective means of assessing risk in connection with duty assessments and underwriting specified LD exposures associated with certain limited types of activities and transactions, there can be no such practical ability for an underwriter to assess information gathering/assimilation capabilities or gauge terrorist intent on the part of a prospective Importer or Filer (let alone on the part of untold additional suppliers of information used by Importers). These intentions/capabilities defy rational analysis and attempts to undertake such evaluations cannot be made on a cost effective basis, given the commercial realities of the customs bonding mechanism.

    b) Distinguishing between import-related breaches which lend themselves to surety solutions and those that do not is not a new notion. CBP has long recognized that certain import-related infractions of law – e.g., 19 U.S.C. § 1592(a) relating to negligence, gross negligence, and fraud – are more properly addressed via means other than liquidated damages because they relate to behavior which does not lend itself to commercially realistic

underwriting analysis. We observe some noteworthy parallels. It is difficult to see how a surety underwriter could be any more successful in predicting careless or inadvertent ISF breaches than they could be in predicting ordinary or gross negligence. Identifying an importer who harbors fraudulent or other antisocial (including terrorist) intent is difficult enough for CBP, which has comprehensive information collection and analysis tools at its disposal. Importers who intentionally mislead CBP would unquestionably attempt to deceive surety underwriters as well, and the latter have much more limited detection resources at their disposal than does CBP. A surety's primary underwriting tools (in general) are financial analysis, consideration of entry characteristics, and review of past transaction results. These become meaningless in the context of assessing security risk. We do not suggest 1592(a) as an enforcement mechanism for ISF. (As discussed further below, no-load messages are the appropriate enforcement mechanism.) We merely point out these analogies to bring key bonding/LD issues into sharper focus.

c) Effective security enforcement is the aim of CBP, ourselves, and all responsible citizens of the international trade community. It is very important to employ enforcement techniques which are truly effective in achieving security objectives. "No-load messages" (i.e., steps that actually keep the cargo from being laden on board a ship bound for our shores) are clearly a technique that will achieve true progress in the area of import security; LD will not. We live in an age of fierce competition among international traders in general, "just-in-time" inventory management, and assiduous attention to/control of shipping activities. The consequences of a no-load message are, in and of themselves, a severe punishment for non- or partial-compliance with ISF requirements and serve as a forceful motivator of full compliance.

2. For the reasons previously mentioned, a surety cannot effectively underwrite such risks. Inability to underwrite and quantify risk inevitably results in deterioration of loss experience. This can damage a surety's financial rating and result in limiting importer and customs broker access to viable customs bond providers. Materially impairing the free availability of import bonds in general could serve to seriously disrupt an entry process which today operates quite efficiently.

3. The notion of bonding/LD of ISFs gives rise to serious concerns regarding single transaction bonds (STBs). We see no apparent mechanism for the handling of ISFs under STBs; and today, there remain many importers who do not have an Activity Code 1 Continuous bond (CB) in place. eBond (ACE ESAR A2.4) is apparently still years away. It is reasonable to assume that in many (if not most) cases the "Importer" for ISF filing purposes will also be the "importer of record" for entry purposes. Nevertheless, it is difficult to see how paper STBs could possibly be compatible with the security filing process (which clearly mandates *electronic* filing of ISFs via ABI or AMS). This presents a problem because the amount of time required to place a CB in effect (generally 5-10 working days) will inevitably cause

serious disruption to shipping arrangements for Importers in some circumstances. If an STB is not a viable, timely alternative when no CB is in effect 24 hours prior to lading, what is to be done to keep freight moving? STBs must continue to be a viable financial security option for importers.

4. We believe that CBP should not establish a requirement for licensed customs brokers to maintain an import bond in order to continue to be qualified to act as a filer for ABI, ISF, In-Bond, or other legitimate customs purposes. So far as we can determine, the concept of "bonding of filers" is a new one within the context of CBP operations/requirements. Many "filers" do maintain bonds right now, but only because they are essentially "principals" for the purposes of a given action/activity (e.g., an importer who files his own entries and maintains an Activity Code 1 bond, a bonded carrier who transmits in-bond data and maintains an Activity Code 2 bond, an international carrier or NVOCC who transmits manifest data relating to their own B/Ls and maintains an Activity Code 3 bond). Generally, however, parties acting solely as filers and not as principals in a transaction or activity have not been required to maintain a bond to act in such capacity. The prime example of this is the licensed customs broker. If filing entries/entry summaries via ABI as agent for an importer client (acting under a valid power of attorney), a broker is not required to post a bond. (If the broker acts as importer of record on a given transaction – hence, acts as a principal rather than as an agent in the entry transaction – he of course must have an import bond.) CBP's "In-Bond Plan" incorporates the concept of bonding of filers. In that instance, it is for the purpose of gaining better control over "responsible parties" (true initiators of activity over which they exercise considerable control as opposed to entities merely acting as an agent).
5. If CBP were to proceed with the requirement for Importers and Filers to be bonded in connection with ISFs, what would be the LD implications of this "double-bonding"? In the event of default, against whom (Importer, Filer, or both) would LD be assessed? If against only one, how would CBP decide which?
6. Carnet holders currently do not require import bonds and changing this would significantly deteriorate the purpose and effectiveness of the Carnet system worldwide. Further, if the bonding requirements as currently written are imposed on Carnets, it would be incompatible with the obligations undertaken by the United States Council for International Business (USCIB) in guaranteeing Carnet holders.

<u>Carrier Provisions related to Bonding Requirements</u>

In addition to import (or entry) bonds, Roanoke Trade writes a significant proportion of international carrier bonds (Activity Code 3) on file with CBP. The two carrier reporting requirements (Vessel Stow Plans and Container Status Messages) are of less overall concern to us and our sureties than are the ISF bonding requirements for the following reasons:

1. The scope of data required in reports is narrower.

2. The information in ocean carrier reports is apparently information generally created by and/or under the direct control of such carriers whereas Importers, in formulating ISFs, will be more reliant upon information that must be provided by third parties.
3. As a result of the implementation of the "24 hour rule" several years ago, a large proportion of ocean carriers are already well indoctrinated in the process of reporting of security data via AMS; furthermore, they are being asked to add two data elements as opposed to five or ten.
4. While the universe of Importers numbers in the hundreds of thousands, the world of ocean carriers (including NVOCCs) is much more limited. This makes intensive review of such bond principals and "special underwriting" a much more practical endeavor.
5. For various reasons, the underwriting of Activity Code 3 bonds is already much more stringent and work-intensive than the underwriting of import bonds. The underwriting mode for such bonds will change little as a result of new ocean carrier reporting requirements.
6. On a *relative* basis, the LD provisions for violation of ocean carrier reporting requirements are less severe than those dealing with defaults related to ISF filings.

It should be noted that the foregoing observations are offered in the context of *ocean carrier* reporting requirements. To the extent that the proposed rules embrace the transmission of ISFs by ocean carriers and specifically include provisions for revision of 19 C.F.R. § 113.64 to include ISF filing responsibility and liquidated damage provisions (equal to the value of the goods) in connection therewith, we reassert concerns previously mentioned on that subject.

Carnets

We urge CBP to exempt Carnets from 10+2, or alternatively exempt them until such time CBP can work with the USCIB and other involved parties to develop an approach that will effectively enhance security without unnecessarily impairing trade.

The NPRM indicates that "FROB," IE Shipments, and T&E Shipments will require five data elements, some of which differ from the 10 elements for goods intended to be entered into the United States and goods intended to be delivered to a foreign trade zone. Carnets as well, need to be specially considered in terms of how to conform due to their informal entry process involving a temporary type of importation.

The trade will require CBP's accepted interpretations of the ISF definitions as pertains to Carnet before any party can possibly comply, as the definitions do not precisely fit a Carnet shipment's profile. USCIB and its Service Providers will also require confirmation of CBP's interpretation of 10+2 as it relates to Carnets in order to begin the development of computer systems and new operational procedures. Currently, we are not aware of any ACS data fields that may accommodate Carnets.

Definition of "Importer"

A word or term other than "importer" should be used by CBP in part 149, except when CBP is making reference to the entity liable for the payment of all duties and responsible for meeting all statutory and regulatory requirements incurred as a result of importation (i.e., importer of record).

The NPRM creates a new and unique definition for the commonly used and understood term "importer" and limits its definition and use to Part 149. This approach risks creating significant confusion among those required to comply with the rule.

"Importer" typically refers to the person making entry of merchandise. However CBP does not propose that "the importer of record" for the goods must make the Importer Security Filing. It could very well be that the "importer of record" would not be the party causing the goods to arrive in a U.S. port, especially since the ISF is also required for goods that are not intended to be entered.

We suggest that CBP eliminate the use of the term "importer" whenever that term is not consistent with its definition throughout the rest of the Customs regulations. One way that CBP might eliminate confusion in the terminology is by following the method adopted by the Commerce Department to handle identification of the person responsible for filing Shipper's Export Declarations (SED's). Commerce adopted the term "principal party of interest." CBP could also use that term in this context since there is no overlap between the Commerce application (exports) and this new CBP application (imports and FROB/IE/T&E, etc.).

The text description used for part 149 similarly could be changed. As supported by our explanation about why "importer" is not the best term to use, CBP could rename the title to part 149 "PART 149-CARGO SECURITY FILING." The regulations in part 149 deal with the security filing pertaining to the cargo being transported, not the importer.

Whether or not CBP accepts our request to use a term other than "importer," we ask that CBP give examples of application of this term. We presume that in many cases the "Importer" for ISF purposes will be the same entity appearing as "importer of record" on entry documents. However, there can be varying interpretations of the language "causing goods to arrive within the limits of a port in the United States," and insight into CBP's assumptions will be important.

Definition of "Authorized Agents"

For security reasons and because of possible questions regarding the conduct of "customs business," we are concerned about the possibility that CBP may permit a virtually unlimited range of business types to act as filing agents for ISF purposes. There is no question that "Importers" (as defined in the proposed rules) or licensed U.S. customs brokers when acting as the agent for an Importer, should be permitted to transmit ISFs.

If additional classes of filing agents are to be considered, we would submit that:

1. Only U.S. entities should be accepted. This should not be taken to mean the filing agent must be incorporated in the U.S. per se. However, the entity should have an established physical presence operating within the jurisdiction one of the United States of America or the recognized territories. The government of the U.S. should possess at least the basic capacity to take legal action as deemed appropriate in connection with matters of national security.
2. It would be best to limit Filers to being entities that are licensed by or otherwise under some sort of meaningful scrutiny of the U.S. government. (E.g., ocean freight forwarders, NVOCCs, international carriers.)

Reasonable and Realistic Implementation/Informed Compliance

CBP has stated that they may take "an 'informed compliance' approach" following the effective date of the final rule. CBP has also stated that "pursuant to existing 19 CFR 4.7(b)(3)(iii) and proposed 19 CFR 149.2(c), CBP will take into consideration how, in accordance with ordinary commercial practices, the presenting party acquired Importer Security Filing information and whether and how the presenting party is able to verify this information. Where the presenting party is not reasonably able to verify such information, CBP will permit the party to electronically present the information on the basis of what the party reasonably believes to be true." In the NPRM, CBP has acknowledged the fact that "in some cases, business practices may have to be altered to obtain the required information in a timely fashion." In the spirit of Informed Compliance, CBP goes on to say that they will "provide guidance in the form of FAQs, postings on the CBP website, and other outreach to the trade" at some point in the process.

When phasing in the rules, it will be extremely important to employ methodologies which recognize commercial realities and encourage – rather than frustrate – Importers and Filers. We expect that it will take Importers some time to identify all information collection issues and arrive at best practices to arrive at timely and accurate ISF filings. Using controlled test groups comprised of a meaningful cross-section of importers using actual reporting channels (ABI and AMS) would make it possible to refine the process, develop a more robust list of FAQs, and achieve optimum results on an overall basis as quickly as possible. CBP has already announced in NPRM that it will adopt a phase-in *enforcement* process similar to that which was utilized when the 24 Hour Rule and Trade Act regulations were implemented. A phase-in of *participation* (i.e., proceeding first with a test group actually using approved electronic reporting mechanisms) would be a sensible, practical approach as well. Although CBP states in the NPRM that they will not consider this sort of phase-in, this position should be seriously reconsidered.

Lastly in this regard, we take note of the comments submitted by Michel Danet on January 29 on behalf of the World Customs Organization. (See Docket ID USCBP-2007-0077-0011.) We expect that CBP will strive to act in full compliance with the WCO SAFE Framework of

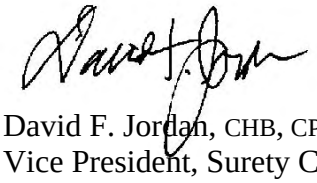
Standards (SAFE) amendment procedures. In this vein, we suggest that approaching 10+2 implementation via a "test group" or phased-in participation approach as discussed in the previous paragraph might accomplish the rational rules-introduction objectives of all concerned while affording CBP adequate opportunity to attend to WCO SAFE amendment procedural matters.

Closing Comments

We heartily endorse CBP's priorities in fulfilling their multifaceted missions. No objective constitutes a higher calling than the protection the lives and property of our citizens. Our comments are submitted in a sincere spirit of cooperation and with our hopes that, working together, the public and privates sectors will achieve an environment in which terrorists are truly defeated via safe shores and flourishing international trade.

Yours truly,

Roanoke Trade Services, Inc.



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