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customs update: 10+2 = part deux

Journal of Commerce

January 2008

Nearly a year ago, we examined Customs and Border Protection's 10+2 security filing rule. Earlier this month, the agency published the text of the rule. Time to assess how things have changed in the past 11 months.

The basic data elements remain the same, two from the carrier and 10 from the importer (or agent), but there have been some interesting changes in thinking at Customs since the original strawman proposal. Carriers are still expected to transmit vessel stow plans and container status messages (CSM). Stow plans tell you where a particular shipment is located on the vessel. CSMs are nothing more than messages/e-mails telling the steamship operator about the status and location of a given container. Here is where the first clarifications are issued by Customs. The vessel stow plan must be received no later than 48 hours after departure from the last foreign port. However, if the length of the voyage is less than 48 hours, the stow plan must be received prior to arrival at the first U.S. port of call.

More interesting changes come in the context of CSMs. The events triggering mandatory filing of CSMs are when a booking is confirmed, when a container undergoes a terminal gate inspection, when gate-in or gate-out occurs, when a container is loaded or unloaded, when a vessel arrives or departs a port, when a container is the subject of an intra-terminal move, when a container is stuffed or stripped (ordered and confirmed), and when a container is subject to heavy repair. Customs has given the carriers the option of transmitting all their messages rather than forcing them to screen the ones to omit.

At the same time, importers are still expected to transmit the same 10 data elements, but there are a number of interesting wrinkles:

1. Manufacturer (or supplier) name and address;
2. Seller name and address;
3. Buyer name and address:

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4. Ship to name and address;
5. Container stuff location;
6. Consolidator (stuffer) name and address;
7. Importer IRS number;
8. Consignee IRS number;
9. Country of origin;
10. Commodity HTS number.

While the list of data elements remained unchanged, there have been some nuances and outright changes worth noting.

1. Manufacturer (or supplier) name and address -- the name and address to report are of the entity that last manufactures, assembles, produces, or grows the commodity; if that is not known and cannot be determined through due diligence, or may not apply, then the name and address of the supplier of the finished goods in the country from which the goods are leaving is to be reported. One way or the other, you are to report the party who would otherwise need to be known to construct the MID.
2. Seller name and address -- of the last known entity by which the goods are sold or agreed to be sold; if no sale, then the name and address of the owner is to be reported.
3. Buyer name and address -- the last known entity to whom the goods are sold or agreed to be sold; again if there is no sale, report the owner of the goods.
4. Ship to name and address -- report the first deliver-to party scheduled to physically receive the goods after release from Customs' custody. Originally Customs wanted the actual buyer, now it appears if the goods go to a warehouse or distribution center, the coordinates for that entity would be reported.
5. Container stuffing location name and address of the physical location(s) where the goods were stuffed; for break bulk goods it is the physical location(s) where the goods were made shipment-ready. The noteworthy change here is from address only to name and address.
6. Consolidator (stuffer) name and address -- of the party who stuffed the container or arranged for its stuffing; for break bulk goods, it is again the shipment-ready party.
7. Importer IRS number -- here Customs added the FTZ applicant ID number;
8. Consignee IRS number -- no change;
9. Country of origin -- was clarified to include the country of manufacture, production, or growth, based upon the import laws, rules and regulations of the U.S.;

10. Commodity HTS number -- still required to the six-digit level, but allowed to be reported to the 10-digit level.

Freight remaining on board (FROB) and in-bond shipments for export were added to the types of goods requiring reporting, although only a limited number of additional data elements must be reported and is information carriers routinely have in their possession: booking party, port of unlading, place of delivery, ship to name and address and HTS number.

So, why the concern? Well, unless otherwise permitted, this data must be reported 24 hours prior to loading. In reading the NPRM, it is clear Customs has decided the world is just going to have to change how business is done. Importers naturally have raised reasonable questions such as what happens if a best effort fails to obtain the information, or it turns out to be wrong? In response, Customs has made clear it is the importer's responsibility to get the Importer Security Filing (ISF) (as it is called) filed and correct. So, first, you must exercise due diligence to get the information. Then, if it is wrong and the shipment has not yet arrived, you must update your ISF. Customs has also said that until its technology is updated, these ISFs must be transmitted through AMS or ABI. Customs expects to program its platforms to allow the ISFs to be filed, but let's start at the beginning.

Customs says quite clearly the data elements it is requesting are provided at time of entry, so what's the problem? Clearly having the data elements at about the time a shipment arrives is hardly the same as providing them by as much as a month or more prior to arrival. So, the first question is to the carriers -- are you now finally going to provide correct bill of lading numbers prior to receiving cargo? These ISFs are to be filed reflecting the bill of lading number at the lowest level, meaning both the master and house. While you may file one ISF for a multiple container shipment, you must still have all the details. So, whether you ship directly or through a consolidator, such as an NVOCC, you or your service provider have not been able to obtain a correct bill of lading number prior to delivering a shipment. That will have to change!

Next, there is the very real fact that in many (most?) instances, the U.S. importer does not control the forwarding of his shipment. As such, despite Customs' cavalier statement that the data it is requesting is reported at time of entry, where and when the container is stuffed is generally not something the importer knows or frankly cares about. As such, practical operational issue arises. If the importer has no relationship with the freight forwarder, how does he get those details from that forwarder? The likely answer is either directly from the forwarder or through the forwarder's U.S. delivery agent, but that begs the question of when will that data be provided and can it really hold up the dispatch of an otherwise compliant shipment?

Customs also reiterated that only one party will file the ISF. A surprising point is made in the NPRM. If anyone other than the importer files the ISF, the party performing the filing must have a power of attorney from the importer. Undoubtedly this was a concession by Customs to very realistic complaints from the trade saying unless you give us some means to control who files these ISFs, meaning designate our agents, we cannot be responsible for the data that is provided, especially if it is junk.

From the outset, the most controversial element of Customs' proposal has been the requirement that the ISF link the country of origin, manufacturer and HTS. The potential programming costs to the importing community are astronomical. Despite this fact, Customs continues to ignore the practical suggestion to write an algorithm that would cause the Automated Targeting System to make all the possible matches and determine whether any

combination created a risk. If so, that shipment would be subject to inspection. Instead, Customs keeps insisting on putting the burden on the trade to link at the line item level when filing. Perhaps Customs thinks it has equalized the situation by stating that if an importer wishes to have a forwarder report the ISF, he will have to provide that forwarder with the relevant details, but that does not change the burden being imposed. One of the recommendations of the trade was to allow an entry to be filed in lieu of the ISF. Customs rejected that idea. So, either your customs broker or your forwarder is going to be required to input these linked data elements as part of the ISF which means to the trade, you are in essence paying for the filing of two entries. Customs -- why is that necessary?

There are two other topics of note. First, as with any NPRM, there is a section dealing with cost/benefit. In the case of 10 2, the text states, "[E]xisting data limitations and a lack of complete understanding of the true risks posed by terrorists prevent us from establishing the incremental risk reduction attributable to this rule." So, neither OMB nor Customs can really tell us the extent of the benefits of providing the 10 2 data, but they are going to proceed anyway, never mind the cost. At the same time, Customs states it figures the increase in cost per shipment is between $20 and $38 per shipment, but also invites the public to provide comments on the economic, environmental or federalism effects of its proposal.

The other topic which caused surprise to some was the portion of the proposal which deals with penalties. It is not surprising that penalties would result, rather, the question is if the purpose of the ISF is to provide data for national security purposes, are these penalties sufficient? If the vessel stow plan is not filed, the liquidated damages will be $50,000 for each vessel arrival. Liquidated damages for the failure to provide CSMs is set at $5,000 per violation, $100,000 per vessel arrival. If you are the importer and fail to meet the ISF requirements, your fine will be the value of the imported merchandise. Bearing in mind that mitigation guidelines are likely to be published which will reduce the amounts of such fines, are these numbers high enough to deter evasion?

In the end, the importing community is going to have to decide whether it can do things the way Customs wants. It's not a matter that Customs has a choice. The SAFE Port Act mandates the agency must develop a means to obtain more shipment/entry data about goods prior to arrival. The question for the trade is just how doable is Customs' proposal and what will it really cost. What do you think?

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