

Security vs. trade compliance

Customs' plan to match ISF, entry reopens old debate about uses of commercial data.

BY ERIC KULISCH

U.S. Customs' plan to compare information on a new cargo security form — required of importers before vessel loading overseas — with the customs entry presented to clear goods on arrival is raising concern the agency may use the advance data to measure trade compliance.

Trade industry opinions on how Customs and Border Protection should use the data are mixed, however, with some companies believing authorities should not limit use of

available tools that can help crack down on trade fraud.

At CBP's annual Trade Symposium in Washington on Dec. 9, Richard DiNucci, chief of the Secure Freight Initiative Office and the man in charge of implementing the Importer Security Filing, publicly confirmed for the first time that the agency would match the Importer Security Filing with the customs entry to make sure the information lined up. The news, coupled with an effort in Congress to use the data

for non-security purposes, suggests that the government is beginning to remove the firewall between distinct enforcement missions, according to several trade specialists.

Under the ISF rule, importers must electronically submit 10 types of data about the supplier, logistics provider, cargo contents and consignee 24 hours before loading. Ocean carriers are required to submit two data sets related to the containers they transport. Most of the import information is already provided on the customs entry,

but the ISF is filed in advance so that CBP can screen the information for any red flags that a terrorist compromised a container before it reaches U.S. shores. CBP officials insisted throughout the rulemaking process and beyond that the ISF would be strictly used for security purposes and not for compliance.

The border management agency will begin full enforcement of the "10+2" rule on Jan. 26 after a year-long transition period, with penalties of up to \$5,000 per filing for inaccurate or late transmissions. Officials have said they will be lenient on the penalty front, especially early on and for companies that made a concerted effort the past 12 months to practice filing and iron out implementation problems.

"There's a blurring of the lines that's happening. I'm sure there's an answer, but people didn't get that here at the premium forum" for communicating with the trade industry, said Beth Peterson, president of trade consulting firm BPE, referring to the Trade Symposium and its audience of more than 800 industry members.

In a telephone interview, DiNucci said that by comparing the data on the ISF to

the entry "all we've really done here is layer the data, including manifest data, to look for the connections. We're not using this data for trade compliance purposes."

Under CBP's 24-hour rule, ocean carriers must electronically submit their cargo manifest to CBP a day before the container is loaded.

Some trade specialists say the practical effect of comparing the advance data to the entry has implications for enforcement of import safety regulations, duty violations and other compliance programs, even if that is not the stated intent.

Generally, importers or their customs brokers file an entry form prior to, or at arrival, to declare their goods and obtain approval to enter them into the nation's commerce. They provide more complete information and supporting documentation—or correct any discrepancies related to the product count, classification, origin and other items—by submitting within 10 business days of release an entry summary, which is used to establish their duty rate and record statistical data.

The trade managers say it's not clear now whether CBP will issue a penalty for an ISF violation if a company changes a piece of information, such as the product's harmonized tariff number, on the entry summary or if the two forms somehow differ.

Comparing the ISF and the entry "is an indication that the two types of enforcement are starting to blend," said Karen Lobdell, director of trade security and supply chain services for Chicago-based law firm Drinker, Biddle & Reath. Nonetheless, she said she feels DiNucci's team plans to use the ISF to look for glaring differences that would be helpful for identifying high-risk cargo and not to find compliance problems with the entry.

Meanwhile, Congress is putting pressure on CBP to use security data for compliance purposes. The Senate version of the pending Customs Reauthorization Bill includes a provision instructing the agency to use "10+2" data for commercial enforcement. The language would amend the Trade Act of 2002, which says that data used for transportation security cannot be used for compliance purposes.

Many businesses have historically been nervous about comingling data for compliance and security enforcement because they don't want to get penalized for helping the government achieve its national security goals. The main concern is that advance commercial data typically comes from suppliers outside the United States that the importer doesn't have control over.

Marianne Rowden, president of the American Association of Exporters and

Importers, expressed anger that Congress was reneging on a bargain made with industry in 2002 to limit the use of data given to CBP.

"We feel we've gotten screwed," she said in an interview. "We insisted on the provision because we don't trust Customs and that concern was justified.

"It's a shell game. CBP came to us for advance data because the manifest didn't have the type of quality data necessary and the entry is too late for a security assessment. So now they're coming back and saying security data can be used to check entry data. They want it both ways. Either you have data for security or trade data for compliance," Rowden said.

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Other signs CBP's bifurcated security and trade enforcement missions are beginning to meld involve the Importer Self-Assessment (ISA) and the apparent linkage of the ISF with filings required of companies that operate in foreign trade zones.

The ISA is a compliance partnership program that gives vetted importers with strong internal controls the responsibility to self-police compliance with trade regulations in return for fewer Customs audits. In an effort to better ensure safety of imported merchandise and foodstuffs, CBP last year launched a pilot program in conjunction with the Consumer Product Safety Commission to expand ISA to include product safety. The new ISA component, which developed in response to a rash of recalls

and other discoveries of unsafe products from several countries, is designed to encourage companies to maintain a high-level of compliance with product safety laws and standards. CBP and CPSC verify through on-site visits that participating companies have adequate rules and processes in place to ensure product safety throughout the supply chain.

The ISA's product safety component is another example of a compliance program that is touching areas outside Customs' traditional focus on import regulation, Lobdell noted.

"It's more of a gray area. It's not each area operating in their individual silos," she said of the nascent trend.

Integration Point, a global trade management software provider, recently noticed that CBP is sending electronic messages to foreign trade zone operators indicating that it has received the ISF and that the bill of lading number corresponded with the one found on the trade zone filing, known as the e214 form, the company said on its Web blog.

Zone operators must submit data on the goods admitted into facilities with special duty-exemption or deferral privileges.

"Because this new message is appearing when a zone admission is filed, it seems that CBP is taking steps to link the ISF and the zone admissions," Integration Point said. It questioned whether the move is the first step in checking that all e214s filed have corresponding ISFs.

The fact that CBP is using penalties for late, incomplete or inaccurate ISFs instead of ordering the container held at the dock undercuts the agency's argument that security is the key enforcement goal, Rowden said.

Penalties, by definition, are a compliance tool, she argued.

Entry matching is "expanding the liability of the importer. Security means the box doesn't move if there's a question. Now there's a penalty if you don't dot your 'i's or cross your 't's. That's not security.

"What's the point of the exercise? To prevent something in a container from blowing up. Otherwise, it's not risk management," she said.

CBP probably made the decision, Rowden speculated, because it realized it didn't have the space or resources in foreign ports to have local customs authorities inspect all the containers with ISF violations.

Account Management. Opposition to using ISF data for other enforcement purposes is not universal within the import industry. Nike Inc., for example, sees a potential benefit to using ISF data for targeting shipments that may contain counterfeit or

unsafe goods, Jeff Whalen, the company's assistant general counsel for customs and international trade, said during the August meeting of the Commercial Operations Advisory Committee that advises the Department of Homeland Security.

"It does not matter whether CBP uses this information alone or in connection with other information that they might have," he elaborated afterwards. "If CBP can target non-compliant shipments earlier and more accurately, we think that will result in better intellectual property right enforcement and less disruption for compliant importers."

Whalen drew a distinction between using the ISF data as a targeting tool to identify substantive violations of customs laws and a way to trip up companies for administrative mistakes absent some other violation. ISF data alone should not be the basis for issuing penalties, he said.

CBP officials have stressed that they only intend to penalize companies for gross or recurring errors, not minor technical violations of the ISF regulation.

Customs' ability to analyze multiple sources of information about a company also fits within the gradual evolution towards account-based management, in which the agency looks at an import account's overall risk related to compliance, safety and security rather than monitoring the compliance of each import transaction.

Many large importers also favor account management to oversee their overall compliance with recordkeeping, classification, valuation, product safety, security and other government requirements. They tend to participate in voluntary partnership programs such as the ISA and the Customs-Trade Partnership Against Terrorism that reduce audits and inspections for those that demonstrate an ability to meet minimum Customs standards and self-correct problems. A holistic approach to risk management would measure compliance against the totality of their quality control processes so that a single technical violation doesn't necessarily trigger a penalty. And, it inevitably requires more overlap between functional areas in the agency and more sharing of data for multiple purposes, trade experts say.

Under such a revamped CBP operating model, which is still in the blueprint stage, it is less unusual to envision the use of security programs for non-security purposes, Lobdell said.

The only way companies can ensure they aren't penalized for violations if CBP uses the ISF for compliance is to file what CBP calls a unified filing, Peterson said. The unified filing option allows importers to submit their customs entry early and

append two extra data elements required by the ISF so that they don't have to file a similar document twice. Some companies have complete data early enough are submitting the entry in advance to meet the ISF requirement.

Unified filings are not widely used so far because of uncertainty on how to use them and the lack of software to automate the filing. Companies instead have focused on less complex implementation tasks as they prepare for the upcoming enforcement deadline.

A unified filing would allow importers to amend the ISF without conflicting with

information listed on the entry, but Peterson said she would hesitate using the unified entry until its scope is better understood.

Integration Point is recommending as a best practice that its customers compare everything on the entry with the "10+2" filing, said Melissa Irmen, vice president for products and strategy. One way to do that, she said, is to pick a random sample of ISFs to compare with the entry, purchase orders or invoices.

The company also has an automated module that can quickly match every ISF to the other documents and make sure the data stayed the same. ■

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