

September 8, 2009

Via E-Mail: Kimberly.Marsho@dhs.gov

Kim Marsho, Director
Office of Trade Relations
U.S. Customs and Border Protection
1300 Pennsylvania Avenue. NW
Washington, DC 20229

Re: Modification of Ruling Letter Allowing Containers Containing Residual Chemicals to be Entered as Empty Containers
(Customs Bulletin and Decisions, Vol. 43, No. 28, July 17, 2009)

Dear Ms. Marsho:

We appreciate U.S. Customs and Border Protection (“CBP”) meeting with AAEI and other association on August 26, 2009 regarding the international trade community’s concerns on the implementation of the above captioned modified ruling. AAEI represents broad base of members, including manufacturers, importers, exporters, wholesalers, retailers and service providers including brokers, freight forwarders, trade advisors, insurers, security providers, transportation interests and ports. As a result, we are very interested in ensuring that we work with CBP in the spirit of partnership through “informed compliance” under the Customs Modernization Act, so that implementation of the modified ruling occurs with the least amount of disruption to the free flow of legitimate trade.

In accordance with our understanding from the meeting on August 26th, we are submitting the questions (with a few scenarios) and areas of concern below regarding compliance for consideration by CBP so that a guidance document or “Frequently Asked Questions” document may be issued by CBP to the international trade community.

Question 1:

Who is the party that should be filing the Customs entry - is it the non-resident exporter who owns the product that was not discharged; is it the US producer/exporter, who may not have any right to make entry based on the terms of the original sale, and who may not be able to verify that the residue is in fact, originally theirs; or is it the carrier who owns the tank/container?

- Scenario 1:

U.S. company exports bulk product via [its own] tank truck or rail to customer in Canada or Mexico as part of ongoing repetitive transactions. The product is pumped from the conveyance for delivery to the customer; residue “tank heel” remains and conveyance is returned in each instance to the U.S. company for refilling.

How can the U.S. Company be the importer of record for the remaining tank heel even though the U.S. company does not own the returning goods (i.e., the company does not have a financial interest in the goods).

Scenario 2:

- Same scenario as in #1 except the tank container is leased by the U.S. company from a third party.

Who is the importer of record?

Scenario 3:

- Same scenario as #2, except there is no repetitive transactions, just a one-time export. After the product is delivered to customer residue remains and conveyance returns to the U.S. for cleaning and use by another U.S. company either for export or domestic transaction.

Who is the importer of record? The original U.S. exporter no longer has a financial interest in the goods. The foreign customer owns the residue, but is not importing them into the U.S. The trucking company does not have any financial interest in the goods.

Scenario 4:

- Who is the importer of record when the consignee is in a foreign country but the customer is in the U.S.?

Scenario 5:

- A U.S. company exports goods via tank truck or rail to customer in Canada or Mexico. There are repeat transactions. The product is delivered to customer and the container is washed in Canada or Mexico.

Please confirm our understanding that the container can return as an “instrument of international traffic” and that no special documents will now be required to prove that the container was washed?

Question #2:

Current measurement equipment and practices were never designed to measure heels or FROB. Accordingly, measuring the amount of “heel” residue remaining in a tank after unloading is inherently unreliable due to calibration limitations for such small quantities. What standard will CBP set for the quantity that is to be invoiced and declared to take account of these known commercial variables? How does CBP expect to avoid 1% manifest discrepancy rules?

Question #3:

Due to volumetric expansion as well as considering that viscous products cling to the inside container surfaces, quantity discrepancies will result (i.e., three separate measurements will yield three different quantities). Which measurement should the importer of record use for the entry?

Question #4:

What is CBP's understanding of the availability of scales to measure discharged material rail cars? Presuming there is a resolution to the inaccuracy in measurement abilities, how will CBP accommodate the need for the numerous railcars that will have to be diverted from scheduled routes in order to be detoured toward the limited scales available for rail cars at a multitude of destinations?

Question #5:

What is the basis for CBP prohibiting application of the *de minimis* concept to the definition of empty instruments of international traffic (considering no such limitation is apparent in statute or regulation) when the Supreme Court has expressly indicated that the *de minimis* concept attaches to every legal principal. See, Wisconsin Dept. of Rev. v. William Wrigley, Jr., 505 U.S. 214, 231 (1992) (“*de minimis* . . . is part of the established background of legal principles against which all enactments are adopted, and . . . which all enactments are deemed to accept.”) See also, Ingraham v. Wright, 430 U.S. 651, 674 (1977). In Alcan Aluminum Corporation v. United States, 165 F.3d 898, 902-03 (Fed. Cir. 1999), the United States Court of Appeals for the Federal Circuit reiterated how this concept had repeatedly been applied to customs law: “*de minimis* is no less firmly entrenched in the law regarding imported goods. “ Whether a particular activity is a *de minimis* deviation from a prescribed standard must, of course, be determined with reference to the purpose of the standard.” Wisconsin Dept. of Revenue, 505 U.S. at 232. Application of *de minimis* is particularly important in cases such as the one at hand, where stark, all-or-nothing operation of the statutory language would have results contrary to its underlying purposes.

Question #6:

If the conveyance containing a residual quantity of NAFTA-qualified product is being transported back and forth between NAFTA plants, is there an obligation to track and trace the amount in the conveyance?

Question #7:

Since residue may remain in the container from quite some time in the past (perhaps years), when it is to be entered in a current transaction should it be valued on the basis of the most recent valuation or from some time in the past when it was first loaded in the container?

Question #8:

What coordination has occurred within CBP HQ offices to account for the impact to the CTPAT program by virtue of this ruling modification to evaluate whether the foreign oversees customers from whom “empty” conveyances are now returned will be considered foreign suppliers within coverage of C-TPAT and what level of information will now be required from carriers to document the trip back into the U.S?

Question #9:

What is CBP's position on certain substances which are imported in a "molten" state. When the temperature drops, the material literally turns to concrete. This substance cannot be cleaned out, weighed or counted. Typically, affected tank cars are simply refilled with new molten material, which thereafter is commercially based on the material able to be pumped out at destination.

Specific issues with Class 2 Products (flammable gasses, not liquids):

1. The tank cars and trucks used to transport Class 2 type products cannot be opened for any type of inspection. These containers remain pressurized even after unloading. As a result, there are a myriad of related safety concerns associated with attempts to read the residual volume.
2. CBP needs to provide guidance on how quantities will be measured.
3. Containers taken out of service for cleaning and purging could potentially impact the ability to transport goods in a commercially acceptable manner.

Areas of Concern on Implementation

1. Looking at this from the information systems perspective, modification of current business practice is of a great concern. Many processes which are currently automated will not have to be done manually (e.g., product description, estimate product amount, HTSUS classification, and the associated value for the container and the residue it contains). Additionally, manual flagging and post-entry process has to be implemented in order to identify and report information updates to CBP as necessary. As noted above, the value issue is the most difficult to address as it most companies cannot provide cost numbers to customers for entry reporting on the invoice.
2. CBP needs to issue guidelines for declaring the value of residue prior to enforcement.
3. CBP should take into consideration that companies need to adopt new processes and conduct training at all levels, including time to develop programs to implement and train should be considered before enforcement begins. Communication and updates to the various entities is an issue. Companies are currently reviewing the data sources for each of the logistics supply chain scenarios, creating document templates to be completed manually (invoices, TSCA, etc), and preparing to provide training for the employees who will be responsible for the generation of the import documents. However, as little to no automation to generate this documentation will exist, there are no automated checks and balances in place for this process. The industry needs more time to develop systems changes needs to be considered.
4. There are also heel concerns. This new procedure will open industry to various accounting issues.
5. Industry that has never been subjected to customs activity must be given time to develop, test and implement an import compliance program (e.g., broker selection, bonds, etc.)
6. What additional equipment requirements to containers (e.g., seals) may be needed in order to comply.
7. The increased costs to industry will be significant and will ultimately be passed on to consumers. There are some initial estimates that additional documentation, third-party processing, and duty paid on the residue alone may cost \$125,000 per year for every company affected by the modified ruling – without including the cost of delays at the border. Other estimates (based on 900 truck loads per month) indicate that the cost may be closer to \$80,400 per month after including the following costs: \$3,900/month for carrier incremental equipment and labor; \$27,000 / month for demurrage (based on \$60/hr, extra 1/2 hour per load wait time at border); \$31,500 for customs entry based on \$35 per entry x 900; \$18,000 for seals based on 5 seals per load x \$2.50 = \$10/load for

materials, plus 10 minutes driver time at \$60/hr to attach = \$10 labor, totaling \$20.00 per load x 900 loads.

8. What impact would the inability to prove receipt into a facility in the U.S. have on other programs (e.g., duty drawback, taxation, Importer Self-Assessment program, etc.).
9. Industry is concerned with the magnitude of potential escalation of number of entries that CBP will be required to process (e.g., man-hours, staffing, equipment, etc).
10. Industry is concerned that CBP establish a uniform procedure for handling entries without individual port discretion.
11. What impact will there be to a carrier - for trucks, drivers are only permitted to be on the road for a limited period of time (e.g., Department of Transportation "hours of service" regulations) - will increased times at the border due to entry filing, put individual drivers at a disadvantage and force companies to hire additional drivers and obtain additional equipment?
12. What about the long standing concept of "bottom, sediment and waste" (BS&W) on tanker importations. Does the modification of this ruling suggest that BS&W will not have to be counted, weighed or otherwise and reported? We believe that such an interpretation would effectively stop oil importations into the country for the foreseeable future.

AAEI respectfully requests that CBP either issue a notice in the Federal Register or post a document to CBP's website answering the specific (or similar) questions and areas of concern listed above. In light of the significant issues listed above, we believe that it is in the sound administration of the customs laws for CBP to delay enforcement of the customs entry requirements for chemicals and other residue in containers which are currently entered as "instruments of international traffic" until CBP has issued guidance to the industry, and importers, carriers, exporters and other parties in the supply chain have an adequate period to adjust their business operations and compliance processes. Additionally, we respectfully request that AAEI be included in any stakeholders working group meeting with CBP should the Agency find it useful.

As always, we thank you for considering our thoughts and suggestions, and we look forward to working with you to facilitate safe trade.

Sincerely,

Marianne Rowden
President and CEO

cc: Michelle Forte, Co-Chair, AAEI Chemicals and Bulk Commodities Committee
Richard Salamone, Co-Chair, AAEI Chemicals and Bulk Commodities Committee