

**Departmental Advisory Committee on Commercial Operations of the Customs and Border Protection and Related Homeland Security Functions**

**February 13, 2008  
J.W. Marriott Starr Pass Resort & Spa  
Tucson, AZ  
1:00 p.m. – 5:00 p.m.  
Meeting Minutes**

**1:00: Opening Remarks**

Basham said that US Customs & Border Protection (CBP) will work with Commercial Operations Advisory Committee (COAC) on the implementation of the 10+2 requirement and that CBP will allow a phased in approach.

Bruce Leeds thanked CBP for the tour of the Nogales Port and how impressed we were with CBP's enthusiasm and professionalism.

Motion to approve Minutes from November 16, 2007 by CBP Commissioner – was approved.

**Advance Trade Data (“10+2”)** by Rich DiNucci, Director, Secure Freight Initiative, Office of Field Operations

10 to 12 comments received – focus of these has been primarily systems and how the field will be trained as well as how CBP will conduct outreach to trade. He also noted the 15 day extension to March 18<sup>th</sup> was published in the Federal Register. Rich said that CBP is ready to discuss lessons learned from the testing done under Advance Trade Data Initiative (ATDI) from a systems standpoint, and to get us some comfort. This effort will help answer key questions related to the filing itself. There is a good cross section of the trade community participating – there are no issues with linking thus far nor the data elements required. There are still issues related to the timing.

Global Trade Exchange (GTX) – multiple bids submitted on the Request for Quotations (RFQ) but CBP cannot tell us who responded. There is a team looking at the proposals and their technical capabilities.

Switched back to the topic of 10+2 as Commissioner Basham has to leave at 1:30 p.m.

Bruce Leeds said that we spent the morning working on a letter containing our primary recommendations and that comments will be submitted at a later date. The comments are in a 20 page document and we would like a special COAC conference call on March 14<sup>th</sup> to discuss the comments and vote on, adopt, and to submit it post-haste.

Curtis Spencer then read into the record COAC's 8 recommendations with respect to 10+2.

- CBP should use a phased approach for implementation and enforcement. Effective date for all filers projected to be 12 months from the effective date of the final rule.

- Removal of the proposed imposition of liquidated damages in connection with the Importer Security Filing (ISF).
- There must be no linking of the data elements in the ISF.
- There must be a timely confirmation message indicating that the security filing has been completed, filed and accepted.
- The type, length, and definition of each required data element must be clearly described in the regulations and any accompanying instructions.
- The ISF and the SAFE framework of Standards should be harmonized.
- The carrier messaging requirements must be clearly defined.
- We strongly recommend a more realistic and collaborative cost, benefit and feasibility study as COAC believes that the costs used are understated in the Notice of Proposed Rulemaking (NPRM)..

COAC Suggested that the next publication in the Federal Register be published as an Interim Final Rule.

Commissioner Basham said that CBP will consider these recommendations.

Bruce Leeds moved COAC to adopt the letter. The measure passed. Peggy and Tony abstained.

Anne Marie Highsmith said that a telephone conference of COAC is permitted with the Co-Chairs of the designated federal officials.

**First Sale Rule** – Adrienne Braumiller asked CBP to withdraw the issuance of the “proposed interpretation”. Explained that COAC will send a letter/comment requesting this withdrawal. The reasons for this request are:

COAC was disappointed that we were not consulted prior to the publication of such a significant change in policy that the Notice of the Proposed Interpretation represented. The SAFE PORT ACT required such consultation, as Section 401(c)(1) requires a 30 day notice to COAC of any policies and actions that have a significant impact on international trade and customs revenue functions.

Further, CBP’s attempt to change the law pursuant to a Notice of Proposed Interpretation is not appropriate. CBP cannot legally change the valuation statute pursuant to a Proposed Interpretation.

Additionally, the value statute is clear on its face, thus there is no interpretation by CBP necessary. The statute at 19 USC 1401a (f)(2)(B) states that merchandise imported into the U.S. may not be appraised under a system that provides for the appraisal at the higher of two alternative values.

Moreover, the Proposed Interpretation runs counter to well established precedent of cases dating over 20 years. In fact, as recently as January 3, 2008, CBP conceded to Target in the case of Target v. the United States, in which Target used the first sale price for the export of shoes purchased through a middleman and imported into the United States. In addition, per Barry O’Brien, that if the First Sale Rule is approved it would distort the price index from US Census for the past five years.

Lastly, any change in the interpretation of the statute must be introduced by legislation amending the statute, 19 USC 1401a and not through an ineffective pronouncement that suddenly CBP is adopting a different interpretation.

CBP responded that they believed we should file our objections as comments. Bruce Leeds requested that assuming CBP decides not to withdraw the Notice, that CBP extend the time to submit comments by an additional 15 days and promised to submit a request for this purpose.

Dan Baldwin, Assistant Commissioner, Office of International Trade, said there were internal discussions regarding this and they believe that there are laws justifying elimination of the first sale. Again suggests we include this in our comments.

Tim Skud, Deputy Assistant Secretary Tax, Trade and Tariff Policy, said that simply because CBP failed to consult COAC, that SAFE Port Act requirement to consult with COAC has not been breached – because consultation can occur after the publication for the proposal. Curtis disagreed for the reason that CBP knew it would be controversial. Tim Skud said that CBP considered this to be a serious administrative problem that required public airing.

Back to Rich DiNucci – Secure Freight Initiative (SFI) – drafted a report on lessons learned CBP sent an email to Operators in the Ports of Entry for their feedback. This is for the April Report – this is important for metrics.

### **Customs and Trade Partnership Against Terrorism (C-TPAT) – Todd Owen**

Status updates on 3<sup>rd</sup> party validations in China and the 3<sup>rd</sup> Party Logistics (3PL) discussions.

As of Jan 31<sup>st</sup>, CBP published some statistics for last year in a document entitled C-TPAT A YEAR In REVIEW – that identifies all CBP's accomplishments in 2007. CBP is revalidating on a 3 year basis – even though the SAFE Port Act requires these be conducted every 4 years.

2 new offices:

- Buffalo – 18 employees– focused on activities in Canada
- Houston – 25 employees– focused on activities in Mexico

15 Companies out of the 324 companies who have suppliers only in China agreed to participate in the Third Party Pilot but only 3 companies are nearing completion.

CBP is still working with China CBP to allow CBP to do the validations – still working-slow process- CBP will report out on that at next COAC meeting.

3PL – draft eligibility criteria floated out to COAC subcommittee. Only want to add entities that can help strengthen the international supply chain. COAC submitted comments on the 1<sup>st</sup> draft and CBP is working on reviewing those.

Lisa Schimmelfenning said that she wants to revisit the benefits for C-TPAT members, especially with regards to bonds.

Per Barry O'Brien, he recommends that CBP re-establishes communication with the trade on the interpretation and meaning of the SVI number. There is confusion in the importing community on how to establish an auditing policy for the inspection of factories in China. Multiple third party inspecting firms are auditing the same factory.

Dan Baldwin – put out a suggestion that COAC form a Trade Subcommittee to examine Continuous Bonds- (risk management, bond amounts, special benefits for Importer Self Assessment (ISA) Members and for CTPAT Tier 3 Members) because bonds have not been dealt with on any significant basis for 17 years.

Dan Baldwin said that bond benefits for ISA members makes sense since the purpose of the bond is to protect the revenue and as ISA members have good Internal Control Programs (ICP's) to ensure revenue is collected, bond benefits make sense. This however cannot be said to make sense as to C-TPAT Tier 3 members.

Bruce Leeds- Proposed once again that exporters be allowed to join C-TPAT. One suggestion would be that if a Company is a C-TPAT Member as an importer than the next step would be that this company can ask CBP that it be included as an Exporter. Also comports with mutual recognition.

#### **Conveyance Security Devices – Todd Owen**

There was a Request for Proposals for CSDs and CBP has received 10 proposals. Todd said that he consulted with certain COAC members to help determine whether CSD's actually provide benefits – such as high risk cargo like agricultural products; in-bond shipments. The CSDs will allow better security. CBP will do some testing with the CSDs in the future. Want to apply CSDs to high risk situations – not to all shipments.

Earl Agron indicated agreement with this limited CSD effort described by Todd Owen. However, there is a danger that a small pilot as described will lead to false impressions not representative of a large scale rollout of CSDs.

CBP's CSD requirement that the CSDs use a non proprietary architecture was also strongly supported.

Earl Agron noted 2 shortcomings of the CSD Requirements published (version 1.2 Dated December 10, 2007) related to the Request for Proposals:

1. The CSD requirements indicate that the probability of detection shall be no less than 95% per door opening while the CSD is armed. This means that if you open the right hand door 100 times, the CSD will simply not detect 5 of those openings. Something as simple as detecting a door opening should be more accurate.
2. The CSD requirements indicate that the probability of false alarm and critical failure shall be no less than 4%. Normally these two measures are separated so it is unclear why CBP combined them. In any case, this 4% reliability hurdle is too liberal to be workable on any large scale CSD deployment. For comparison

purposes, the ISO electronic Seal reliability is 100 times more reliable than the proposed CSD standard.

### **COAC OUTREACH to Agricultural Industry- Kevin Harriger**

Goal is to teach CBP about land-based plant pests and foreign animal diseases while at the same time trying not to unduly burden the trade. Formed a Joint Agency Task Force – created an action plan (U.S. Department of Agriculture (USDA) focuses on risks from pests). Held a stakeholder meeting with The USDA and several industry-based stakeholders and catalogued their concerns as well as Congressional reports to come up with the 10 points of light. It is his job to ensure that CBP's mission regarding agriculture is met nationwide across all ports. What should the agricultural role be at super ports to ensure the Agriculture Mission is met top down. Wanted to make sure had adequate resources. Some of the concerns include:

- Training is key.
- Twin Agency task – make sure that mission is met
- Metrics and Operational Support are available
- Tracking user fees dollars in the budget
- Outreach and communication is also a core goal.
- Making sure that line personnel understand the job.

Nogales is an excellent example of a pest-free zone

Geoff Powell – trying to expedite the CBP release – offered assistance.

Tom Winkowski – since the merger of the USDA into CBP – they are really now getting some momentum in protecting the US against pests and avoiding the shortages of these officers properly trained to clear these shipments.

Mike Mullen – suggested we form a committee on Agriculture to ensure key issues are addressed.

Tom Winkowski thinks we will strengthen informed and voluntary compliance with regards to Agriculture issues.

Peggy suggested a small number of COAC members attend the April Stakeholders Meeting. Mike Mullen agreed.

**International Trade Data System (ITDS)** - Mike Dolan from the U.S. Coast Guard – announced that as of January 24<sup>th</sup> the United States Coast Guard (USCG) signed a Letter of Intent (LOI) to adopt the ITDS. Brings USCG into the present – and it is the 43<sup>rd</sup> agency to participate in ITDS. The USCG has jurisdiction over ocean carriers.

3 examples of how ITDS will provide USCG a more effective operating environment:

- Hazmat periodic review of foreign entities – based on performance metrics. In other words target foreign entities with a bad track record.
- Stow Plan – often lack stow plans as will not know whether and where Hazmat cargo is stowed – this would allow them to act accordingly in the event of a fire or other concern.

- Wouldn't it be nice if the USCG could know which containers USCG placed on hold versus the containers held by Other Government Agency (OGA)?

Have a lot of issues with integration of information systems so there are some big hurdles to address however, they are moving in the right direction.

Barry O'Brien – commented that CBP should make sure that future money required to develop Automate Commercial Environment (ACE) should not be cut – because it would also be important to ensure that ITDS moves along quickly. In other words, the sooner that ACE is funded and developed, the sooner ITDS will be operational.

Tim Skud – said that ITDS issues were discussed at TSN, He said that the Consumer Product Safety Commission (CPSC) is ramping up a new project and ITDS will be the backbone of their approach.

Tim Skud – in response to a question from Sam Banks said he would check with Office of Management Budget (OMB) to find out if the agency ITDS milestones "scorecard" is a public document.

Also discussed the World Customs Organization (WCO) Data Implementation Model – international reporting codes and formats of data and will be globally adopted and presented this to TSN.

Jevon Jamison asked about GTX and how it will fit into the operating environment.

Chris Koch suggested if the bidders on the GTX project cannot meet the RFQ criteria that CBP use those dollars on ACE instead.

### **International Trade Issues/Updates – Dan Baldwin**

**Dan Baldwin – with regards to Conditional Release on Apparel**, Dan said CBP is trying to add typical scenarios on how the punitive aspect could impact the trade.

Remote Location Filing (RLF)– there is an NRPM out – CBP received a number of good comments on this and how we can expand RLF until ACE is fully functional. The most controversial issue is the elimination of paired ports.

Dan strongly requested we submit comments.

Regarding the Office of International Trade (OIT), Adrienne Braumiller presented Brad Shorser's update.

The subcommittee has been divided into 3 separate workgroups:

1. The Importer Self Assessment (ISA) participant detention policy for wearing apparel;
2. Increasing paperless entry filing and expanding eligibility for Remote Location Filing (RLF) to other types of entries; and
3. Import safety