Legislative and Government Affairs Position Paper of the

Customs Brokers & Forwarders Association of Northern California (CBFANC)

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Customs Brokers & Forwarders Association of Northern California (CBFANC)
PCC Mission to Washington 2013

Mission Statement:

CBFANC represents hundreds of companies involved in the lawful and secure movement of cargo through ports across Northern California, including the seaports of Oakland and San Francisco, airports in San Francisco, Oakland, San Jose, Sacramento and a wide range of other facilities in the region. Customs brokers clear cargo and help enforce regulations of the federal government and approximately 44 governmental agencies such as USDA, FDA, Fish & Wildlife, FCC, and many others. We facilitate communication between all parties involved such as Customs & Border Protection (CBP), ports, truckers, importers, cargo handlers, carriers, and numerous other companies and agencies. As freight forwarders we provide a service used by companies that deal in international or multi-national import and export. While the freight forwarder doesn't actually move the freight itself, it acts as an agent between the importer or exporter and various transportation services.

We are part of the solution. As Congress addresses issues critical to our nation's security and the efficient flow of legitimate commerce, which is so vital to our economic prosperity, CBFANC comes to Washington, D.C. every year to share with you our bird's-eye view of the multifaceted logistics industry.

Customs brokers and freight forwarders have a stake in the effective enforcement of our nation's laws, which help promote safety, security and better economic conditions for us all. Our laws help prevent terrorist attacks, keep the borders secure, eliminate tainted goods from the nation's product and food supply, and keep out pests which could harm California's agricultural industry.

Trade creates jobs. We welcome attempts by Congress to improve our economic situation by promoting the efficient movement of legitimate trade.

We look forward to meeting with you to share our concerns regarding continued challenges facing our industry. We hope you will support jobs and economic expansion by embracing trade.

CUSTOMS RE-AUTHORIZATION

House Ways & Means and Senate Finance committees have been working on introducing legislation to re-authorize and reorganize Customs & Border Protection (CBP) for several years. H.R.6642 came out at the end of the 112th Congress, and as such invites comment.

Section 222 needs to be changed in two ways. This section requires customs brokers to obtain unspecified information which proves the identity of their clients before transacting customs business on an importer's behalf. CBFANC agrees the government needs accurate information concerning who is importing into the United States. However, without a hard list of specific items to be obtained from the importer, some brokers will shirk this important responsibility and offer lower fees. Good brokers need to be rewarded, not punished, for doing their fair share and helping ensure the government is protected. Further, without a hard list, penalties can be based on subjective criteria and punishment can be non-uniform or arbitrary. This is unfair. The playing field needs to be level, and the requirements cannot be subjective.

Section 222 also needs to be changed in regards to penalties. A failure to obtain the unspecified required information can result in revocation and suspension of a broker's individual license or permit to do business in a port or even at the national level. This is beyond draconian. It provides no due process. This is unconstitutional and needs to be wholly revoked.

Section 224 concerns non-resident importers, and needs two changes. Non-resident importers will be required to obtain a resident agent who will be liable for any unpaid duties or penalties. That is what a bond is for. If the government has a problem with bonds, then it should address that matter specifically. Making a resident agent liable for unpaid fees will severely infringe on the ability of people to import into the United States and this will set up a backlash of retaliation against US exporters. Further, this requirement is effective upon passage of the bill into law. Our trading partners will need a minimum of six months to understand, and arrange to comply with, any new requirements.

Section 217 requires personnel in Customs & Border Protection to receive educational training toward fulfillment of their important mission. We have been saying this for years. This is a great idea, but should not be limited to classification and appraisement. Training should be broad in nature. CBP especially needs training on outbound procedures for other agencies' regulations.

CBFANC requests the inclusion of a new section in any new bill. The Importer Security Filing (**ISF**), which was mandated by the SAFE Ports Act of 2006, must be "customs business." ISF is advance data filed 24 hours before cargo is laden on board the mother vessel destined to the United States. This data allows CBP to do targeting and this information is shared currently with other federal agencies as well. As the name implies, the ISF is for *security* purposes. However, currently anyone in the world can file this electronic data provided that they have an approved electronic connection to CBP. It is

incomprehensible that non-licensed persons, possibly in dangerous countries, are allowed to provide this important security data. By making the ISF "customs business," only a licensed customs broker *in the United States* will be able to provide this data and help keep our nation secure from terrorist threats.

Section 102 makes the Deputy Commissioner of Customs & Border Protection a position which is appointed by the President with the approval and consent of the Senate. This is a good idea as CBP requires substantive oversight from the Administration, not merely the Congressional committees.

Section 103 requires the Administration to provide separately for the budget of Customs & Border Protection. This is also a good idea as it will help promote CBP's Trade Transformation initiative and especially plan technological advancement for ACE.

Section 203 doubles the budget for the new Automated Commercial Environment, or ACE. We would like to see ACE finally come to some kind of fruition after 28 years and over three billion taxpayer dollars spent. We realize this must go through Appropriations. But we support a budget increase of any kind for ACE.

CPB DUE PROCESS NPRM

On February 26, 2013 CBP issued an NPRM[1] to change its regulations to provide due process to brokers and importers in cases where CBP revokes certain property interests. This NPRM is a direct result of CBP's loss before the CIT in the Lizarraga case[2]. While we applaud CBP for providing explicit due process in its regulations, significant changes are needed. In the event that CBP fails to make the changes we suggest below, Congress will have to intervene.

In 2009 CBP revoked "immediately and indefinitely" the **filer code** of Guillermo Lizarraga, a customs broker in San Diego, citing purported misuse. A filer code is a unique 3-digit code which allows a broker to file a customs entry electronically. As 97% of all customs transactions are electronic, revoking a filer code is tantamount to putting a broker out of business. CBP issued the letter without warning and made no attempt to discuss alleged problems so as to remedy them. Lizarraga won an injunction at the CIT. Finally, more than two years later, CIT decided that CBP's action was without merit as CBP was wholly unable to prove its allegations of misuse of the filer code. The judge in the case admonished CBP that it would have to *at a minimum* provide due process to accord with the Administrative Procedure Act (APA). Hence this NPRM.

Unfortunately, CBP fails in its NPRM to define what constitutes "misuse" of a filer code. Further, CBP provides only ten calendar days to reply to an allegation of misuse. This is unreasonable for any size of business. Again, we are talking about putting a broker out of business. If the revocation letter is mailed on a Friday, for instance, and Monday is a holiday, the broker might then have only three more calendar days to respond, assuming the notice is not lost in the mail or indeed mislabeled. For brokers with branch offices, a broker will be wholly unable to investigate and respond cogently. The court system then would be the only recourse. This is an unreasonable burden for many brokers.

CBP must define what may constitute "misuse" of a filer code in its regulations. CBP also needs to provide no less than 30 calendar days to respond to the allegation.

CBP also has ignored one provision which the judge in the Lizarraga case stipulated: CBP must give the broker "opportunity to demonstrate or achieve compliance with all lawful requirements." In fact, CBP already has on its website a Broker Management Handbook[3] which details how this opportunity to comply will be given; but this process is not yet codified in regulation.

CBP also proposes to terminate a broker's ability to **file entries remotely**. Currently, a broker can file an entry electronically in a port where the broker has no physical office or permit; but a national permit is required. CBP is proposing to revoke this privilege but

[1] https://www.federalregister.gov/articles/2013/02/26/2013-04320/establishment-of-due-process-procedures-on-license-like-processes
[2] http://www.cit.uscourts.gov/SlipOpinions/Slip_op10/10-113.pdf
[3] http://www.cbp.gov/xp/cgov/trade/trade_programs/broker/

does not specify in a concrete way the grounds for doing so. CBP's language here is extremely broad: "if the port director finds *a basis* for the discontinuance of RLF privileges," in cases where the filer

(1) No longer meets the eligibility criteria set forth in 143.43,
(2) Fails to file all additional information required by CBP pursuant to 143.45; *or*
(3) *Fails to adhere to all applicable laws and regulations*.

CBFANC agrees brokers must respect and comply with all applicable laws and regulations. However, remedy for compliance must be through administration actions to maintain compliance, not by immediately revoking electronic privileges. As currently written, this NPRM is draconian.

CBP also proposes to revoke an importer's **immediate delivery privileges** "if the port director finds that there is *a basis*" for doing so. CBP leaves such a basis wholly undefined. CBFANC feels that CBP does not have this authority; only Congress can mandate such a revocation. Before the Customs Modernization Act of 1993 (The Mod Act)[4], importers were required to submit all duties and fees up front. Customs also had the responsibility to ensure all customs entries complied with all applicable laws. The Mod Act transferred responsibility from the then Customs Service to importers under the new concept of "reasonable care." Customs then took up the responsibility to provide sufficient guidance to importers to maintain compliance. The trade off was that importers could then use immediate delivery privileges to tender duties and fees ten days after the conditional release of cargo. Here, CBP abrogates its constitutionally mandated responsibility and also provides no basis for doing so. This part of the NPRM needs to be wholly revoked.

[4] http://en.wikipedia.org/wiki/Customs_Modernization_Act

HITACHI

Congress must act to fix the protest statutes, specifically 19 U.S.C. § 1515(a). This is a matter of paramount importance to our industry. An importer must have adequate recourse to obtain a duty refund from Customs without filing a lawsuit. This also affects the business of customs brokers directly.

Hitachi Home Electronics, an importer, recently lost a precedent-setting case at the Court of International Trade (CIT)[5]. Hitachi appealed the ruling to the Court of Appeals, and lost again[6]. (Please see the dissenting opinion[7]). Months ago, the Supreme Court declined to take up the case. Now only Congress can set things right.

Before the CIT's precedential ruling in Hitachi, an importer might have to wait for two years for a refund of overpaid duties from Customs. Now, the courts have set the astonishing precedent that Customs never has to process a refund request at all, not even after several years. An importer's only recourse is to the court system. This is a miscarriage of justice and very bad public policy.

This problem will grow larger in an era of budget cuts. Already, the Department of Commerce has cited this ruling to justify inaction and won a court case[8]. We are afraid frankly that parts of the federal government will simply stop doing work that they don't feel they want to. This is an affront to the American taxpayer.

The current statutes governing protests were revised in 1970 to give Customs more time to make a determination, in fact up to two years. Since 1930, Customs had had only 90 days to make a determination, affirmative or negative. As globalization started getting underway, and verification of country of origin grew harder to pin down, 90 days was not enough time in a small but significant amount of cases. About 3,000 claims per year would go to court at the end of 90 days, and this situation did not please anyone. Congress granted Customs an 800% increase in time to decide a protest. Conversely, importers were granted an escape clause if two years would be too long to wait. An importer can ask for *accelerated protest*, and in practice these claims are all denied; but this is the method for the importer to file a lawsuit *should it choose to do so*. Importers and brokers should not be forced to sue due to the inaction of Customs.

The problem currently facing importers and brokers after the Hitachi ruling is that a refund will have to be at least $300,000 or there is no benefit seeking redress in the courts. That is an unacceptable bar. Customs needs to do its congressionally-mandated job and not just the work it wants to. **Please amend 19 U.S.C. § 1515(a) to say that *a protest is deemed allowed at the end of two years unless expressly denied by Customs.***

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[5] http://www.cit.uscourts.gov/SlipOpinions/Slip_op10/10-46.pdf
[6] http://www.cafc.uscourts.gov/images/stories/opinions-orders/10-1345.pdf
[7] http://www.cafc.uscourts.gov/images/stories/opinions-orders/10-1345%20order.pdf
[8] http://www.cit.uscourts.gov/SlipOpinions/Slip_op12/12-150.pdf