



September 19, 2008

VIA EXPRESS MAIL

U.S. Customs and Border Protection
Office of International Trade
Regulations and Rulings
Attention: Trade and Commercial Regulations branch
1300 Pennsylvania Avenue, NW
Mint Annex
Washington, DC 20229

RE: CBP General Notice 19 CFR Part 177
 Customs Bulletin and Decisions, Vol. 49, No. 35, August 20, 2008
 Proposed Modification of Ruling Letter Allowing Containers Containing
 Residual Chemicals to be Entered as Empty Containers.

To Whom it May Concern:

The American Trucking Associations (ATA) is pleased to offer the following comments on the August 20, 2008, General Notice, published in the Customs Bulletin and Decisions, Vol. 49, No. 35, referenced above. ATA believes there are a number of issues in the referenced Proposed Modification that are unclear and raise a number of questions that must be addressed before we can fully understand Customs and Border Protection's (CBP) intent and comment meaningfully. Our questions on these issues are discussed below.

Background

As the national trade association of the trucking industry, ATA, based at 950 North Glebe Road, Arlington, VA 22203, is a federation of motor carriers, state trucking associations, and national trucking conferences that promotes and protects the interests of the trucking industry. Directly, and through its affiliated organizations, ATA represents more than 37,000 motor carriers of every size, type, and class in the U.S., Canada and Mexico.

The trucking industry is an undeniably important sector of the U.S. economy, employing 8.7 million people throughout the economy in jobs related to the industry in 2005. In addition, ATA represents an industry overwhelmingly dominated by small businesses.

The U.S. Department of Transportation (DOT) records show more than 564,000 motor carriers registered in 2007. Of this number, 89.2% of the companies operate 6 or fewer trucks; 96.7 operate 20 or fewer trucks; and only 3.3% operate more than 20 trucks. According to Small Business Administration, the size standard for a small business in the trucking industry is \$23.5 million in annual receipts (see 13 CFR §121.201); ATA estimates that more than 95% of U.S. motor carriers would be considered small businesses under this SBA definition.

Despite the fact that trucking is dominated by small businesses, it is a powerhouse in the U.S. economy, reporting \$645.6 billion in gross freight revenues, which was 83.8% of the nation's freight bill in 2006; carrying 10.7 billion tons of freight, or 69% of total domestic tonnage; and moving 64.4% of the value of trade between the U.S. and Canada in 2006, and 80.7% of the value of trade between the U.S. and Mexico.¹

Issues

There are a number of questions and issues raised by CBP's proposal, which we will address below. These include:

- What is the purpose and scope of this Proposed Modification?
- Are cargo tanks (as defined in Title 49) included?
- Has CBP considered the cost of the change to carriers and shippers?
- Why would officers ever need to open tank trucks for inspection?
- Why could not the Automated Commercial Environment (ACE) truck e-manifest be better utilized?
- How accurate do the measurements have to be?
- What is the purpose of modifying the quantities?
- Do CBP officers receive training in handling hazmat and chemicals?

CBP proposes to change an original letter ruling that allowed chemical residue in steel containers to re-enter the U.S. as an "instrument of international traffic," (IITs) – the residue being a very small part of the amount of a full container because it is virtually impossible to completely empty the containers. As an instrument of international traffic, the container and its residue have been exempt from manifesting and entry requirements.

After years of treating containers being returned to the United States with a small percentage of chemical residue as instruments of international traffic, CBP now indicates its intention to change this policy on the grounds that it is inconsistent with its treatment of similar commodities, such as petroleum slops. The agency proposes to change the ruling to be consistent with the agency's treatment of "similar commodities." CBP is particularly concerned that its officers could be exposed to chemicals (regulated under the Toxic Substances Control Act) if they mistakenly believe that the containers are empty.

¹ American Trucking Trends, 2007-2008. American Trucking Associations, Inc., Economic and Statistics Group.

As described in more detail below, the regulations governing the transportation of hazardous materials, including containers holding chemical residues adequately addresses this concern and eviscerates the rationale underlying the proposed policy change.

If finalized, the proposed modification would require the importer to estimate the amount of the residual chemical and provide this information to the carrier for inclusion on the electronic manifest transmission to CBP. Additionally, the estimated quantity of residue is to be used at the time of entry and subsequently, if a more precise quantity is obtained after arrival in the U.S., the entry would need to be amended.

Discussion

ATA understands the need for safety at the border to protect officers from dangerous substances. However, the issue of CBP officer exposure is erroneous, because hazardous materials (even those contained in a bulk container as residue) are subject to the U.S. DOT's hazardous materials shipping paper requirements,² container marking requirements³ and labeling requirements,⁴ and placarding requirements,⁵ which together constitute the hazard communication provisions of the hazardous materials regulations.

Furthermore, CBP officers should be trained on these globally accepted hazard communications requirements to minimize any potential exposure. ATA would like more information on CBP officer training on the hazardous materials provisions applicable to the transportation of these vital commodities.

ATA believes that there is no condition under which a law enforcement or customs official should open a cargo tank to inspect the interior. Many of these tanks carry nitrogen blankets and there is no regulatory requirement that the presence of nitrogen be indicated on the cargo tank or shipping paper. Should a person simply open a manhole cover, manway, or valves, without first testing for the presence of hazardous materials injury is almost assured. Likewise, many of the loads carried could cause harm if the officer came into contact with the liquid residue or air space. For these reasons, the hazard communications requirements, outlined above, are mandated by regulation in both Canada and the United States.

The Commercial Vehicle Safety Alliance (CVSA)⁶, which inspects on-the-road safety of trucks under the auspices of the U.S. DOT Federal Motor Carrier Safety Administration teaches its inspectors to never open a cargo tank. If there is suspicion of illegal contraband and/or of people being smuggled, the package is moved to a safe area and inspected by individuals that have received special training in this area.

² See 49 CFR Part 172, Subpart C (§§ 172.200 – 172.205).

³ See 49 CFR Part 172, Subpart D (§§ 172.300 – 172.328).

⁴ See 49 CFR Part 172, Subpart E (§§ 172.400 – 172.450).

⁵ See 49 CFR Part 172, Subpart F (§§ 172.500 – 172.556).

⁶ CVSA is an international not-for-profit organization comprised of local, state, provincial, territorial and federal motor carrier safety officials and industry representatives from the United States, Canada, and Mexico. Its mission is to promote commercial motor vehicle safety and security by providing leadership to enforcement, industry and policy makers. CVSA member jurisdictions are represented by various Departments of Transportation, Public Utility and Service Commissions, State Police, Highway Patrols and Ministries of Transport

Having demonstrated that the U.S. and Canadian hazardous materials transportation regulations contain hazard communication provisions designed to protect individuals such as CBP officials, ATA proposes that CBP continue to allow product residue to move into the US manifested as an IIT. Changing the status of the product residue to a commodity requiring manifesting and customs clearance would be onerous on the carrier, the shipper, and to customs brokers and would not provide any additional level of protection beyond the existing hazard communications requirements.

The proposed change would significantly delay the return transit of the tractor, trailer and driver to the U.S. The motor carrier's customs paperwork for the return of the residue, as proposed, could not begin to be processed until unloading at the receiver's place of business is completed. After unloading and indentifying that residue exists, the carrier would have to determine the value and amount of the residue remaining, which could be as small as 18 gallons (.3% of a 6000 gallon trailer, assuming this is the reportable threshold), and then have a customs broker complete the entry for CBP in order for the truck to return to the US. The driver will likely be at the crossing point awaiting documentation, adding to the delays often experienced now without this added requirement.

In addition, if CBP's proposal is finalized, carriers would face the additional burden of validating the estimated quantity of residue with the actual quantity of residue when it is removed from the trailer, usually at a cleaning facility. Under the proposal, any discrepancy between reported and actual quantities would then require a report or change in the original CBP documentation.

Estimating the amount of "heel" remaining in a tank after unloading is an art at best. Eighteen gallons left in a 6,000 gallon trailer results in less than one inch of "residue." On completion of unloading, the driver or customer's employee would have to evaluate the quantity of residue. If the product is at all viscous, a significant amount can cling to the sides of the trailer and slide to the bottom during transit. That 18 gallon heel identified may become 25 gallons by the time the truck reaches the terminal or cleaning facility. What will CBP do with the knowledge that 25 gallons was received rather than the 18 gallons reported? What is the importance of this information to CBP? In most cases, this product is treated as waste and disposed of consistent with Environmental Protection Agency (EPA) regulations. In some cases, the product remains in the tank and the shipper refills the tank with the same or similar product. In this case, there is no product disposal and no means to accurately determine the amount of the chemical residue.

Depending on the product, there may be health and safety issues associated with attempts to measure residue left in a container. We know that if the tank truck or container comes back into the U.S. with residue, it must comply with the hazardous materials regulations, including the hazard communication provisions, described above. If the container is cleaned somewhere in Mexico or Canada, the regulations require the labels and other hazard communication devices to be removed. Any changes of this potential magnitude

should be part of a rulemaking undertaken in consultation with the DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA).

It appears CBP is attempting to implement regulations for residue to be consistent with regulations for hazardous waste. This will only impede the flow of international freight and do nothing to serve the shipping or regulatory communities.

Operational Impacts and Costs

Currently, IIT's move with relative ease into the US based on information supplied in the carrier's electronic manifest (ACE). The manifest may include information on the presence of residue; although this is not required. The proposed modification, however, would require a customs broker to classify, value and to submit an entry to CBP, which adds time and cost to the process and eliminates many of the efficiency benefits gained by the use of the electronic manifest or the participation in the Free and Secure Trade (FAST) program.

Every bit and byte transmitted by a carrier adds to the cost of doing cross-border business electronically. ACE transmissions have a cost attached to them, and every new requirement for a new data element or more information has a transaction cost as well as a very large computer software reprogramming expense. In addition, there is a cost associated with a broker filing an entry through the Automated Broker Interface (ABI) system. Generally, this cost is accrued to the broker, but it is still a cost.

The general notice makes no attempt to quantify what these costs and operational impacts might be on an industry-wide basis. They are far too important to simply ignore.

Instruments of international traffic are currently manifested by the carrier, and there is no requirement to submit data to a broker for classification, valuation, and entry. Costs would also be incurred to deal with the inevitable discrepancy reports.

Carriers are also concerned that the requirement for an entry will result in changes to operational practices to accommodate the time brokers will need to prepare the submission. This would typically take three to four hours and potentially delay the movement of the truck across the border – and again, there is a price tag associated with these delays for drivers who lose pay and companies whose equipment is tied up.

Better Utilization of ACE/ITDS

ATA questions the need for more formal electronic manifesting of residues as "U.S. Goods Returned" and the proposal to discontinue the use of "IITs" on the electronic manifest. We believe the need for this information could be accomplished in a much simpler manner, utilizing enhancements to the ACE IIT data element(s).

However, ATA wishes to point out that it may be possible to annotate the manifest to indicate the presence of residues, and thereby provide CBP with the information it needs.

We see no valid health and safety reason to have these residues measured and classified, and an entry prepared.

Need and Benefit of the Change

It is unclear to ATA what benefit(s) would derive to the U.S. if residues were classified, assigned a value, and subject to the same entry procedures as imported goods. ATA can see no benefit from a tariff or tax standpoint because the residues will be “U.S. goods returned.” We believe any health and safety concerns are already addressed by the DOT hazardous materials regulations and may simply be addressed through CBP officer training.

Conclusion

ATA reiterates that the existing hazard communications requirements set forth in the DOT hazardous materials transportation regulations provide adequate protection to CBP officers who may encounter these materials and that the proposed modification would not provide CBP officials with any additional protection not currently available through the existing hazard communications regulatory requirements. CBP’s Proposed Modification is a significant regulatory action that must be handled by a rulemaking rather than a revision of an interpretation through a letter. Any rulemaking or action by CBP regarding chemical residue or hazardous materials should be done in conjunction with PHMSA. In addition, we have raised a number of very important concerns concerning the scope of, the need for, and the operational issues surrounding this proposal.

Thank you for allowing ATA to comment on this important issue. We look forward to speaking further with you about it.

Sincerely,



Margaret Irwin
Director
Customs, Immigration and Cross-Border Operations