var javascript_version = 1.0;

Bill C-43 Incorporates To Be Determined Advance Data Element Requirements

March 31, 2008

On February 15, 2008, Bill C-43 "*An Act to amend the Customs Act*" was tabled for first reading in Canada's House of Commons. Most of the proposed provisions in Bill C-43 relate to housekeeping matters to allow Canada Border Services Agency ("CBSA") officers to stop and question a person who is in and has not left a customs controlled area (e.g. the baggage area of airports). However, the following apparently innocuous provision is in the middle of proposed Bill C-43, and to a trained customs eye, creates a level of uncertainty in critically important areas:

"6. The Act is amended by adding the following after section 12:

The Governor in Council may make regulations:

- *(a) requiring persons to give, before a conveyance's arrival in Canada, information about the conveyance and the persons and goods on board;*
- *(b)* ***respecting the information that must be given****;*
- *(c) prescribing the persons or classes of persons who must give the information;*
- *(d) prescribing the circumstances in which the information must be given; and*
- *(e) respecting the time within which and the manner in which the information must be given." (Emphasis added*)

The "information that must be given" is the information that must be completed on customs import documentation at the point in time that the advance commercial information must be provided prior to the shipment of the goods to Canada. The advance commercial information is important to ensure that the CBSA and the joint Canada-United States enforcement teams have sufficient information prior to the arrival of the goods to assess risk posed by the shipment and to make a determination regarding the inspection of the shipment. Given the fact that the identification of high risk shipments is an important element of border security, it can be expected that the administrative monetary penalty system will be amended to include, or will encompass penalties (possibly on an escalating basis), for failure to provide accurate advance data.

The proposed provision in Bill C-43 looks very

Practice Areas

International Trade
- Customs Law
- International Trade Law
- International Trade Policy

Author(s)

Cyndee Todgham Cherniak
Counsel

Office

Toronto

similar to the starting line in Canada of the advance data element debate in the United States (also known as the 10+2 debate). Importers and exporters and businesses involved in the cross-border trade in goods (including customs practitioners and customs brokers) should be concerned about potential new Canadian measures that will both thicken the border and result in increased compliance costs. Further, Canada is a sovereign nation and there is no reason to believe that Canada will harmonize its data element requirements with the proposed rules in the United States.

It is likely Bill C-43 will pass through the Canadian legislative process without much debate or fanfare. After Bill C-43 completes the Canadian legislative process and becomes law, the regulations establishing the advance data element requirements may be passed quickly. The Canadian Cabinet (with the advice and guidance of the CBSA and other governmental bureaucrats) pass regulations and do not require the legislative approval of the House of Commons.

The problem with the development of the advance data element requirements by regulation is that exporters to Canada and importers into Canada may have to accept advance data element requirements without a consultation process (as Canadians are rarely consulted on the contents of regulations) and the regulations may be changed at any time to increase or alter the information that must be provided. While regulations are often stated to come into effect on a future date so that the affected parties may adjust their business practices (e.g. install computer software) to comply with the new requirements, such a delay or the adequacy of the time to adjust is not guaranteed. Consequently, if Canadian businesses wish to consult with the Government of Canada regarding the advance data element requirements, they would need to be proactive, show the initiative, and request that the bureaucrats working on this matter engage in consultations. Since there is no way of knowing when the regulations will be published and when the proposed start date will be, time is of the essence to start communications on this subject.

The potential for a quick passage of the regulations without prior consultation may present difficulties for importers of goods into Canada who are responsible for communicating the information to the CBSA on customs import documentation. There is a corresponding difficulty for exporters who often are the party in control of the information and bear the contractual responsibility for providing the information to the Canadian import of record. Under the Canadian system there is a disconnect because the person who is liable to pay penalties to the CBSA is the importer of record and the person who often controls the information and makes the mistakes is a foreign exporter. As a result, the Canadian importer of record must:

(i) become aware of the new advance data element requirements;

(ii) adjust its own compliance regime (and possibly acquire new computer software which needs to be

developed);

(iii) train staff to ensure that compliance may occur at the date the regulations come into effect;

(iv) teach its exporters about the new advance data element requirements and possibly provide exporters with new computer software so that the information may be exchanged;

(v) ensure that its customs brokers and other service providers are aware of the new advance data element requirements and have upgraded their procedures to process the information accurately;

(vi) undertake verifications that the exporters and service providers are properly communicating information; and

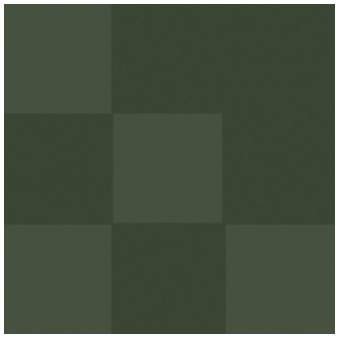
(vii) conduct its own compliance audits before the CBSA conducts an audit.

Unfortunately for the importer of record, it may be very difficult to perform many of these required tasks to maintain its own high compliance standards and control the financial risk associated with non-compliance.

It is not possible to provide any information at this time so that businesses may control their own risk. At the present time, no information has been published regarding Canada's envisioned advance data element requirements. The best starting place is the proposed "10+2" rule of the United States even though Canada may decide to pass regulations requiring different information. It is a good assumption that there will be some overlap in the Canadian and U.S. rules.

The United States Proposed Rule Making (NPRM) regarding 10 + 2 was published in the Federal Register on January 2, 2008 and requires carriers to provide two data elements: (1) vessel stow plans; and (2) container status messages. The proposed 10 elements of the U.S. "10+2 rule" to be required from importers are:

1) Manufacturer (or supplier) name and address – the name and address to report are of the entity that last manufactures, assembles, produces, or grows the commodity; if that is not known and cannot be determined through due diligence, or may not apply, then report the name and address of the supplier of the finished goods in the country from which the goods are leaving.



2) Seller name and address – of the last known entity by which the goods are sold or agreed to be sold; if no sale, then the name and address of the owner is to be reported.

3) Buyer name and address – the last known entity to which the goods are sold or agreed to be sold: again if there is no sale, report the owner of the goods.

4) Ship to name and address – report the first

deliver-to party scheduled to physically receive the goods after release from Customs' custody.

5) Container stuffing location – name and address of the physical location(s) where the goods were stuffed; for break bulk goods it is the physical location(s) where the goods were made shipment ready.

6) Consolidator (stuffer) name and address – of the party who stuffed the container or arranged for its stuffing; for break bulk goods, it is again the shipment ready party.

7) Importer IRS number – including the Foreign Trade Zone applicant ID number.

8) Consignee IRS number.

9) Country of origin - to include the country of manufacture, production, or growth, based upon the import laws, rules and regulations of the U.S.

10) Commodity HTS number – required to the 6 digit level, but allowed to be reported to the 10 digit level.

The comment period for Proposed Rule Making (NPRM) regarding 10 + 2 closed March 18, 2008. The comments filed by interested parties should highlight some of the problems that Canada will also face in developing its advance data element requirements.

1) The 10+2 rules do not provide adequate information concerning:

- (i) the technical requirements and exactly how this program is going to work;
- (ii) who is responsible for the provision of the information;
- (iii) how will confidentiality be maintained;
- (iv) when the advance data element requirements will be implemented;
- (v) whether there will be a phase-in period; and
- (vi) what are the data formatting requirements for each element.

2) The cost-benefit study U.S. Customs and Border Patrol relies upon underestimates both the government and private sector costs of implementation and fails to satisfy the concern that ACS will not crash given the extensive amount of data bytes which will need to be sent to comply with the Importer Security Filing as proposed.

3) U.S. Customs and Border Patrol have underestimated the disruption this proposal would cause to international trade, including the possibility of retaliation by our trading partners. There is also no harmonization of requirements or definitions with the World Customs Organization Framework of Standards to Secure and Facilitate Global Trade.

4) Linking of the manufacturer identity with the origin and tariff number of the goods shipped is not well thought out and should be dealt with

differently.

5) How does the proposal for liquidated damages satisfy the national security reasons for this proposal?

6) U.S. Customs and Border Patrol have failed to make the case for how this proposal enhances national security and if it does, why this is the proper means by which to accomplish the stated end.

Canadian businesses must now ask the same questions and more. While the need for security is important, the layers of security are putting increasing costs on businesses at a time when manufacturers have to adjust to the value of the Canadian dollar and a slow down in the economy. Now is the time for a discussion about how any new security measures will affect the competitiveness of manufacturing and importing businesses and what can be done to minimize any negative effects.

Cyndee Todgham Cherniak is counsel in the International Trade Group in Toronto. She is also an adjunct professor at CaseWestern ReserveUniversitySchool of Law in Cleveland, Ohio teaching a course on the North American Free Trade Agreement (NAFTA) and bilateral trading arrangements. Contact her directly at **416 307-4168** *or cyndee@langmichener.ca.*