Comments of the

World Shipping Council

Submitted to

U.S. Customs and Border Protection
Department of Homeland Security

In the matter of

Notice of Proposed Rulemaking

Definition of Importer Security Filing Importer

Docket Number:
USCBP-2016-0040

September 6, 2016
The World Shipping Council (WSC) is a non-profit trade association that represents twenty-five liner shipping\(^1\) companies that carry over 90% of U.S. international containerized trade. WSC’s member companies operate more than 5,000 ocean-going liner vessels -- mostly containerships -- of which approximately 1,500 vessels make more than 27,000 calls at ports in the United States each year.

WSC respectfully files these comments with U.S. Customs and Border Protection (CBP) in response to the notice of proposed rulemaking (NPRM) published on July 6, 2016 (81 Fed. Reg. 43961), which proposes to expand the definition of importer security filing (ISF) importer to clarify which party is responsible for the ISF filing for certain types of shipments bound for the United States.

1. **FROB Cargo**

The final sentence of the proposed revised ISF importer definition addresses who is responsible for the ISF-5 filing for FROB shipments. It states: “For FROB cargo, the ISF Importer will be the carrier or the non-vessel operating common carrier.” This proposed change does not provide sufficient clarity with respect to *which* carrier is responsible for the ISF-5 filing in *which* instance. Leaving the obligation for the ISF-5 with the “carrier or the NVOCC” -- without indicating when the carrier is responsible for the ISF-5 and when the NVOCC is responsible for the ISF-5 – does not improve the precision of the regulation with respect to which carrier is the responsible party for the FROB ISF-5 filing when an NVOCC is involved in the shipment.

This ambiguity could be eliminated by amending the ISF Importer definition to indicate that the carrier is responsible for filing the FROB ISF-5 except when a shipment is being carried by a NVOCC, in which case the NVOCC would be the ISF importer responsible for submitting the ISF-5. This change would assign responsibility for the ISF-5 filing consistent with current business practice.

**Recommendation:** We recommend that the underlined text below be added at the end of the last sentence of the ISF importer definition at § 149.1(a) to clarify when the carrier and when the NVOCC is responsible for the ISF-5 filing:

“For FROB cargo, the ISF Importer will be the carrier or the non-vessel operating common carrier, meaning the carrier is responsible for submitting the information required under § 149.3(b) of this part, except when a shipment is being carried by a non-vessel operating common carrier, in which case the non-vessel operating common carrier is the ISF importer and is responsible for submitting the information required under § 149.3(b) of this part.”

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\(^1\) Liner vessels operate on fixed schedules among pre-determined ports. WSC’s member lines operate containerships, roll-on/roll-off, and car carrier vessels. A list of the Council’s members may be found at [www.worldshipping.org](http://www.worldshipping.org).
2. Vessel Diversions Causing Foreign-to-Foreign Shipments to Become U.S. FROB Cargo

The preamble of the NPRM (page 43692, third column, final paragraph) discusses the situation in which foreign-to-foreign NVOCC-controlled cargo could become U.S. FROB cargo if the vessel is diverted to the United States:

“In some circumstances, the vessel operating carrier would be the party that causes the goods to arrive in the United States despite the NVOCC having booked the shipment. An example would be when an NVOCC books a shipment not initially scheduled to arrive in the United States, but the vessel is diverted to the United States by a vessel operating carrier. If the cargo remains on board the vessel at the U.S. port and is not discharged until it arrives at the originally scheduled foreign destination port, this would create FROB cargo. In this situation, the vessel operating carrier would be the party that caused the cargo to arrive in the United States and thus the party responsible for filing the ISF.”

This preamble language is confusing for two reasons. First, foreign-to-foreign vessels are diverted to the United States in cases of extreme weather, machinery failure or other unforeseen circumstances and FROB ISF filings, if required for diverted vessels, could never be filed prior to loading as required by the current regulations. Second, the preamble suggests that the vessel operating carrier should be responsible for filing ISF-5 information at the house bill of lading level in situations in which foreign-to-foreign NVOCC-controlled cargo is diverted to the United States and becomes FROB cargo. This is not workable, because the carrier in a case of a diversion of a foreign-bound vessel to the United States would not have possession of the business confidential house-bill level information it would need from the NVOCC to be able to file the ISF-5. On this point of which party has direct access to the required information, the diversion situation is precisely the same as the ordinary FROB situation, which CBP discusses at length at 81 Fed. Reg. 43962.

**Recommendations:** We recommend that CBP exempt cargo on foreign-to-foreign vessels diverted to the United States due to weather, machinery failure or other unforeseen circumstances from the FROB ISF-5 filing requirements. We believe such an approach is reasonable from a risk-management perspective because: 1) many of the cases in which foreign-to-foreign shipments could become U.S. FROB cargo due to a vessel diversion would likely involve shipments bound to Canada, 2) the Canadian Border Services Agency (CBSA) requires advance cargo information similar to what CBP requires, and 3) we understand that CBP has an

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2 The NPRM and other CBP regulations use various terms to refer to vessel operating carriers. For the purpose of the ISF regulations and the related “24-hour rule” regulations, the term “carrier” has always been understood by CBP and the trade to mean the operating carrier that issues the bill of lading, because that is the carrier that has the required information that must be filed with CBP. Under vessel sharing arrangements, a vessel that is operated by one carrier may carry containers for which several other carriers have issued bills of lading. When we refer to obligations of carriers, we refer to the operating carrier issuing the bill of lading, consistent with this longstanding CBP practice.
information sharing agreement with CBSA through which CBP could be informed of or obtain information on high-risk shipments. Since §149.1 of the NPRM only addresses definitions, we recommend that a new sentence (underlined below) be added to §149.2(b)(4) to exempt vessel diversion FROB cargo:

“(4) The data elements required under § 149.3(b) of this part for FROB, prior to lading aboard the vessel at the foreign port. In the event that a vessel on a foreign-to-foreign voyage is diverted to a U.S. port because of weather or other unforeseen reasons and the cargo aboard becomes FROB cargo, no importer security filing is required for the FROB cargo aboard the vessel.

Should CBP be unable to exempt vessel diversion FROB cargo, we recommend that CBP consider requiring -- for cargo on foreign-to-foreign vessels diverted to the U.S. due to weather, machinery failure or other unforeseen circumstances -- submission of the FROB ISF-5 only from the ocean carrier, irrespective of whether the shipment involves an NVOCC or forwarder. Under this approach, CBP would receive the FROB ISF-5 data elements at the straight bill of lading (for shipments not involving an NVOCC or forwarder) or at the “master” bill of lading level (for shipments involving an NVOCC or forwarder). For vessel diversion FROB cargo, CBP would thus receive ISF-5 information from the ocean carrier that CBP could supplement, in the case of Canada-destination cargo, with information from CBSA. To implement the above-describe approach, we recommend that the following sentence (underlined below) be added to §149.2(b)(4):

“(4) The data elements required under § 149.3(b) of this part for FROB, prior to lading aboard the vessel at the foreign port. In the event that a vessel on a foreign-to-foreign voyage is diverted to a U.S. port because of weather or other unforeseen reasons and the cargo aboard becomes FROB cargo, the carrier shall provide CBP with the data elements required for its shipments under § 149.3(b) at the master bill of lading level as soon as practicable.”

Should CBP decide to require submission of FROB ISF-5 filings from the ocean carrier and the NVOCC or forwarder in cases when cargo on foreign-to-foreign vessels is diverted to the U.S. due to weather, machinery failure or other unforeseen circumstances, we recommend that the following sentence (underlined below) be added to §149.2(b)(4) to deal with diversions of vessels on foreign-to-foreign voyages to the United States. We note that in such diversions, there may be cases in which the foreign-to-foreign NVOCC/forwarder does not currently file information with CBP and would need to make arrangements with a third party such as a service center or the vessel operating carrier to perform the ISF-5 filing on the NVOCC/forwarder’s behalf. Given this and because FROB ISF filings resulting from vessel diversions cannot be and will never be done prior to vessel loading, we believe there must be flexibility on the timing of such filings:
“(4) The data elements required under § 149.3(b) of this part for FROB, prior to lading aboard the vessel at the foreign port. In the event that a vessel on a foreign-to-foreign voyage is diverted to a U.S. port because of weather or other unforeseen reasons and the cargo aboard becomes FROB cargo, the carrier shall provide CBP with the data elements required for its FROB shipments under § 149.3(b) as soon as practicable, and shall promptly inform all non-vessel operating common carriers with cargo on the vessel, whereupon each non-vessel operating common carrier shall provide CBP with the data elements required for its FROB shipments under § 149.3(b) as soon as practicable.”

3. Immediate Exportation (IE), Transportation & Exportation (T&E) and FTZ Shipments

With respect to IE and T&E shipments and goods to be delivered to an FTZ, our understanding is that the NPRM places the primary responsibility for filing ISF-5s for such shipments on the goods owner, purchaser, consignee or agent such as a licensed customs broker.

The next to last sentence in the proposed ISF importer definition, which states, “For IE and T&E in-bond shipments, and goods to be delivered to a FTZ, the ISF Importer may also be the party filing the IE, T&E, or FTZ documentation”, appears to be designed to allow the carrier or NVOCC to file the ISF documentation for such shipments, as is the case in some instances today.

We request that CBP in the final rule confirms that our understanding of the purpose of the above sentence in the proposed ISF importer definition is correct.

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