 **AAEI** American Association of Exporters and Importers

The Voice of the International Trade Community Since 1921

May 21, 2009

Border Security Regulations Branch
Office of International Trade
U.S. Customs & Border Protection
1300 Pennsylvania Ave. (Mint Annex)
Washington D.C. 20229

Re: Comments in response to the Interim Final Rule
FR Doc USCBP-2007-0077; CBP Dec. 08-46
Importer Security Filing and Additional Carrier Requirements

Dear Sir:

On behalf of the American Association of Exporters and Importers (AAEI) and in accordance with the referenced Interim Final Rule, the Association respectfully submits the following comments on US Customs and Border Protection's (CBP) proposed Importer Security Filing (ISF) and Additional Carrier Requirements.

Introduction

AAEI has been a national voice for the international trade community in the United States since 1921. Our unique role in representing the trade community is driven by our broad base of members, including manufacturers, importers, exporters, wholesalers, retailers and service providers including brokers, freight forwarders, trade advisors, insurers, security providers, transportation interests and ports. Many of these enterprises are small businesses seeking to export to foreign markets. With promotion of fair and open trade policy and practice at its core, AAEI speaks to international trade, supply chain, security, export controls, non-tariff barriers, import safety and Customs and Border Protection issues covering the expanse of legal, technical and policy-driven concerns.

As a trade organization representing those immediately engaged in and directly impacted by developments pertaining to international trade, trade facilitation and supply chain security, we are very familiar with the hands-on and operational impacts of policies and programs. We have commented extensively on the ISF to date, and look forward to continuing to provide the front line trader perspective to the impact that ISF is having on our membership. We reference and incorporate our previous comments on this issue, particularly our continued concern that the use of this program to assess liquidated damages reneges on the principle of using this program solely to reduce the risk of having compromised containers reach U.S. soil.

We have divided our comments into four sections: 1) Comment Period; 2) Flexible Data Elements; 3) Operations Impact; and 4) Other Suggestions. For the purpose of these comments, we define Small and Medium Enterprise Business (SME) as a company having less than 500 employees.

1. Comment Period

AAEI has complied with all CBP requests to continually submit questions and comments to the CBP email address dedicated to this issue. However, we note that there are currently multiple interpretations for what exactly the ISF program comment opportunity is intended to invite. For the purpose of our comments, we are presuming the comment period is not intended for the program as it stood on November 25, 2008, but that we are free to comment on the program as it stands today. The rapidly changing nature of the program and the numerous details being addressed ad hoc are of great concern to AAEI and its membership and potentially hinder the ability of our members to meet the compliance goals mandated by ISF and their own corporate policies.

It is our absolute certainty the ISF program will, and must, continue to evolve long after the June 1, 2009 deadline for public comment has passed. This short deadline when measured against the program's considerable requirements poses a significant challenge to our providing complete and accurate comments to the issues and challenges that we as an industry face in the implementation of "10+2."

2. Flexible Data Elements

The Interim Final Rule requires the "importer" file an Importer Security Filing (ISF) 24 hours prior to the "importer's" container being loaded on the ocean vessel. Ocean carrier Automated Manifest System (AMS) manifests are often filed 24 - 48 hours prior to an ocean vessel arriving in the ISF departure port. Due to the time between when the AMS manifest is filed and vessel loading of containers, ISFs are often filed after the AMS manifest but 24 hours or greater prior to loading. Furthermore, the AMS manifest filing process does not provide the date/time when each importer's container is loaded for comparison to the importer's ISF filing date/time.

CBP should measure timeliness of Importer Security Filings based on vessel departure date and time rather than "load date", and provide the importer with visibility to the dates used in measuring compliance with ISF deadlines. We understand that CBP is considering this change, and strongly support such an approach. Neither the importer nor their agent has visibility to the actual date/time a container is loaded on a vessel. However, the vessel departure date is generally readily available to industry, such as through published sailing schedules with estimated departure date, and use of this date provides more certainty and visibility for measurement for CBP and all parties in the supply chain. The vessel departure date also aligns more closely with date of export, which is part of current entry reporting. Whatever date/time is utilized should be readily available to the trade and visible to the importer and filer through ABI/AMS/ACE to ensure compliance and allow monitoring for unauthorized parties submitting ISFs on behalf of the importer.

We request a written announcement, preferably in the Federal Register, clearly stating that for the purpose of meeting the requirement to file an ISF, "24 hours prior to loading" the date of loading is defined as the departure date from the port of export. AAEI fully supports the use of the scheduled vessel departure date/time as the start time of the "24 hours prior to loading" clock. This information is readily

available and would be easily implemented and a transparent solution to the challenge at hand.

With regard to the flexible data elements, i.e., filing two elements later and the option to use alternatives of the linked elements, neither of these so-called flexibilities provide what we have requested. It is not practical to bifurcate filings or mix-and-match the alternative linked elements because doing so requires our members to expend significant additional resources to rework the filings as later, more correct information becomes available. This additional cost is something we can ill afford. Many of our members are choosing not to utilize the flexible data elements at all because of the programming, compliance risks, and the transaction auditing costs involved with this option. With our understanding that penalty mitigation will be the exception not the rule and strict liability will be the standard of care, the trade community remains concerned about the unintended ramifications of this option. We request that CBP adopt reasonable care as the standard of care associated with all aspects of the ISF program.

The "flexible" data elements permitted under the Interim Final Rule should be made a permanent feature of the ISF. Under the interim final rule, importers are allowed to treat certain data elements as flexible. This means the importer is allowed to timely file the ISF based on the best information available prior to loading and departure, then correct or supplement the information prior to arrival at the U.S. port.

This flexibility properly reflects the practical considerations of preparing and filing the ISF. The importer often lacks sufficient information to completely and accurately file all the required data prior to loading and departure. The importer may need to conduct additional research or obtain additional information to perfect the ISF. Importers must be allowed the opportunity to use reasonable care to file the best information available prior to loading and departure, then perfect and correct the information prior to arrival.

CBP has seen to it that the proposed rule allows for the importer to provide a "range" of HTS numbers along with other "flexible" data elements. However, the proposed rule currently requires the importer amend the ISF filing prior to shipment arrival with the HTS number that will be used for the entry summary. To be consistent with the language of the statute, we request that the final rule allow the Importer to provide Customs with the HTS number for the imported product that the importer "reasonably believes to be true," without being required to amend the ISF or risk ISF penalty exposure if the HTS number applied at entry differs.

Alternatively, the final rule should provide the importer with the flexibility to provide CBP with a range or listing of the probable HTS numbers, again, based upon the importer exercising reasonable care, and without any obligation to amend the ISF filing with the HTS number used at entry (we note that these suggestions may require some modification of the CATAIR). Allowing this flexibility should provide CBP with an accurate description of the merchandise that can be used for security purposes while not requiring CBP and the importer to debate the nuances of classification for purposes of meeting the security requirement. After all, the ISF is being filed for "security" purposes and not to determine "duty and admissibility."

The final consideration of the flexible filing is the issue of penalties potentially being applied per filing or amendment. In order for our members to take advantage of this flexible filing option, CBP needs to provide some relief from the aggregate penalties faced by the trade for filing amendments to the ISF. Absent fraud and/or malicious intent, penalties should be applied per ISF and not per filing *or update*.

3. Operations Impact

A. Visibility for Importers

Because the Importer is not necessarily the filer of the ISF, and therefore does not have direct access or visibility to the ISF, AAIEI remains concerned about the lack of visibility the actual Importer of Record has with the ISF program as currently structured. The vast majority of importers are not in a position to handle their own filing, so when an ISF is filed, any and all further communication from CBP is sent to the filer (i.e., the agent) and not to the importer (i.e., the principal) who is ultimately liable for the information presented in the filing. This lack of direct feedback leaves open the potential for an unauthorized party to file on a legitimate importer's behalf and not have that filing discovered until the importer receives a bill from the filer, at which point the goods will most likely already be in the country. Giving importers direct and timely access to the data filed on their behalf will also minimize the likelihood of corporate identity theft from occurring.

This system function also presents a barrier to timely filing which the trade has recommended be overcome by means of the importer being given access to the data filed on its behalf in real time. Further, we believe the lack of access to the ISF filing may raise a constitutional issue in terms of the liability standards that are currently proposed to be imposed on the importer and not the filer. At a minimum, the report card or progress report should be timely made available to the importer whose liability is at stake.

We have also offered the recommendation that the entire filing and any other relevant information be made available to the importer of record directly from CBP (through either the Automated Commercial Environment or ABI) in real time. So far, CBP seems to be addressing this as a commercial issue between the importer and its agent, except as it relates to Tier 3 C-TPAT members the first of whom are only now receiving their reports. However, such an approach does not take into account the very real possibility the importer will not know of the inability or refusal of its agent to file timely and accurate information until it is too late, and should that happen, liquidated damages hardly seem appropriate when ISF is intended to address national security concerns.

Another issue that has yet to be formally addressed in the ISF context is the fact that until the ACE system is fully functional, the ISF data should to be sent directly to the importer, and not through ABI. CBP's Account Managers currently have the ability to send importers reports in Excel spreadsheet format about their entry activity, and CBP needs to construct something similar for ISF and make the Account Managers responsible for distributing this information to the importers they manage. While Account Managers may be a viable option for allowing large importer access to their filing data, SME's which are generally not large enough to warrant an Account Manager must also be allowed access to their filings from CBP and not just from their service providers. It is also important to note that with the weight of liability the ISF

program entails, notifications every 30 days as currently proposed are not adequate if CBP expects importers to be proactive and timely in addressing any issues that may arise. Importers need timely and prompt access directly from CBP to their filings and information.

When addressing these concerns, overall visibility to the trade community should also be considered. The trade community would welcome a summary of report cards or a summary of ISF statistics so that companies can measure their own compliance against other importers. At a minimum, the report card or progress report should be made available in a timely manner to the importer whose liability is at stake.

B. Additional Comment Period for Changes

AAEI strongly urges that CBP publish in the Federal Register (FR) all changes, modifications or enhancements to the ISF program that fall within the Executive Directive of items eligible for FR review and meet the mandates of the Administrative Procedures Act. This should include any change in the program that will require a change in definition or importer behavior. Further, allowing a period of notice and comment before additional substantive changes are adopted would allow the trade to adequately review and comment on the real world impact of these proposed changes. It would also give the trade adequate time to prepare and modify their systems to implement these and other substantive changes to the ISF program as they arise.

An example of the kind of substantive change that AAEI requests be addressed in a separate FRN would include treatment of the bill of lading information. Our concern regarding the bill of lading information focuses on the fact that the bill of lading was never cited as a data element for ISF. However, it is the only tie CBP has between the manifest data, the Customs entry, and the ISF. Despite this fact, our importer members continue to suffer the problem of steamship operators not providing the master bill of lading number in a timely fashion, meaning with many carriers in many trade lanes, the bill of lading number is assigned only once the vessel sails, thereby forcing all ISFs to be untimely. This is a problem which persists with some consolidators as well. We are aware that CBP continues to work with the steamship operator community to address this issue, but that does not change the fact many carriers in many parts of the world see no need to change their practices as the bill of lading number is not mentioned in the ISF regulations.

A specific example of a problematic change is the situation that recently arose. On April 1, 2009, a CSMS message was issued indicating that the 10+2 filing requirements in the CATAIR was modified. That message was later modified in another message dated April 13, 2009. Neither message, however, indicated when the program changes would be implemented to CBP programs. The statement said:

these changes will become effective no sooner than May 18, 2009. You will be notified approximately one to two weeks in advance via subsequent CSMS message when a definitive date is determined.

As a result of these vague terms, software providers and company IT departments are unable to perform release planning around the changes to the program.

C. Timing Issues

As stated above, a possible solution is to use the date/time of ocean vessel departure. Whatever date/time is utilized should be visible to the importer and filer through ABI/AMS/ACE to ensure compliance and provide for timely monitoring of unauthorized parties potentially submitting ISFs on behalf of the importer. Additionally, we request a formal announcement, preferably in the Federal Register Notice, which clearly states when the '24 hour prior to loading' clock starts. As previously noted, it seems most practical to use scheduled vessel departure date/time as the start time, and this is a solution that AAEI fully supports.

We are also unclear how the issuance of "Do Not Load" (DNL) orders, should they occur, will impact the ability of containers in line behind the container that has a DNL issued to be loaded and dispatched timely. A thorough explanation of the actual process of loading and unloading under the new ISF regime would be extremely helpful to the trade community.

D. Quantifying the Costs of Compliance

The trade community has yet to identify a final and total cost for the implementation of the ISF program. However, we are certain that the costs will be significant for program development and will easily exceed the original cost estimates generated by CBP during the initial exploration phase of this program. Therefore, the trade community is currently finding it difficult to quantify the costs of compliance with this new regulation. Aside from the fact that liquidated damages (currently not applicable) are not and should not be considered a cost of compliance, the trade community's costs are spiraling at a time when companies can least afford to spend money on anything except mission critical functions. Between the manual processes that importers are currently developing, the man hours involved in accurately implementing this program in its entirety, the service fees that are being paid to file and update the ISFs and the actual reprogramming of computer systems- a hard dollar figure will be difficult to measure and, once in hand, will be untimely at best.

Currently, the only cost that is generally being captured is the actual transaction fee for the physical filing of the ISF. Our members are experiencing a wide range of filing fees, but are finding that most filing fees for each filing or update are between \$25 and \$100 dollars. We believe that this range will go up as a greater and greater number of SME's join the ISF process. SME's do not have the leverage to negotiate pricing with their service providers as the larger companies do. Also, since they tend to have smaller shipments in volume and dollar value, these fixed costs will hit SME's much harder and be debilitating much more quickly than they will for the larger importers. Finally, even with the transaction fees for the physical filing being within the reach of a pseudo-accurate estimation, these costs will quickly be dwarfed by the total costs that compliance with "10+2" entails.

Of course, the biggest cost of all is the hidden cost that any delays or slowdowns in the supply chain will and have generated. Until we reach a period of full enforcement and see how the actual impact of DNL orders plays out in ports across the world, our members in the trade community, have no way to predict what delay time should be built into the supply chain. Trade may be factoring in a current delay of 24 hours, but any DNL orders that interfere with containers being loaded or a vessel leaving at the scheduled time will exponentially increase the costs of this program.

In calculating these costs, it is also important to keep in mind that in many instances, it is computers in the U.S. and at origin which must both be reprogrammed. In these especially challenging economic times, finding funding to meet these costs is a considerable hurdle to overcome.

4. Other Suggestions

A. Liquidated Damages/Penalties

The Interim Final Rule implementing the ISF amended part 113.62 of the Customs Regulations to impose a maximum \$5,000 assessment of liquidated damages for each violation of the ISF regulations in Part 149.

In May 2009, during the delayed enforcement period of the ISF, CBP announced that the ISF importer would be liable for a maximum of \$5,000 liquidated damages for each incorrect ISF transmission. The original ISF filing and any amendments to that filing would be considered separate transmissions. Thus, if an ISF importer made an error in its original ISF filing and another error in an amendment to that filing, it would be liable for \$10,000 in liquidated damages.

Publication of ISF liquidated damages mitigation guidelines would serve the interests of CBP and ISF importers by clarifying the recordkeeping requirement of the ISF. Publication would benefit CBP in that it would encourage ISF importers to be as compliant as possible with the ISF filing requirements so as to avoid or minimize liquidated damages. Publication would also benefit ISF importers in that it would encourage importers to be as compliant as possible with the ISF requirements by indicating the records needed to show full or partial compliance with the ISF filing requirements.

CBP has publicly stated an importer's efforts to file ISF during the delayed enforcement period will be considered as a mitigating factor for any liquidated damages issued after enforcement begins. This is an excellent start to development of appropriate guidelines. We recommend those guidelines be developed in collaboration with the trade community to ensure "buy-in" by all parties.

For your consideration, we have three initial recommendations for mitigation guidelines.

- Degree of timeliness should be considered in mitigation guidelines, with reduced penalties for ISF filings that are filed only one or two days late, especially in light of the fact that there may well be deviations from the published sailing schedules. This is a particularly important recommendation for the initial enforcement period of the ISF.
- Changes or discrepancies in the EIN reported for ISF importer or consignee at the 10th or 11th digit levels should not result in a penalty. Accurately reporting the EIN at the 9 digit level will effectively identify the company for security purposes and changes at the suffix level should not be considered a violation.
- Absent fraud and/or malicious intent, penalties should be applied per ISF and not per filing or amendment.

CBP should take a "holistic" view of the ISF filing – that the filing encompasses one shipment on one bill of lading, including the original filing and any corrections or amendments to that filing. The maximum liquidated damages would be limited to a maximum of \$5,000 for the complete filing for that shipment. The number and type of errors and whether they were made on the original ISF filing or an amendment would be mitigating or aggravating factors in determining the final liquidated damages actually assessed.

B. Benefits for C-TPAT Participants

AAEI remains seriously concerned about the lack of tangible benefits for voluntary participation in the costly C-TPAT program. C-TPAT participants are companies that have proven, and continue to prove, they are a strong partner in the government's efforts to enhance security and maintain a safe worldwide trading network. As an incentive for joining this program, companies that spent valuable time and resources to gain compliance were promised tangible benefits. To date, these benefits have been severely limited. The ISF program provides an excellent opportunity to reward these partners with benefits based on their C-TPAT status. As such, we again renew our recommendation that C-TPAT members be able to satisfy the ISF filing requirements by providing routine data at the aggregate level with individual filings addressing any data elements unique to a given shipment. C-TPAT participants should also be afforded additional mitigation consideration for ISF penalties over non-C-TPAT members.

C. Bonds

Recognizing that not all importers have continuous bonds, the Interim Final Regulations allow compliance through the preparation and filing of an ISF bond or a single entry bond. While we appreciate CBP's efforts to allow options for the trade, the experience of our members is that processing a bond to approval by CBP is typically a several days or weeks process. We question how the use of anything but a continuous bond, one that is already pre-filed and approved, is possible in the context of ISF absent either a significant speed up by the Revenue Division or the absence of an accelerated adoption of ACE's eBond functionality. CBP should neither rely on, nor encourage, the possibility that a third party chooses to obligate his bond to serve as a relief valve for CBP's inability to process bonds immediately in an electronic and paperless manner. In order to be serious about an element of national security, CBP needs to hold the responsible party directly accountable, not indirectly accountable through his filing agent's bond.

CBP has stated that use of single transaction bonds may be allowed on a "case-by-case basis." CBP has also said it is in discussion with trade groups regarding the process for the use of a single transaction bond for an ISF filing. Nor has CBP provided much information on a proposed stand alone ISF bond. Given the fact that there are approximately 800,000 importers and only 145,000 continuous bonds on file, CBP must urgently address the bond situation for the majority of importers who do not possess a continuous bond. Relying on an agent's bond (should the agent even permit the use of its bond) is not the answer.

D. Periodic Review of the Program

AAEI requests a periodic review of the program, in its entirety, with additional time to comment during each review period. This approach will give the trade an opportunity to point out glitches and/or inefficiencies in the program that may not otherwise be addressed. This suggestion would also allow for an ongoing dialogue between CBP and the trade on how to better achieve the intended goals of the ISF.

One example would be to establish a review with public comment once per year, possibly on June 1st each year. As noted previously, trade community will not have an accurate estimate of costs or barriers to compliance for many aspects of ISF by the current required comment deadline of June 1, 2009 as compliance is still being developed. For example, our members will not know the cost or impact of holding containers for ISF confirmation and subsequent impact to inventory and production as implementation continues. Technology is also expected to change as ISF is implemented in ACE and better measurement opportunities are identified for targeting or timeliness. Periodic review will provide an opportunity for CBP and the importing community to review their findings and lessons learned as well and drive improvements in the process.

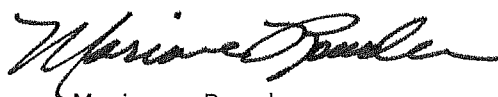
Conclusion

AAEI clearly recognizes the enormous effort expended by public and private sector participants in the consultative and implementation process surrounding ISF, and has continued in this effort to actively work in advancing the vital national interest in enhanced homeland security. However, we believe this ISF program continues to have significant hurdles and challenges far beyond a few technicalities that can be worked out 'as we go along.' We stress the need for continuous review and opportunities to comment so that the program can become both successful and financially viable for industry.

Thank you for the elongated enforcement period. However, our members contend they need to have the elongated enforcement period operating in a "real time" environment without threat of penalty. The operational issues above are the issues identified so far, and there will undoubtedly be others as more users come on board and more ISF's are filed in a timely manner. Our members think that we need to continue operations longer to see what happens when the regulations take effect. Further, the trade community needs a final finished product from CBP prior to the start of trade's period of enforced compliance because ISF affects all stakeholders in the global supply chain. Furthermore, when the regulations do go into effect, the enforcement or imposition of the liquidated damages should be delayed so that the trade and CBP together can get a true sense of the ramifications of the complete and timely filing of the ISF. CBP should also allow for further comments from the trade community once this real-time period has drawn to a close.

In conclusion, the above review leads AAEI to reiterate its strongly held belief that CBP needs to reevaluate its ability to close the comment period on June 1, 2009 and go full speed ahead to a full enforcement date of January 26, 2010 without serious modifications to the ISF. The trade requests, through the ideas outlined in this comment, the opportunity for a substantive partnership and the opportunity to work through these issues together as a team for the express purpose of making our borders more secure.

Sincerely,

A handwritten signature in black ink, appearing to read "Marianne Rowden". The signature is fluid and cursive, with a long horizontal stroke at the end.

Marianne Rowden
General Counsel

cc: Claib L. Cook, Co-Chair, AAEI Customs Policy and Procedures Committee
Aaron Gothelf, Co-Chair, AAEI Customs Policy and Procedures Committee