

THE IMPLICATIONS OF U.S. CUSTOMS REGULATIONS REQUIRING FILING OF CARGO DECLARATIONS 24 HOURS PRIOR TO LOADING

1.0 THE PURPOSE OF THE NEW RULES:

1.1 The purpose of the new regulations has been clearly stated by US Customs: ¹

"... to require the advance and accurate presentation of certain manifest information prior to lading at the foreign port and to encourage the presentation of this information electronically. This information is required in advance and is urgently needed in order to enable Customs to evaluate the risk of smuggling weapons of mass destruction through the use of oceangoing cargo containers before goods are loaded on vessels for importation into the United States, while, at the same time, enabling Customs to facilitate the prompt release of legitimate cargo following its arrival in the United States."

1.2 The context is important because it indicates that enforcement of the new rules will be comparatively strict and inflexible. It also suggests the criteria which may be expected to guide or influence the approach adopted by individual Customs officers at a vessel's first port of entry to the USA.

1.3 The basic intent, therefore, is that any containerized, crated, packaged or wrapped cargo entering the USA by ocean-going vessel must be declared to US Customs not less than 24 hours before it is loaded on that vessel.

1.4 From the explanatory notes issued by US Customs, and also their published responses to questions submitted by the trade, ² it is clear that there exists a system for targeting suspect cargo based on various indicators – one of which is likely to be any amendment of the Cargo Declaration as filed. ³

1 Federal Register Vol.67, No.211 ("FR") p.66318. Cf. p.66328: "This rule-making responds to an urgent national security."

2 See: https://www.cbp.gov/sites/default/files/documents/tpa_faqs_3.doc

3 US Customs has stated that it will shortly introduce new rules concerning the filing of manifest discrepancy reports. However, "... Customs will not allow the manifest discrepancy report to be utilized in lieu of the provision of accurate and complete manifest information under the 24 hour rule." (FR p.66329.) In this connection, see also: https://www.cbp.gov/sites/default/files/documents/tpa_faqs_3.doc: "Frequently Asked Questions" ("FAQ") #18(C): "However, be aware that any change to the original information may affect our risk assessment of the cargo and could result in an examination." Also FAQ #19: "However, the shipment is subject to screening and examination due to the change in the information."

2.0 APPLICATION:

- 2.1 The new rules came into full force on 2 February, 2003.
- 2.2 The new rules apply to all cargoes of foreign origin with only two exceptions:
- (i) bulk cargo; and
 - (ii) break bulk cargo which has been specifically exempted.⁴
- 2.3 On 23 January 2003, US Customs published a new set of “Frequently Asked Questions” which have clarified a number of issues, including an expansion of the definition of bulk cargo.

3.0 BULK CARGO:

- 3.1 “**Bulk cargo**” is now to be defined in the following terms:

“Homogeneous cargo that is stowed loose in the hold and is not enclosed in any container such as a box, bale, bag, cask, or the like. Such cargo is also described as bulk freight. Specifically, bulk cargo is composed of either:

- A. free flowing articles such as oil, grain, coal, ore, and the like, which can be pumped or run through a chute or handled by dumping; or
 - B. uniform cargo that stows as solidly as bulk cargo and requires mechanical handling for lading and discharging.”
- 3.2 According to US Customs, certain specified commodities / commodity types will be classified as “bulk cargo”, so long as all three of the following conditions are met:
- (i) they are not containerized;
 - (ii) they are easily identifiable as loaded on the vessel; and
 - (iii) any bundling is only for the securing of the cargo.

It should be noted that this list is described as being subject to change “as deemed appropriate.”

4 <https://www.cbp.gov/sites/default/files/assets/documents/2018-Nov/Updated%20ISF%20FAQ%20FINAL%2011282018.pdf>
FAQ #41(A). There are also separate rules for empty containers.

The commodities specifically listed are the following:

- ≡ Coils of steel or other metals
- ≡ Rails of steel or other metals
- ≡ Wire rods of steel or other metals (may be coiled or flat)
- ≡ Ingots of metal (precious or otherwise)
- ≡ Round bars of steel or other metal
- ≡ Deformed bars/rebars (of metal)
- ≡ Plates (of metal)
- ≡ Billets (of metal)
- ≡ Slabs (of metal)
- ≡ Pipes (of metal)
- ≡ Beams (of metal)
- ≡ Tubes/tubing of metal
- ≡ Angles, shapes and sections of metal
- ≡ Sheets (of metal)
- ≡ Expanded metal
- ≡ Flat bars (of metal)
- ≡ Strand wire (of metal)
- ≡ Sawn timber/lumber as a commodity (not as packaging material)
- ≡ Paperboard/fiberboard/plywood as a commodity (not as packaging material)
- ≡ Paper products as a commodity (wood pulp, newsprint and paper rolls), not as packaging material
- ≡ Certain perishable goods, not in boxes, bags or containerized, and not frozen, but laden and stowed in a way similar to other types of bulk cargo (includes seafood and produce)
- ≡ Blooms
- ≡ Anodes/Cathodes, in sheets only (may be corrugated)

3.3 Bundling “for the purpose of securing the cargo” must be taken to refer to the bundling of the cargo as effected prior to shipment.

4.0 BREAK BULK CARGO

4.1 **“Break bulk cargo”** is now defined as:

*“...cargo that is not containerized **and** that cannot be classified as ‘bulk’ cargo.”*

4.2 The revised definition of bulk cargo as set out above has removed many, but not all, of the uncertainties concerning the proper classification of such commodities as wrapped steel coils. For example, it appears that “steel blooms” are still to be considered as break bulk, and not as bulk cargo. Also, the US Customs approach to vehicles suggests that the presence of a unique number **may** convert into break bulk cargo a commodity which would otherwise fall under “bulk cargo.”⁵⁾

4.3 The rules state that exemptions will be granted only on a case-by-case basis;⁶ but it is not yet clear how broadly an exemption may be drawn in respect of repetitive movements of the same cargo from the same shipper by the same carrier. Until this has been clarified by experience or by information from US Customs, it must be assumed that “case by case” means “shipment by shipment.”

4.4 US Customs has confirmed orally that no advance declaration is required in respect of bulk cargo which is loaded in the same vessel as non-exempt break bulk.

5 FAQ # 41(B): “For example, new and used vehicles will be classified as break bulk cargo. Although uniform in nature, vehicles have identifying marks (such as a Vehicle Identification Number, or VIN). One necessary aspect of bulk cargo is fungibility. The presence of a VIN removes that component from the shipment of new or used vehicles.”

6 § 4.7(b)(4)(ii)(B): the application is to be made by the carrier, directly to the National Targeting center in Washington -§4.7(b)(4)(ii)(A)

5.0 NON-USA CARGO

- 5.1 The new rules apply, not only to cargo which is destined for a USA discharge port, but also to cargo destined for a foreign port which remains on board the vessel when it reaches its first port in the USA.⁷
- 5.2 However, the new system is based on the carrier's intent to have the cargo on board the vessel when it enters a US port: no advance declaration should be required to cover the mere possibility that a vessel destined only for ports in Canada may have to put into an American port of refuge *en route*.
- 5.3 Where a cargo destined for Canada is loaded on board a vessel which is not at that time scheduled to call at an intermediate USA port, but is then so rescheduled after loading, a declaration must immediately be made for that Canadian cargo. Accordingly, appropriate information must be obtained prior to shipment for any such Canadian cargo.
- 5.4 As worded, the rules appear to refer to the first port of entry in the USA, as distinct from entry into territorial waters.⁸ They do not, therefore, appear to apply to cargo which is on a vessel proceeding directly to a discharge port in Ontario, which entails passage through the USA locks on the St Lawrence Seaway. But, given the context of the new rules, it is possible that this may be an oversight.
- 5.5 US Customs has confirmed that the new rules do not apply to cargo shipped direct to Canada for onward delivery to the USA by road or rail.⁹ (This will apparently be subject to separate regulations, to be promulgated in 2003.)
- 5.6 Canada implemented similar rules in April 2004.¹⁰

7 "The Cargo Declaration ... must list all the inward foreign cargo ... and must separately list any other foreign cargo remaining on board ("FROB"). For the purposes of this part, "FROB" means cargo which is laden in a foreign port, is intended for discharge in a foreign port, and remains aboard a vessel during either direct or indirect stops at one or more intervening United States ports.": §4.7a(c)

US Customs has confirmed orally that, where a vessel loads a base cargo in Canada and is to load a top-off cargo at a USA port, an advance declaration is required in respect of that Canadian cargo.

8 " ... every vessel arriving in the US and required to make entry ...": §4.7(a)

9 https://www.cbp.gov/sites/default/files/documents/tpa_faqs_3.doc- FAQ #11.

10 The following statement from the website of the Canadian Embassy in Washington declares the joint harmonized smart border initiative - (<https://www.international.gc.ca/>):

"The Canada Border Security Agency (CBSA) plays a leading role in streamlining the movement of low-risk, pre-approved goods. CBSA has shifted from a transaction-based processing of goods to a risk-based system that will help the CBSA concentrate resources on goods of higher or unknown risk. An array of risk-management techniques will be used:

- ≡ electronic targeting, increased exchanges of information and intelligence with other law enforcement and customs agencies, analysis of compliance records and pre-arrival information, as well as pre-registration of drivers;
- ≡ greater use of technology such as ion scanners and X-ray equipment; and modernized cargo control for goods requiring more data before they arrive at the border."

See also [Memorandum D5-3-1](#)

6.0 THE CARGO DECLARATION:

- 6.1 The information required from the Charterer/Shipper for inclusion in the Cargo Declaration is set out in the attached questionnaire.
- 6.2 The rules state that generic descriptions of the cargo (e.g., “FAK” or “freight of all kinds”; “general cargo”; “STC” or “said to contain”) are not acceptable.
- 6.3 Where the bill of lading is drawn “to order,” and no consignee is named, the actual consignee must appear in the declaration by name and address.¹¹ For Canadian cargo subject to the US 24 hour rule, the name and Canadian address must be declared.
- 6.4 US Customs is preparing new rules to deal with the filing of manifest discrepancy reports, which should be promulgated shortly.¹² Preliminary indications are that, if such a report is filed prior to the commencement of loading (and, possibly, if it is done after the commencement of loading, but prior to the vessel’s departure from the loading port) the “24 hour clock will be restarted.”¹³

11 https://www.cbp.gov/sites/default/files/documents/tpa_faqs_3.doc- FAQ #32

12 See fn.3 above.

13 This information is found in a set of guidelines circulated by the Customs office in Cleveland to local agents dated 25 November 2002.

7.0 THE CONSEQUENCES OF NON-COMPLIANCE:

- 7.1 From their published responses to questions, US Customs has made it fairly clear that their standard (though not invariable) *modus operandi* will be to penalise the carrier for any impropriety in the Declaration, and also for any inconsistency between the Declaration and the cargo actually shipped, leaving the carrier to recover as best it may from the cargo interests.¹⁴
- 7.2 The consequences of non-compliance with the “24-hour” rule may be far-reaching, including some or all of the following:
- (a) delay to the vessel at the first port of entry in the USA;
 - (b) delay to the vessel at the loading port;
 - (c) fines and other penalties;
 - (d) deadfreight (where the vessel sails without the “offending” cargo);
 - (e) delay to the cargo;
 - (f) rehandling costs for the cargo and/or other cargo;
 - (g) delay to other cargo loaded or to be loaded on that vessel;
 - (h) indirect costs (e.g. stevedore stand-by time, additional wharfage and other port costs)
- 7.3 As the penalties and costs will inevitably fall on the ship - because it is the Master who has the obligation to file the advance declaration - the US Customs has made it clear that it is up to the carrier to sort out his contractual relationships with shippers. It is, therefore, essential that the appropriate information is provided in good time to allow proper filing. If this cannot be done because the Charterer / Shipper provides the information too late, or arbitrarily takes the view that its cargo falls within an exempt category, it must then be prepared to provide an indemnity for the consequences.
- 7.4 Note that deadfreight may also be incurred where the cargo is declared in good time, but US Customs refuses the entry permit for some reason related to the cargo or the declaration: previously, such refusal would have occurred at the port of discharge. Similarly, where the shipper or charterer fails to provide the requisite information in good time, the cargo may be left behind, which will also trigger a deadfreight claim.

¹⁴ “The advance presentation to Customs of vessel manifest information for cargo destined for the United States ... is intended to expedite the release of incoming cargo while, at the same time, ensuring maritime safety and protecting national security. **To this end, it is the vessel carriers themselves ... to which these regulations are targeted and that are ultimately responsible under these regulations for providing mandatory cargo manifest information to Customs.**” (FR, p.66330). Cf. p.66323: “Customs may initiate penalty actions against any party responsible for providing the required information.”

- 7.5 The following additional clause is intended for insertion in charter parties where the cargo may fall within the US Customs 24-hour rule:

“Charterers acknowledge that it is familiar with the regulations and requirements of USA Customs (“the US Customs rules”) and of Canada Customs (“Advanced Commercial Information”) so far as they apply or may apply to any or all of their cargo to be loaded hereunder (“the Cargo”), and that pursuant to the Customs rules of both Canada and the USA, Owners are or may be required to present accurate and complete manifest information about the Cargo to the relevant Customs Authorities not less than 24 hours prior to the commencement of loading. Charterers undertake (without request or reminder) to provide such information in proper form to Owners in good time to allow Owners fully to comply with the Customs’ requirements, and in any event not less than 96 hours or 3 full business days (whichever is the greater) prior to the commencement of loading. Charterers shall indemnify Owners and hold them harmless against any and all consequences howsoever arising out of any failure of Charterers, or the failure of its servants or agents, including shippers or forwarders, fully to comply with this undertaking, including, without limitation, costs, fines, delays (whether to the vessel, to the Cargo or to other cargo loaded or scheduled to be loaded on the vessel), and attorneys’ fees; and Owners shall be entitled to refuse to load the Cargo if such information is not provided in good time or is provided in a form which is, in the reasonable opinion Owners, incomplete. In the event that any or all the Cargo cannot be loaded or must be discharged by reason of the intervention of US or Canada Customs or other proper authority, or is not loaded on account of Owners’ proper refusal to do so in accordance with this clause, Charterers shall also be liable to Owners in deadfreight.”

- 7.6 The same clause, with logical amendment as to its terminology, will also be included for liner booking notes where the cargo may fall within the 24-hour rule.

This briefing note will be up-dated and amended from time to time as further information is received about the practical application of the new rules.

Your input is welcomed. If you have any questions or suggestions for clarification, please contact: sholt@fednav.com

Montreal
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US CUSTOMS RULES FOR ADVANCE DECLARATION OF CARGO PRIOR TO LOADING AT FOREIGN PORTS

This questionnaire is to be completed accurately for all non-bulk cargo except as specifically exempted by US Customs, including all such cargo intended for discharge in Canada which may be on board the vessel at the time of entry into the USA. This information is to be provided to Owners in full and complete form not less than 96 hours or 3 (three) full business days (whichever is the greater) prior to loading. Failure to comply may result in legal consequences, including non-shipment, deadfreight and other claims of a legal nature.

		Each box must be completed. (Insert "Not Applicable" where appropriate)
1	Numbers / quantities as per bill of lading *	
2	Complete description of cargo	
3	Precise weight of cargo	
4	Complete name of Shipper	
5	Complete address of Shipper (including telephone / fax)	
6	Complete name of Consignee/ Receiver	
7	Complete address of Consignee/ Receiver ** (including telephone/ fax)	
8	Complete name of Notify Party	
9	Complete address of Notify Party ** (including telephone / fax)	
10	IMDG Code Number	
11	Identifying number(s) of containers, crates, boxes or other shipping package	

* To be stated as lowest external packaging unit. (E.g. a single container containing 10 pallets with 200 cartons should be stated as 200 cartons)

** This must be a proper address in the USA or Canada as appropriate.