



INTERNATIONAL TRADE SURETY ASSOCIATION

1000 NW 57th COURT SUITE 600 MIAMI, FL 33126 TEL:305-267-9200 FAX:305-267-5155

CBP/Surety Consultation Issue

Customs sureties are eager to work in partnership with CBP. However, CBP has been inconsistent in its consultations with the surety industry. This denies CBP the benefit of crafting programs which take better advantage of the role of sureties in protecting revenues and assuring compliance with law. While ITSA and other surety organizations have communicated with CBP through the TSN, COAC and CSEC, the fact remains that new CBP operational programs are often designed, tested and rolled out without the benefit of the surety industry's comments and expertise. This sometimes results in implementation of changes without regard to the impact that the new program will have on the exposure of sureties to risk and can impede the proper underwriting of a surety's obligations to secure the revenue assessed and laws enforced by the CBP.

Discussion

While CBP has included surety representatives in the TSN and COAC, and has reached out to the surety industry by hosting quarterly meetings of the Customs Surety Executive committee, there are a disturbing number of examples of new programs in which CBP has overlooked sureties as an affected industry, and therefore, has not taken into account its concerns nor sought its comments. The validity of our opinion on this issue and the causes of this problem may be best demonstrated by examining recent instances (some of which are listed below) in which CBP did not seek surety participation.

As a general rule, we believe the problem often arises from a basic misperception at CBP of the role of sureties. Sureties are regarded as a source of funds when importers default, and therefore CBP looks to the Revenue Division for all-things-surety. Field Operations typically does not perceive sureties as part of its operational programs; the Office of Trade generally perceives sureties only as an area for legal rulings on surety obligations and payments. To address this problem (recognized by both our members and by CBP Headquarters officials), ITSA conducted a well-attended "Customs Bond Seminar for CBP Leadership" on February 24, 2011.

It is well understood in the surety industry that the surety's exposure to loss¹ increases when the bond principal is "extended additional credit" without the surety being given the additional information it needs to calculate its exposure or take action to reduce its exposure. Where exposure rises, an informed surety might react by monitoring the new obligations, educating the bond principals to its new risks, or requiring collateral. An uninformed surety is likely to face unanticipated demands and payments, may exit the

¹ E.g., when a principal is allowed to postpone payment, the face amount of the bond isn't changed but the likelihood that a surety will suffer a total loss as a result of unpaid estimated duties is significantly increased.



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customs surety business, and certainly will not provide support to CBP's efforts to have an informed and compliant import community.

In fact, sureties are affected significantly by most new CBP operational programs and have much to offer in the way of supporting CBP innovations in a variety of areas - ranging from security initiatives to priority trade issues; from in-bond movements to reconciliation programs; from post summary corrections to liquidated damage administration. To illustrate our concerns and our mutual opportunities, we offer the following examples, some of which are ongoing issues.

1. Importer Security Filing (ISF). CBP publicly prided itself on having devoted a year to consultation with the trade community prior to publication of its proposed ISF rules...but inexplicably failed to meet with any surety association in that year-long outreach! Even after publication, which included a bare-bones reference without any detail of an ISF bond requirement, CBP declined to discuss the bonding requirement until the eve of implementation. The questions asked by the surety industry in response to the January 2, 2008 Notice of Proposed Rulemaking were deferred for answer at a later time. Prior to implementation, no bond form or language was drafted by CBP. Ultimately, a bond form was designed by ITSA members. During the fall of 2009, the form was presented to CBP, who gave their approval – a scant one week prior to the date bonds became required.

2. Post Summary Correction. CBP, in consultation with brokers and importers, developed a robust approach to Post Summary Correction. Once ITSA members were briefed on the plans in place, the sureties were able to table a host of questions which had not been within the scope of the original vision: will PSC allow change in surety code and/or surety amount, if so, what is the effective date of the new surety bond and/or amount and what happens to the original bond. Will the surety be provided with information regarding the correction, particularly as it affects bond amount, surety and effective date of obligation. These "technical" issues are ones which could have been anticipated and resolved with a well-crafted rule, rather than ignored and left to debate in future administrative and judicial proceedings where CBP may find its obligations were not secured by any surety.

3. Availability of Information to Sureties. While sureties are jointly and severally liable with importers on their obligations to CBP on any given entry, CBP regulations do not require customhouse brokers to provide entry information to the sureties where CBP has made demand on the surety for payment. Section 111.24 of the Customs regulations recognizes that a broker *may* provide information to a surety, but leaves it entirely to the



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broker's discretion. The currently pending proposal to amend Section 111.24 does not address this issue, although ITSA has filed a comment suggesting that it can be the vehicle for this change. Docket No. USCBP-2010-0038. The inability to have access to this information inhibits the surety's ability to seek parties to pay bills, to exercise its own rights to protest or petition, and burdens CBP as sureties are unable to secure payment. Sureties may turn to CBP for information which can further delay collection or supplements to protests or petitions. Often sureties must resort to FOIA requests, which creates additional work for CBP personnel, increases costs to sureties, and usually spawns even further delays.

4. Surety Petition Mitigation and Increasing Denial of Late files. Under the Omnibus Trade and Competitiveness Act of 1988, the government is required to publish guidelines for cancellation of bond charges. Under T.D. 02-20, guidelines for cancellation of claims when petitions for relief are filed untimely were published. These guidelines (taken in combination with guidelines published in T.D. 94-38) specify several types of calculations generally based on estimated duties/taxes/fees. It has been reported that, without consultation with sureties or publication of revised guidelines, various ports have now resorted to calculations generally based on the gross LD assessment (rather than estimated duties) in such situations. This is a radical departure from both existing guidelines and longstanding CBP practice. The result is imposition of extraordinarily harsh assessments on such claims under new rules adopted without any prior notice to, much less consultation with, the surety industry.

5. Bond Instructions issued by Individual Ports. In recent months, there have been many examples of individual ports issuing bond directives which are either at odds or inconsistent with other ports and with CBP Revenue Branch policy on the bond program. These are not isolated situations, as the questionable directives have been issued at ports on the East Coast, the West Coast and in the Mid-West. In each instance, the directives have been modified or withdrawn after consultation with the Revenue Branch. The port directives were clearly issued without first consulting with the Revenue Branch (and so we assume that CBP internal procedures today do not require consultation), and appear to be a reflection of one of the problems identified in the recent Report of the Office of Inspector General of the Department of Homeland Security (June 2011) regarding the lack of centralized authority at CBP regarding Single Transaction Bonds.

The foregoing negative examples notwithstanding, it is worth noting that CBP/surety collaboration has worked well when the partnership has been pursued. In the early 1980's, there was much interaction between CBP (then the U.S. Customs Service) and the surety community when the "universal bond form" (now known as CBP Form 301) and the associated regulatory rewrite were being pursued. In more recent years,



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surety participation (via the Bond Subcommittee of COAC and CSEC) in the creation of a "term and replace" process helped expedite discussions and achieve a beneficial result.

6. Anti-Dumping Administration: A Final Note on Collaboration. In recent years, there have been CBP/surety industry discussions regarding reinstatement of a separate anti-dumping bond form. The difficult problem faced by CBP in seeking to collect antidumping and countervailing duties from importers is a problem shared by the surety industry, which has long tried to find the responsible parties and obtain their payment of the duties. We have also worked with CBP (and Commerce and the Congress) to improve the system to better administer the existing anti-dumping laws. For example, ITSA members were first to advise CBP and the Congress of the fraudulent abuse of the New Shipper bond program to evade duty obligations, resulting in a change (albeit a temporary one) in the law.

ITSA members, and other members of CSEC, have advocated for re-institution of the separate anti-dumping bond to allow sureties to more effectively control and underwrite these risks. That proposal (most recently made in November, 2006), was favorably commented upon by CBP officials (February 2007) but remains pending and unresolved by CBP. The complexity involved in addressing the antidumping bond insufficiency issues is such that this subject cannot be adequately discussed in the Trade Day format. ITSA is prepared to resume the dialogue with CBP, Commerce and other members of the trade to address these issues and sincerely hopes that such discussions may be pursued at the earliest possible date. As a first step in this regard, we will propose that this item be added to the agenda for the upcoming CSEC meeting, tentatively scheduled to take place on September 21, 2011.