

EMPTY CONTAINER WITH RESIDUE

API

INTERNATIONAL TRADE AND CUSTOMS CONFERENCE

HOUSTON MARCH 29, 2011



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EMPTY CONTAINER WITH RESIDUE ISSUE

➤ **BETTER KNOWN AS**

➤ **EVERYTHING THAT CAN GO WRONG**

...

➤ **HAS GONE WRONG**

EMPTY CONTAINER WITH RESIDUE ISSUE- THE BACKGROUND

- ❑ **Since 1994** (Headquarters' ruling HRL 113129), trade uses Instruments of International Traffic (IIT's) to return empty containers that may contain residue--no entry of the residual cargo required
- ❑ **September 2008 – CBP attempts to modify its ruling** – to require residual chemical, petroleum and other products, which may remain in otherwise empty containers (whether shipped by truck, air, vessel or rail), returning to the United States from Canada, Mexico or other foreign locations, to be subject to manifest (including advance cargo information transmission) and entry requirements.
- ❑ **Opposition comments submitted-** but CBP still seeks to enforce modification
- ❑ **2008-2009** - Negotiations with CBP result in suspended enforcement of its modification while efforts underway to work with the trade to address the many concerns raised by CBP's new position; Small working group established = AAEL, ATA, AAR, ACC to represent wider industry interests. **Some key questions:**
 - Who is importer ?
 - Who is shipper?
 - How to measure quantity?
 - How to measure value?
 - Why is entry even necessary? Alternative filing possible?

EMPTY CONTAINER WITH RESIDUE ISSUE-

The Background (cont'd)

❑ 2009 – CBP issues FAQs

- ❑ extremely unhelpful-mere recitation of law without guidance or answers to questions posed;
- ❑ lots of time by trade spent to evaluate and respond-- providing operational and compliance issues and costs;
- ❑ discussions with HQ team ensue;
- ❑ CBP provides “briefing” via trade wide conference call with 150 participants– creates even more confusion;
- ❑ trade offers various scenarios with questions for CBP to answer

❑ **May 2010** - without being prepared to discuss these concerns, and failing to hold the small working group session that had been pledged to develop some workable solutions, CBP officials disclose during a “status” telecon that it **intends to implement its new position in July – October 2010.**

- ❑ **Outrage by industry**– some discussion with Commissioner
- ❑ **CBP pulls back from these enforcement dates to develop further FAQ clarification**

EMPTY CONTAINER WITH RESIDUE ISSUE-

The Background (cont'd)

- ❖ **Spring/Summer 2010**– Rail and Truck associations pursue **their earlier proposed** solution to CBP of using an "enhanced manifest" to alert CBP of the residue returning –truck proposal includes use of section 321 entry—carriers hold separate meetings off line with CBP
- ❖ **Fall 2010 - Coalition comments submitted to CBP** itemizing each question and scenario and providing critique and suggestions including use of the "enhanced manifest" without any Section 321 entry filing necessary
- ❖ **November 2010**– industry again meets with Rich DiNucci at HQ and is offered the following **compromise**:

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The Background –Original Compromise

- ❖ CBP to recognize 3% and 7% standard carrier industry thresholds (for truck and rail, respectively) and
- ❖ In cases where tank to be returned , permit the “owner” to request “Release without Entry” under 19 U.S.C. section 321 if meets the provision of section 321, and
 - ❖ be prepared to supply a “reasonable” value for the residue while using section 321
 - ❖ should develop and maintain back-up documentation for its methodology for determining: 1) whether the residue meets the recognized threshold (i.e., less than 3% or 7%); and 2) the value and quantity of the residue based on formula to devise the estimate.
- ❖ Where carrier is “owner” of container, it will transmit advance electronic data to CBP (with value, quantity and country of origin) and confirm that the residue meets the 3% or 7% threshold, and then request release without entry under section 321 so that the carrier will not be an importer of record with all the liability that attaches to IORs, but must maintain 3A type bonds for section 321 treatment of shipments.
- ❖ o NOTE: trucks already set up with eManifest, so data will be submitted electronically; rail to work with CBP to set up electronic “rail bill” for all tanks that qualify under the 7% threshold and request release without entry under section 321.

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- ❖ **Shippers portion of coalition disappointed b/c:**
 - ❖ entry is still required and burdensome even under section 321
 - ❖ this compromise does not reflect that the **manifest tolerance ranges do not also apply to entry**
- ❖ **November 2010-- ALL SURPRISED** to learn revised FAQs posted on website (under some irrelevant and obscure title) without input or notice to trade coalition – **new enforcement date of July 2011**
 - ❖ Coalition understood CBP intended to circulate a draft text containing these concepts with **FAQs** on this process for the coalition to comment
- ❖ **January 2011**– meeting with revised HQ team- agreed to remove the FAQ from the website so coalition could provide comments
 - ❖ Port Huron unaware of what's happening at HQ– starts to detain trucks
- ❖ **February 2011**- latest revised version of FAQs by CBP
- ❖ **March 2011** – Coalition working on comments, but split in positions necessitating two separate submissions of comments

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Where Are We Today?

Current FAQs draft :

- Allows IIT bond procedure to be used only for the container but not for the residue
 - **How is this helpful?**
- Therefore, returning residue requires Manifest and Entry
- **Manifest** - permitted to report quantity within **range tolerances of container capacity**:
 - $\leq 3\%$ for truck and $\leq 7\%$ for rail
 - These permissible thresholds are to be based on measurement; mathematical calculations or historical data
 - Spot inspections and post entry audits to ensure these thresholds are not exceeded
 - Product description = “Residue last contained XXX”
 - However, no such flexible approach for the shippers/importers regarding range tolerances

EMPTY CONTAINER WITH RESIDUE ISSUE – CBP Recent Actions

Where Are We Today?

- Entry for Residue requirement---may be filed as:
 - **1321-RELEASE WITHOUT ENTRY**
 - where value <\$200 (no importer bond required) **but** following data elements required:
 - Shipper ID — WHO IS THE SHIPPER?
 - Ultimate consignee ID
 - Specific description of product (“LAST CONTAINED XXXX”
 - Product Origin (PRESUMABLY US)
 - Quantity, Weight and Value (allowed to use same tolerance ranges?)
 - **Informal Entry**- where value <\$2,000 (no importer bond required) and **Formal Entry** – where value \geq \$2,000 (requiring importer bond) **using two line items**– one for the container (9801.00.10 or .50) and the other line for the residue –
 - With all the required data elements of entry

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- **SOME ISSUES STILL OPEN FOR TWO YEARS**
 - **WHO IS THE IMPORTER OF RECORD**
 - CBP IDENTIFIES ANY OF THE FOLLOWING AS POSSIBLE
 - OWNER OF THE IIT
 - ORIGINAL EXPORTER
 - FOREIGN CONSIGNEE
 - CARRIER- WHERE INTEREST IS ONLY IN THE RETURN OF THE CONTAINER
 - **PARTIES TO DETERMINE—MAY PROVIDE BY CONTRACT---**
 - IN WHAT OTHER SITUATIONS DOES CBP ALLOW THE PARTIES TO “FLIP” FOR WHO WILL BE THE IMPORTER OF RECORD

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OPEN ISSUES (CONT'D)

- IF ENTRY TO BE COMPLETED THROUGH THE §321 PROCEDURE CAN CARRIER FILE?
- WHAT ABOUT TSCA?
- **WHO IS SHIPPER**– “PARTY THAT CONTRACTED FOR CARRIAGE”
- **ESTIMATES FOR QUANTITY**- UNCLEAR WHETHER THE RANGE TOLERANCES FOR MANIFEST ARE ACCEPTABLE FOR ENTRY- WHAT KIND OF BACK UP RECORDS WILL BE REQUIRED?
- **VALIDATED VALUES**- CAN'T SAY “NO COMMERCIAL VALUE” AND RANGE TOLERANCES (i.e., < \$200) NOT RECOGNIZED
MUST RETAIN DOCUMENTATION ESTABLISHING BASIS FOR DETERMINATION
- **FOR RAIL**-CURRENTLY **NO AUTOMATED FILING** AVAILABLE ON 321 ENTRIES- SO MUST BE NOTIFICATION TO LOCAL PORT VIA E-MAIL OR FAX NOTICE OF LIST OF BOLs COVERING IITs WITH RESIDUE TO BE ENTERED VIA 321-**ACCORDING TO LOCAL PORT PROCEDURES TO BE ESTABLISHED**

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✓ NEXT STEPS:

- ✓ COMMENTS DUE ASAP TO CBP ON LATEST DRAFT FAQ
- ✓ EXPECT AAEI TO SUBMIT SEPARATE COMMENTS FOCUSING ON THE SHIPPER (IMPORTER/EXPORTER) v. CARRIER ISSUES – API CONSIDERING SIGN ON
- ✓ EFFORT TO GET OTHER CBP PLAYERS INVOLVED
- ✓ PROPOSE TO CBP A PHASE IN APPROACH TO SEE IF THEIR OBJECTIVES CAN BE MET BY FIRST TRYING JUST MANIFESTING THE RESIDUE- SEE HOW THAT WORKS THEN CAN IMPLEMENT ENTRY REQUIREMENTS
- ✓ OTHER SOLUTIONS?

28 March 2010

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