

Do-it-yourself compliance

U.S. Customs, industry are bullish on Broker Self-Assessment trial.

By ERIC KULISCH

Expeditors International and A.N. Deringer Inc. are two of four brokerage firms selected by U.S. Customs and Border Protection to participate in a Broker Self-Assessment pilot program, *American Shipper* has learned.

The agency announced July 29 the selection of four companies out of 26 applicants to test whether a trusted compliance program should be instituted on a voluntary basis for customs brokers. CBP will not disclose the names of companies involved for privacy reasons.

OHL in Brentwood, Tenn., subsequently announced its Barthco International unit was chosen for the year-long partnership program.

St. Albans, Vt., logistics and customs services provider A.N. Deringer will also

self-police compliance with customs regulations, said Robert DeCamp, director of regulatory affairs and consulting. An official at Expeditors, one of the nation's largest international freight forwarders, confirmed that the Seattle-based company was accepted into the Broker Self-Assessment (BSA) program.

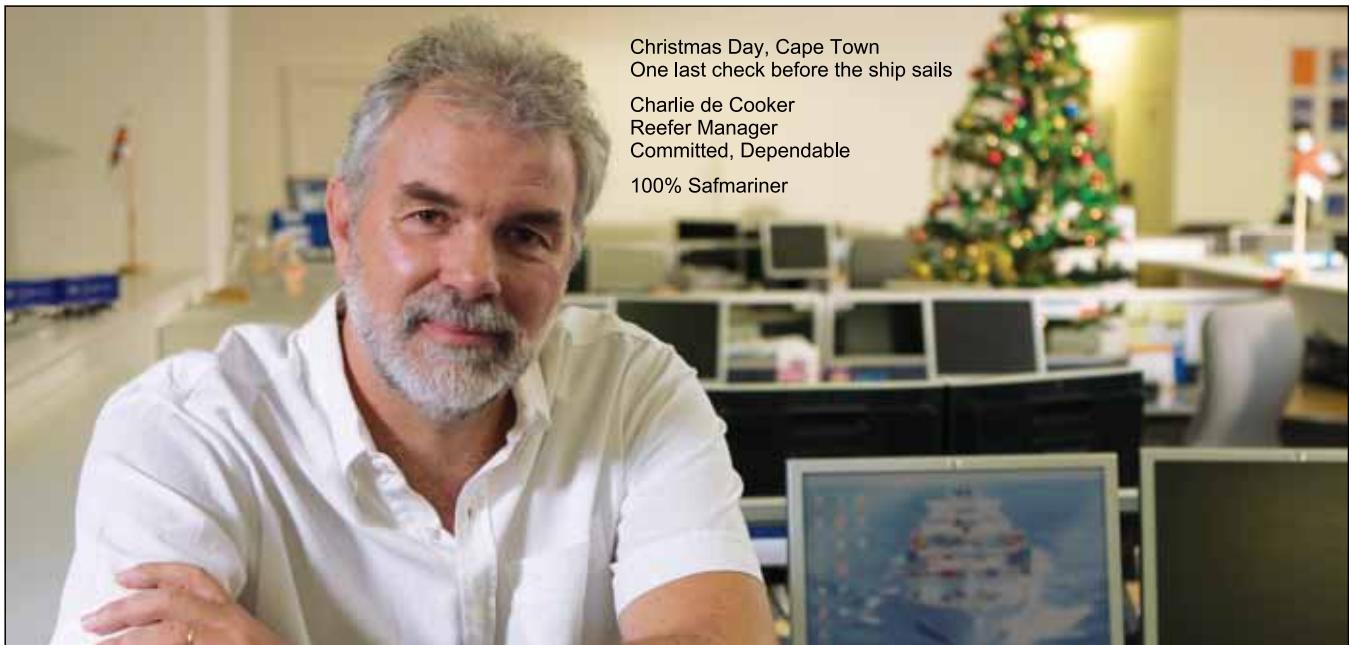
CBP has also picked an unknown small broker (less than 100,000 customs entries per year), in addition to the two medium (100,000 to 1 million entries) and one large (more than 1 million entries) brokers, to get a diverse sample of industry segments involved in the evaluation. All the companies were required to belong to the Customs-Trade Partnership Against Terrorism, a voluntary security-based program in which importers receive fewer container inspections if they

and their vendors follow approved security plans that meet minimum criteria.

The BSA, modeled on the seven-year-old Importer Self-Assessment (ISA) program, is designed to promote higher compliance levels with Customs laws and regulations by letting trusted brokers self-report compliance violations so that CBP can devote limited resources to checking higher-risk companies and enforcement issues. The largest import accounts that handle 60 percent of the customs entry volume have a 99 percent compliance rate, and CBP officials say they want to focus on the other

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Robert DeCamp
director of regulatory affairs and consulting,
A.N. Deringer Inc.



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PEOPLE MAKING THE DIFFERENCE

40 percent of entries.

About 200 companies with strong internal controls have joined the ISA program in exchange for exemptions from periodic agency audits and cargo inspections for trade violations.

Many trade professionals don't believe the benefits outweigh the significant cost associated with meeting ISA standards.

Last October, CBP also launched a pilot program that expanded the voluntary approach beyond customs regulations to product safety compliance.

Under the BSA program, a multidisciplinary CBP team reviews completed questionnaires and visits each broker to learn how they conduct business and determine whether they are able to update and improve



Baldwin

internal controls, perform periodic testing of those controls and disclose to CBP deficiencies discovered through the testing. A key responsibility for the brokers is to maintain an audit trail linking financial records to entries filed with CBP. The government expects brokers to have strong internal controls to comply with federal regulations and act in their capacity as a fiduciary agent for importers.

A permanent program would enable participating brokers to undergo fewer time-consuming audits.

CBP relies on the expertise of customs brokers to accurately file import documentation because 45 percent of all entries are from small, one-time shippers who do not understand the customs clearance process, Dan Baldwin, assistant commissioner for international trade, said at a conference earlier this year.

There are 12,000 licensed customs bro-

kers across the country that filed 25 million customs entries last year.

CBP categorized each of the applicants based on their volume and value of entries, history of compliance reviews, number of ports served, penalties received, areas of specialization and involvement in CBP programs such as Remote Location Filing (which allows brokers to file entries in locations other than the port in which goods arrived) and drawback (a process for importers to obtain a refund of customs duties paid on goods subsequently exported from the United States), said Richard Walio, CBP's chief of partnership programs, in an interview. The goal was to get a cross-section of brokers that deal with a variety of issues. One applicant only filed 165 entries last year, which would not have represented a sufficient baseline for judging progress compared to how they performed before starting the program, he said.

In August, Walio's staff began reviewing questionnaires and conducting on-site checks to develop a profile of each broker. It is also drawing up metrics by which to measure the companies during the next 12 months.

Privately held A.N. Deringer is able to meet the BSA requirements because it has long practiced strong oversight of its regulatory and business processes, DeCamp said.

"Firms that already are committed to quality control and oversight recognize their responsibilities and should fit well into this program" if it expands, he said.

DeCamp said A.N. Deringer has a five-person staff that devotes much of its time to compliance work, such as conducting internal audits of its operations and codes of conduct, and comparing the results with CBP regulatory audits.

The BSA "becomes a badge of confidence to our client base and to the government that we do it right," he said. The company also expects to benefit from sharing best practices with those in the program and refining its own operations to keep up with the constant change in regulations, he added.

OHL, one of the five largest customs brokers in terms of entries processed by CBP, said on its Web site that it achieved a 99.1 percent compliance rate last year.

The BSA grew out of discussions two years ago between Baldwin and representatives of the National Customs Brokers and Forwarders Association of America on how to improve broker compliance and the agency's enforcement approach, according to board member Kenneth Bargteil.

Baldwin questioned the effectiveness of increased penalty actions in achieving

BSA benefits

Potential trade benefits of U.S. Customs and Border Protection's Broker Self-Assessment program:

- A prior disclosure provision that would limit broker liability for self-disclosing violations to CBP, similar to how importers are treated under the Tariff Act.
- Facilitating gaining a waiver for a broker district permit. Brokers must have permits to operate in each Customs district, a condition of which is a licensed individual within the district to supervise the staff in the local offices. Brokerage houses have 180 days to find a replacement if the licensed employee departs the firm, or they can apply for a waiver seeking additional time to make a hire. In some markets, it can take time to fill the job because the pool of licensed brokers is small. A company's participation in BSA would be weighed as a favorable factor in CBP's consideration of a waiver.
- Uniformity in CBP processing so brokers receive the same treatment from port to port.
- CBP assistance in developing a corrective action plan as an alternative to penalty assessments or removal from programs such as Remote Location Filing.
- Assignment of an account manager. Importers and some large customs brokers are provided national account managers. A BSA program is envisioned as one way for small and medium-size brokers to get a leg up on obtaining a national account manager assigned to them and assist with uniformity issues.
- Accelerated review and disposition of electronic drawback claims, reconciliation and ruling requests. (Reconciliation is the process that allows an importer to flag certain items at the time of entry for which it doesn't have complete information and plans to submit at a later date. Information can include the value of a good, some types of classification, Harmonized Tariff Schedule headings or post-entry claims.)
- Limiting brokers to single-issue audits to investigate a particular problem rather than subjecting them to full-blown regulatory audits, which are burdensome for both sides.
- Consideration in disposition of a penalty case so that BSA participation becomes a factor in evaluating whether to mitigate or remove a sanction.
- Enhancing the Broker Evaluation and Analysis Report that Customs provides to brokers with national account managers. The reports gives the results of compliance problems discovered through stratified, random cargo examinations. The physical inspections are done to compare the cargo with the content declarations and customs entries in terms of quantity, classification, value, country of origin and other aspects.

compliance while the industry wanted to address concerns about the lack of uniformity in applying regulations at different ports of entry and the reasonableness of the agency's penalty assessments for broker mistakes, he said.

A major sore point for brokers is the penalty case against UPS Supply Chain Solutions, in which CBP initiated eight penalty actions totaling \$90,000 in fines against its brokerage division for misclassifying a computer part on 60 customs entries in 2000. Two penalties were for \$30,000 apiece and the others were for \$5,000.

A federal appeals court in August upheld the Court of International Trade's decision that UPS misclassified the parts, but overturned the portion of the ruling that said CBP followed proper procedures in determining that UPS Customshouse Brokerage Inc., as the UPS division was known back in 2000, did not have sufficient internal controls in place to ensure proper compliance with Customs regulations. The court said CBP, at minimum, must check all 10 factors listed in the federal code for determining whether a broker exercises "responsible supervision and control." Those factors include:

- Training.
- Issuing written instructions and guidelines to employees.
- Maintaining updated copies of the Harmonized Tariff Schedule and CBP regulations and rulings.
- Frequency of internal audits.
- Availability of a licensed broker to consult with non-licensed employees.

The UPS case underscores that "Customs has not been following the administrative protocol as closely as it should when regulating brokers, particularly when it comes to penalties and disciplinary actions," said NCBFAA Customs Counsel Alan Klestadt.

UPS and the broker community also argue that Customs is only allowed to issue a single penalty and a total penalty amount of \$30,000 for any violations that occurred prior to formal notification of a problem.

The NCBFAA negotiated an understanding on broker liability with the government a quarter-century ago, but subsequent legislation amending the statute governing broker rules didn't explicitly spell out how penalties would be capped, according to association officials. The legislation was an attempt to provide the legacy Customs Service a less draconian tool for enforcing broker rules, which to that point was limited to suspension or revocation of a broker's license. After agreeing to introduce a monetary penalty regime, industry and Customs officials reached a tacit agreement that broker liability would be limited to a

single \$30,000 penalty for repeating the same violation before receipt of a warning letter. The broker community assumed that CBP would interpret the informal agreement that way, but the trial judge said there is nothing in the law or the legislative record supporting the brokers' claim.

The law doesn't require CBP to notify brokers of its intent to assess a penalty, although the agency often does so. The pre-penalty procedure is part of the mandatory process for importer violations.

Brokers were also concerned by talk from some CBP officials about the need to raise penalty ceilings for the industry.

The BSA program is expected "to give Customs an improved understanding of how brokers operate, which hopefully will reduce situations in which penalties are initiated and help them understand the routine procedural safeguards that most brokers have in place to ensure compliance," said Klestadt, a partner in the New York law firm Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt.

The idea is that a better-educated border revenue agency should be able to provide more consistent regulation of the customs broker industry.

"One of the things we're looking for is a uniform set of guidelines against which


we are evaluated. And that's one thing that BSA will hopefully deliver," he said.


Bargteil, who is a vice president in the Baltimore office of global freight forwarder Kuehne + Nagle, said cooperation between a NCBFAA task force and CBP to develop the BSA program was excellent. During the pilot phase none of the participating companies will receive any tangible benefits, but potential trade benefits that CBP may consider if the program becomes permanent are posted in a reference guide on the agency's Web site (see box).

"Most of the benefits we didn't put into the pilot because we didn't want the perception those companies that got in had an unfair market advantage," Walio said.

The exception to that policy involves prior disclosure because CBP needed to assure companies volunteering to open up their business operations that they wouldn't get hit with penalties for unearthing an internal discrepancy as part of their cooperation with the agency, he said.

One of the benefits of a BSA program to CBP is that brokers with strong internal controls often can incorporate legislative or regulatory changes in their compliance process and document the new requirements faster than the agency can enforce them, Walio said. ■


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