

June 14, 2022

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Dear Ms. Fan and Mr. Teter,

NCBFAA raises an issue of concern relating to CBP regulations governing the filing of electronic EPA Notice of Arrival (NOA) data for pesticide shipments.

In 2016, NCBFAA worked closely with EPA to achieve a successful implementation of the EPA Message Set in ACE. Prior to that time, Notices of Arrival (Form 3540-1) were submitted in paper form *prior to* the shipment's *arrival* in the United States. With ACE, it was well understood in the trade that filing the 3540-1 data electronically in ACE using the EPA Message Set would be considered timely filed even if the filing took place after arrival. Not only do the regulations support our conclusion, but we were also told by EPA that as long as the NOA data was filed concurrently with the entry, the timing did not necessarily have to occur prior to arrival.

### **Background**

The Interim Final Rule published September 30, 2016 (81 FR 67140) specifically provided an electronic alternative to the paper NOA procedure, allowing the NOA data to be submitted *concurrently with* the filing of the entry. In the preamble to the Interim Final rule, CBP explained that it "is amending Section 12.113 to clarify that CBP must be in receipt of the completed NOA at the time of entry, *and not upon arrival*, and that an electronic alternative to the NOA may be filed via any CBP-authorized electronic data interchange system with the *filing of the entry*. [Emphasis added.]"

This distinction between the timing for electronically filed NOAs versus paper NOAs was further underscored when CBP stated that "the NOA may still be filed in a paper format, however it must be submitted to the EPA *prior to arrival* of the shipment. [Emphasis added.]"

Elsewhere in the preamble, CBP was clear: "This rule liberalizes the procedure by permitting the option of filing an electronic alternative to the NOA with the entry documentation..."

Given this background, importers and customs brokers have had every reason to believe that filing the NOA data in ACE concurrently with the entry filing is the correct procedure, regardless



of the timing of the shipment's arrival. Indeed, that is how the trade has operated for the past six years. Only recently, Region 5 has issued warning letters to importers and, in one case, a penalty, for not filing the electronic NOA data prior to arrival. In these circumstances, the entry/NOA data was filed within hours after arrival and all of the shipments were compliant with FIFRA requirements.

NCBFAA now learns that this has been a topic of discussion between EPA and CBP for some time and that the 2016 Interim Final Rule will soon be replaced by a Final Rule to "clarify" this issue. From our recent discussions with EPA, we expect the Final Rule will change the policy and the practice that has been in effect for the past six years by requiring the electronic NOA data and entry data to be submitted prior to arrival.

### **NCBFAA Concerns**

NCBFAA has significant concerns regarding this potential change in policy:

1. **Supply Chain Realities:** While importers and brokers prefer to file their entry documentation in advance, it is not always possible to do so. Along the land borders and with air shipments, arrival can happen quickly and the entry often occurs several hours after arrival of the truck or the landing of the plane. If the EPA NOA data/entry documents must now be filed before the shipment arrives, this has major repercussions on supply chains and would require shipments to be held at origin or trucks to be stopped at the other side of the border until all entry documents can be filed, placing further pressure on beleaguered supply chains.

The importer/broker would have to review the content of every ocean/air/truck shipment at the point of origin to determine if it must be held for pre-submission of an EPA NOA. From a logistics standpoint, given the volume and pace of trade, this is a daunting prospect, particularly since often the broker does not know the shipment contains pesticides or devices until we key in the entry.

And, in fact, it may not even be technically feasible to file an entry in ACE for an ocean shipment being held at origin, since an estimated arrival date is required for the broker to transmit the entry in ACE.

2. **Defining the Problem:** We are not convinced that earlier receipt of the NOA data will address EPA's concern. In recent discussions, EPA cited noncompliant product redelivery as the issue. Yet, the timing of the filing will not solve this problem.

It seems that EPA may also not be satisfied with the information they have to adequately review the entry for admissibility (the current 6-point check on the NOA data). If so, getting the data earlier will not be the answer. Are there additional data

elements that would help to target noncompliant shipments? Are there technology solutions that can provide stronger enforcement with less disruption?

Some agencies, such as the Food and Drug Administration (FDA), are seeing promising results with Artificial Intelligence and other emerging technologies to allow their systems to better target shipments for inspection. This sharpens enforcement with less manpower. Perhaps this approach is worth exploring for EPA also.

3. **What Is a “Complete” Automated Notice of Arrival:** Prior to 2016, a “complete” NOA paper form was a form signed by EPA. The signed form was required to be submitted to CBP prior to arrival. During recent discussions with EPA, the agency seemed to imply that a “complete” NOA at the time of entry in ACE continues to refer to an EPA-signed NOA.

Since 2016, customs brokers have always understood that the NOA data from the form provided by the importer (not a form signed by the EPA) meets the requirement when submitted in ACE at entry (with the understanding that once EPA receives the NOA through the ACE entry, the agency electronically approves it through the issuance of a “May Proceed” message). Is EPA now suggesting that a paper NOA must be submitted to EPA for signing while the shipment is held at origin? This must be clarified. Such an interpretation would be a significant departure from current practice and turn back the clock on automation efforts. Nor is it clear how this would even work in today’s highly automated process.

4. **Stakeholder Outreach:** Because the Interim Final Rule was first published six years ago with a 30-day comment period that drew a limited response, we urge CBP and EPA to seek additional public comment or otherwise conduct stakeholder outreach to assess the impact of this change before issuing a Final Rule. This cannot be characterized as a mere “clarification” of the 2016 Interim Final Rule. Requiring the NOA electronic data prior to shipment’s arrival is a substantive policy change that deserves appropriate stakeholder input.

We encourage EPA and CBP to engage NCBFAA and its members in future discussions about the NOA at an earlier point. We can provide useful insight into the specific details of supply chain flows in different transportation modes and the operation of the entry process to help the agencies better understand the operational impact of policy decisions. Other agencies, such as the FDA or the Department of Agriculture (USDA), often turn to us as a resource as they develop policies to solve import processing problems at the outset. The result has been better compliance with fewer disruptions when new policies are implemented.

5. **Interim Enforcement Discretion:** If and when a Final Rule is issued that requires the entry/NOA data to be submitted prior to arrival, we request that you include a 6-month interim enforcement discretion period where warning letters, instead of penalties, are

issued by EPA. This will allow customs brokers and importers the necessary time to modify their processes to comply with the changes in the Final Rule. We also request that the interim enforcement discretion period be applied currently as this issue is being sorted out.

NCBFAA welcomes the opportunity to discuss these issues with you further. Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. D. Gonzalez", with a stylized flourish at the end.

J. D. Gonzalez