

August 22, 2003

Department of Homeland Security  
Bureau of Customs and Border Protection  
Office of Regulations and Rulings  
Attention: Regulations Branch  
1300 Pennsylvania Avenue, NW  
Washington, DC 20229

SUBJECT: COMMENTS ON PROPOSED RULE ON REQUIRING ADVANCE  
ELECTRONIC PRESENTATION OF CARGO INFORMATION (RIN 1515-AD33)

Gentlemen:

I am providing comments on the Department of Homeland Security, Bureau of Customs and Border Protection's (CBP's) proposed rule and request for comments on requiring advance electronic cargo information, as published in the July 23, 2003, *Federal Register* (see 68 FR 43573). The *Federal Register* notice describes CBP's proposed revisions of Customs' regulations for shipping certain high-risk cargos, by providing advance notification of such shipments to CBP by way of an approved electronic data interchange system. These requirements would apply to high-risk cargo before it is either brought into or sent from the U.S. by any mode of commercial transportation (sea, air, rail or highway), and would affect persons importing to, exporting from, or transshipping certain high-risk cargos through the U.S.

The U.S. Nuclear Regulatory Commission (NRC) strongly supports CBP's efforts to improve security of high-risk cargos during the import, export, and transshipment through the U.S., in particular selected shipments of radioactive material. The NRC staff reviewed the proposed rule and is providing one observation and three comments for your consideration.

1. *Observation:* The NRC would suggest that additional clarification be provided in the preamble of the final rule on the bases for the differences between the time-frame reporting requirements for inbound and outbound shipments by vessel, air, rail and truck. The NRC is not opposed to the differences in notification times; however, we believe that additional clarity can be provided on the bases for these differences, given the potential for disparate impact on shippers.
2. *Comment:* In the proposed 19 CFR 123.92(b)(1), domestic cargo transported by truck and arriving at one port from another in the United States after transiting a foreign country (see §§123.21 and 123.41) is exempt from the advance electronic filing requirement for incoming cargo per 19 CFR 123.92(a). CBP's Summary of Electronic Submission Timeframes by Mode, indicates in the notes section that as a matter of clarification and definition of the proposal's coverage, United States exports to Canada are not subject to advanced electronic cargo information submission under this proposal unless (a) the merchandise is licensable by the Department of State or Department of Defense regulations or (b) the merchandise is transiting Canada with a third country as the destination.

However, the NRC would note that large shipments of radioactive material warranting tracking are routinely exported to Canada from the U.S. For example, depleted sealed sources of radioactive material—with a significant residual radiation dose rate—are routinely returned from NRC- and Agreement State-licensed irradiator facilities to the M.D.S. Nordion company in Canada. The NRC believes these shipments are of sufficient interest to warrant advance notification to CBP. Therefore, the NRC would suggest that advance notification of shipments of radioactive material being exported to Canada be provided for certain radioactive materials. As a criterion for these notifications, the NRC would suggest including shipments to Canada that require the shipper and carrier to implement security plans in accordance with U.S. Department of Transportation's regulations found in 49 CFR 172.800 (e.g., placarded shipments of radioactive material).

3. *Comment.* The NRC is concerned with an aspect of the proposed rule relating to information security requirements associated with advance notifications for shipments of radioactive material. Specifically, the NRC requires that its licensees and certificate holders protect shipment information (including advance notifications), for certain types of radioactive material shipments, classified national security information (under E.O. 12958, as amended), classified restricted data (under section 141 of the Atomic Energy Act of 1954 (AEA) [42 U.S.C. 2161]), or sensitive-unclassified safeguards information (under section 147 of the AEA [42 U.S.C. 2167]). Consequently, electronic transmission of these notifications requires the use of U.S. government-approved encryption technologies appropriate for the level of information protection and the information technology (IT) systems receiving these advance notifications must be approved for receipt and storage of this classified and/or sensitive unclassified information.

Shipments and thus advance notifications that would be made by NRC licensees and certificate holders would be made by private parties and not by, or for, the U.S. government (i.e., the NRC). Consequently, the exemptions specified in the proposed rule [e.g., 19 CFR 192.14(d)] that rely upon 15 CFR 30.50 through 30.58) do not appear to apply to such shipments. Therefore, although the NRC supports CBP's requiring licensees and certificate holders provide advance electronic notification of imports, exports, and transshipments of radioactive material, notifications containing classified or sensitive unclassified information must be transmitted, received, stored, and handled in accordance with applicable government security standards, regulations, and orders.

Historically the NRC has not mandated that its licensees and certificate holders obtain approved encryption devices for electronic transmission of classified or sensitive unclassified information. Instead, it supported selected licensees and certificate holders (i.e., sponsored them in obtaining COMSEC accounts) in voluntarily obtaining approved encryption devices or in transmitting such information to the NRC as hard copy. As a matter of practice, most licensees have chosen to transmit classified and sensitive information to the NRC via hard copy (i.e., they have transmitted the information to the NRC via the U.S. Postal service or other overnight delivery service). As a further consideration, in the recent past the NRC has expanded the number of licensees who would be required to protect shipment notifications as sensitive unclassified information and is currently considering further expansions of this requirement to other types of licensees.

Furthermore, the NRC understands that export control restrictions exist with certain types of encryption devices. Therefore, the ability of foreign companies—who are importing radioactive material to NRC licensees or who transship radioactive materials through the U.S. (and to whom the NRC would require that such shipment information be protected as sensitive unclassified information)—may be unable to easily obtain the necessary encryption devices because of export control restrictions.

Accordingly, the NRC would recommend that CBP clarify certain provisions in a final rule, specifically:

- CBP should indicate that these requirements also apply to non-government advance notifications which contain classified or sensitive unclassified information.
- CBP should indicate the alternate electronic destination for submitting advance notifications which contain classified or sensitive unclassified information, unless the existing CBP IT systems, specified in the proposed rule, will be capable of receiving advance notifications containing classified or sensitive unclassified information.

Additionally, as an interim measure, CBP could require submission of classified or sensitive unclassified advance notifications [to meet the intent of this proposed rule] via hard copy and express delivery service, pending establishment of appropriate encrypted transmission and storage capabilities. NRC is willing to explore with CBP coordinating receipt and sharing of advance notification from licensees with the objective of reducing any unnecessary burden on shippers while enhancing security. Specific issues that may influence the implementation date for full electronic submission of these advance notifications would include:

- Determining whether the NRC will need to issue a conforming rulemaking (including the NRC's requirements for full fee recovery) or Orders to NRC and Agreement State licensees mandating that licensees obtain approved encryption devices to permit electronic notification of subject shipments to CBP.
- Providing sufficient lead time for licensees to procure and install such devices, to obtain any necessary facility and/or personnel security clearances, to establish any necessary COMSEC accounts, and to train personnel on the use of these encryption devices.
- Resolving any export control restrictions on encryption devices for use by foreign persons who would be making covered shipments into or through the U.S. that would contain sensitive unclassified information.

4. *Comment:* The NRC would suggest revising the proposed 19 CFR 103.31a to indicate that advance cargo information which contains classified or sensitive unclassified information (i.e., information controlled in accordance with E.O. 12958, as amended, or other applicable statutes) will be released only in accordance with applicable regulations, statutes, and orders.

Thank you for your consideration of the NRC's comments on your proposed rule. The NRC's Office of Nuclear Security and Incident Response (NSIR) is ready to meet with you to achieve timely resolution of the concerns we have identified on the proposed rule. Please contact Mr. Philip Brochman of the NSIR staff at (301) 415-6557, or by e-mail at PGB@nrc.gov, for further information on the issues we have identified in this letter.

Sincerely,

***/RA by Michael F. Weber for/***

Roy P. Zimmerman, Director  
Office of Nuclear Security and  
Incident Response

cc: W.F. Kane, DEDH

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\* See previous concurrence

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