

Article

Counterfeit Cargo Trends in Ocean Transport



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On July 23, U.S. Customs and Border Protection announced the recent signing of an Automated Commercial Environment-International Trade Data System (ACE-ITDS) memorandum of understanding with the Federal Maritime Commission to share ACE and other data to strengthen the balance of facilitation and enforcement regarding the regulation of ocean carriers and other entities involved in ocean trade.

FMC Chairman Mario Cordero further noted “This longstanding collaboration furthers mutual objectives — to ensure security at our nation’s ports and compliance with the Safe Port Act.”

Additionally, CBP has recently announced similar arrangements with China Customs.

We believe at least one of the reasons these agencies are combining forces at this time, which is somewhat unusual given their different regulatory mandates, is a new ocean transportation pattern which has evolved to facilitate the import of counterfeit commodities and has the potential for even more troublesome security challenges.

The U.S. Chamber of Commerce’s Global Intellectual Property Center reported the following statistics obtained from CBP’s Office of International Trade-Seizure Statistics for fiscal year 2012:

- Department of Homeland Security seized 22,848 intellectual property-infringing products worth \$1.3 billion.
- Top counterfeits seized by DHS were handbags/wallets, watches/jewelry, apparel, consumer electronics, footwear, and pharmaceuticals.
- China and Hong Kong are the primary sources of intercepted counterfeit products, representing 84 percent of all CBP seizures.

One can safely conclude from these statistics, with the exception of counterfeit pharmaceuticals which tend to be shipped into the United States in smaller quantities by air couriers, that the vast majority of counterfeit products seized by CBP were shipped in large quantities in marine containers via ocean carriers. Obviously, the

\$1.3 billion seized is the tip of the iceberg since surely many multiples of that number slip by CBP unnoticed. The real numbers can only be imagined, but the experts all say the losses, which are directly related to counterfeiting, significantly impact the economy and reach the hundreds of billions of dollars annually. There is a definite paradigm shift in play in the counterfeiting enforcement picture that will focus more on the means of transport, than on the parties directly involved in the importation of counterfeit products.

The *modus operandi* which has developed in the importation of counterfeit products by ocean carriers employs shipping documents which can only be termed “corporate identity theft” in that they appear to involve players which typically ship the products indicated on the documentation, but in fact those parties have absolutely no involvement in the shipments. The fraudulent documents are key to successfully entering these illegal imports.

In the China trade lanes these transactions usually involve, knowingly or not, a FMC-registered or licensed non-vessel-operating common carriers effecting the shipments from China, and its corresponding FMC-licensed ocean transportation intermediary (OTI) in the United States making delivery arrangements for the counterfeit goods. The other salient feature in the scheme is inevitably there’s a non-FMC-licensed/registered intermediary in China making all the shipment arrangements through the FMC-registered/licensed NVO. In these cases the intermediaries interfacing with the FMC-registered NVOs are also not registered with China’s Ministry of Transport.

On the U.S. side, there are instructions provided by the FMC-licensed U.S. OTI (agent to the overseas FMC NVO) to the U.S. customs broker to not contact the importer directly, but rather coordinate all deliveries through a contact person in the United States. This person’s contact information is usually a phone number (mobile phone) and makeshift e-mail address. Neither the registered NVO in China nor the U.S. OTI, or customs broker, have direct contact with the actual shippers or consignees of the counterfeit goods.

Deliveries are coordinated by the so-called contact person who clearly is not the consignee noted on the documentation, and in whose behalf the cargo was cleared. Payments for freight charges to the FMC-registered NVO in China are made by a middle-man in China, and these payments are usually paid in cash directly to the NVO's bank.

There are certainly enough red flags in these transactions for CBP, China Customs, and the Ministry of Transport in China, and FMC to take notice over the activities of entities which they routinely regulate. However, this documentary charade has one objective: to allow U.S. imports to fly under CBP's radar without physical inspection and detection.

Even CBP's new Importer Security Filing (ISF) system is being circumvented by these fabricated companies, and when CBP does happen to discover the scheme, there's no importer to pursue since the only importer on all documentation is a party whose identity has been stolen. In fact, once CBP does happen to seize a shipment with the characteristics described herein, the usual pattern is the overseas intermediaries and U.S. contact person disappear. The only participants left on the scene are the transportation intermediaries and ocean carriers, who either knowingly or unwittingly participated in the importation of the counterfeit products.

In the context of the topic we have been discussing, it's clear that, at the very least, U.S. federal agencies, as well as China Customs, are contemplating joint enforcement activities in this area. While the responsibilities of CBP under the Safe Port Act (the ISF, for example) are clear, it is less clear, however, what jurisdictional basis the FMC would have to pursue anti-counterfeiting as described. However, the 1998 Shipping Act, as amended, and its implementing regulations currently have enough teeth to focus on the activities of the FMC-registered NVOs and their licensed OTI agents in the United States in the context of the red-flag activities described. We say "currently," because the FMC is in the process of revamping its regulations (comments on the new rules closed on Aug. 31) and they include even more stringent provisions related to agency-licensed NVOs and ocean carriers accepting cargo from unlicensed/un-registered NVOs — the typical handlers of counterfeit merchandise.

In any case, in view of the public declarations made by the FMC, CBP, and China Customs with regard to joining forces in combatting unfair and deceptive practices to ensure security at our nation's ports, and compliance with the Safe Port Act, it appears there may be a paradigm shift in play to address counterfeit goods imports of counterfeit entering the United States.

We believe enforcement actions will take the

form of FMC-initiated investigations against OTIs involved in these imports, after receiving some indication from CBP that they have seized cargo believed to be counterfeit. The other mechanism which we believe will impact OTIs involved in these transactions is from importers whose merchandise is being counterfeited and receive notices from CBP of seizures made on what appears to be counterfeit goods with their marks.

We believe these importers will seek reparations at the FMC through existing FMC Complaint procedures which award attorneys' fees. In any case, these developments will create an additional burden on NVOs and freight forwarders which act as delivery agents to ensure that they, and their overseas agents, do not unwittingly become embroiled in these illegal imports.

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