



Southern Shrimp Alliance

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June 1, 2010

DELIVERY VIA ELECTRONIC MAIL

Tracey Denning
Agency Clearance Officer
U.S. Customs and Border Protection
Office of Regulations and Rulings
799 9th St., NW
7th Floor
Washington, DC 20229-1177
tracey.denning@dhs.gov

Re: **60-Day Notice and Request for Comments; Revision of an Existing Collection of Information; Comments of the Southern Shrimp Alliance**

Dear Ms. Denning:

The following comments are submitted on behalf of the Southern Shrimp Alliance ("SSA"), in response to the notice published by U.S. Customs and Border Protection ("CBP") on April 1, 2010, inviting comments regarding CBP's proposed revision of an existing collection of information relating to the distribution of funds under the Continued Dumping and Subsidy Offset Act ("CDSOA"). 75 Fed. Reg. 16,493.

SSA is a non-profit alliance of members of the shrimp industry in eight states committed to preventing the continued deterioration of America's domestic shrimp industry and to ensuring the industry's future viability. SSA serves as the national voice

for the shrimp industry in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas. SSA neither seeks nor receives monetary distributions pursuant to the CDSOA program, but a substantial portion of our organization's individual members receive CDSOA disbursements.

The domestic warmwater shrimp industry is far and away the largest participant in the CDSOA program. Since fiscal year 2006, over a thousand members of the domestic shrimp industry have submitted certifications to CBP seeking CDSOA disbursements. The amount of CDSOA funds distributed from antidumping duties collected from the six antidumping duty orders on certain frozen warmwater shrimp has been substantial: in four fiscal years, CBP has reported distributing nearly \$172 million, with an additional \$14.4 million withheld from distribution.

Unfortunately, although the CDSOA program has made large amounts of funds potentially available to the domestic industry, CBP's administration of the program, when coupled with the aggressive and sometimes fraudulent claims of certain claimants, has resulted in a large portion of these funds being directed away from shrimp fishermen desperately in need of assistance towards parties that benefit from low-priced shrimp imports as shrimp purchasers. The perversion of the CDSOA program continues to deeply concern SSA and has resulted in our organization bringing suit against the agency at the U.S. Court of International Trade.

Here, we write in support of CBP's proposal to revise CBP Form 7401 to include two additional data elements: "Start Date of Qualifying Expenditures" and "End Date of Qualifying Expenditures." As a general matter, SSA supports any efforts by CBP to

improve the accuracy and integrity of certifications submitted to the agency. Lax enforcement of and significant non-compliance regarding CBP's CDSOA regulations both punishes honest applicants and encourages further malfeasance with respect to submitted claims. Requiring parties to list both when their reported qualified expenditures began to be incurred and when such expenditures ended will assist in ensuring that parties do not accidentally or intentionally seek qualified expenditures for dates beyond those permitted by CBP's interpretation of its regulations, thereby limiting exaggerated qualified expenditure claims. The burden on parties submitting certifications is minimal and requiring parties to provide these two pieces of data will likely assist claimants in ensuring that they have correctly calculated a claim.

Although the proposed addition to CBP's CDSOA form is a useful step, it is nevertheless substantially less than what the agency could and should be requiring from applicants. In addition to the two data elements proposed to be added to the paper and electronic CDSOA form, SSA requests that CBP amend these forms further to request that claimants provide a narrative description of how the qualifying expenditures claimed are determined to be related to the production of the product covered by the order or finding, consistent with 19 C.F.R. § 159.63(d). For the reasons detailed below, further amendment of the form will assist in ensuring that CDSOA distributions are not made for invalid claims.

CBP has administered the CDSOA program for nine years and the agency's experience has clearly established that the program, as administered, invites and encourages abuse. Nearly five years ago, the U.S. Government Accountability Office

(“GAO”) criticized CBP’s unwillingness to “verify claims systematically or on a routine basis.”¹ The GAO observed that CBP’s approach ran counter not only to general good governance principles but also to the specific findings of the Inspector General of the U.S. Department of Treasury in 2003.² The GAO explained:

CBP’s current position is at odds with its own Inspector General’s (IG) position and our work on financial management, which highlights the importance of verifying claims. In its audit of the CDSOA program, Treasury’s IG emphasized the need for more robust claim verification. In the report, the IG questioned why CBP was not reviewing CDSOA claims on an annual basis, and particularly the expenditures claimed. The IG went on to note that certifications are legally subject to verification and that these certifications would serve as a deterrent against the submission of deceptive claims. Moreover, it emphasized that untimely verifications could result in the loss of revenue for other deserving companies if, in fact, deception was later discovered. Our overall work on claims and disbursements throughout the government shows that the systematic verification of claims before they are processed (or after they are paid) is key to ensuring the validity of transactions and to avoid disbursement problems such as improper payments. This work also reveals the importance of internal controls, such as verification, to ensure that only valid transactions are initiated in accordance with management decisions and directives. (p. 24; footnote omitted).

The GAO also observed that the absence of routine and systematic verifications augmented problems created by the agency’s decision to not seek more information from applicants seeking CDSOA disbursements:

Program officials told us they basically accept the information in company claims and rely on complaints from competitors to initiate verifications. In reviewing certain claims and CBP’s procedures, we found that claims are

¹ U.S. Government Accountability Office, International Trade: Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act, GAO 05-979 (September 2005) at 23.

² Department of the Treasury, Financial Management: Bureau of Customs and Border Protection Needs to Improve Compliance with the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), OIG-03-085, Washington, D.C. (June 17, 2003).

generally not questioned even though top CDSOA recipient companies have claimed over \$2 trillion since fiscal year 2001 (see app.II). CBP normally does not take steps to determine that companies are still in business and producing the item covered by the order under which they are making a claim. Neither CDSOA nor CBP require companies to explain their claims, provide supporting documentation about their claims, or follow a format when listing their qualifying expenditures. For example, in reviewing the 2004 claims filed by top CDSOA recipients, we found that most companies did not provide any details about their claimed expenditures. Indeed, one company listed all of its claimed expenditures under the category of raw materials. CDSOA and CBP do not require that companies have their claims reviewed by a certified public accountant or a party outside of the company. (p. 22).

This system of administration has unquestionably invited abuse. Based on a tip made to NOAA Law Enforcement Officials, an investigation of the \$8.5 million qualified expenditure claim submitted by Ocean Springs Seafood Market, Inc. in fiscal year 2006 resulted in a guilty plea for the company's proprietor, Earl Fayard, Jr., to making false, fictitious or fraudulent claims against an agency of the federal government in violation of 18 U.S.C. § 287.³ Mr. Fayard, who was alleged to have created false invoices to create nearly half a million dollars in fraudulent claims, was sentenced to two years probation and ordered to pay restitution. The Government's court filings supporting Mr. Fayard's conviction indicated that an informant would testify at trial that the informant was approached by Mr. Fayard in early 2006 and:

was shown an October 28, 2005 news article from Seafood.com News which stated in pertinent part: "accountability for the accuracy of claims for Byrd Amendment money is 'virtually non-existent' . . . 'companies making the largest claims generally received the largest payments' and only one company has been audited..."⁴

³ USA v. Fayard, Case # 2:08-cr-00273-JCZ-DEK-1, Eastern District of Louisiana (New Orleans).

⁴ "Factual Basis by USA as to Earl H. Fayard, Jr." (Jan. 21, 2009).

In other words, the government's allegations represent an indictment of the susceptibility of the CDSOA program to fraud as the result of CBP's administration of the program. But for the exceptional work of NOAA Law Enforcement Officials, this fraud would have likely gone entirely undiscovered.

The lengths that CBP has gone to in order to not address inaccurate claims are set out in excruciating detail in the civil litigation between certain members of the Vietnamese American Commercial Fishermen's Union ("VACFU") and VACFU.⁵ Part of the record of that civil litigation indicates that CBP began a verification both of the certification for substantial qualified expenditures submitted by VACFU and of the organization's actions with respect to its members once CDSOA disbursements were received. VACFU's counsel informed the federal district court that at "{s}ometime prior to May 22, 2007, the Chief of the Audit Oversight Branch of the Customs and Border Protection Agency, Ms. Connie Reynolds-Shine, visited the Union to confirm that it was eligible for the distribution under CDSOA."⁶

The inquiry, however, appears to have been dropped, as VACFU continued to submit qualified expenditure claims and receive disbursements. The U.S. Department of Justice attorney representing CBP informed the Court, as support for a request for the continuation of a hearing, that "Customs further determined that the auditor originally reviewing paperwork for the VACFU, Ms. Connie Reynolds-Shine, has since

⁵ Huynh v. Vietnamese-American Commercial Fishermen's Union, Case # 08-4064, Eastern District of Louisiana (New Orleans).

⁶ "Defendant's Opposition to Motion for Summary Judgment," ¶ 6 (February 2, 2010).

retired, leaving a gap in historic agency knowledge regarding the facts and circumstances in the current dispute.”⁷ Nevertheless, VACFU’s own filings indicated that the organization openly conceded that it had submitted substantial claims on behalf of a party that VACFU, itself, asserted was not a member of the organization⁸ and, moreover, that VACFU did not check the claims of the members on whose behalf it submitted a collective certification – “The Union does not and did not have the staff to audit its member’s certification” – despite the receipt of a five percent handling charge for CDSOA funds distributed to its membership.⁹ Thus, although CBP began a verification, there is little indication that the verification was vigorously pursued or even completed. At the same time, VACFU, by its own admission, was filing for and receiving funds for a party that it would later allege was not a member of the organization and, despite receiving significant fees to do so, was not making any effort to check the accuracy of claims from its members. As a result, large claims were made and paid without verification by the submitting party or, more importantly, by the government agency authorizing massive payments to a single entity. These large payments, to the extent that they were made in response to invalid claims, effectively reduced the amount of essential funds available to other deserving shrimp fishermen.

In the civil litigation, CBP’s hand was forced by VACFU, which brought the agency into the case alleging that a member had inappropriately claimed certain

⁷ Declaration of Peter M. Mansfield (Feb. 2, 2010) at ¶ 6. The statement that Ms. Reynolds-Shine has retired from the agency appears to be erroneous.

⁸ “Defendant’s Opposition to Motion for Summary Judgment,” ¶ 4 (February 2, 2010).

⁹ Id. at ¶¶ 1, 3.

expenses, that were thereafter made part of VACFU's qualified expenditure claims. Forced to address the claim in a federal district court, the Government informed the Court that it had reviewed the relevant claim of the individual VACFU member and "Based on this review, the United States has determined that the funds held in the registry of the Court were paid based on a claim for an ineligible expenditure under the CDSOA – namely, the cost of fuel purchased for resale to other parties."¹⁰ The amounts involved were significant; the VACFU member that brought the case agreed to relinquish claims to nearly \$1 million in distributed CDSOA funds (\$911,968.65) that was determined to be related to ineligible expenditures.¹¹ Yet, the discovery of what CBP alleges were CDSOA disbursements in response to ineligible expenditures has not led to any further action by the agency. CBP has not taken steps to inform the shrimp industry that it has determined that costs related to the purchase of fuel for resale to other parties do not constitute eligible qualified expenditures. In fact, the civil case resulted in a settlement between the government, VACFU and the VACFU members involved, and, but for a breakdown in the consummation of that settlement, the terms of the settlement would not have been known to third parties.

The certified qualified expenditure claims of Ocean Springs Seafood Market and VACFU from 2006 through 2009, as reported by CBP, for CDSOA funds related to

¹⁰ "United States Memorandum in Support of Motion for Leave to File Cross-Motion for Partial Summary Judgment" (March 24, 2010).

¹¹ Exhibit 1 (¶ 10) to Plaintiffs' Motion to Enforce Settlement (May 28, 2010). VACFU agreed to repay CBP an additional \$30,000 related to a 5% commission amount it received on the submission of claims related to the purchase of fuel for resale (¶ 5).

collected antidumping duties from the order on certain frozen warmwater shrimp from India is set forth below:

| | 2006 | 2007 | 2008 | 2009 |
|-----------------------|------------------|------------------|------------------|------------------|
| Ocean Springs Seafood | \$8,544,483.00 | \$14,033,252.94 | \$20,708,934.20 | \$20,618,543.18 |
| VACFU | \$110,046,282.88 | \$267,635,960.80 | \$300,704,253.88 | \$305,820,486.68 |

CBP reports that these two parties were allocated CDSOA benefits based on the full measure of their qualified expenditure claims. These qualified expenditure amounts indicate that Ocean Springs Seafood Market's 2009 claim was 141% larger than its claim in 2006 – the claim that resulted in a guilty plea for a false claim – and that VACFU's 2009 claim was 178% larger than its claim in 2006. These claims appear to have been processed by CBP without any additional scrutiny despite the circumstances presented by each. If a criminal conviction and direct discovery of what can be only charitably described as negligent claims made for CDSOA funds did not result in more wary review of these specific claims, it is exceptionally troubling to imagine what occurs with claims where NOAA Law Enforcement has not pursued an investigative inquiry or where CBP has not been forced into a private litigation between CDSOA claimants.

There can be no valid justification made for the current operation of the CDSOA program by CBP. While CBP may feel that the CDSOA was forced upon them without consultation or sufficient resources to administer the program, hostility to the existence of the program does not justify the continuing minimal, inadequate efforts by the agency to ensure that the program is not abused. CBP has been charged with the responsibility of ensuring that antidumping duties collected are – as Congress clearly intended –

distributed to businesses that are struggling to survive in the face of continuing unfair trade.

As such, at an absolute minimum, CBP should amend the CDSOA form further to request that claimants provide a narrative description of how the qualifying expenditures claimed are determined to be related to the production of the product covered by the order or finding. This information is required by the agency pursuant to 19 C.F.R. § 159.63(d) in the context of any verification conducted and is something that should be established at the time that a certification is prepared and submitted. This additional information request would place a minimal burden on claimants but assist in ensuring that ineligible qualified expenditures – such as costs related to the purchase of fuel for resale – do not compose part of the qualified expenditures claimed. This small step will not cure the myriad problems attendant to the administration of the CDSOA program. Nevertheless, requiring such information holds some promise for helping to reign in exorbitant, inaccurate, or fraudulent qualified expenditure claims.

Domestic shrimp fishermen in the Gulf of Mexico are currently facing a crisis of unprecedented proportions. Thousands of small businesses are desperately in need of support from their government. Shrimpers did not ask for the CDSOA program, but they have become eligible for the benefits of the program under the operation of law. To date, CDSOA has largely failed shrimp fishermen. But the past need not determine the future and we once again ask that CBP take seriously the massive power it wields to assist an industry desperately in need.

Ms. Tracey Denning
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Pursuant to CBP's instructions, these written comments have been directed to Tracey Denning, Agency Clearance Office, U.S. Customs and Border Protection. We are grateful for any consideration provided to the foregoing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Williams". The signature is written in a cursive style with a large, stylized initial "J".

John Williams
Executive Director