

# Best Practices for Filing the Import Declaration

Joint Industry Workshop on the EPA Formaldehyde Rule

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# Overview

What the formaldehyde rule requires

TSCA import certification requirements

How to certify

What happens after certification

Enforcement considerations

Next steps for importers

# What the Formaldehyde Rule Requires

# 40 C.F.R. § 770.30(d)

“On and after December 12, 2018, importers of articles that are regulated composite wood products, or articles that contain regulated composite wood products, must comply with the import certification regulations for ‘Chemical Substances in Bulk and As Part of Mixtures and Articles,’ as found at 19 CFR 12.118 through 12.127.”

Formaldehyde rule published Dec. 12, 2016

Effective date – Feb. 10, 2017

# Elements

## When:

- 2 years from date of publication, so December 12, 2018
- Unless suspension and possible withdrawal affects compliance dates

## Who:

- importers of regulated articles

# Elements

## What is subject to import certification:

- Articles that are composite wood products (“hardwood plywood made with a veneer or composite core, medium-density fiberboard, and particleboard”) that are regulated under the formaldehyde rule
- Articles that contain regulated composite wood products
- Excludes excluded products (not regulated)
  - Those listed in 40 C.F.R. § 770.1(c), e.g., structural plywood, second-hand finished goods

# Elements

## What must be done?

- Importers of regulated articles must comply with the Customs & Border Protection (CBP) regulations on TSCA import certification
  - 19 C.F.R. §§ 12.118 – 12.127
- Submit to CBP a positive import certification indicating that the chemicals in the articles to be imported comply with TSCA
- Adoption of TSCA import certification requirements for chemical imports

# TSCA Import Certification Requirements



# TSCA § 601, Formaldehyde Standards

“Not later than July 1, 2013, the Administrator, in coordination with the Commissioner of U.S. Customs and Border Protection and other appropriate Federal departments and agencies, shall revise regulations promulgated pursuant to section 13 of this Act as the Administrator determines to be necessary to ensure compliance with this section.”

40 C.F.R. § 770.30(d)

# TSCA § 13, Entry into the Customs Territory of the United States

“The **Secretary of the Treasury** shall **refuse entry** into the customs territory of the United States (as defined in general note 2 of the Harmonized Tariff Schedule of the United States) of any **chemical substance**, mixture, or **article containing a chemical substance** or mixture offered for such entry if—

(A) it fails to comply with any rule in effect under this Act, or

(B) it is offered for entry in violation of section 5, 6, or title IV a rule or order under section 5, 6, or title IV or an order issued in a civil action brought under section 5, 7 or title IV”

# “Chemical substance”

TSCA § 3(2)(B) excludes from the term “chemical substance”:

- Pesticides
- FDA-regulated materials and products
- Other things regulated under other statutes

Formaldehyde is “chemical substance”

# CBP Regulations

## Title 19 – Customs Duties

- Part 12 – Special Classes of Merchandise
- §§ 12.118-12.127: TSCA
- Also § 127.28

Originally  
adopted 1983

Amended 2016

- 81 Fed. Reg. 94980 (Dec. 27, 2016)
- Effective January 26, 2017
- Establishes an electronic option for filing import certifications and makes other changes

# Articles generally excluded

*"Article means a manufactured item which:*

- (i) Is formed to a specific shape or design during manufacture,
- (ii) Has end use functions dependent in whole or in part upon its shape or design during the end use, and
- (iii) Has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article ...."

19 C.F.R. § 12.120(a)(1)

# Articles of composite wood products

CBP regulations apply to chemical substances in articles only if EPA has so required in a rule under TSCA

§ 770.30(d) is such a rule

- First such rule
- Where EPA has restricted imports of chemicals in articles previously, section 13 requirements were not triggered

# Basic requirement

The importer or its authorized agent must certify either that –

- The chemical shipment is subject to TSCA and complies with all applicable rules thereunder, or
- The chemical shipment is not subject to TSCA

Sign and file with CBP either the positive or the negative statement

# Certifications

## Positive statement:

- “I certify that all chemical substances in this shipment comply with all applicable rules or orders under TSCA and that I am not offering a chemical substance for entry in violation of TSCA or any applicable rule or order thereunder.”

## Negative statement:

- “I certify that all chemical substances in this shipment are not subject to TSCA.”
- Intended for pesticides, FDA-regulated materials, etc.



# What does the certification mean?

"All chemical substances" = formaldehyde

No other chemicals in imported articles are subject to section 13 certification requirements

"Comply with all applicable rules" = formaldehyde rule

"Certify" = formal representation to U.S.

Subject to enforcement action for false statements to the government, 18 U.S.C. § 1001

# Negative certification?

Should the negative certification be submitted for imports of exempt articles?

- No
- Implies not subject to TSCA – not a pesticide, etc.
- The chemicals in imported articles are subject to TSCA even if exempt from the formaldehyde rule

Await EPA guidance

Possible – voluntarily submit a positive certification

- The chemicals in the articles would be in compliance with TSCA

# How to Certify

# Filing process – paper

Importer or customs agent handles

Certification must appear as a typed or stamped statement on:

- An appropriate entry document or commercial invoice, or
- An attachment thereto

Submit additional information about the certifier (importer or agent) (once rule change effective)

- Name, phone number, address, email address

File certification with director of the port of entry before release of the shipment

# Blanket certifications

## Current process

- Port director may approve an importer's use of a blanket certification in lieu of filing separate certification for each individual shipment
- List products covered by name and Harmonized Tariff Schedule of the United States subheading number
- Identify foreign supplier by name and address
- Be signed by an authorized person
- Good for 1 year from date of approval
- Invoice must include a reference to the blanket certification and incorporate it by reference

# Blanket certifications

## Future process (once CBP rule is effective)

- No blanket certifications
- Blanket certifications had limited utility
  - Valid only at one port of entry
  - Valid only for one year
  - Required incorporation of reference to blanket certification on entry documents
  - More burdensome than individual certifications
- CBP wants filers to use electronic system

# Filing process – electronic

(Once final CBP rule is effective)

Submit certification electronically to:

the **Automated Commercial Environment system (ACE)**,  
or

any other CBP-authorized  
Electronic Data Interchange (EDI)

Submit additional information about the certifier (importer or agent)

Name, phone number, address, email address

# ACE background

CBP began testing ACE in 2002

Security and Accountability for Every Port Act of 2006 (SAFE Port Act)

- Mandates that all federal agencies requiring documentation for clearing the importation of cargo participate in the International Trade Data System (ITDS) by using a CBD-authorized EDI
- Single portal for the collection and distribution of standard electronic import and export data



# ACE background

Executive Order 13659 (2014), *Streamlining the Export/Import Process for America's Businesses*

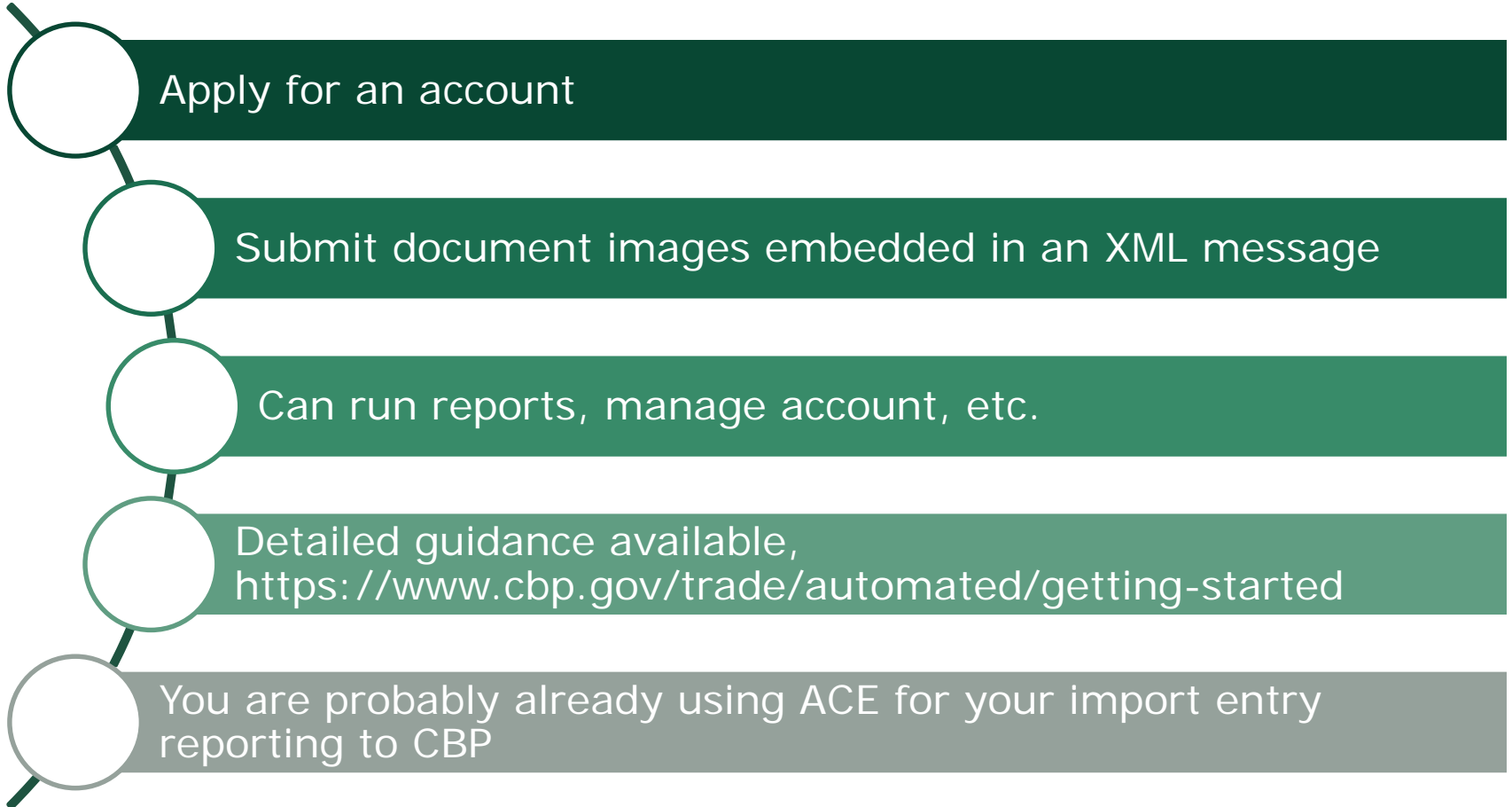
- **“by December 31, 2016**, participating agencies shall have capabilities, agreements, and other requirements in place to utilize the ITDS and supporting systems, such as the **Automated Commercial Environment**, as the primary means of receiving from users the standard set of data and other relevant documentation (exclusive of applications for permits, licenses, or certifications) required for the release of imported cargo and clearance of cargo for export”

# ACE background

CBP has tested ACE for use with TSCA import certification forms

- ACE tested in 2012-2016 using TSCA import certification forms and other documents
- Extensive testing in 2016 with TSCA import certification forms
  - Waived requirement to submit paper certifications for test participants
- Now ready for full-scale implementation

# ACE process



# What Happens After Certification

# CBP may detain shipment

CBP will detain a shipment, at importer's risk and expense, whenever –

- EPA has reasonable grounds to believe the shipment is not in compliance with TSCA (i.e., formaldehyde rule) and notifies port director
- Port director has reasonable grounds to believe the shipment is not in compliance with TSCA
- No import certification is provided

# Release under bond

Port director may release to the importer a detained shipment when –

- Port director has reasonable grounds to believe that the shipment may be brought into compliance, or
- Importer gives bond, submitted on Customs Form 301, and bond conditions are met
- “Brought into compliance” = file import certification, label appropriately, establish compliance with emissions limitations, etc.

# Release under bond

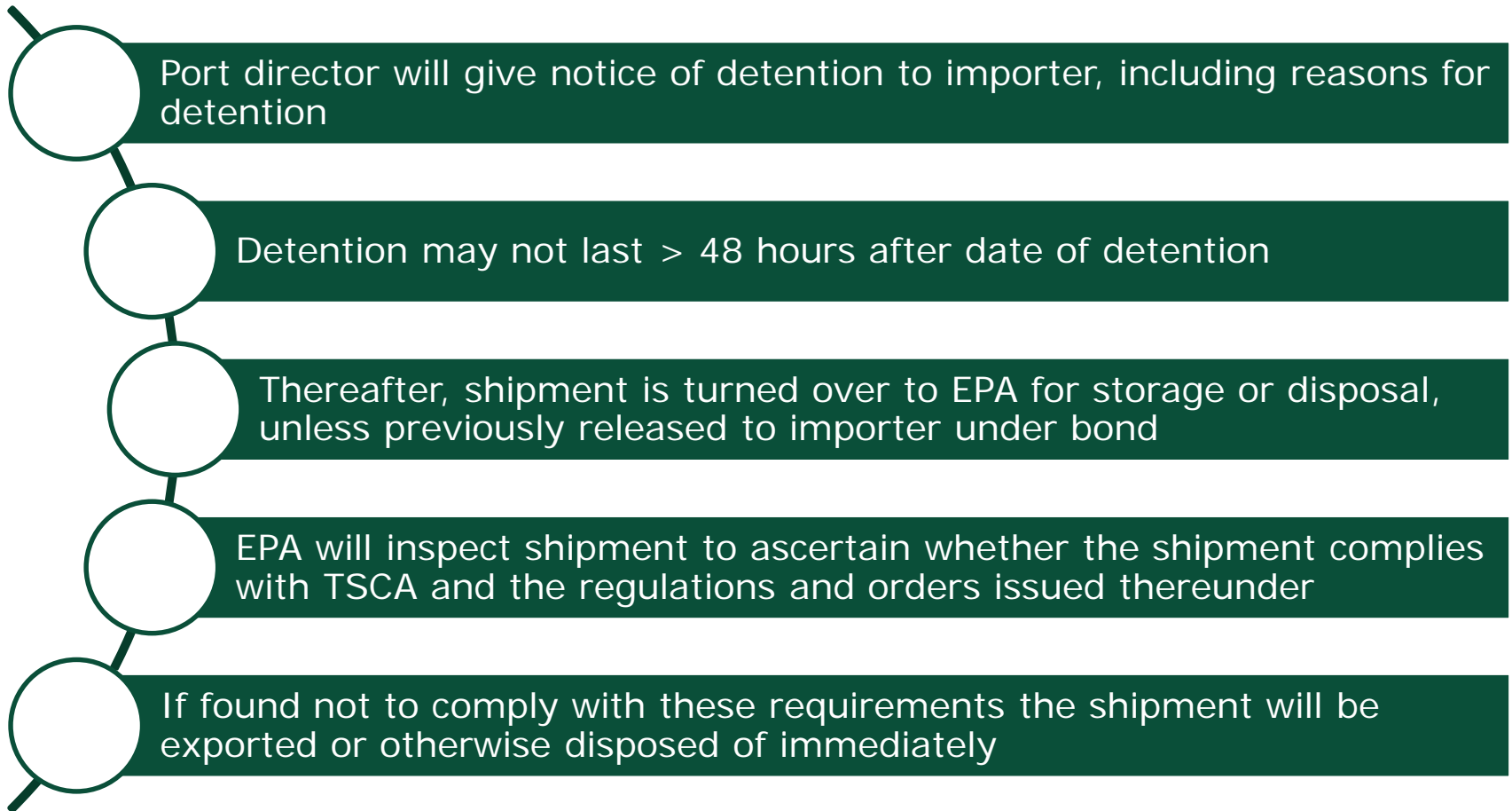
Bond will be in amount determined by CBP

Released shipment must be held intact and not used or otherwise disposed of (e.g., shipped) until EPA makes a final determination

CBP may issue demand for redelivery, giving reasons

- If importer fails to redeliver within 30 days of redelivery notice, port director will assess liquidated damages in the amount of the bond

# Detention





# Procedure after detention

Importer may submit written documentation to EPA (copy to port director) within 20 days from date of notice of detention

- Should establish compliance or correct noncompliance

EPA will allow or deny entry within 10 days of receipt of documentation

- Evaluation of information

Time deadlines may be extended

# Notice of abandonment or export

Importer may submit notice of abandonment of shipment to EPA and port director (or through ACE)

- Importer remains liable for expenses of detention and disposal

Importer may submit notice of export of shipment to EPA and port director (or through ACE)

- Due 30 days after EPA directs port director to refuse entry, or 90 days after demand for redelivery
- Must provide details on carrier, destination carrier and port, etc.

# Enforcement Considerations

# EPA Import Policy

## 40 C.F.R. § 707.20

- Importers must comply with CBP rules
- EPA will coordinate with CBP about whether particular imports comply with TSCA
- Enforcement comes from CBP's refusal of entry
- Separate EPA enforcement for false certification or failure to submit certification as required

# EPA import policy

EPA expects certifications to be based on actual knowledge

Where no actual knowledge, an importer should attempt to discover chemical constituents (i.e., formaldehyde levels) by contacting another party to the transaction (e.g., its principal or foreign supplier)

The greater the effort the importer makes to learn about compliance, the smaller the chances of violation

# EPA import policy

“If a shipment is ultimately determined to have violated TSCA, the good faith efforts of the importer to verify compliance, as evidenced by documents contained in his files, may obviate or mitigate the assessment of a civil penalty under TSCA.”

Penalties are relatively limited under Enforcement Response Policy

- Bigger penalties for violating formaldehyde rule

# Enforcement case

*ALM Corporation v. EPA*, 974 F.2d 380 (3<sup>rd</sup> Cir. 1992)

- No import certifications; incorrect negative certification
- EPA administrative enforcement action

Failure to comply with CBP TSCA import regulations is a violation of TSCA § 15

- Detention and refusal of entry not exclusive remedies; EPA may assess civil penalties

Compliance with TSCA is not a defense to failure to submit import certification

- Nor is late submission of import certification

# Next Steps for Importers



# Confirm compliance

Key: When giving positive certification, must be accurate (i.e., in compliance with formaldehyde rule)

Foreign suppliers are not subject to rule

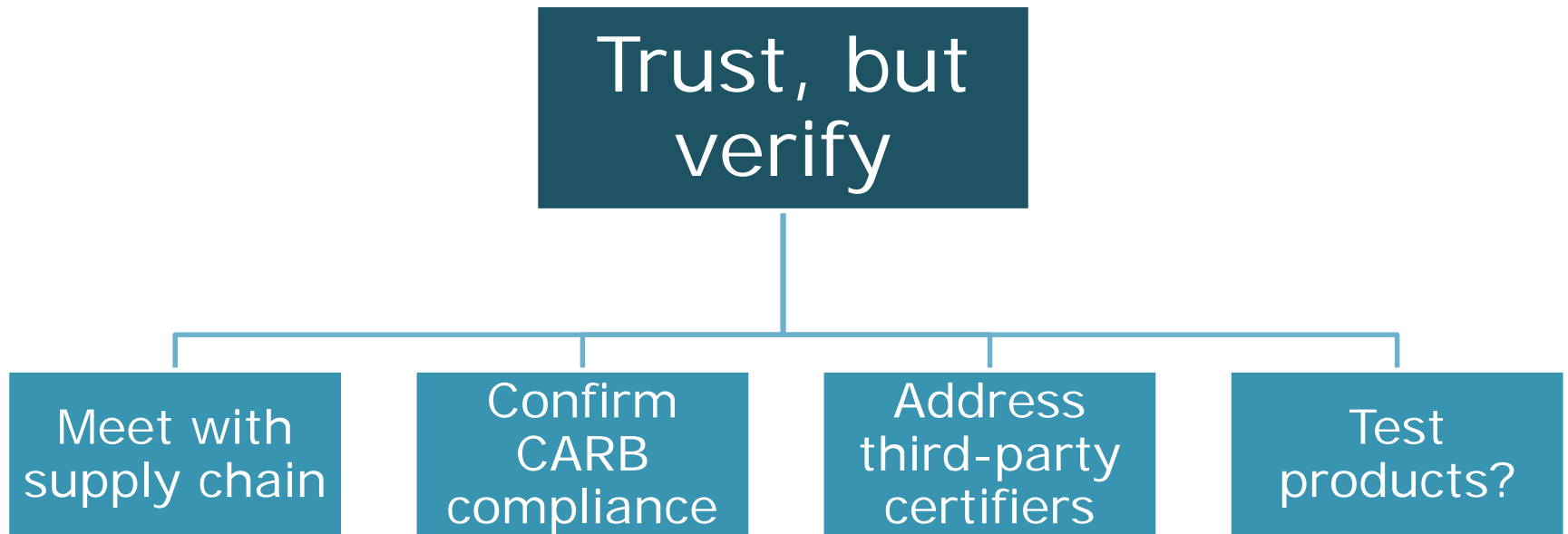
- But need to comply to access U.S. market

Educate foreign supply chain

- Producers + fabricators + distributors
- Limited requirements beyond CARB

Address labeling for before and after December 12, 2017

# Confirm compliance



# Learn how to certify

Electronic certification  
preferable to paper  
process

```
graph TD; A[Electronic certification preferable to paper process] --- B[Integrate with existing CBP entry process under ACE]; A --- C[EPA guidance is expected]
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Integrate with  
existing CBP entry  
process under ACE

EPA guidance is  
expected

# Small parts

Import certification applies even to finished products containing *de minimis* amounts of composite wood products

- Exempt from labeling requirement
- Subject to import certification requirements

Need work process to identify finished goods to be imported that contain composite wood products

# Questions?



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