MASTER CUSTOMS SPECIALIST (MCS) COURSE

Part 2: Compliance | Module 4: Bonds, Sureties, and Powers of Attorney

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INTRODUCTION

Each import carries risk to the United States. These risks include an importer may not pay applicable duties and taxes, shipments may later be determined not to comply with U.S. regulations and require redelivery and/or correction, or Partner Government Agencies such as the U.S. Food and Drug Administration (FDA) and U.S. Fish and Wildlife Service (FWS) may also have reporting requirements to facilitate the importation.

To facilitate trade and mitigate these risks, CBP requires a Customs bond be posted to ensure an importer's compliance with all CBP and PGA regulations including payment of duties and taxes. The importer's use of the Customs bond is the instrument to guarantee an importer's compliance with their regulatory commitments.

CBP is authorized to accept cash in lieu of bond (19 CFR 113.40) for instances where a principal either does not wish to or does not have the ability to secure bonding through the surety marketplace. In order to post cash, the principal must contact CBP and deposit cash, equal to whatever the bond amount would have been had a bond been posted. Because CBP is not permitted to release this security until all transactions secured by the cash have been resolved/liquidated, it is possible (in fact it is very likely) that the principal will have to deposit multiple years' worth of cash with CBP to achieve the same status as a single or continuous bond.

So, while other instruments are allowed, the use of bonds is much preferred.

Lesson 1: Bonds

A bond is an agreement, or contract, between three parties:

- **The principal** – the entity required to post the bond which is typically an importer, trucker/warehouseman or drawback claimant.
- **The surety** – the company guaranteeing payment which is usually, but not always, an insurance company. CBP has guidelines for individuals acting as surety.
- **The obligee** – CBP who can obtain remedy through the bond.

A CBP bond guarantees the payment of all rightful duty, taxes, and fees, as well as compliance with all applicable laws and regulations of the United States on goods imported into the United States. The bond also indemnifies the surety allowing them to use all legal means to collect the monies paid to CBP on the principal's behalf.

Bonds may be issued as either single-entry bonds or continuous bonds. Which type to use depends on the volume of imports and transaction undertaken. Some bond types can be either single-entry or continuous bond while others must be one of the two types.

A single transaction bond is issued to cover one particular transaction (an entry, for example) whereas a continuous bond is issued to secure multiple transactions of a particular type, as defined by the bond.

The most common bond types are in **bold**.

Single-Entry or Continuous Bonds	Continuous Bond Only	Single-Entry Bond Only
Importer/broker	**Custodian of Bonded Merchandise**	Wool and Fur Products
Accelerated Duty Drawback	**Foreign Trade Zone Operator**	Bill of Lading
International Carrier	Instruments of International Traffic	Detention of Copyrighted Material
Importer Security Filing	Entries filed within the last five years	Neutrality
	Airport security	Court costs for condemned goods
	In-bond export consolidator bond	
	IPR Bond	
	Marine Terminal Operator	
	ITC Bond	
	Public Gauger	

Lesson 2: Bond Types

This module will focus on the six most common types of bonds (shown in bold on the previous chart). These bond types make up the vast majority of active bonds. Should you need to write a bond for another bond type, please refer to 19 CFR 113 and the chart given later in the material.

Bonds are often referred to by their activity code on the CF 301 form.

Most of these bonds are found on CBP's statutory multi-purpose bond form CF 301, though some are prepared on manuscript forms. The term "manuscript form" refers to a bond which contains the language prescribed by regulation but does not conform to a standardized form.

Depending on where the bond is obtained, either the surety's representative, or the surety themselves should be able to provide the bond. In lieu of that, CBP will be able to provide guidance on the specific form and nature of any bond they might accept.

Code	Name	19 CFR Source	Code	Name	19 CFR Source
1	Importer or Broker	113.62	8	Detention of Copyrighted Material	113.70
1a	Drawback Payments Refunds	113.65	9	Neutrality	113.71
2	Custodian of Bonded Merchandise	113.63	10	Court Costs for Condemned Goods	113.72
3	International Carrier	113.64	11	Airport Security Bond	113 Appendix A
3a	Instruments of International Traffic	113.66	12	International Trade Commission Exclusion Bond	113 Appendix B
4	Foreign Trade Zone	113.73	14	In-Bond Export Consolidation Bond	
5	Public Gauger	113.67	15	Intellectual Property Rights (IPR)	
6	Wool & Fur Products Labeling Act Importation	113.68	16	Importer Security Filing (ISF)	113 Appendix B
7	Bill of Lading	113.69	17	Marine Terminal Operator	

(As listed on CBP Form 301)

Activity Code 1 – Importer or broker

The importer/broker bond is the most common bond filed with CBP. This bond guarantees that all rightful duty (including antidumping/ countervailing duties), taxes, and fees will be paid to CBP, and ensures compliance that all relevant laws and regulations concerning the importation of the particular good are adhered to by the importer of record.

As of 08-31-2015, of the 209,572 active continuous bonds on file with CBP 193,653 were importer/broker bonds. Approximately 92.4%

Continuous bond amounts are generally set at 10% of the duty, taxes and fees paid in the last 12 months (by all principals on the bond) or $50,000 – whichever is greater. When this formula yields a bond amount under $100,000, the bond is set in increments of $10,000. When this formula yields a bond amount in excess of $100,000, the bond is set in increments of $100,000.

Single transaction bond amounts are most commonly set in an amount equal to the value of the goods plus the applicable duty, taxes, and fees. There are other formulas that have been used ranging from 10% of the entered value to 3 times the entered value. In the event there is a question as to which formula should be used, Customs should be consulted.

Activity Code 1a – Drawback Payment Refunds (Accelerated Drawback Bond)
The accelerated drawback bond allows principals who are enrolled in the accelerated duty drawback system to claim accelerated duty drawback in an amount equal to the bond amount.

Both continuous and single transaction bond amounts are set in the same manner – 100% of the amount of accelerated duty drawback the principal wishes to claim.

Activity Code 2 – Custodian of Bonded Merchandise
Custodian of bonded merchandise bonds allow for the operation of all manner of warehouses, bonded carriers, freight forwarders, cartmen & lightermen, and container station operators.

CBP has no published formula for determining bond sufficiency; therefore CBP must be consulted with respects to a bond amount in the event this bond is required. This bond cannot be written on a single transaction basis.

Activity Code 3 – International Carrier Bond
International carrier bonds cover operations of ships, airlines, and other conveyors of international merchandise. The bond ensures that operators properly manifest the goods they are carrying, pay for overtime services, and comply with other CBP regulations related to the clearance of the vessel.

CBP has a variety of different formulas for determining bond sufficiency based on the specific operations the bond is intended to cover; therefore, CBP must be consulted with respects to a bond amount in the event this bond is required.

Activity Code 4 – Foreign Trade Zone Bond
A foreign-trade zone is a secured area under CBP's supervision that is generally considered outside United States territory (for commerce purposes) upon activation. A foreign-trade zone is typically located in or near a CBP port of entry and falls under the authority of that port. All foreign-trade zone activity is subject to public interest review and is subject to the laws and regulations of the United States, as well as those of the states and communities in which they are located.

A foreign trade zone bond is required to operate a zone. The bond amount for the bond can only be determined by CBP; however, it is usually not less than $50,000. Based on the different types of foreign-trade zone operations, the principal must receive specific approval from the local port to act in this capacity and must contact CBP prior to submitting a bond application.

Activity Code 16 – Importer Security Filing

Importer Security Filing (ISF) bonds ensure compliance with the Importer Security Filing regulations and may be filed as either a continuous or single transaction bond.

In the event of a single transaction bond, the bond amount is set at a static $10,000. In the event of a continuous bond, the bond amount is set at $50,000.

Lesson 3: Other Bonds

Customs brokers may encounter numerous other bonds that are not "CBP" bonds but are related to the trade. The most common are listed below:

- Carnet bonds are required by the U.S. Council for International Business (USCIB) to support the Carnets they issue for U.S. companies bringing their goods overseas. The USCIB requires a bond be posted to demonstrate the financial responsibility of the Carnet holder so that in the event the Carnet holder violates the terms of the Carnet, and USCIB has to pay under those terms, that the USCIB can be made whole. USCIB typically requires a bond in an amount equal to 40% of the value of the goods traveling under Carnet.
- Ocean Transportation Intermediaries (or OTI) bonds are required by the Federal Maritime Commission (FMC). These bonds are required in order to support licenses issued by the FMC to act as an Ocean Freight Forwarder (FF) or as a Non-Vessel Operating Common Carrier (NVOCC). The purpose of these bonds is to demonstrate financial responsibility.
  The FMC requires that a domestic, licensed NVOCC provide a bond in the static amount of $75,000.
- An NVOCC that is not a domestic (U.S.) entity may secure a bond, but the bond amount is a static $150,000
- Ocean Freight Forwarders must also post a bond to demonstrate financial responsibility. Their bond requirement is a bond amount of $50,000.
- The Federal Motor Carrier Safety Administration (FMCSA) is another type of bond customs brokers may encounter. This sets a level of financial responsibility for motor carriers, freight forwarders, and brokers. The bond amount for this type of bond is $75,000.

Lesson 4: Bond Sufficiency

It is critical that importers periodically review their bonds to make sure they are in amounts sufficient to cover its obligations. A bond may become insufficient for a number of reasons. The most common reason is that an importer sees an increase in imports and related duty activities. It could also occur as a result of duty rate changes. For example, during the Section 201, Section 232 and Section 301 changes, some importers received requests from CBP to increase their importer bond (activity code 1) from the $50,000 minimum to $20 million +. In a 2018 discussion with Surety Companies, CBP revealed a 47% increase in bond sufficiency reviews in August 2018 over the previous month.

When CBP deems a bond to be insufficient, it must go through a termination process. This process can take up to 15 days per CBP's termination policy. While an importer is waiting, they effectively do not have a valid continuous bond in place because an importer can only have one open continuous bond per importer number. This means all imports would require a Single Transaction Bond, which is more costly. It also increases the importer's and surety's risk since each STB must be tracked and remain open until the entry liquidates.

A Fast Termination can be requested as detailed in 19 CFR 113.27(b). However, this is subject to CBP approval and can be rejected. If Fast Termination is approved, it must be manually processed and cannot use the automated eBonds process.

Lesson 5: The Surety

Merriam-Webster defines surety as "one who becomes legally liable for the debt, default, or failure in duty of another" (Merriam-Webster.com). This is exactly what the bond does. In all cases, the CBP bond guarantees the payment of all rightful duties, taxes, and fees – along with compliance with all applicable laws and regulations for goods imported into the United States. The bond is not insurance. Though regulated by the various state insurance departments in the United States, a surety bond is really more akin to credit than it is to insurance. Insurance operates under the presumption that there will be a loss, while surety operates under the presumption that there will not be a loss, as reflected in the premium rates and underwriting conditions seen in bonds.

The surety presumes no loss by virtue of the concept of indemnity. Essentially, the surety is simply vouching for the principal saying, "Release the goods to the principal, if the principal fails to pay the duty, the surety will pay the duty." In the event the surety pays the duty, fee, or fine on the principal's behalf, the concept of indemnity allows the surety to seek a recovery (or to be made whole) from the principal. While the concept of indemnity is provided via common law to all sureties, many sureties (depending on their internal practices) may decide that a separate agreement of indemnity is required prior to the acceptance of liability for a particular principal. In this scenario, the surety will provide the form and instructions for its completion.

In order to act as surety on a CBP bond, an individual (that is a living person) must either comply with the terms of the regulations set forth in 19 CFR 113.35, or in the event of a corporate surety, must be listed on Treasury Circular 570. Because the overwhelming majority of CBP bonds are secured by corporate surety, that will be the focus of this section. Treasury Circular 570 can be found at: https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570_a-z.htm

Surety Liability

Once a bond has been issued and a transaction has been secured by the bond, the surety company has liability to CBP under the terms and conditions of the bond. Because the surety company stands in the place of the principal with respect to these obligations, the surety's liability is never truly extinguished (though liquidation of the transaction is generally considered the *reasonable end* to surety liability).

It is for this reason that issues affecting surety liability are often the most difficult issues for a surety to deal with. An example of this would be entries subject to antidumping or countervailing duties (AD/CVD). Because AD/CVD suspends surety liability indefinitely, they are among the most difficult transactions to underwrite. This is due to the belief by the surety community as a whole that while one can reasonably see where an importer will be in a year, or even two years, it is impossible to reasonably predict where a principal will be in 3 to 10 years. If the surety cannot predict where the company will be over that period of time, the surety is unlikely to make a guarantee for that principal's performance in that later timeframe without the benefit of some form of security (typically collateral or additional indemnity).

In many respects, the surety acts as an unsecured creditor to a principal. While most principals are likely to attract a surety to meet their needs, others need to offer the surety an additional level of comfort that the surety will be repaid in the event of a loss. This additional comfort is typically referred to as "collateral" or "collateral security" and may be in the form of cash or a letter of credit, in an amount and form dictated by the surety and held in trust by the surety until such time the surety determines it can be returned to the principal.

Sometimes the principal's guarantee to repay the surety is not enough and surety will require the indemnity of either an individual or another entity to secure surety's position. This can be seen as being similar to a co-signor on a loan.

Lesson 6: Customs Bond Intermediaries

The majority of surety companies have neither the expertise, desire, nor the technology to efficiently issue and maintain a complete portfolio of Customs bonds. As a result, most surety companies issuing Customs bonds do so through specialty insurance agents and brokers (commonly referred to as "intermediaries") who are granted various levels of authority from the surety company to handle their bonds and even interface with CBP on the surety's behalf. Depending on the relationship with the surety company(ies) they represent, these intermediaries may offer a wide range of services which may include web-based bond issuance, claims handling, access to multiple surety markets, and regulatory expertise as it relates to bond and bonded situations. Customs brokers may have relationships with one or more of these intermediaries, either directly or through main street agents and brokers, based on that broker's specific needs.

While surety bonds are not insurance, they are often regulated at the state level like insurance. As such, they are typically distributed by "main street" insurance agents and insurance brokers licensed by the insurance department in the state in which that agent or broker reside. These agents and brokers will typically deal in a wide range of insurance products, which include bonds. The term "main street" is used to differentiate these agents and brokers from the specialty intermediaries as noted above.

Lesson 7: Powers of Attorney

A power of attorney (POA) is a document that allows one person or entity to appoint another person or entity to act on their behalf. The person or entity who issues the POA is known as the "grantor" while the person or entity that is empowered by the POA is referred to as the "grantee" or "agent". When the agent signs or executes a document using the POA, the agent signs with the title "Attorney-in-Fact" or more commonly "Atty-in-Fact".

POAs are an important document as most entries are made under power of attorney. Most, if not all, bonds are issued based on a POA.

The POA is a legal document and may grant either very broad or very narrow power depending on the circumstance. The Customs power of attorney (CBP form 5291) is broad in the sense that it empowers the agent with:

> …full power and authority to do and perform every lawful act and thing the said agent and attorney may deem requisite and necessary to be done for and on behalf of the said principal with- out limitation of any kind as fully as said principal could do if present and acting, and hereby ratify and confirm all that said agent and attorney shall lawfully do or cause to be done by virtue of these presents … (19 CFR 141.32)

By contrast, the CBP form 5297 "Corporate Surety Power of Attorney" which allows a surety agent to bind a surety company to a bond states:

> Grantor appoints the above-named person (Grantee) as its attorney in fact to sign its name as surety to, and to execute, seal, and acknowledge any bond so as to bind the surety corporation to the same extent as if done by a regularly elected officer, limited only to the extent shown above as to Customs and Border Protection port and amount on any single bond obligation.

The NCBFAA also provides its members with a recommended POA form.

It is generally understood that the agent has a fiduciary duty to act in the best interests of the grantor. Before taking any action that is not specifically permitted by the POA, or may be questionable, the agent should seek input from competent counsel so as to minimize the likelihood of legal entanglements.

Accepting a power of attorney is an important process within a brokerage or freight forwarding operation. To act on behalf of their customers, a brokerage/freight forwarding firm must have a valid and active POA. Just because there is a paper in hand doesn't mean it's a valid POA.

Each organization should develop an acceptance procedure.

Key areas for a POA acceptance procedure include:

- Is the organization named on the POA the correct importer?
- Is the organization a resident or non-resident corporation?
- If it is a non-resident corporation, is your firm authorized to accept service of process against the nonresident (141.36)?
- Is the correct importer of record number listed on the POA, including suffix?
- Does the POA have an expiration date that you need to track, other than the standard 2-year validity of a partnership POA?
- Is the person who signed the POA authorized to bind the corporation? Per 141.28, powers of attorney must be executed by a person authorized by the resident corporation to do so. Non-resident corporations require additional documentation in some cases. CBP generally accepts that a president, vice-president, secretary or treasurer of the corporation is authorized to sign POAs. If your signature is from another individual, it may not be valid.
- Beware of signatures on shipper's letters of instruction, or non-POA forms. If that individual isn't authorized to bind their organization, you may not be authorized to conduct the business you are undertaking.