

## GUIDELINES FOR LIQUIDATED DAMAGES AND PENALTIES FOR NON-COMPLIANT WOOD PACKAGING MATERIAL (WPM) – JULY, 2017

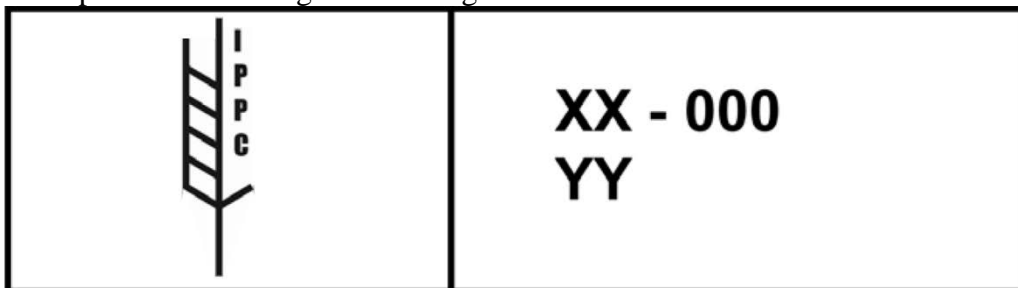
The statutory requirements of 7 CFR §319.40-3 mandate that regulated WPM – includes, but not limited to, crates, pallets, boxes, and pieces of wood used to support or brace cargo – being imported into the United States shall be heat treated or fumigated with methyl bromide, and include a mark that certifies the wood completed the required treatment as indicated by the International Plant Protection Convention (IPPC) in its International Standards of Phytosanitary Measures (ISPM) *Regulation of wood packaging material in international trade*<sup>1</sup> and any associated amendments, revisions or exemptions identified by the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS).

The regulation (7 CFR §319.40-3) requires that WPM display a visible, legible, and permanent mark certifying treatment. The mark must be approved under ISPM 15 to indicate that the article has been subjected to an approved measure and the mark must include the following elements:

1. The IPPC logo;
2. The International Organization for Standardization (ISO) 2-letter country code for the country that produced the wood packaging material;
3. The unique number code for the producer of the wood packaging material as assigned by the National Plant Protection Organization (NPPO); and
4. The treatment code using correct abbreviation according to Annex 1<sup>2</sup> (**HT** for heat treatment or **MB** for methyl bromide fumigation).

Example 1 illustrates the basic approved mark. The IPPC logo is on the left. On the right, XX represents the ISO country code. To its right, and separated by a required hyphen, 000 represents the unique number assigned to the producer of the wood packaging material. This number allows the tracing back to the treatment facility. Below those codes, YY represents the method of treatment. Acceptable variations to the layout are shown in examples 2 – 6.

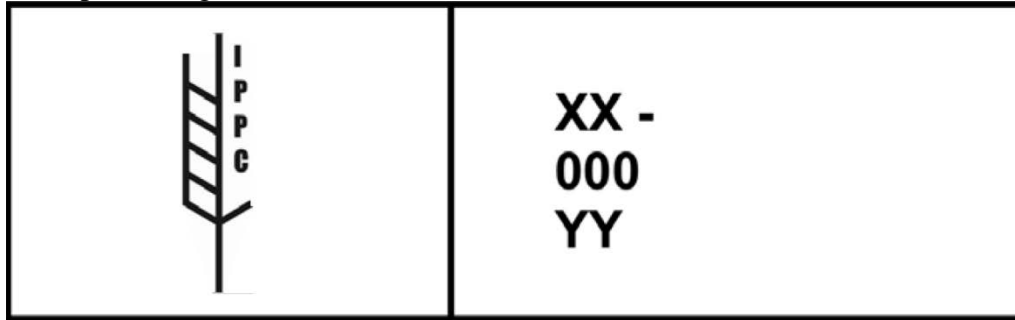
Example 1. Basic design of marking.



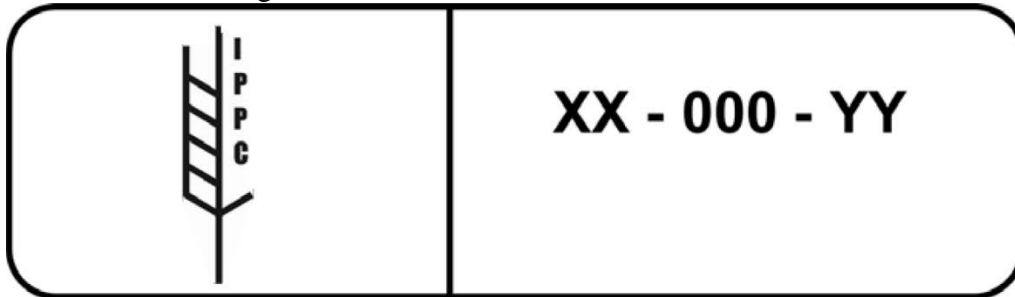
<sup>1</sup> ISPM 15. 2016. *Regulation of wood packaging material in international trade*. Rome, IPPC, FAO.

<sup>2</sup> ISPM 15. 2013. Annex 1. *Approved treatments associated with wood packaging material*. Rome, IPPC, FAO.

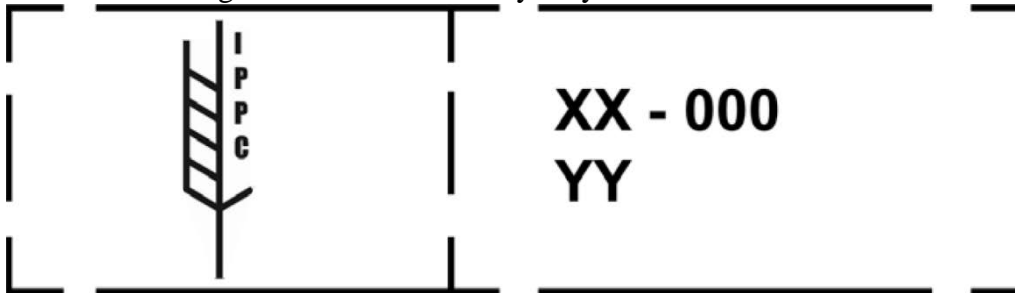
Example 2. Right-side elements stacked.



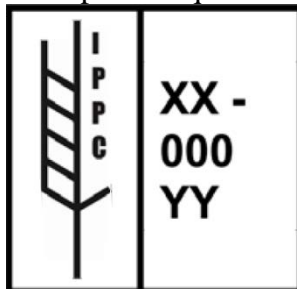
Example 3. Right-side elements in single line. Box with rounded corners, which may be found with the other arrangements of the elements.



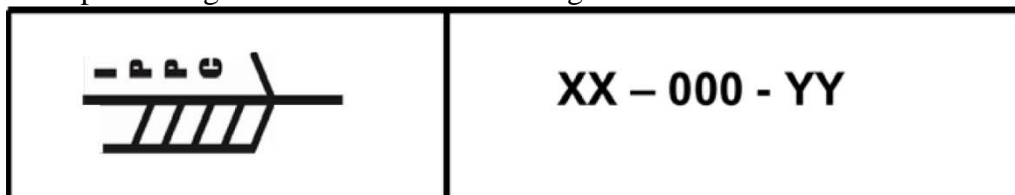
Example 4. Stenciled design. Usually inferred by the gaps on the box border and other elements. Arrangement of elements may vary.



Example 5. Square box instead of rectangular.



Example 6. Logo rotated 90° to the left. Right-side elements in one line.



## EXCEPTIONS AND EXEMPTIONS

The regulation applies to WPM made from softwood or hardwood. Certain articles are exempt or excepted from the treatment and marking requirements, and they include:

1. Manufactured wood materials such as fiber board, plywood, whisky and wine barrels, and veneer,
2. Loose wood materials (defined as excelsior [wood wool], sawdust, and wood shavings, produced as a result of sawing or shaving wood into small, slender, and curved pieces),
3. Pieces of wood that are less than 6 mm (0.24 in) in any dimension, and,
4. Firewood, mesquite wood for cooking and small noncommercial packages of unmanufactured wood for personal cooking or personal medicinal purposes coming directly from Mexican Border States.

## FAILURE TO COMPLY WITH 7 CFR §319.40-3

Regulated WPM must be properly marked to indicate that it has been either heat treated or treated with methyl bromide. There are three categories under WPM for this enforcement:

1. **UNMARKED:** WPM that is encountered by CBP during the course of inspection and found not bearing the required treatment and markings required under 7 CFR §319.40-3(b)(1) and CFR §319.40-3(b)(2)
2. **INAPPROPRIATELY MARKED:** WPM that is encountered by CBP during the course of inspection and found to be inappropriately marked or illegibly marked is assumed to be untreated by either of the approved methods identified under 7 CFR §319.40-3(b)(1); and
3. **INFESTED:** WPM that is infested with a named pest confirms that the WPM has not been treated in accordance with 7 CFR §319.40-3(b)(1). Named pests are live wood boring pests of the families *Cerambycidae*, *Buprestidae*, *Siricidae*, *Cossidae*, *Curculionidae*, *Platypodidae*<sup>3</sup>, *Sesiidae*, or *Scolytinae*<sup>4</sup>.

7 CFR §319.40-3(b)(3) provides for immediate export of WPM that does not contain the required mark. Marked WPM containing pests in the above mentioned families is considered WPM that has not been treated and marked in accordance with 7 CFR §319.40-3, and shall be immediately exported pursuant to 7 CFR §319.40-3(b)(3). As of November 1, 2016, USDA-APHIS has provided allowances for secure disposal (under compliance agreement) of violative **maritime dunnage** if the pest risk is not excessively high and an incinerator facility approved by APHIS to burn wood is available. The importer of record, carrier, or bonded custodian is responsible for any costs or charges associated with disposition.

When assessing liquidated damages and/or penalties, the value of the merchandise is the value of

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<sup>3</sup> Platypodidae has been reclassified as Platypodinae, a subfamily under Curculionidae.

<sup>4</sup> Scolytidae has been reclassified as Scolytinae, a subfamily under Curculionidae.

the WPM plus the value of the commodity or commodities identified for importation on the entry documentation.

### **ASSESSING LIQUIDATED DAMAGES**

If the party whose bond is obligated at the time of the discovery of the violation has received an Emergency Action Notification (EAN) requiring remediation of the violative WPM but fails to do so, CBP may issue a **liquidated damages claim** against that party.

The following procedures shall be utilized in **liquidated damage cases where there is a failure to comply with the EAN**:

- **If a consumption entry is made and the goods were conditionally released and the importer failed to comply with the EAN**, issue the claim against the importer under 19 CFR § 113.62(e) – *Basic Custodial Bond Conditions – Agreement to Rectify Any Non-Compliance with Provisions of Admission*. The liquidated damages claim shall be issued at three times (3x) the entered value of the merchandise but no greater than the bond amount.
- **If a consumption entry is made, but the goods were not conditionally released, and the importer failed to comply with the EAN**, issue the claim against the importer under 19 CFR § 113.62(g) – *Basic Custodial Bond Conditions – Reimbursement and Exoneration of the United States*. The amount of the liquidated damages claim shall be the cost of export or remediation but no greater than the bond amount. In an effort to ensure compliance with the EAN, the goods shall not be released and the port should follow procedures outlined in 19 CFR § 151.16, *Detention of Merchandise*, until the WPM violation is addressed. Once it is determined that the requirements of the EAN will not be met and CBP has to take remedial measures, the claim for liquidated damages shall be issued against the importer.
- **If an entry is not made and the carrier failed to comply with the EAN**, issue the claim against the carrier under 19 CFR § 113.64(c) – *International Carrier Bond Conditions – Agreement on Unloading, Safekeeping, and Disposition of Merchandise, Supplies, Crew Purchases, Etc.* The liquidated damages claim shall be issued at three times (3x) the entered value of the merchandise, but no greater than the bond amount.
- **If a party other than the carrier or importer failed to comply with the EAN, and that party is responsible for the merchandise under its custodial bond**, issue the claim against that party under 19 CFR § 113.63(a)(1) – *Basic Custodial Bond Conditions – Receipt of Merchandise: principal agrees to operate as custodian of shipment*. The liquidated damages claim shall be issued at three times (3x) the entered value of the merchandise, but no greater than the bond amount.

### **ASSESSING PENALTIES**

When non-compliant WPM is found, there are 2 types of assessments that may be issued. One type is a liquidated damages claim (section above). The liquidated damages claim is specific for failure to comply with remediation orders, *i.e.* failure to comply with the EAN. The other type is a penalty. A penalty applies to the party attempting to import non-compliant WPM, *i.e.* violation of 7 CFR § 319.40-3. In this writing, the terms “liquidated damages claim” and “penalty” are

not interchangeable. The following bullet points represent cases where a penalty may be issued :

- The importer, carrier, or bonded custodian **attempts to conceal** a violation of WPM, CBP personnel shall issue a penalty either under Title 19 United States Code § 1592 – *Penalties for fraud, gross negligence, and negligence*, or § 1595a(b) – *Penalty for aiding unlawful importation*, assessed at the domestic value of the merchandise.
- The importer, carrier, or bonded custodian failed to comply with 7 CFR § 319.40-3 on WPM that is associated with merchandise and the violation has been documented and notice of violation given to the responsible party, then CBP personnel may issue a penalty under Title 19 United States Code § 1595a(b) – *Penalty for aiding unlawful importation*, or under § 1592 – *Penalties for fraud, gross negligence, and negligence*, assessed at the domestic value of the merchandise.
- The carrier or shipping line discharged dunnage that is independent of shipments and failed to comply with 7 CFR § 319.40-3, and an EAN was issued for immediate remediation, then CBP personnel may issue a penalty for a “technical violation” under Title 19 United States Code § 1592 assessed from \$1,000 to \$2,000 for first time violation, and from \$2,000 to \$10,000 for subsequent violations.

In all instances where the party responsible for the importation, attempts to import contrary to law by violating 7 CFR § 319.40-3, a penalty may be assessed against the party. CBP will evaluate the totality of the situation in regards to any aggravating and/or mitigating circumstances in deciding whether to issue the penalty. In the course of the pest risk mitigation of the importation, if the party fails to fulfill obligations as directed on the EAN, then CBP can issue a penalty against the party even if a claim for liquidated damages has already been assessed.

**ISPM 15 REQUIREMENTS APPLY TO ALL SPECIES OF CONIFEROUS (SOFTWOOD) AND NON-CONIFEROUS (HARDWOOD) PACKAGING MATERIALS.**

**EXAMPLES OF VIOLATIVE WOOD PACKAGING MATERIAL**

Figure 1. Non-compliant marking



Figure 2. Illegible marking



Figure 3. Pest infested



Figure 4. Pest infested (showing frass)

