

## **GUIDELINES FOR LIQUIDATED DAMAGES AND PENALTIES FOR NON-COMPLIANT WOOD PACKAGING MATERIAL (WPM) – JULY 2018**

The “Guidelines for Liquidated Damages and Penalties for Non-compliant Wood Packaging Material (WPM)” are a revision to the guidelines that went into effect on March 9, 2007 and revised on July, 2017.

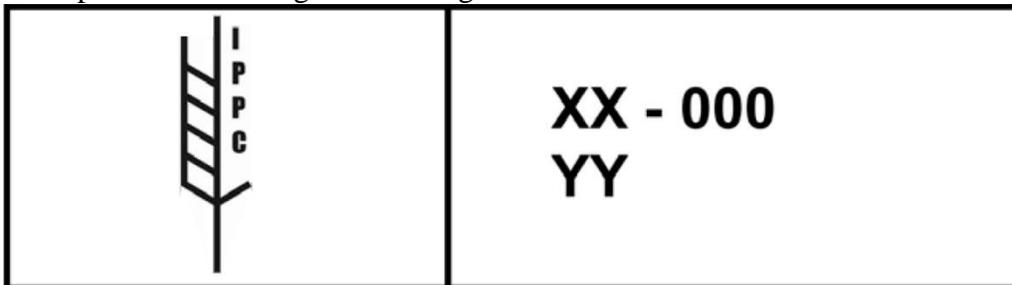
The statutory requirements of 7 CFR §319.40-3 mandate that regulated WPM – includes, but not limited to, crates, pallets, boxes, and pieces of wood used to support or brace cargo – being imported into the United States shall be heat treated or fumigated with methyl bromide, and include a mark that certifies 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, **MB** for methyl bromide fumigation, or **DH** for dielectric heating).

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.

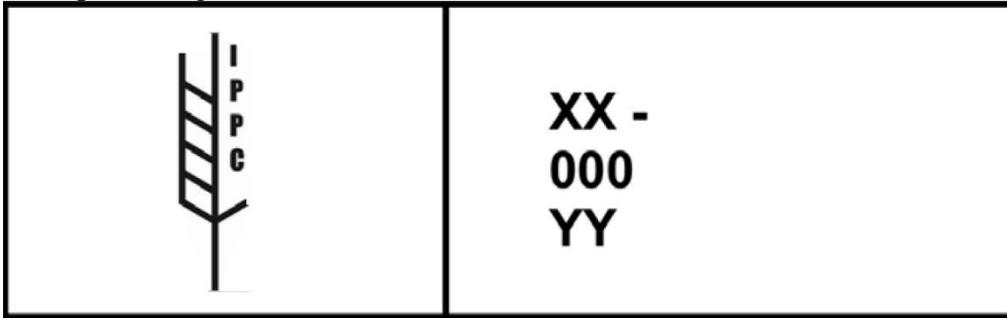
Example 1. Basic design of marking.



<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.

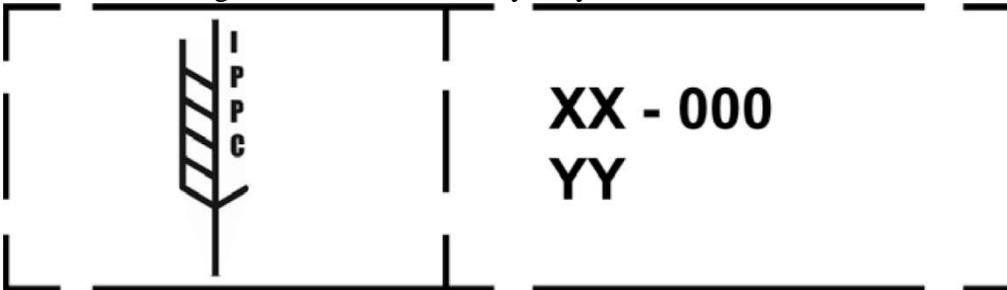
Example 2. Right-side elements stacked.



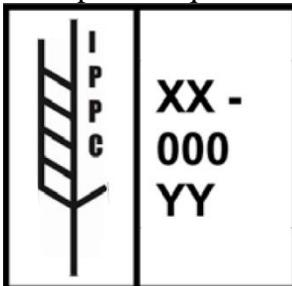
Example 3. Right-side elements in single line. Box with rounded corners, which may be found with the other arrangements of the elements.



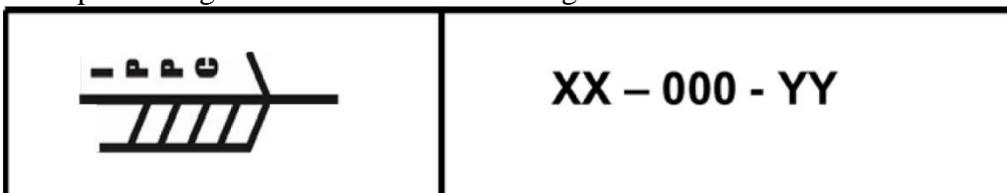
Example 4. Stenciled design. Usually inferred by the gaps on the box border and other elements. Arrangement of elements may vary.



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 timber pest confirms that the WPM has not been treated in accordance with 7 CFR §319.40-3(b)(1).

Title 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 of violative **maritime dunnage** if the pest risk is not excessively high and compliance agreements are in place. The importer of record, carrier, or bonded custodian is responsible for any costs or charges associated with disposition.

## **ENFORCEMENT ACTION:**

CBP may take two separate types of enforcement action, or take both, depending on the specific circumstances of a WPM violation. CBP may assess a claim for liquidated damages when there is a failure to comply with direction in an Emergency Action Notification (“EAN”). A penalty may be assessed, regardless of whether a party has complied with direction in an EAN. In this writing, the terms “liquidated damages claim” and “penalty” are not interchangeable.

When assessing liquidated damages and/or penalties, the value of the merchandise is the value of 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 EAN requiring action on WPM and the party fails to take such action, 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 Unlading, 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*. The principal agrees to operate as custodian of shipment in this subsection. 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:**

CBP may assess a penalty against any party attempting to import non-compliant WPM, (a violation of 7 CFR § 319.40-3). Penalties may be assessed in addition to claims for liquidated damages, and may be assessed even though there is compliance with an EAN. As stated earlier in this document, effective November 1, 2017, Agriculture Programs and Trade Liaison (APTL) removed the threshold of over 5 WPM violations for the assessment of penalties. The practice of resetting the count of repeat violations each fiscal year is discontinued. From this date onward, a trade entity who has a documented WPM violation for failing to comply with the WPM regulation may be assessed a penalty under 19 USC § 1595a(b).

If the importer, carrier, or bonded custodian failed to comply with 7 CFR § 319.40-3 in one of the three ways described in the “FAILURE TO COMPLY WITH 7 CFR § 319.40-3” section above, then CBP may issue a penalty under 19 USC § 1595a(b), *Penalty for aiding unlawful importation*, assessed at the domestic value of the merchandise. Penalties assessed pursuant to 19 USC § 1595a(b) do not require issuance of a pre-penalty notice.

If the responsible party (the entity with the bond) has been issued an EAN for immediate remediation of violative WPM but fails to fulfill obligations as directed on the EAN, then CBP personnel may issue a liquidated damages claim against that party. Additionally, if that same party was the party responsible for the attempted importation of the non-compliant WPM, a penalty may also be assessed against that party for the violative WPM. The liquidated damages claim is for breach of bond obligations (failure to comply with the EAN). The penalty is for violation of 7 CFR § 319.40-3.

**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)

