

focus on

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Secure Trade of Goods: The Homeland Security Act of 2002, Maritime Transportation Security Act of 2002, Advance Notice of Cargo Manifest Information and Other Recent Initiatives

Several recent security-related developments will require importers, exporters, carriers, brokers and others to change their practices and expectations regarding the efficient movement of goods across U.S. borders. Additionally, the increasing focus of the U.S. Government and ports on improving security offers companies with innovative solutions potential opportunities to help facilitate security throughout the supply chain. The focus of this overview is the landmark Homeland Security Act of 2002 ("Homeland Security Act," H.R. 5005), the Maritime Transportation Security Act of 2002 ("Maritime Security Act," S. 1214), new requirements regarding advance notice of cargo manifest information and several existing Administration initiatives related to the secure transport of goods entering the United States.¹

On November 19, 2002, the Senate passed the Homeland Security Act, thereby setting in motion the planned establishment of the Department of Homeland Security. As the new home for the U.S. Customs Service (Customs) and the Transportation Security Administration

1. Ensuring the secure movement of particular goods – specifically food, pharmaceuticals, medical devices, and cosmetics – presents additional implications for producers who manufacture such products within, or ship such products to, the United States. For a summary of the new Public Health Security and Bioterrorism Preparedness and Response Act (Pub.L. 107-188) enacted in June 2002, please see <http://www.hhlaw.com/publications/> (Food, Drug, Medical Device and Agriculture: "The U.S. Food and Drug Administration's Implementation of the Bioterrorism Act: Applicability to Exporters of Products to the United States"). Rules governing the movement of people across U.S. borders have also been the focus of significant recent revisions. More information on legislative changes, as well as new regulations regarding special registration requirements for nationals of certain countries and tracking of students and non-U.S. citizens within the United States, are also available at <http://www.hhlaw.com/publications/> (Immigration).

(TSA), the Department of Homeland Security will now assume lead responsibility for inspecting goods that enter the United States and directing projects to ensure a more secure global supply chain. In addition, on November 14, 2002, Congress approved the Maritime Security Act, often referred to as the "Port Security Act." This bill imposes new obligations on shipping companies, importers and others, authorizes funding for new technologies to improve security at American seaports and calls for improved security measures at foreign seaports through which goods destined for U.S. ports travel. Closely intertwined with the Maritime Security Act and U.S. Government security-related efforts are new cargo manifest requirements and other Administration initiatives that affect the monitoring, securing and reporting of goods being transported to the United States.

The Homeland Security Act

By combining approximately 170,000 federal workers from 22 current government agencies, the new Department of Homeland Security will represent the largest federal government reorganization since the creation of the Department of Defense in 1947. The Department's initial annual budget is expected to exceed \$35 billion. The Act creating the Department will take effect 60 days after the date of enactment, and the President must submit a reorganization plan to Congress no later than the effective date.

The functions of the new Department will revolve primarily around four directorates: (1) Information Analysis and Infrastructure Protection (to assess U.S. vulnerabilities and map them against foreign threats); (2) Science and Technology (to consolidate disparate efforts and policies related to chemical, biological, radioactive and nuclear threats); (3) Emergency Preparedness and Response (to direct one overarching response in the event of terrorist attacks and other emergencies); and (4) Border and Transportation Security (to prevent the entry of terrorists and instruments of terrorism into the nation's ports and transportation systems). The Directorate for Border and Transportation Security is expected to have the most significant effect on the flow of international trade.

Both Customs and TSA will be transferred as distinct entities into the Border and Transportation Security Directorate.² The Department of Homeland Security also will assume authority over the U.S. Coast Guard, which will remain an independent entity and be responsible for policing U.S. waters through which goods are transported. The Homeland Security Act does not alter the missions of these agencies. The new Department is, however, expected to proceed with implementing the changes mandated by the Maritime Security Act and other initiatives discussed below. For example, the Homeland Security Act contains a provision to fund the continued construction of Customs' Automated Commercial Environment (ACE), a new mechanism for importers to monitor their trade accounts.³ Furthermore, the Homeland Security Act requires the Department of Homeland Security, the Department of Agriculture, the Department of Health and Human Services and other relevant agencies to devise a plan no later than 18 months after the enactment date to exchange information regarding goods that are imported into the United States and inspected or regulated by one or more agencies.

2. Selected Customs revenue-related functions will remain under the authority of the Treasury Department.
 3. On May 1, 2002, Customs announced the first phase of the ACE, which will replace its existing Automated Commercial Systems (ACS) and develop full electronic processing of commercial importations. 67 Fed. Reg. 21800 (May 1, 2002).

Funding authorization for the changes anticipated in the Homeland Security Act is not yet complete, with Congress having specified funding at 2002 levels until January 11, 2003. Additional funding measures will await Congress' return in January 2003.

The Maritime Transportation Security Act

The purpose of the Maritime Security Act is to address security vulnerabilities related to trade through U.S. seaports. The bill – which the President is expected to sign in late November 2002 – imposes new obligations on businesses that import or export goods to the United States, companies that operate facilities at U.S. ports, brokers, carriers and non-vessel operating common carriers. Notable provisions include:

- ***Automatic identification systems (AIS) on all commercial vessels:*** All commercial vessels navigating in U.S. waters must be equipped with AIS. Vessels that are built on or after January 1, 2003, must be equipped with AIS at the time of construction. Vessels built before January 1, 2003 that are also passenger vessels required to carry a SOLAS certificate, tankers or towing vessels that move tank vessels must install AIS by July 1, 2003. All other vessels built before January 1, 2003, must be equipped with AIS by December 31, 2004. In addition, the Department of Homeland Security may implement a long-range automated vessel tracking system for all vessels in U.S. waters that employ the Global Maritime Distress and Safety System or other satellite technology.
- ***Restrictions on entry of goods originating from or transhipped through foreign ports with inadequate security:*** The bill requires the Department of Homeland Security to assess the antiterrorism measures implemented at foreign ports served by U.S.-bound vessels. If the Secretary determines that a foreign port does not maintain effective antiterrorism measures, the Secretary of the Department of Homeland Security may take actions 90 days after notifying the foreign government, including prescribing conditions on goods originating from or transhipped through that port.
- ***Mandatory development of security plans by certain vessels and facilities at U.S. ports:*** The bill requires owners or operators of vessels and facilities that the Secretary of the Department of Homeland Security believes "may be involved in a transportation security incident" to develop security plans for deterring such incidents to the maximum extent practicable. The owners or operators must develop and submit such plans to the Secretary of the Department of Homeland Security within six months after interim final regulations are issued regarding these security plans.

The Maritime Security Act also mandates several additional security features involving U.S. ports and the supply chain that may affect companies doing business through those ports.

- ***Developing secure systems of cargo transportation:*** Consistent with Customs' Container Security Initiative, the Act mandates development of a program to evaluate and certify secure systems of cargo transportation. The program will include developing standards and procedures for screening cargo prior to loading in a foreign port; establishing standards for securing cargo and monitoring it during transit; and setting performance standards for seals and locks on shipping containers. The Secretary of the Department of Homeland Security must develop these antiterrorism systems and performance standards no later than January 1, 2004.
- ***Biometric transportation worker identification cards:*** The Act authorizes the development of transportation worker identification cards for access to secure areas of ports.

In addition, the Act directs the Secretary of the Department of Homeland Security to undertake a number of projects to enhance the physical security of seaports, including conducting vulnerability assessments, establishing local port security committees to coordinate law enforcement efforts, and developing comprehensive security plans and incident response plans for all ports, facilities and vessels.

While authorizing approximately \$250 million in funds for security measures, the Act also directs the U.S. Government to devise additional fundraising proposals. Within six months of the enactment of the bill, the Secretary of the Department of Homeland Security must transmit a report to the Senate that includes a funding proposal for various Coast Guard projects and development of port facility security plans for fiscal years 2003 through 2008. The report must also include projected funding proposals for the AIS, the secure system of cargo transportation, the transportation worker identification cards, a system of polling vessels entering U.S. waters, maritime intelligence requirements and the Sea Marshall program. A hotly disputed provision that would have imposed a port security user fee as a method of generating funds was removed from the legislation prior to final passage.

Advance Notice of Cargo Manifest Information

In addition to the above changes, the Maritime Security Act would amend relevant portions of the Trade Act of 2002 (Pub.L. 107-210) to require regulations to be issued, no later than October 1, 2003, regarding the electronic transmission from bonded carriers of cargo manifest information prior to the arrival or departure of the cargo. These requirements are to be implemented for all modes of transportation, including sea, air, rail, and surface.

The U.S. Customs Service issued final regulations related to sea transport on October 31, 2002, requiring that bonded carriers electronically transmit cargo manifest information 24 hours in advance of loading of U.S.-bound cargo in foreign ports. 67 Fed. Reg. 66,318. Customs' final regulations have generated significant concern in the trade community because of potential delays that may result from inadequate documentation, as well as the extensive information required. For example, Customs has stated that it will no longer accept generic cargo manifest descriptions such as "freight of all kinds" (FAK), "general cargo" or "said to contain" (STC). Carriers are instead required to provide a precise description (or Harmonized Tariff Schedule numbers to the 6-digit level) and weight of the cargo or, for a sealed container, the shipper's declared description and relevant weight.⁴

Customs states that it will not grant permits to unlade any cargo for which it has not received timely or accurate manifest information. Violations may result in penalties or liquidated damages. The new manifest rule will take effect on December 2, 2002, although Customs will delay enforcement actions for non-fraudulent violations of the new rule for an additional 60 days (January 31, 2003). Bulk cargo is exempt from the advance notification requirement; break-bulk cargo is not exempt, but Customs will consider administrative exemptions for

4. Other information required will now include: (i) the last foreign port before the vessel departs for the United States; (ii) the Standard Carrier Alpha Code (SCAC); (iii) the carrier-assigned voyage number; (iv) the vessel's scheduled arrival date at the first U.S. port in Customs' territory; (v) the numbers and quantities from the carrier's ocean bills of lading; (vi) the first foreign port where possession is taken of the U.S.-bound cargo; (vii) the shipper's complete name and address, or identification number upon implementation of the ACE, from all bills of lading; (viii) the complete name and address of the consignee or the owner or owner's representative, or ACE identification number, from all bills of lading; (ix) the vessel name, country of documentation, and official IMO vessel number; (x) the foreign port where the cargo is laden on board; (xi) the internationally recognized hazardous material code if applicable; (xii) the container numbers if applicable; and (xiii) the seal numbers for all seals affixed to containers.

break-bulk cargo on a carrier-by-carrier basis. Customs considers the new manifest requirements to be a critical part of its Container Security Initiative (CSI), a new program (described below) that includes targeting high-risk containers through the use of automated information.

In anticipation of meeting the October 1, 2003, deadline for issuing regulations for other modes of transportation, Customs expects to begin consulting with the trade community in January 2003.⁵ In addition, the Security Assistance Act of 2001, incorporated into Public Law 107-228, requires advance manifest information for exporters, and the Public Health Security and Bioterrorism Preparedness and Response Act will require presentation to the Food and Drug Administration of advance manifest information for importers and exporters of products covered under that Act (foods, pharmaceuticals, medical devices and cosmetics).

Other Developing Initiatives

In addition to implementing new legislation, the Department of Homeland Security plans to continue several trade-related initiatives already begun in response to September 11:

- **Customs-Trade Partnership Against Terrorism (C-TPAT):** In April 2002, Customs launched C-TPAT, a joint government and business partnership which asks businesses to ensure the security of their own supply chain in an effort to strengthen overall supply chain security. Participation in C-TPAT is open to most aspects of the supply chain, including importers, carriers (air, rail, sea), air freight consolidators/ocean transportation intermediaries, brokers, non-vessel operating common carriers and manufacturers. To encourage enrollment, Customs offers several potential benefits to C-TPAT participants, including the possibility of fewer inspections, an assigned account manager, access to the C-TPAT membership list, and eligibility for account-based Customs processes. C-TPAT is also becoming a prerequisite for participation in selected other Customs programs. Businesses must apply for membership and must agree to implement a security program in accordance with C-TPAT guidelines, as well as provide Customs with a range of information. According to Customs, over 1100 companies have enrolled in C-TPAT as of November 2002.
- **Container Security Initiative (CSI):** In January 2002, Customs launched the CSI to reduce the risk of a terrorist attack stemming from containerized cargo. CSI consists of four core elements: (1) using automated information to identify and target high-risk containers; (2) pre-screening those containers identified as high-risk before they arrive at U.S. ports; (3) using detection technology to pre-screen high-risk containers quickly; and (4) using smarter, tamper-proof containers. Customs has initially targeted twenty of the world's largest seaports responsible for more than half of all seagoing containers bound for the United States. Its goal is to place Customs inspectors in foreign ports to help pre-screen cargo containers before departing for the United States.
- **Free and Secure Trade (FAST):** The FAST program is a bilateral initiative between the United States and Canada to facilitate secure trade at the border. Importers, carriers and commercial drivers who enroll in FAST may benefit from more efficient clearance processes for commercial shipments. FAST processing is based upon advanced transmission of information relating to known low-risk shipments. A truck that uses the FAST lanes must be a FAST approved carrier, carrying qualifying goods from a C-TPAT

5. Initial meetings are currently scheduled for January 14 (air), January 16 (truck), January 21 (rail) and January 23 (sea).

approved importer, and be in possession of a valid FAST-Commercial Driver Card. The program is scheduled for implementation at Canadian ports in December 2002.

Given the breadth of the security-related changes being implemented, they are likely to have significant consequences for an extended period. Hogan & Hartson will continue to track these new developments.

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