

Corporate  
Customs & International Trade Practice

October 2006

## **Congress Puts Stamp of Approval on CBP's Security Programs**

The Senate recently approved the Port Security Improvement Act of 2006 ("SAFE Port Act"), which was introduced in the House of Representatives in March of this year. Congressional approval of the SAFE Port Act "ratifies" the programs that the Bureau of U.S. Customs and Border Protection ("CBP") put into place a few years ago in order to improve supply chain security, including the Customs-Trade Partnership Against Terrorism and the Container Security Initiative. The President is expected to sign the Act into law as early as Friday, October 13th.

The Act includes the following appropriations of funds:

- ✦ \$400 million for port security, including a port security training program;
- ✦ \$70 million for research and development of nuclear and radiological detection equipment;
- ✦ \$106 million to carry out the Automated Targeting System for identifying high-risk ocean borne container cargo;
- ✦ \$443 million to carry out the CSI program;
- ✦ \$212 million to carry out the C-TPAT program and another \$110 million for staffing CBP with personnel to conduct validations.

Relevant sections of the SAFE Port Act are summarized below.

### ***Domestic Radiation Detection and Imaging***

Section 121 of the Act requires that all containers entering the United States through the 22 busiest seaports to be examined for radiation by December 31, 2007. In addition, the Secretary is to develop a strategy, to be implemented within 3 years from enactment of the Act, for the deployment of radiation detection capabilities that include:

- ✦ risk-based prioritization of ports of entry at which radiation detection equipment will be deployed;

- ✦ proposed timeline for deployment and type of equipment to be used at each port of entry;
- ✦ standard operating procedures for examining containers with such equipment, including operator training plans.

By December 31, 2008, this strategy should be expanded to the remaining U.S. ports of entry.

### ***Random Searches of Containers***

Section 122 of the Act provides that within one year of enactment, CBP is required to develop and implement a plan to conduct random searches of containers. These searches would be in addition to any targeted or preshipment inspections of containers required by law or regulation.

### ***Post Incident Resumption of Trade***

Section 202 of the Act specifies that, in the event of an incident that disrupts trade, CBP will give preference to the following cargo:

- ✦ entering a port of entry directly from a foreign seaport designated under CSI;
- ✦ handled by a validated C-TPAT participant; or
- ✦ has undergone one of the following:
  - a nuclear or radiological detection scan;
  - an x-ray, density or other imaging scan;
  - or
  - an optical recognition scan at the last port of departure prior to arrival in the U.S., which data has been evaluated and analyzed by CBP personnel.

### ***Automated Targeting System***

Section 203 of the Act provides that CBP shall require the electronic transmission of additional data elements for improved high-risk targeting, including appropriate security elements of entry data to be provided as advanced information with respect to cargo destined for

importation into the U.S. prior to loading on vessels at foreign seaports.

CBP is to draft regulations to carry out this section of the Act that will include provisions relating to consultation, technology, analysis, use of information, confidentiality and timing requirements.

CBP plans to open a second national targeting center by the end of the year to focus on gathering information on containers by "teleforensics" and "remote imaging." CBP's objective is to increase the use of Non-Intrusive Inspection ("NII") practices to determine which containers will need physical inspections.

### ***Container Security Initiative***

Section 204 of the Act calls for the establishment of minimum standards and procedures for securing containers in transit to the U.S. In conjunction with this, the Act requires CBP to establish and implement the Container Security Initiative ("CSI") to identify and examine or search maritime containers that pose a security risk before loading such containers in a foreign port for shipment to the U.S., either directly or through another foreign port.

The Act sets out guidelines for CBP to use in designating foreign seaports as CSI participants. It also requires CBP to establish minimum technical capability criteria and standard operating procedures for the use of non-intrusive imaging and radiation detection equipment in conjunction with CSI. Further, the Act requires CBP to mandate that each port designated under CSI operate the non-intrusive inspection and nuclear and radiological detection systems in accordance with the established technical capability criteria and standard operating procedures.

Although CSI has been around since January 2002, its inclusion in the Act reaffirms the importance of this program. Currently, there are 50 fully operational CSI ports in Europe, Asia, Africa, the Americas and the Middle East. This number will undoubtedly grow over the next few years.

### ***Customs-Trade Partnership Against Terrorism***

Section 211 of the Act calls for the establishment of the Customs-Trade Partnership Against Terrorism ("C-TPAT"), a voluntary program whose purpose is to strengthen and improve the overall security of the international supply chain and U.S. border security, and

to facilitate the movement of secure cargo throughout the international supply chain.

According to Section 213 of the Act, the minimum requirements for participation in C-TPAT are a demonstrated history of moving cargo in the international supply chain and conducting an assessment of the supply chain, and implementing and maintaining security measures that meet the following criteria:

- ✚ business partner requirements;
- ✚ container security;
- ✚ physical security and access controls;
- ✚ personnel security;
- ✚ procedural security;
- ✚ security training and threat awareness; and
- ✚ information technology security.

#### *Tier 1 (Section 214 of Act)*

The limited benefits for Tier 1 participants are a reduction in the score assigned pursuant to the Automated Targeting System ("ATS") of not greater than 20 percent of the high-risk threshold. The Act requires that CBP complete the Tier 1 certification process within 90 days of receipt of a C-TPAT application.

#### *Tier 2 (Section 215 of Act)*

Tier 2 participants are those who have undergone a validation of their C-TPAT application, which is to include on-site assessments at appropriate foreign locations that the applicant utilizes in its supply chain. The benefits to Tier 2 participants include: (1) reduced scores in ATS; (2) reduced examinations of cargo; and (3) priority searches of cargo.

The Act specifies that CBP complete a validation, to the extent possible, within one year after a company's certification as a Tier 1 participant. CBP has announced that it expects to complete a preliminary blueprint this month to test the feasibility of using third party auditors in certain parts of the world to assist with conducting C-TPAT validations. CBP views this as a tool to obtain access to those areas of the world in which they currently are not allowed to conduct validations (e.g., China).

CBP still feels that inherently the validation process should be a governmental function, however, if they cannot gain access to a country to conduct them, or the location is deemed to dangerous to send CBP personnel,

the third parties offer an alternative to gain the necessary supply chain visibility.

Tier 3 (Section 216 of Act)

The desirable Tier 3 status, which until now has been a bit of a mystery, according to the Act, is to be granted to participants demonstrating a sustained commitment to maintaining security measures and supply chain security practices that exceed the guidelines established for validation as a Tier 2 participant in C-TPAT.

The criteria provided in the Act for designation as a Tier 3 C-TPAT participant are:

- ✚ compliance with guidelines exceeding those established for validating a C-TPAT Tier 2 participant, specifically regarding controls over access to cargo throughout the supply chain;
- ✚ voluntary submission of additional information regarding cargo prior to loading;
- ✚ using container security devices and technologies that meet established standards and criteria; and
- ✚ compliance with any other established cargo requirements.

The benefits under Tier 3 are to include: (1) expedited release of cargo in destination ports within the U.S. during all threat levels; (2) further reduction in cargo examinations; (3) priority for cargo examinations over Tier 1 and Tier 2 participants; (4) further reduction in ATS risk score; (5) receiving notification of specific alerts and post-incident procedures (assuming this does not compromise U.S. security interests); and (6) inclusion in joint incident management exercises. Under the Act, these benefits are required to be granted to C-TPAT participants meeting Tier 3 status within two years of the Act's enactment.

The Act also provides for the denial of C-TPAT benefits where a participant fails to meet the requirements necessary for participation in the program and for suspension or expulsion from the program where false or misleading information is provided to CBP during the validation process. CBP's decision to deny or suspend C-TPAT benefits can be appealed.

According to the Act, CBP must also develop and implement a revalidation process for Tier 2 and Tier 3 participants. The framework is to be based upon objective criteria for identifying participants for periodic revalidation.

Finally, CBP is required to increase the number of full-time personnel working on validations and revalidations by at least 50 people each year over the next 3 years.

***C-TPAT Security Link Portal***

On a related note, the C-TPAT Security Link Portal is up and running, and the mandatory means of communication with CBP on C-TPAT. Those currently applying for C-TPAT are required to enter their security profiles into the Portal for processing of their applications. Existing C-TPAT participants should have uploaded their security profiles into the Portal by the October 1, 2006 deadline to prevent possible suspension of benefits.

***Status Verification Interface***

As an aside, CBP has posted to its website the criteria for obtaining access to the Status Verification Interface ("SVI"). SVI allows consenting certified C-TPAT partners to verify whether their business partners are participants of C-TPAT. The criteria include: access to the internet C-TPAT Security Link Portal; achieved certification status as a C-TPAT participant; generating an SVI alpha-numeric identification number in the C-TPAT Security Link Portal; and accepting the terms of the electronic C-TPAT "Consent to Use Company Name" form found in the Portal.

***Pilot for Integrated Scanning System***

Under Section 231 of the Act, within 90 days of enactment, the Department of Homeland Security will designate three foreign ports through which containers are shipped or transshipped to the U.S. for piloting an integrated scanning system, to include NII and radiation detection. For those ports selected for the pilot, 100 percent of all U.S. bound containers will be scanned.

This section of the bill was hotly debated, as many Democrats wanted 100 percent scanning of all U.S. bound containers from all foreign ports and they wanted it within a short timeframe (e.g., one year). There was a large amount of controversy about this and lobbying by the trade community to avoid it. CBP generally agreed with the trade community that this issue could not be forced because the technology is not ready yet, which could result in huge delays, additional costs, and unknown reciprocal behavior from U.S. trading partners.

Thus, the language in the final bill is a compromise. After the pilot program, there is no timeline set in stone for further expansion of the program unless the department can determine it is feasible to do so without disrupting trade. Commissioner Basham has indicated that CBP is in discussions with about a half dozen ports (names undisclosed) and they expect to have agreements in place with at least one if not all three by the end of the year.

### ***International Trade Data System***

Section 405 of the Act provides for the International Trade Data System ("ITDS"). This system will allow the Automated Commercial Environment ("ACE") to become the "single window to government" that CBP and Trade has always envisioned.

The purpose of ITDS is the elimination of redundant information requirements that are requested by multiple agencies on imports (e.g., CBP, FDA, FCC, DEA). It will result in a single portal system, operated by CBP, for the collection and distribution of import and export data as required by the various federal agencies. As ITDS was not in any statute, CBP and the trade community could not force agencies to participate. However, this bill mandates participation by all federal agencies that require documentation for clearing or licensing the importation and exportation of cargo. The deadline for implementation is no later than the date that ACE is fully implemented (most likely in 2009 or 2010).

### ***Conclusion***

Overall, the SAFE Port Act, as it finally passed in Congress, is something that the trade community can live with. Thanks to extensive lobbying and ongoing dialogue with congressional members by numerous trade associations, the most controversial measures were removed or compromises were reached that are acceptable moving forward.

It is important to note that although the bill does provide measures designed to improve the security of our ports, it does not speak to other modes of transportation. Not included in the final bill was the \$4.5 billion that was sought by numerous conferees in Congress for shoring up rail, mass transit and hazardous materials and pipeline security.

Although there is still much more to be done in the overall scheme of things, the SAFE Port Act does validate the importance of the many programs developed by CBP to enhance supply chain security.

*If you have any questions regarding the SAFE Port Act or its implications for the programs summarized above, please do not hesitate to contact Karen A. Lobdell, Beata K. Spuhler, or any other member of Gardner Carton & Douglas LLP's Customs and International Trade Practice.*

#### **Customs & International Trade Practice:**

**Kathleen M. Murphy**  
Chair, Partner  
312-569-1155 ph  
kmurphy@gcd.com

**Joan Koenig**  
Counsel To  
(312) 569-1163 ph  
jkoenig@gcd.com

**Randy Rucker**  
Attorney  
312-569-1157 ph  
rrucker@gcd.com

**Beata Spuhler**  
Attorney  
312-569-1158 ph  
bspuhler@gcd.com

**Therese Ignich**  
Trade Specialist,  
Licensed Customs Broker  
312-569-1582 ph  
tignich@gcd.com

**Karen Lobdell**  
Global Trade and Supply  
Chain Specialist,  
Licensed Customs Broker  
312-569-1066 ph  
klobdell@gcd.com

**James Sawyer**  
Partner  
312-569-1156 ph  
jsawyer@gcd.com