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**“CSI”, “C-TPAT”, THE “24 HOUR RULE”  
AND VESSEL SECURITY PLANS:  
DO NEW U.S. SECURITY PROGRAMS RESULT  
IN NEW LIABILITY ISSUES?<sup>1</sup>**

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The United States Customs and Border Protection Service views its mission as follows:

“We are the guardians of our Nation’s borders—America’s frontline. We serve and protect the American public with integrity, innovation and pride. We enforce the laws of the United States, safeguard the revenue, and foster lawful international trade and travel.”<sup>5</sup>

Customs describes itself as the only border agency with an extensive air, land and marine interdiction force with an investigative component supported by its own intelligence branch.<sup>6</sup>

In the wake of the September 11, 2001 terrorist attacks on America, the Customs Service was charged with expanding America’s borders to facilitate the early detection and prevention of further terrorist attacks. To that end, Customs implemented the

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<sup>1</sup> This paper is intended for discussion purposes only and does not constitute, nor should it be relied upon, as legal advice. Specific legal questions should be addressed to counsel. This paper has been prepared for the private educational use of those attending the meeting of the BLG Annual Maritime Law Seminar at Montreal, Canada on December 5, 2003 and is not to be relied upon by any other person, firm or entity or in respect of any other matter. This paper has been prepared on the basis of a general survey of the law and practices as of December 5, 2003. © 2003: Reproduction, copying or redistribution of this paper or the information contained herein without prior permission of Freehill Hogan & Mahar, LLP is strictly prohibited.

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<sup>5</sup> *About Customs*, available at [www.customs.ustreas.gov](http://www.customs.ustreas.gov).

<sup>6</sup> *Id.*

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Container Security Initiative (“CSI”), the Customs-Trade Partnership Against Terrorism (“C-TPAT”) and, with immediate and far-reaching impact, the 24 Hour Rule.

### **North American Customs Initiatives**

The Free and Secure Trade (“FAST”) program is a bilateral initiative between the United States and Canada<sup>7</sup> (there is also a FAST bilateral initiative between the United States and Mexico).<sup>8</sup> FAST is designed to harmonize the commercial processes for clearance of commercial highway shipments at the border. FAST began in December 2002, and through the program, carriers and importers are offered expedited clearance when enrolled in Customs’ C-TPAT<sup>9</sup> or Canada’s Partners in Protection (“PIP”).

FAST aims to streamline and integrate the two countries’ registration processes for drivers, carriers, and importers, minimizing paperwork and ensuring that only low-risk participants are enrolled as members. FAST provides dedicated highway lanes for the movement of goods at major border crossings,<sup>10</sup> with low-risk transborder shipments suffering fewer physical examinations of cargo. Customs estimates that the savings in time for high volume low-risk carriers and importers will offset or mitigate the cost of program participation.

Two cargo release methods are presently utilized for FAST shipments. Through the use of electronic data transmissions and transponder technology, the National

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<sup>7</sup> See <http://www.customs.ustras.gov>.

<sup>8</sup> *Id.*

<sup>9</sup> See discussion below.

<sup>10</sup> The major crossings currently involved in FAST offering dedicated traffic lanes are: Blaine-Douglas, Detroit-Windsor, Buffalo-Fort Erie, Lewiston-Queenston, and Champlain-Lacolle. Dedicated traffic lanes will be operation in 2004 for the following border crossings: Alexandria Bay-Landsdowne, Derby Line-Stanstead Place, Highgate Springs-Phillipsburg, Pembina-Emerson Junction, Portal-North Portal, and Sweetgrass-Coutts. Information on FAST is available at <http://www.customs.ustras.gov>.

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Customs Automated Prototype (NCAP) provides entirely paperless processing. The Pre-Arrival Processing System (PAPS) is another Customs Automated Commercial System (ACS) that utilizes barcode technology to expedite the release of commercial shipments while processing each shipment through Border Cargo Selectivity (BCS) and the Automated Targeting System (ATS). FAST requires that cargo be sealed with high security seals as described in 19 C.F.R. §24.13a(a), (b) and (c). Generally, these requirements include the use of bolt seals, cable seals or padlock/handcuff seals.

The U.S.-Canada NEXUS Program provides for streamlined travel of people across the border. NEXUS provides dedicated transit lanes and allows border crossing without routine customs and immigration questioning. NEXUS is currently operational in Blaine, Buffalo, Detroit, and Port Huron. NEXUS is coming on line at Niagara Falls, Highgate Springs, Champlain, and Sweetgrass. Over the next year, additional NEXUS expansions will be made in North Dakota, Maine and New York. Individuals must be pre-approved by both the United States and Canada and is only open to citizens or permanent residents of the U.S. or Canada, or to non-permanent residents who can demonstrate a need to use the NEXUS lanes. Customs and Canada's Customs and Revenue Agency must both determine that individuals qualifying for NEXUS are "low-risk".<sup>11</sup>

### CSI

Each year, some 16 million containers move through U.S. ports, representing some \$475 billion worth of commerce. Statistically speaking, approximately 40% of all

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<sup>11</sup> More information on NEXUS is available at <http://www.customs.ustras.gov>.

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containers in the world pass through a U.S. port each year. Approximately 70% of all U.S. bound containers originate or pass through some 20 foreign container ports.<sup>12</sup> However, of the millions of containers that pass through U.S. ports each year only a small percentage, approximately 2%, are actually inspected by the Customs Service.<sup>13</sup>

Prior to September 11, Customs' prime concern in identifying suspect containers related to narcotics, foreign invasive species, and contraband.<sup>14</sup> With the shift in focus to the possibility that the transportation system may be used to deliver a weapon of mass destruction, Customs launched CSI in January, 2002.<sup>15</sup>

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 US ports; (3) using detection technology to quickly pre-screen high-risk containers; and (4) using advanced, more tamper-resistant containers. CSI also has the goal of taking these measures without slowing down trade.<sup>16</sup>

Customs is implementing bilateral CSI agreements with the countries hosting the 20 largest container ports in the world outside the United States.<sup>17</sup> Since inception almost two years ago, CSI agreements covering 18 of these 20 ports<sup>18</sup> have been concluded, and

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<sup>12</sup> According to Customs, these twenty ports are (in descending order): Hong Kong, Shanghai, Singapore, Kaohsiung, Rotterdam, Busan, Bremerhaven, Tokyo, Genoa, Yantian, Antwerp, Nagoya, Le Havre, Hamburg, La Spezia, Felixstowe, Algeciras, Kobe, Yokohama, and Laem Chabang. "U.S. Customs Container Security Initiative Guards America, Global Commerce from Terrorist Threat", [http://www.customs.ustreas.gov/xp/cgov/newsroom/press\\_releases/112002/11012002\\_4.xml](http://www.customs.ustreas.gov/xp/cgov/newsroom/press_releases/112002/11012002_4.xml).

<sup>13</sup> Peter Tirschwell, *Don't Make Matters Worse*, Journal of Commerce Week, Mar. 25-31, 2002 at 4.

<sup>14</sup> *Id.*

<sup>15</sup> "U.S. Customs Container Security Initiative Guards America, Global Commerce from Terrorist Threat", available at <http://www.customs.ustreas.gov>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Agreements have been reached with (among others) the ports of Halifax, Montreal, Vancouver, Algeciras, Rotterdam, Antwerp, Le Havre, Bremerhaven, Hamburg, Felixstowe, Göteborg, Genoa, La

the program is poised to be expanded further. Customs' goal is to create uniform international standards on container and marine terminal security.<sup>19</sup>

As part of the program, cooperating foreign governments must host U.S. Customs agents at their ports who will help to identify and screen high-risk containers before they are loaded onto U.S. bound vessels. The CSI is generally viewed as supportive of the Cooperative G8 Action on Transport Security adopted by the G8 in June, 2002, and the World Customs Organization unanimously passed a resolution that will enable ports in all 161 member nations to begin to develop container security systems using CSI principles.<sup>20</sup>

Because CSI is a cooperative program between the U.S. government and foreign governments, it does not theoretically impose any specific new obligations on the commercial shipping community. However, to provide CSI participants with the information needed to identify, target and pre-screen possible high risk shipments, Customs has enacted the 24 Hour Rule, which does impose increased obligations and potential liabilities.

#### **"24 Hour" Manifest Rule**

Prior to September 11, Customs regulations required the filing of cargo manifests 48 hours before vessel arrival. That meant, in the vast majority of cases, that the

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Spezia, Hong Kong, Singapore, Yokohama, Tokyo, Kobe, Osaka, Nagoya, Busan, Shanghai, Shenzhen, Port Kelang, Tanjung Pelepas, Laem Chebang, Colombo and Durban. There are also agreements with Italy, Spain, France, Germany, the United Kingdom, Mexico, Korea, Singapore, Japan and China. *Id.* The European Commission is seeking to obtain a pan-European CSI agreement with the United States. "Customs: Commission Proposes to Negotiate EU/US Co-Operation Arrangements for Transport Security", <http://www.europa.eu.int>.

<sup>19</sup> "U.S. Customs Container Security Initiative Guards America, Global Commerce from Terrorist Threat", available at <http://www.customs.ustreas.gov>.

<sup>20</sup> *Id.*

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containers covered by the manifest were already onboard a vessel bound for a U.S. port, which limited any screening efforts prior to the port of arrival. In an effort to enhance security by pushing U.S. borders outward, Customs enacted the “24 Hour Rule,” which went into effect on December 2, 2002, with a 60 day grace period for enforcement. On February 1, 2003 Customs began enforcing the new regulation.

In contrast to CSI and C-TPAT, the 24 Hour Rule is mandatory. Federal Regulations now<sup>21</sup> require the electronic transmission of vessel cargo manifest information directly to Customs 24 or more hours before the cargo is loaded aboard a U.S.-bound vessel at a foreign port.<sup>22</sup> The manifests are preferably to be filed using the Customs Automated Manifest System (“AMS”), which is now available to both carriers and NVOCCs.

The new regulations forbid cargo descriptions such as “said to contain” or “freight all kinds” or other general descriptions of cargo in the manifest. Cargo declarations must include a precise description and the weight of the cargo, or the six-digit Harmonized Tariff Schedule (“HTS”) number under which the cargo is classified, if provided by the shipper. The new regime also requires complete names and addresses of the shippers and consignees.

Under 19 U.S.C. §1431(c), importers and consignees currently may request confidentiality to protect their names and addresses, as well as the details of their shippers, from disclosure by Customs. 19 C.F.R. §103.31(3)(d) states that an importer or consignee may request confidential treatment of its name and address contained in inward

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<sup>21</sup> As of February 1, 2003.

<sup>22</sup> 19 C.F.R. §§4, 103 and 113.

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manifests. In addition, an importer or consignee may request confidential treatment of the name and address of the shipper or shippers to such importer or consignee by using certain procedures outlined in that regulation. The regulations do not require the provision of facts to support the conclusion that disclosure of names and addresses would cause harm to the competitive position of the importer or consignee. Confidentiality, once granted, is valid for two years and must be renewed at least 60 days before expiration.

Carriers and NVOCCs may be held liable under the 24 Hour Rule for a failure to provide manifest information to Customs or for transmitting any document that is forged, altered or false. One important difference in the 24 Hour Rule is that there is no requirement that there be any “knowing” violation: any violation potentially subjects the carrier or NVOCC to penalties. Carriers and NVOCCs should therefore ensure that accurate information is provided to Customs.

Civil penalties to be imposed on carriers for inaccurate information may be found at 19 U.S.C. §1436, and liquidated damages for NVOCCs may be found at 19 C.F.R. §113.64(c). Penalties under 19 U.S.C. §1436 may be severe: \$5,000 for a first offense and \$10,000 for a second offense. The maximum liquidated damages imposed upon NVOCCs under 19 C.F.R. §113.64(c) is \$1,000. Furthermore, in the case of a violation of the 24 Hour Rule, Customs may prevent the vessel from unloading any cargo (even if the violation applies to only one container), or may prevent the vessel from unloading the cargo in violation. Customs advises that procedures for reporting and correcting manifest discrepancies will be published in due course.

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It is important to note that NVOCCs intending to transmit cargo declarations electronically (either directly, or through a service provider or port authority) to Customs must first obtain an international carriers bond in the minimum amount of \$50,000. The Customs port director at each U.S. port has the discretion to require an increase of the bond. Once a bond is on file with Customs, it is good for all U.S. ports of entry.

Customs commenced enforcement of the 24 Hour Rule on February 1, 2003 and some shipments for which cargo declarations were not filed in timely fashion were left behind at various ports. Between February 2, 2003 and April 29, 2003, Customs reviewed more than 2.4 million bills of lading and found 260 containers with inadequate cargo descriptions that were issued “Do Not Load” orders.<sup>23</sup> As of May 4, 2003, Customs’ policy has been to issue monetary penalties for late submission of cargo declarations. Customs has also made it clear that “do not load” orders will be given for any cargo with a blank or vague cargo description, including instances where consignee fields have been left blank, or the use of “To Order” or “To Order of Shipper” without corresponding information in the consignee field and notify party field has occurred. Customs may also issue monetary penalties for Foreign Remaining On Board (FROB) cargo that has invalid cargo descriptions and has been loaded onboard the vessel without providing Customs with a 24-hour time frame for targeting.<sup>24</sup>

From a contractual point of view, ship owners and charterers will want to consider including language in their carriage documentation which clearly delineates (a) who has responsibility for compliance with the Customs’ filing requirements, (b) who will be

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<sup>23</sup> *CBP Expands Enforcement of the 24-Hour Rule*, available at [www.customs.ustreas.gov](http://www.customs.ustreas.gov).

<sup>24</sup> *Id.*

liable for cargo not loaded due to a failure to properly comply with the requirements, and (c) who will bear the loss of time and extra expenses in the event loading or discharge are delayed due to a late or improper filing with Customs.

### C-TPAT

C-TPAT is a Customs program whereby importers, carriers, and others agree to take measures to meet Customs' voluntary security guidelines. The program initially focused on importers before expanding to include ocean carriers, air carriers, and railroads. Requirements for trucking companies and port authorities are being adopted.

For companies that develop and maintain a comprehensive supply-chain security program using US government guidelines, Customs inspections will be sped up or even sometimes waived altogether.<sup>25</sup> Under C-TPAT, a company must qualify for participation by demonstrating that its security program is adequate under the guidelines. Customs requires applicants to fill out detailed questionnaires that seek information on internal security, including steps taken to prevent theft, shipping and receiving controls, and the integrity of automated systems. Employees must be pre-screened and the company must conduct periodic background reviews, adopt internal codes of conduct and controls for reporting and managing problems related to personnel security.<sup>26</sup>

Although the program is voluntary, Customs has stated that companies participating in the program are considered "low-risk", and their cargo will be processed

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<sup>25</sup> *US Customs Offers Security Fast Track*, <http://www.lrfairplay.com> Apr. 25, 2002.

<sup>26</sup> *See Sea Carrier Security Recommendations for C-TPAT*, <http://www.customs.ustreas.gov>; *Required Documentation: Sea Carrier – C-TPAT Supply Chain Security Profile Questionnaire*, <http://www.customs.ustreas.gov>; *Required Documentation: Sea Carrier – C-TPAT Agreement to Voluntarily Participate*, <http://www.customs.ustreas.gov>; *Sea Carrier Instructions for C-TPAT*, <http://www.customs.ustreas.gov>.

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at a significantly faster rate than that of companies which fail to participate.<sup>27</sup> Thus, the costs involved in participating are designed to be offset by the benefits of faster processing and fewer inspections.

In providing guidance to the C-TPAT program, Customs advises that there are no monetary penalties associated with C-TPAT.<sup>28</sup> This statement is true, as C-TPAT does not impose monetary penalties; however, it is clear from the C-TPAT agreement that participation in C-TPAT does not exempt a carrier “from any statutory or regulatory sanctions in the event that discrepancies are discovered during a physical examination of cargo or the review of documents associated with the Carrier Customs transactions.”<sup>29</sup> Hence, a C-TPAT participating carrier will not be exempt from any statutory or regulatory sanctions in the event of a violation of Customs regulations.

Whether or not a carrier is a C-TPAT participant, U.S. authorities have the power to detain a vessel which is thought to pose a threat to port security. Customs and the U.S. Immigration and Naturalization Service can also require the vessel to hire an approved armed guard service to ensure that detained crewmembers do not depart the vessel. Again, owners and charterers should consider documentation clauses which clearly state who is to be responsible for the cost of such security measures, and which party will bear any loss of time to the vessel.

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<sup>27</sup> *US Customs Offers Security Fast Track*, <http://www.lrfairplay.com> Apr. 25, 2002.

<sup>28</sup> *C-TPAT Frequently Asked Questions – Air, Rail, and Sea Carriers*, <http://www.customs.ustreas.gov>.

<sup>29</sup> *Required Documentation: Sea Carrier – C-TPAT Agreement to Voluntarily Participate*, <http://www.customs.ustreas.gov>.

**U.S. VESSEL SECURITY PLAN REQUIREMENTS**

As a result of the 9-11 tragedy, the U.S. Congress passed the Maritime Transportation Security Act (MTSA) on November 25, 2002. The Act is intended to thwart possible terrorist attacks and/or mitigate damages in the event of such an attack. The MTSA provides, *inter alia*, that foreign cargo vessels of greater than 100 gross tons operating in U.S. waters must create and implement a Vessel Security Plan (USVSP).

In December 2002, the International Ship and Port Facility Security Code (ISPS) was adopted by the International Maritime Organization (IMO) and attached to Chapter XI of the existing Safety of Life at Sea Convention (SOLAS). The ISPS Code provides that all vessels subject to SOLAS must create and implement a vessel security plan (ISPS Plan) and carry on board an International Ship Security Certificate (ISSC) verifying compliance with the ISPS Code.

While both the MTSA and the ISPS Code share the same goal of preventing terrorist attacks, the timelines for compliance with these regimes differ. Under the MTSA, the USVSP must be submitted to the U.S. Coast Guard for approval by December 31, 2003, with ultimate compliance required by July 1, 2004. Under the ISPS Code, vessels are permitted to submit their ISPS Plan before July 1, 2004.

At first glance, it appears that foreign commercial vessels subject to SOLAS and intending to call to U.S. ports must comply with both of these regimes. However, recent rules promulgated by the U.S. Coast Guard attempt to relieve this burden by deeming compliance with ISPS as compliance with the MTSA.

*The U.S. Coast Guard Final Rule: Compliance with the ISPS Code  
Equals Compliance with the MTSA*

The maritime security requirements of the MTSA were published by the U.S. Coast Guard in a final rule on October 22, 2003. These replace the temporary rules originally issued in July 2003. The final rule states that foreign flag vessels operating in U.S. waters, which are subject to SOLAS, need not submit a USVSP to the U.S. Coast Guard, but need only carry a valid ISSC by July 1, 2004. Thus, the rule attempts to relieve the burden on foreign vessel owners/operators of having to compile a USVSP by December 31, 2003. The final rules also attempt to eliminate many of the additional requirements of the MTSA in an effort to align the USVSP requirements with the ISPS Plan requirements.

*Recommended Submissions*

December 31, 2003 is the deadline for submitting a USVSP for all vessels subject to the requirements of MTSA, but outside the scope of the ISPS Code. As for foreign vessels coming within the requirements of both the MTSA and ISPS Code, the U.S. Coast Guard eliminated the need of making this filing deadline. Apparently, foreign vessel owners/operators do not have to meet the December 31, 2003 deadline, provided that these foreign vessels are in compliance with the MTSA by virtue of having a valid ISSC by July 1, 2004. As mentioned above, the July 1, 2004 date parallels the existing deadline already in place under the ISPS Code.

As the MTSA legislation pre-dated the ISPS Code, there was no mention of the above filing exemption. Apparently, the U.S. Coast Guard arguably went beyond its authority by relieving foreign vessels from the obligation originally set forth in the

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MTSA. Current efforts are underway, however, to resolve this problem with new legislation. To be on the safe side, we would recommend that a USVSP be filed on or before December 31, 2003 by all vessels. In any case, all vessels must be operating with a valid ISSC no later than July 1, 2004.

**Summary**

The CSI program seeks to, in effect, extend America's cargo security borders to foreign ports of loading. The C-TPAT initiative is a voluntary security partnership between Customs and commercial carriers, designed to increase carriers' awareness of security issues. Currently, the 24 Hour Rule is the real teeth of Customs' efforts to identify high risk cargoes before they are loaded on board vessels. It presents a logistical challenge to shippers and carriers alike, with potential significant penalties and liability if the requirements are not met. By the end of this month, vessels subject to the MTSA must file their USVSP's. Pursuant to the U.S. Coast Guard's final rule under the MTSA, vessels outside the scope of the MTSA but within the scope of the ISPS Code must carry valid ISSC's by July 1, 2004.

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December 5, 2003