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## Cargo Security – The Legal Perspective: A Top 10 List

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The Customs and Trade Partnership Against Terrorism, known by the acronym C-TPAT, is the hot issue of the day for importers and international supply chain service providers. This government to business initiative seeks to safeguard the integrity of the international supply chain by getting importers, customs brokers, freight forwarders, consolidators, carriers, non-vessel owning common carriers and port authorities to agree voluntarily to increase security along every step of the supply chain. Announced in November 2001 and rolled out to most companies the following July, C-TPAT membership is growing daily. More than 3000 companies have submitted mem-

bership applications, and this number will grow once foreign vendors and warehouses are offered the opportunity to enroll later this year.

In light of this trend toward partnering with government, companies should be mindful of potential issues that could arise as a direct or indirect result of this partnership. In no particular order, we present our top 10 list of legal issues that companies should consider when deciding whether or not to enroll in C-TPAT or other government sponsored security initiatives:

1. C-TPAT is a formal agreement between government and the trade partner. You are making formal, written representations to the Bureau of Customs and Border Protection ("Customs"), an agency within the U.S. Department of Homeland Security. These representations include agreeing to "develop and implement . . . a verifiable, documented program to enhance security procedures throughout [your] supply chain process." In addition, the participant must provide Customs a cargo security profile, in which that company outlines the process elements it has in place for security procedures.

The security profile that you submit to Customs establishes the standard that you must meet in a Customs validation review. In light of this, do not promise more than you can deliver.

Your cargo security program cannot be static. It must be able to incorporate changes that you make to your supply chain, such as a change in a vendor or service provider, as well as changes suggested by Customs. And you need to be able to convey these changes back to Customs. This, too, is implicit in the agreement.

2. Your participation in programs such as C-TPAT must be *documented* and *verifiable*. As mentioned above, Customs has developed and implemented a validation process to test whether C-TPAT participants have implemented the security measures set out in their security profiles. Each validation will be customized based on the representations contained in the company's security profile. At a minimum, you will need to demonstrate that you have complied with this standard during the tenure of your status as a C-TPAT participant.

As of now, fewer than 50 validations have been conducted, all successful. The question remains though, how will Customs treat that first participant who "fails" its validation? Expulsion from the program is an obvious result. Customs has also suggested that cargo security is linked to the admissibility of merchandise, thus implying that statutory authority exists for the commencement of an action to impose civil penalties against a company that fails a validation.

3. Customs asks that C-TPAT participants use "every reasonable effort to secure compliance by the responsible party." Does simply sending out letters or security questionnaires to your service providers or vendors constitute "reasonable efforts?" What actions should you take to verify the responses that you receive? And which companies do you need to send questionnaires to in the first place? Does the level of scrutiny depend: 1) on the product being imported; 2) on the country from which the product originates; 3) on the country(ies) through which the product passes during transit, or 4) on the identity of the manufacturer of the product? The wrong answer to these types of questions

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could negatively impact the security profile that you submit to Customs.

4. The requirement that a C-TPAT participant notify law enforcement agencies of anomalies or other suspected illegal activities may create corporate obligations or liabilities pursuant to other U.S. laws. In light of this, should your first phone call go to Customs or to counsel? The most obvious example of a supply chain "anomaly" is theft. But what if an investigation of a tampered container were to yield proof that the container had been used to smuggle drugs or other contraband? Or had been used to transport undocumented individuals, perhaps even terrorists? Or, in the worst case scenario, it had been used to move a weapon of mass destruction or food that had been purposely contaminated? The heightened importance of corporate governance and the new reporting requirements set out in Sarbanes-Oxley raise the question, could the discovery of a tampered shipping container be deemed so material that disclosure pursuant to Sarbanes-Oxley would be necessary?

Other practical considerations exist. The service providers you hire may also participate in C-TPAT and thus share this obligation. What are their procedures for assuring that the "anomaly" or "suspected legal activity" is one that should be reported to law enforcement.

5. Participation may impact your existing and future contractual relationships with service providers and vendors. As part of its security profile a C-TPAT applicant must gather and retain profiles of its "Tier 1" suppliers, defined as "those entities receiving and packing a finished commodity, for transportation to the final destination." What if a supplier represents in its profile that it has no written standards or procedures regarding supply chain security? You may have to decide whether to continue doing business with companies that you believe do not meet your C-TPAT standards. In some circumstances, termination of such relationships could trigger breach of contract issues. Sourcing issues could arise, as product managers and logistic coordinators search out new C-TPAT compliant vendors or service providers. Or it could mean withdrawal of your C-TPAT application.

6. Foreign law may affect your ability to implement security programs. For example, the security recommendations published by Customs suggest background checks of employees and/or others with access to your cargo. But background checks are against the law in many nations. You must consider how your cargo security program will be

impacted by the laws of foreign jurisdictions.

The United States is not the only country actively working to secure the international supply chain against tampering. Canada has unveiled its Partners in Protection program, and with the United States has created Free and Secure Trade ("FAST"), a highway carrier initiative designed to safeguard the integrity of the U.S. and Canadian supply chain by creating a class of pre-approved, low risk highway carriers.

Cargo security is an issue to our other trading partners as well. So much so that the international trade community is making efforts through the World Customs Organization ("WCO") to create cargo security standards to be implemented by all countries that are members of the WCO. The near future will see the proliferation of C-TPAT like programs, and with them new foreign laws and regulations that impact companies involved in international trade.

7. Cargo security is not just a Customs matter, as other federal regulatory agencies may be impacted. In a very short time importers and exporters of food, drugs and medical devices will experience the security obligations created by the "Public Health Security and Bioterrorism Preparedness and Response Act of 2002." This law will be enforced by the U.S. Food and Drug Administration ("FDA") starting December 12, 2003. A primary goal of the Bioterrorism Act is to protect the U.S. against the introduction of contaminants into the food supply, including food from foreign sources. The Act as it relates to food has four main components: 1) registration of domestic and foreign establishments involved in food production; 2) prior notice to the FDA of food scheduled for importation; 3) record keeping by those involved in producing, transporting, importing, and distributing food; and 4) administrative detention for non-compliant merchandise. Companies involved in the food industry, including food importers, will need to implement supply chain security and reporting procedures in order to comply with the Bioterrorism Act, regardless of whether those companies are C-TPAT participants. On the other hand, these procedures can dovetail with and complement existing C-TPAT procedures.

Another example is the U.S. Drug Enforcement Agency ("DEA"). A secure supply chain helps prevent narcotics traffickers from using legitimate business shipments or conveyances as a means of smuggling contraband into the U.S. In fact, C-TPAT is modeled after the Business Anti-Smuggling Coalition ("BASC"), a business-led, govern-

ment supported voluntary initiative whereby businesses review their import processes for deficiencies, and promote greater security at foreign manufacturing facilities.

8. Future Customs programs are likely to be tied to cargo security. We already see this with C-TPAT, where participants are promised fewer cargo exams and are offered the right to enroll in the Importer Self Assessment ("ISA") program.

The ISA program allows the participant to self assess its compliance with the Customs laws and regulations and to report those results to Customs. The carrot from Customs is the promise to: 1) exempt the ISA participant from Customs audit, known as a Focused Assessment; 2) assign the participant a Customs account representative; and, 3) provide training by Customs auditors.

We believe that to encourage enrollment in cargo security programs, Customs will continue to link new importer benefits, many of which will result from the development of Customs' new automated system, ACE, with participation in C-TPAT. For example, shortly Customs will unveil a program for the periodic payment of duties, a program that could simplify the mechanics of dealing with Customs. It is anticipated that this program will be restricted to C-TPAT participants.

9. Real benefits to your company will come when cargo security and Customs compliance are combined. Participation (or non participation) in C-TPAT is but one of the factors that Customs considers in making its examination determinations or creating the audit pool for the Focused Assessment. The number of examinations may be lessened further for companies that Customs determines are in compliance with the Customs laws and regulations, and your ability to pass a Focused Assessment is enhanced by ensuring corporate Customs compliance.

In addition, stories are already being told of companies saving lots of money because of C-TPAT participation. Most of these savings can be attributed to decreases in merchandise loss or damage because of heightened scrutiny, and to reduction in demurrage and warehouse costs because of fewer cargo exams.

10. *Currently*, cargo security programs are not required by U.S. statute or regulation. Will you be prepared if cargo security were to become mandatory in the U.S. or abroad? And what will you do if a major customer asks you if you are a C-TPAT member or if you abide by the C-TPAT guidelines? Will the result of answering "no" be the loss of that customer?