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Cargo Security And U.S. Customs: A Roadmap To C-TPAT

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What a difference six months makes. Our article in the October, 2002 *Metropolitan Corporate Counsel*, "Securing the Supply Chain; Customs Moves to Safeguard U.S. Borders Against Terrorism," profiled the Customs-Trade Partnership Against Terrorism ("C-TPAT"), a program where importers and other supply chain service providers voluntarily assume responsibility for their own cargo security by partnering with the newly renamed Bureau of Customs and Border Protection ("Customs"). Few importers had enrolled in C-TPAT at the time that article was written. Concerns about cost, complexity, and skepticism about Customs' ability to provide the promised benefits most likely contributed to the initial reluctance of many companies.

More recently C-TPAT has flourished. At its inception, C-TPAT was offered to few low risk, high volume importers. Since then, it has been made available to importers, brokers, carriers, freight consolidators, port authorities and terminal operators, growing to more than 2,000 participants. Customs has quintupled its staff working on C-TPAT matters to handle new applications and to verify that existing members are, in fact, following through on their security initiatives, in a

process called validation.

Why this expanding interest in C-TPAT? The concept of C-TPAT is now better understood by companies involved in international trade, many of whom see their competitors and service providers enrolling and decide they must too. Some non C-TPAT importers are feeling a not too subtle push to join from customers that are C-TPAT members. If an importer has its major U.S. customer inquire of it whether it is C-TPAT compliant, or request that it be so by sending it a security profile questionnaire or asking that it sign a compliance certificate statement, then the likelihood of it enrolling in C-TPAT increases.

In addition, Customs started issuing CF 28s-official forms on which Customs asks questions related to the admissibility of merchandise to obtain security information from non C-TPAT participants in an effort to compare security measures with compliance rates. Although Customs recently discontinued this practice, reacting from pressure exerted by the trade community, the use of this method of "official" inquiry and the targeting of non C-TPAT importers indicates that, in all likelihood, Customs intends to consider supply chain security as part of an importer's overall compliance measurement. Recent statements from Customs suggest that security regulations are being contemplated and that failure to enroll in C-TPAT might be deemed a deviation from the importer reasonable care standard.

Analysis of how the C-TPAT program works in the "real world" is now possible in light of this growing participation, as well as the commencement by Customs of the validation of C-TPAT members. Customs' website, www.customs.gov, offers general information on the program and the types of

inquiries to make of vendors and supply chain service providers. Not readily clear from those materials is how a company can organize itself to become C-TPAT compliant.

How C-TPAT Works

The policy behind C-TPAT is to encourage importers to ensure that the links in their supply chains used to import goods into the United States are identified and believed to be reasonably secure. To date, C-TPAT is limited to imported merchandise, but its expansion to exports is foreseeable.

Participants subscribe to C-TPAT by entering into a Memorandum of Understanding ("MOU") with Customs. Thereafter, the applicant answers a questionnaire demonstrating its current state of supply chain security, and implements or maintains initiatives to improve its security. Once the MOU and questionnaire have been accepted by Customs, the agency plans to validate the company's information by visiting the participant and reviewing whether the stated procedures are in place and functioning.

How To Get Started With C-TPAT

Once your business decides that participation in C-TPAT may be beneficial, it must take steps to meet Customs' expectations. For example, while Customs presents the MOU as a statement of intent by the private party, that document does have some indicia of a formal contract. The applicant promises to maintain and improve security initiatives and Customs promises to allow the applicant access to certain restricted Customs programs and to treat it differently from non C-TPAT importers in terms of the number of cargo examinations it undergoes. While the applicant can withdraw from C-TPAT without being in breach of the MOU, it should be sus-

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pect of doing so for fear of casting on it the undesired attention of Customs.

In addition, an applicant should have in place established policies on how it will verify the security of its cargo before applying for C-TPAT. With Customs validating the representations made by importers, it is in a company's best interest to make sure it can deliver on its promises and to do so before it is formally accepted into the program.

In light of the above, the following steps may prove useful in establishing a C-TPAT program.

1. Identify a C-TPAT "Champion"

As with any company program, a program manager should be designated to educate managers and train employees, gather relevant information, identify existing related programs and resources, and manage the process going forward.

2. Get "Buy In" at the Executive Level

C-TPAT requires a commitment from different corporate departments, and may involve considerable expense. Accordingly, executives will need to know how the program works, why resources should be devoted to it and how the company can benefit from it. Such benefits include:

A. Internal and public recognition that the company is a responsible importer and has taken the initiative on homeland security measures.

B. Recognition by Customs that the company has pledged to take steps to ensure security in its importing activities. Conversely, Customs has indicated its belief that an association exists between non C-TPAT companies and poor import compliance rates.

C. Participants in C-TPAT can improve order to delivery cycle time by experiencing fewer cargo examinations than non-participants. Customs has the authority to inspect containers imported into the United States, and has stepped up its physical inspection activities since 9-11. No importer wants to experience shipping delays and additional costs due to Customs inspections, where merchandise is delayed at the docks for unloading, physical inspection by Customs, and repacking. Given the present security environment, Customs has no flexibility to respond to pleas by importers who need cargo to keep production lines running, customer deliveries prompt or to get seasonal goods to market. Importers may have no choice but to hold and pay for greater inventory to plan for such contingencies. Participation in C-TPAT may ease this situation by creating a fast lane environment for participants.

D. Establishing a C-TPAT team may enable a company to focus and improve on otherwise overlooked items such as pilferage,

reduction of shipping errors, accuracy in shipped quantities, improved documentation, and management of sub-contractors' activities.

E. Importers can use C-TPAT participation to become eligible for participation in other Customs related compliance initiatives that could reduce the frequency of customs audits. Importer Self Assessment is one such program.

After making a high-level commitment to C-TPAT, the company should evaluate its policy relating to international cargo security and delegate the responsibility and commensurate authority to carry out that policy.

3. Formulate a C-TPAT Team

A C-TPAT manager should assemble a team representing a cross section of several departments and management, typically including representatives from: 1) Customs and Importing; 2) Logistics; 3) Operations; 4) Purchasing; 5) Security; 6) Human Relations; 7) Inventory Control; 8) Legal Counsel.

The team will work together to prepare the MOU. As discussed above, while Customs regards the MOU as informal, certain legal obligations could arise in consideration of the benefits flowing back from Customs, especially if errors were uncovered by Customs during the validation phase.

Thereafter, the team representatives would be responsible for completing the C-TPAT questionnaire and follow up requirements. The team would oversee the implementation of the security program (or changes to an existing one) and ensure that all security initiatives declared in the questionnaire remain in place as reported.

4. Map Out Supply Chain Scenarios and Determine Potential Security Gaps

The team should identify all foreign sources of supply and map out the chain of custody for each source, beginning with the placement of a purchase order and continuing through delivery and storage at the company's or customer's site in the United States. The team should, for example, consider addressing the following with respect to each step in its supply chain:

> Products

- Identification of security sensitive cargo;

- Identification of packaging or containers vulnerable to tampering.

> Suppliers

- Security related to the placement and acknowledgement of purchase orders;

- Identification of terms of sale: when does title transfer and when does the control of the cargo become the responsibility of the importer;

- General security conditions at production plants and warehouses;

- Security in areas relating to packing;
- Security in areas where containers are loaded;

- Determination of whether to impose security standards on suppliers;

- Possible incorporation of security requirements in the purchase orders or long term supply agreements;

- The establishment of particular security standards for overseas affiliates.

> Movement of Goods-Foreign Inland Transport

- Approve inland trucking companies and railway carriers;

- Address use of NVOCCs and cargo consolidators;

- Consider security at staging warehouses.

> Movement of Goods-International Transport

- Ensure that foreign freight forwarders and international carriers are cargo security compliant;

> Transport of Goods in the United States

- Ensure that cartmen, truckers, railway carriers and other carriers are cargo security compliant;

- Ensure that any company-owned transports are cargo security compliant.

> Receipt and Storage of Goods in the United States

- Ensure that physical plants are secure from intruders;

- Ensure that all personnel with access to foreign made goods are security cleared.

5. Monitor security procedures on a continual basis

Once an importer is in the C-TPAT program, a mechanism should be in place to monitor security procedures. Customs has stressed that continued participation in C-TPAT depends on the ongoing commitment to maintaining a high level of security, and is subject to validation within three years of enrollment into C-TPAT. If a participant fails to live up to the standards set in its questionnaire response, then Customs, at a minimum, can terminate its C-TPAT membership.

Conclusions

The above is simply an outline to consider if putting together a C-TPAT program. The decision to participate must be carefully considered by your company, balancing obligations, additional cost, and potential difficulty in attaining supplier buy-in, against the benefits detailed above. If you decide C-TPAT is for you, the final form of your company's program will, of course, fully depend on its products, locations, structure and management's resolve to address the issues.