

# Statement

**of Catherine Robinson**

*Director, High Tech Trade Policy*

*on behalf of the National Association of Manufacturers*

*before the Committee on Finance*

United States Senate

*Hearing on S. 1631, the Customs Facilitation and Trade Enforcement Act  
of 2009*

**October 20, 2009**

**WRITTEN STATEMENT OF  
THE NATIONAL ASSOCIATION OF MANUFACTURERS  
FOR  
THE COMMITTEE ON FINANCE  
“S.1631 the CUSTOMS FACILITATION AND TRADE ENFORCEMENT ACT OF 2009”  
ON  
OCTOBER 20, 2009**

The National Association of Manufacturers (NAM) is pleased to provide the following written statement for the record of the Committee on Finance Hearing on “S. 1631, the Customs Facilitation and Trade Enforcement Act of 2009” held on October 20, 2009. The NAM represents a broad spectrum of U.S. manufacturers, with members in every industrial sector and every state. Its membership includes both large multinational corporations with operations in many foreign countries and small and medium manufacturers that are engaged in international trade on a more limited scale. Our members depend heavily on imported parts, components, and finished products to compete not only in the U.S. marketplace but, also in foreign markets. NAM members have a strong track-record of working with the U.S. government to improve supply chain security and compliance practices.

The NAM is committed to national security. NAM members recognize the importance of preventing the importation of high-risk shipments into the United States, particularly the smuggling of weapons of mass destruction and related materials. Our members are committed to working with Customs and Border Protection (CBP) and other U.S. law enforcement agencies to prevent this from happening and to keep America secure and safe from terrorist threats. NAM members have invested significant resources to secure their supply chains and continue to work collaboratively with the government to make the United States secure.

Striking the right balance between enhancing national security and facilitating trade is important to NAM members. Manufactured goods accounted for 75% of all imports into the United States in 2008. U.S. manufacturers have global supply chains, source inputs from around the world, and import parts and components on a daily basis. Unfortunately over the last several years, both legislation and federal regulations that have increased the burden on manufacturers and on the companies that transport our raw materials and finished products, often failed to incorporate input from industry or consider the economic implications, and moved away from the dual mission of security and trade facilitation.

The NAM strongly believes that economic security is an important piece of our national security. S.1631 is a significant step in recognizing: the role of economic security; the need to implement balanced, vetted, and effective policies to advance the twin goals of Department of Homeland Security (DHS); the importance of public-private partnership and providing benefits for importers who have gone above and beyond to secure their supply chains; and the need to improve commercial enforcement to prevent the circumvention of intellectual property rights (IPR), anti-dumping (AD) and countervailing duty (CVD) orders and to protect the well-being and safety of importers and U.S. citizens.

The Customs Facilitation and Trade Enforcement Act of 2009 seeks to prioritize trade facilitation within DHS; improve interagency and congressional coordination; reward importers with strong compliance records; increase government and industry collaboration; strengthen intellectual property protections; trade enforcement and import safety programs; and expedite the completion of the many still outstanding modernizations needed within the agency. The NAM supports the goals of the legislation. We recognize that this is no small task, and we appreciate the ambitious work of Senators Baucus and Grassley. The NAM believes S.1631 has the potential to result in substantial change to the status quo; however, two significant changes and a number of smaller modifications are needed for the bill to be successful. The NAM, through the Customs and Border Coalition, has provided a detailed list of suggestions to the committee (copy attached).

The key changes needed are highlighted below:

- 1. The reorganization of DHS and CBP should include not only the creation of new political-level positions for trade, but also the resources to implement trade programs, and internal review mechanisms to guarantee that the Office of Trade has a seat at the table when new policies (both trade and security-related) are developed.**

When the U.S. Customs Service was moved from the Department of the Treasury in 2003 to the newly-created Department of Homeland Security many were concerned that the trade mission of the agency would be lost within DHS, whose primary focus was security. Nearly seven years after the move, it is no longer a concern but reality. The impact of new policies on legitimate trade often appear to be afterthoughts, and industry concerns are not adequately considered. Over the last seven years, many have recognized this trend and, in response, CBP has undergone numerous reorganizations in attempts to address the lack of balance between the twin goals of DHS and CBP. Unfortunately, the various internal changes have not resulted in a renewed focus on trade facilitation.

The NAM believes that for the reorganization proposed in this legislation to accomplish the goals of reprioritizing trade facilitation and lifting its stature within the agency, the following must occur:

- senior political-level positions must be created to raise trade issues above the staff level.
- Sufficient resources must be given to the Office of Trade to carry out trade projects and programs aimed at elevating trade facilitation.
- CBP should create an intra-agency process for consultation with the various offices within CBP on new initiatives that may affect trade facilitation and legitimate trade.

Without the proper resources, the Office of Trade will have to depend on the Office of Field Operations (OFO) to carry out any new trade initiatives or programs. OFO and the new Office of Trade do not share the same mission and OFO could decide not to provide the necessary resources or support to the Office of Trade. This has been the reality under the current structure at CBP.

Another key aspect is increasing internal cooperation and communication across offices within CBP. The trade office is rarely involved in the development of policies that have a security focus, and thus the impacts on trade facilitation are often not considered. Before a new policy can move forward, the Office of Trade should be given an opportunity to evaluate the impact on legitimate trade, even if the primary focus of the policy is security.

As the legislation currently exists, it only accomplishes the first of these objectives by creating several new political-level positions for trade facilitation. The NAM encourages this committee to amend the legislation to include sufficient resources for the new political appointees to carry out their responsibilities and to create a structure that will require intra-agency collaboration and vetting on new policies.

2. **The bill should not repeal §343(a)(3) of the Trade Act of 2002 in its entirety, but rather should narrowly tailor §211(e) to allow Customs and Border Protection (CBP) to use security data to improve targeting for IPR, import safety, and other programs while prohibiting CBP from using the data for customs entry purposes.**

The NAM is concerned that the unintended consequences of repealing §343(a)(3) could have a significant impact on trade facilitation. Therefore we request that §211(e) be narrowly tailored to achieve the intended purpose of improving advanced targeting for IPR, enforcement and import safety violations, and duty or preference programs.

The NAM supports the effort to improve targeting for the above- mentioned purposes. However, as the section currently exists, NAM members are concerned that they will be subject to increased penalties when importer security filing (ISF) data is compared against entry summary data. ISF data and entry summary data are subject to two different legal standards and should not be compared when determining negligence for commercial penalties. Differences between the two documents will often legitimately occur based on when the information is collected by the importer and submitted to CBP. This is not evidence of negligence or wrongdoing on the part of the importer.

As CBP moves towards collecting more advanced data, it is imperative to establish a precedent that advanced data and entry data are not equal, and that each serves a distinct purpose – the first for identifying threats to our security and safety and the second for assessing import duties.

While it is not this committee's intent for CBP to compare ISF data against entry data, it is not unrealistic for industry to worry that, over time, the two documents could be compared against each other, greatly increasing the risk of potentially unwarranted penalties and legal battles with CBP. Therefore, we request that §211(e) be amended to prevent CBP from being able to use the ISF to establish proof of negligence in a §1592 case.

The NAM is also concerned that if security data is used for commercial targeting purposes, it will be subject to the Freedom of Information Act (FOIA). During the creation of the ISF program, industry was repeatedly told by CBP that ISF data would not be subject to FOIA. This is critical, since security data contains many trade secrets would disadvantage manufacturers vis-à-vis their competitors if made available through FOIA actions.

The NAM strongly encourages this committee to amend the legislation to narrowly tailor the use of security data and guarantee that the data will not be subject to FOIA.

### **Additionally Smaller but Important Modifications**

The NAM appreciates the effort made in this legislation to address many of the shortcomings in existing programs and mandates, and looks forward to working with the members to make adjustments. The NAM supports the incorporation of the following changes into the final bill:

1. Customs-Trade Partnership Against Terrorism (C-TPAT): The NAM fully supports the requirement that CBP develop benefits for members of C-TPAT and believes this is important in encouraging importers to continue partnering with the government. We are concerned that without a clear mandate and definition of "benefit" from Congress, CBP will continue business as usual and call non-benefits "benefits." (e.g., CBP currently calls the ability of industry to participate in the C-TPAT Symposium a benefit). To guarantee that the legislation achieves its intended goal, the NAM recommends that the legislation:
  - a. include a definition of "benefit";
  - b. mandate that the benefits be tangible or measurable; and
  - c. commission an *independent* study to evaluate whether the initial promised C-TPAT benefits have been realized.

The NAM believes these changes will show importers that Congress recognizes the significant costs and resources importers have invested to secure their supply chains and will encourage more importers to participate in the program.

2. Customs Facilitation Partnership Program (CFPP): The NAM believes that the CFPP has the potential to recognize importers who have long-standing records of compliance. However the NAM is hesitant to support the creation of a new voluntary program without more detail on the structure of the program, the requirements to participate, and the anticipated benefits. NAM members have signed up for many programs over the last seven years with the promise of benefits and recognition that they are low-risk, trusted

importers, only to find that the benefits are elusive and that the trustworthy importers are treated in the same way as unknown importers. While the NAM understands that this committee cannot micromanage CBP, it can provide clear guidance and mandates for the program. The NAM encourages this committee to review the foundation of this program and to provide deadlines for implementation, broad criteria for applicants, and a mandate that tangible or measurable benefits accompany entry into the program. This committee should encourage CBP to work with other agencies to create an across-the-board program for pre-admissibility for importers with best-in-class compliance programs.

3. Mutual Recognition Programs: The NAM supports expansion of mutual recognition programs and believes the legislation should encourage CBP to work with other governments to put mutual recognition programs in place wherever possible.
4. Advisory Committee on Commercial Operations of Customs and Border Protection (COAC): The NAM appreciates the efforts of the committee to improve the effectiveness of the COAC through this legislation. It is critical that the COAC not report directly to the agency for which it is providing advice. Currently, the COAC reports to CBP, and as a result CBP is able to control the agenda and dialogue at meetings.

We offer several suggestions for further changes to the current structure:

- a. Clearly state that the COAC is to report to DHS and CBP should not be permitted to chair the meetings.
  - b. Enlarge the size of the COAC to expand industry participation.
  - c. Allow for active public participation in open sessions
5. Import Safety: The NAM encourages the committee to bolster §221 by requiring DHS to take a coordinating role to work with other agencies as they develop import safety policies, to use science-based import safety standards, to consult with the COAC and other relevant advisory committees in developing requirements, and to require that all policies be consistent with international obligations.
  6. Intellectual Property Rights: S.1631 includes many provisions that will strengthen intellectual property enforcement; however the NAM believes additional provisions should be added. We support adding provisions that:
    - a. Provide CBP officers with explicit authority to provide samples, pictures of markings on the packaging or product, or other information to determine the legitimacy of a suspect imported product.
    - b. Provide importers with samples of the seized and forfeited goods after the goods have been determined to be counterfeit and are destined for destruction by CBP.
    - c. Broaden CBP's administrative authority to seize counterfeit or pirated goods bearing registered, but unrecorded, trademarks or clearly infringing copyrightable works that are not recorded.
    - d. Allow industry the opportunity to submit names of companies and/or individuals known to violate IPR to the government.

7. Drawback: Importers have been working with CBP and this committee for a number of years on the revised drawback provision. We appreciate its inclusion in this legislation. However, the NAM fails to understand the rationale for linking implementation of the drawback provision to the completion of the Automated Customs Environment (ACE). We do understand that submitting the documentation for duty drawback will be simplified once ACE is up and running; however given the past history of ACE implementation, the NAM is not confident that ACE will be functional by 2012 and firmly believes the revised duty drawback provision should be effective immediately upon enactment of this legislation.

S.1631 is an important bill and we believe if our recommendations are incorporated, this committee will achieve the goals of the legislation. We have provided the Customs and Border Coalition's recommendations, for which the NAM is the secretariat, as an addendum to this statement. This document provides even more specific suggestions to improve the bill. We thank the committee for allowing us this opportunity to provide a statement for the record and look forward to working with the committee as this bill moves through the legislative process.



**Comments on S.1631-The Customs Facilitation and Trade Enforcement Reauthorization Act of 2009**

**TITLE I**

**Reorganization of CBP**

Section 2(a): Principal Deputy Commissioner should report jointly to the Commissioner of CBP and the Assistant Secretary for Policy at DHS

Section 4(a): Appointment of a Trade Advocate. Add requirement that the appointed individual must have a minimum of five years in non-government services.

-require that the trade advocate report directly to the principal deputy commissioner

Section 5(c): Appointment of a Deputy Assistant Commissioner for trade facilitation and enforcement. Add requirement that the appointed individual must have a minimum of at least 5 years in non government services.

**General comments on reorg**

- Need to move “trade resources” such as import specialists to the office of trade and out of the office of field operations
- Need to require on that on all policy that the office of trade has a spot at the table. Currently, the office of trade is not involved at all on security programs. The office of trade should have a voice.

**Customs Review Board**

Section 6(b) Add “and, when appropriate, other relevant agencies.”

**Personnel**

§110—add to §401 (a) that the Director of trade policy within DHS’ Office of Policy must have a minimum of 5 years of private sector experience.

## TITLE II

### **§201-C-TPAT**

- Suggest in statute for the creation of a definition of “benefit”
  - o Benefit=something of material significance to encourage importers to participate in the program in full recognition of the additional costs the importer incurs for participating in the voluntary program.
- §201 (a) insert after additional “tangible or measurable” trade benefits
- §201 (a) after tier 1, tier 2, tier 3 add “and other participants.”
- §201 (a) consider additional benefits for CTPAT participants who also participate in ISA and/or FAST
- §201 (a) at the end of the (a) add “which were not available to C-TPAT participants prior to the date of enactment of this legislation.”
- Commission a study to evaluate whether the initial promised benefits of C-TPAT have been realized.
- When CBP changes its trade, or regulatory and enforcement criteria, CBP must make sure that C-TPAT benefits are not diminished or materially changed.
- Compliance plus C-TPAT status should be a factor to reducing bond
- TSA should recognize C-TPAT status for the Certified Cargo Screening Program (CCSP)
- Propose new paragraph (d) to Section 201 to read as follows:

“(d) The Commissioner shall continue to develop new ways to enhance the C-TPAT program beyond the period for which annual reports are required, per Section 201(c) above. The purpose of such enhancements shall be to (1) increase the import and export supply chain security of the United States, and (2) provide additional significant benefits to C-TPAT partners.”
- 

### **§202 Customs Facilitation Partnership Program (CFPP)**

- Expand to include other relevant agencies
- Replicate §201(a-c) substituting CFPP for CTPAT
- Create a series of deadlines for implementing and selecting the first group of participants
- Look at the CBC QTIP proposal
- The program must contain components having account-based strategies to manage and partner with compliant trade participants.
- Need to include more information on purpose and scope of program.

### **§203: Mutual Recognition Programs**

- Encourage CBP to work with other governments to put Mutual Recognition Programs in place wherever possible.

## **§204 COAC**

Additional recommendations:

- Provide authority to allow non-coac participants in the public sessions to ask questions
- Formally authorize COAC to allow the creation of subcommittees and for non-coac members to be able to openly participate
- Remove the party affiliation requirement
- State that CBP shall participate but not chair the COAC meetings

Section 204(b) – New subsection (5):

“An individual may be removed from the committee by a majority vote of its members if the individual fails to attend two or more consecutive committee meetings in a calendar year.”

Section 204(b) – New subsection (6)

“The committee membership shall select a Trade Chairperson. The CCOAC Chairperson will be elected by the Committee at the last meeting of any two-year term. It is desired that the Chairperson serve only a two-year term; however, with a majority vote the Chairperson may be re-elected, subject to continuation on the Committee.”

Section 204(b) – New subsection (7)

“The committee may vote to create subcommittees to carry out its work. The subcommittees must be chaired by a current member of CCOAC. The Subcommittee membership may consist of current Committee members and appointments from affected portions of the trade.”

Section 204(d) – New subsection (5):

“The Secretary of the Department of Homeland Security and the Secretary of the Treasury shall arrange to post minutes of the CCOAC meetings at their respective web sites for public inspection.”

## **§205 ACE**

- Require full implementation by 2012 to include all functionalities currently developed
- Require CBP to annually update ACE with new functionalities such as ISF and Lacey Act

## **§206 ITDS**

- CBP needs to take a more prominent coordinating role with the other agencies to facilitate development
- Re-connect ACT and ITDS

## §211(e)

### **Section 211 (e)--Repeal of section 343 (a) (3)**

**-What specifically is the committee trying to accomplish? Will the ISF data accomplish that goal?**

Potential fix if not removed from the bill:

(F) The information collected pursuant to the regulations shall be used exclusively for ensuring aviation, maritime, and surface transportation safety and security, and shall (ADD) “ **not be used as proof or evidence to establish violations of §1592**” ~~determining entry or for any other commercial enforcement purposes.~~

## §215-Importer of Record

- What is the committee trying to accomplish with this provision?
- Recommendation: As part of the program’s development, there needs to be a viable means for importers to de-activate IOR’s in order to prevent future importing activity against these numbers.

## §221-Import Safety

- Is there appropriate staffing within DHS/CBP to lead the Import Safety Work Group (ISWG)?
- Should Import Safety and IPR be combined at the ten ports of entry mentioned in the bill?
- DHS should take a coordinating role to work with other agencies as they develop import safety policies.
- What is the status of the Action Plan created by the Bush Administration?
- For both the ISWG and the rapid response plan, language needs to be added to require consultation with CCOAC and other relevant advisory committees.
- Under §221(c) add “(6) where appropriate, CBP should use accepted government and industry developed standards used by the agency of primary jurisdiction for determining admissibility.”
- Under §221 add “(d) Where the importer has implemented strong internal controls and has a record of being highly compliant, the importer should receive benefits under §202.
- Under §221 (c) add “(7) adopting science-based import safety standards, and when not available, the ISWG shall develop them in conjunction with industry and the agency of primary jurisdiction.”
- Under §221 (c) add “(8) developing policies that are consistent with international obligations
- Under §221 add “(e) Require the ISWG to submit an annual report on import safety activities to determine if the new policies improve product safety and to provide a cost-benefit study.”

## **IPR**

- §233—instead of volume, use FOB value and retail value
- §234- No private sector input. No procedure for requesting removal. Nothing about making list available to other agencies.
- §237 add trademark to the section to make it “copyright and trademark.”
  - o Does not address recordation of non-registered, non-U.S. works.
- §238(a)—add “must” before “provide copyright or trademark owners...”
- §239 (d) Why 30 days? Why not less?
- See IACC’s comments for further IPR comments and recommendations
- Provide CBP officers with explicit authority to provide samples, pictures of markings on the packaging or product, or other information to determine the legitimacy of a suspect imported product.
- Provide importers with samples of the seized and forfeited goods after the goods have been determined to be counterfeit and are destined for destruction by CBP.
- Broaden CBP’s administrative authority to seize counterfeit or pirated goods bearing registered, but unrecorded, trademarks or clearly infringing copyrightable works that are not recorded.

## **TITLE III**

### **§302-Drawback**

- Remove link between the drawback provision and implementation of Ace; hence the duty drawback provision should be effective immediately upon enactment of this legislation

### **§307- Pilot Program**

- What is the committee trying to achieve with this section. There are already ports that operate 24/7
- Expand to include sea ports

### **§311-De Minimis**

- The de minimis level should be raised to \$800, which is the value of goods a traveler can bring into the United States duty free and without customs entry procedures. The value has been at \$200 since 1993
- The Secretary of the Treasury should periodically consider adjusting the values established in paragraphs (a) and (b) above to ensure the limits are consistent with the rate of inflation as measured by the Consumer Price Index.
- Change Sec 311(b)(3) to read:
  - “(b) Entry of Merchandise Valued at \$5000 or Less, ---
    - “(1) In General. –The Secretary of the Treasury shall prescribe rules and regulations for the declaration and entry of merchandise if the aggregate value of the shipment of merchandise is not more than \$5000.
    - “(2) Exception. Delete this subparagraph.

