

**WRITTEN TESTIMONY OF
THE NATIONAL RETAIL FEDERATION
FOR THE RECORD
FOR
THE SENATE FINANCE COMMITTEE
FOR
A HEARING ON THE CUSTOMS FACILITATION AND TRADE
ENFORCEMENT ACT OF 2009 (S. 1631)**

OCTOBER 21, 2009

On behalf of its member companies in the U.S. retail industry, the National Retail Federation (NRF) submits these comments to the Senate Finance Committee (Committee) to be included in the record for its October 20, 2009 hearing on "The Customs Facilitation and Trade Enforcement Act of 2009" (S. 1631).

By way of background, the National Retail Federation is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail establishments, more than 24 million employees - about one in five American workers - and 2008 sales of \$4.6 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

Retailers represent a sizable portion of the shipping community in the United States, and import hundreds of billions of dollars worth of merchandise a year into the United States. As such, retailers work closely with U.S. Customs and Border Protection (CBP), and, as stakeholders, are keenly interested in improving the commercial operations of CBP and clarifying its trade facilitation mission.

NRF applauds the Senate Finance Committee and its staff for their work on the "Customs Facilitation and Trade Enforcement Act of 2009". We appreciate the attention the Committee has placed on CBP and the recognition of the need for the agency to focus on trade facilitation as well as its traditional enforcement and security mission. Since the tragic events of 9/11 and the creation of the Department of Homeland Security (DHS), it seems as if CBP's sole mission was to guard against the smuggling of weapons of mass destruction into the United States. While we agree this is an extremely important objective, and strongly support CBP's current efforts, there are many within the trade community who feel as if trade facilitation has fallen by the wayside as a core element of CBP's mission. We believe that this bill is an important measure to ensure that trade facilitation is at the forefront of CBP's mission and is balanced with the agency's homeland security responsibilities.

NRF has reviewed the legislation as introduced and has identified many provisions that we strongly support. There are also some provisions over which we have some concerns and a few where we believe there needs to be further clarification. We will discuss each of these areas below.

Areas of Support

As stated, there are several provisions in the bill the retail industry strongly supports. We believe these provisions in general will not only help to improve

trade facilitation, but will also help improve relationships with other federal agencies which rely upon CBP for enforcement purposes.

Sec. 201 – Trade Benefits Under the Customs-Trade Partnership Against Terrorism. While NRF strongly supports the Customs-Trade Partnership Against Terrorism (C-TPAT) program, we are encouraged and support the requirement in the bill that CBP develop and define trade benefits to C-TPAT participants. While CBP touts the security benefits - reduced risk scoring resulting in potentially fewer security inspections - we believe that additional trade benefits should be provided under the program. Companies who participate in the C-TPAT program, especially those who have reached the highest, Tier 3 level, should be provided enhanced trade related benefits in recognition of their status as companies that tend to go above and beyond the basic requirements of the program.

In addition to consulting with the Commercial Customs Operations Advisory Committee (as established in the bill) and the Trade Support Network, we would also suggest that CBP consult with C-TPAT members to identify additional trade benefits. This group should include all of the member categories of C-TPAT, not just importers. One of the biggest criticisms that we have heard about the program is that the benefits that members currently receive are limited to the importer members. Where appropriate, CBP should also extend both security and trade benefits to other C-TPAT participants.

Sec. 205 – Automated Commercial Environment Computer System. NRF strongly supports the provision in the bill for dedicated funding for the Automated Commercial Environment (ACE) computer system, and requiring CBP to finish ACE development and implementation. As the committee is aware, ACE is the commercial trade processing system designed to eventually replace the current, antiquated import processing system, the Automated Commercial System (ACS). ACE was first envisioned when Congress passed the Customs Modernization Act in 1993. Congress first provided funding for ACE in 1999. At that point in time, CBP believe it would be a four year project costing a little over \$1 billion.

It has now been close to 10 years in development at a cost well above the initial \$1 billion. In addition, new requirements have been placed upon CBP that require additional functionality within ACE. Some of these requirements were beyond the control of CBP, such as the new Lacey Act import declaration requirements. Our only concern is whether the \$325,000,000 is sufficient funding to complete the development and full implementation of ACE by 2012.

Sec. 206 – International Trade Data System. As with ACE, NRF strongly supports the development and implementation of the International Trade Data System (ITDS). ITDS has been built as the front end system to ACE that will allow other government agencies access to information gathered by CBP for their

own enforcement activities. This “single window” will allow the trade community to submit information once instead of to multiple agencies.

Our concern is not only with the development of the ITDS program, but the commitment from the other agencies that are supposed to participate in the program. Even though an Executive Order was signed requiring other government agencies to use ITDS, there is still a concern whether these agencies internal IT systems are able to communicate with ITDS. Unfortunately this is not an issue that this committee can resolve, as it relates to the budget requests of other agencies that do not fall within the jurisdiction of the Senate Finance Committee. One such example is the Consumer Product Safety Commission, which must now conduct its own risk based screening of imports, in conjunction with CBP, under the Consumer Product Safety Improvement Act. CPSC has been woefully underfunded for years, especially with regards to information technology requests that would allow it to participate fully in using the ITDS platform.

Sec. 302 – Drawback for Exported Merchandise. NRF supports the inclusion legislation of the provision relating to duty drawback. This provision has been a longstanding objective for members of the trade community for several years. The language represents consensus within industry on improvements in the drawback process.

Sec. 311 – De Minimis and Informal Entries – NRF supports the provision in the legislation that would increase the value of de minimis shipments, including sample shipments, from \$200 to \$500, and increase the value of informal entries from \$2000 to \$2500. The proposed changes in this provision would provide benefits to both the trade community and CBP.

Areas of Clarification

Sec. 202 – Customs Facilitation Partnership Program. NRF appreciates the Committee placing priority on enhancing trade facilitation and providing additional benefits for those companies that undertake extra measures to ensure their compliance with U.S. Customs laws. Nonetheless, we would ask for clarification from the Committee as to how this program would actually work and what benefits participants would receive. While we understand that the Committee envisions a system that would work in a way similar to C-TPAT as a voluntary partnership program, we are unclear how this new program would work with other partnership programs such as the Importer Self Assessment (ISA) program. As with C-TPAT, ISA has different requirements and benefits for participation. Would these requirements and benefits be included in this new Facilitation Partnership Program, or would it be something completely different? Consultation on such a new program should not be limited to a new Customs Commercial Operations Committee (CCOAC) created under the bill. When C-

TPAT was created, consultation on development of the program was not limited to current COAC members, but rather included formal input from other interested parties with deep knowledge of security requirements to help shape the program.

Sec. 204 – Commercial Customs Operations Advisory Committee. As the Committee is aware, there currently exists a Customs Oversight Advisory Committee (COAC) created in 1993 under the Customs Modernization Act. While we understand that the envisioned Commercial Operations Advisory Committee (CCOAC) would replace the existing committee, we have a few concerns.

First, we appreciate raising the level of involvement of the Department of Homeland Security to the Assistant Secretary of Policy and Planning. DHS needs to be more engaged with this advisory committee. However, we question the involvement of the Director of U.S. Immigration and Customs Enforcement (ICE). Even though ICE is the investigative arm of CBP, we are unconvinced that it is necessary to include ICE at the leadership level of the CCOAC. Rather, ICE should be involved in any subcommittee work that the CCOAC engages in that includes areas of ICE's mission and responsibilities.

Second, we do not believe that a four year term for CCOAC members is appropriate. It is our view that the current two year term, with one consecutive appointment is more than adequate. Under the proposed provision, an individual could potentially serve eight consecutive years on the CCOAC. We are concerned that such extended terms might deter interested persons from making such a large time commitment, and reduce vacancies that would allow new members to join the committee.

Third, we would encourage that Sec. 204(b)(4) Transfer of Membership be written so that the Secretaries of Treasury and Homeland Security "shall" transfer members who are currently serving on the COAC to the new CCOAC. The provision is written as "may" transfer, which infers that current COAC members might not be appointed to the new CCOAC before their terms have expired. In our view, transferring current COAC members to the new CCOAC would ensure a smoother transition, while at the same time, a shorter appointment period would facilitate population of new members on the committee.

Sec. 211(b) – National Targeting and Analysis Groups. This provision of the bill provides a list of customs and trade laws that are enforcement priorities under the commercial risk assessment and targeting system. One question we have is how the commercial targeting system impacts admissibility of goods. For example, questions regarding the valuation and classification of a product do not affect whether that product is admissible to be entered into the U.S. customs territory. Disputes over duty and classification are common, and should not delay entry of a good while the issue is being resolved through administrative

and judicial procedures, as long as the importer has posted sufficient bond. A clarification on this point from the Committee would be helpful.

Sec. 215 – Importer of Record Program. NRF would also like clarification on this provision regarding the Importer of Record program, which CBP currently operates. Specifically, does this provision seek to replace the current program, or merely reorganize the current program and place additional participation requirements on both CBP and the trade community?

Chapter 2 – Import Health and Safety. NRF strongly supports a coordinated effort among all federal, state and local agencies involved in enforcing health and safety rules and regulations with respect to imports. We applaud the Committee for including these provisions in the legislation. However, we would like some clarification from the Committee as to how this Import Safety Working Group would operate vis-à-vis the Import Safety Working Group that was established under the last administration. Our hope is that this provision would just memorialize the current working group, and continue to improve upon the work that the previous group has accomplished. In addition, the working group should also look at the past work of the interagency working group that was created to evaluate responses to the Avian Flu. This group did a substantial amount of work putting together rapid response and protocol plans. In addition, there should be opportunities for the working group to consult with the trade community on the development of rapid response plans and best practices.

Areas of Concern

Sec. 102 Officers and Employees. This provision proposes to eliminate the Office of International Trade, Office of International Affairs and Office of Trade Relations within CBP. It would also create a number of new positions including the Principal Deputy Commissioner, a Deputy Commissioner, an Assistant Commissioner for Trade and a Trade Advocate. While we understand that the goal behind these changes to CBP's structure is to create more focus on trade facilitation, we wonder if this will have the desired effect. How would current positions within the offices proposed for elimination be incorporated into the newly created Office of Trade? We know that transitions such as this can create a certain degree of inconsistency. Any disruptions caused by a reorganization of CBP will have a negative impact on the trade community. We strongly urge Congress and CBP to specify measures to ensure a seamless and transparent reorganization so as to minimize potential disruptions to the trade community.

Sec. 110 Personnel. The provision in the bill on personnel amends Section 401 of the Security and Accountability for Every Port Act of 2006 (SAFE Port Act), which created a Director of Trade Policy in the DHS Office of Policy and Planning. We are concerned with how the Director of Trade Policy will work with CBP. Congress needs to ensure that this new position does not lead to additional bureaucracy or micromanagement of CBP by DHS. We would also

like clarification on what the Committee means by “economic security interests of the United States associated with international trade”. Who is responsible for making this determination? Is it this new Director or is it done in consultation with others through an interagency process and with an opportunity for public comment?

Sec. 211(e) Use of Trade Data for Commercial Enforcement Purposes. This provision proposes to eliminate the protections granted under Section 343(a) of the Trade Act of 2002 with regards to using advanced information that is collected for cargo security purposes. Specifically, this provision would allow CBP to use new advanced data that is being collected under the new Importer Security Filing (ISF), better known as “10+2”, for commercial enforcement purposes. While NRF strongly supports employing risk-based targeting for both security and commercial enforcement purposes, we have significant concerns about how this newly-collected data would be used and potential penalties that could be associated with it.

CBP is currently enforcing the ISF through a phased-in implementation, with full implementation, including penalties, set to begin January 2010. Throughout the ISF phased-in implementation period, CBP has assured the trade community that the information collected was strictly for security purposes. This point is important because the information supplied through the ISF is required much earlier in the import process, and is, therefore, “best available” at that point in time. This fact raises some significant concerns with respect to the use of this information for commercial targeting. Specifically, will the information be compared to the entry, which is filed at a much later date than the ISF? If so, would companies be subject to commercial penalties for information that was incorrect on the ISF if it did not match information on the entry documents, for which reconciliation is permitted to allow for updated information?

We would encourage the Committee to examine carefully what information is required to improve commercial targeting. We have spent nearly 7 years to reach the point we are today with the ISF. Instead of just making this information readily available for commercial targeting, we would encourage CBP to work with industry, as it did with the 24-Hour Rule and ISF, to determine what data elements are needed to enhance commercial targeting and when and how it should be provided.

Thank you for the opportunity to submit comments on this matter. If you have any questions, please contact Jonathan Gold (goldj@nrf.com), NRF’s Vice President, Supply Chain and Customs Policy.