



WORLD SHIPPING COUNCIL
PARTNERS IN AMERICA'S TRADE

**Comments of the
World Shipping Council**

**Before the
United States Customs Service**

**In the Matter of
Notice of Proposed Rulemaking to Expand
Confidential Treatment of Certain U.S. Trade Information
Docket Number RIN 1515-AD18**

February 10, 2003

I. Background

The World Shipping Council¹ provides the following comments to the Notice of Proposed Rulemaking (NPR) issued by the U.S. Customs Service on January 9, 2003 regarding a proposal to expand the confidentiality of U.S. trade data for imported cargo by amending 19 CFR Part 103. (*68 Federal Register 1173 et seq.*) Under 19 U.S.C. 1431(c) and Customs' existing regulations, importers and consignees are authorized to make requests that their name and address, and the shipper's name and address, be withheld from public disclosure. The NPR would change Part 103 to authorize a carrier filing inbound cargo manifest information to file confidentiality requests for importers or consignees.

As the NPR states, this proposal is based on comments from certain NVOCC representatives that were made in response to the new 24-hour advance cargo manifest filing regulations. The NPR states that the NVOCC group contended that such release "would reveal confidential business information", and that the intent of the proposal was to allow NVOCCs to "be relieved from any disadvantage that might result from publication of certain manifest information."

The Council does not believe the proposed rule should be adopted for the following reasons.

II. The Proposal Is Inconsistent With the Purpose of the Statute

The policy of the existing statute is that specified U.S. import trade data "*shall be available for public disclosure.*"² This data is obtained from Customs by commercial enterprises, which develop the data into a variety of information products used by thousands of business and government users. This activity has been taking place for decades. The statute provides for the public disclosure of certain data elements in a vessel manifest, and lists the data elements that are to be made public. The 24-hour rule does not – and could not - change or amend the statutorily defined list of data elements that are released for public disclosure. Thus, the 24-hour rule does not result in more or new types of data elements being made available for public disclosure. It simply provides that all carriers must now file cargo declarations before the vessel is loaded.

The statute does provide for an exception to the general policy favoring public disclosure of this information, by allowing importers or consignees to submit biennial certifications for confidentiality of certain manifest information, i.e. a procedure

¹ The Council is a Washington, D.C.-based trade association representing more than forty liner shipping companies serving America's international trade. The Council's member lines provide international transportation services to tens of thousands of importers and exporters in America's foreign commerce. The Council's members having been filing cargo manifest data with the Customs Service for many decades, and that information has been made publicly available pursuant to 19 U.S.C. 1431 without incident or problems.

² 19 U.S.C. 1431(c).

according to which those entities may request the suppression of this information.³ The existing regulations provide that authorized employees, attorneys, or officials of importers or consignees may make such requests. We think it is important that there is absolutely no evidence that importers or consignees are unaware of their ability to exercise this right, or have encountered difficulty in filing such requests either directly or through their attorneys. In fact, approximately 1,700 importers choose to opt out, representing roughly 20 percent of the imported containerized cargo. In addition, the Customs Service has gone to great lengths to inform the importers and consignees of their rights in many public fora, including on the Customs Service website.

As a result, this proposal is clearly not founded upon or justified by the need to address any impairment of the importer's or the consignee's ability to exercise this right. It is founded on the explicit, expressed desire of a class of carriers to try to keep as much of this information confidential as possible for their own purposes⁴. If Customs were to approve this proposed rule, it would not be accommodating unmet needs of importers or consignees who wish to file certifications for confidential treatment of their shipment data. It would instead be clearly and actively promoting and encouraging the expressed desire of a large class of carriers to suppress data that the law clearly says should be public. This is clearly contrary to the statute's express policy, and we question whether the agency has the authority to do this.

Exceptions to the policy of the law, which is to make such information publicly available, should be narrowly tailored, as Congress and the agency have done until now. Existing law allows for an exception to the general policy as noted above, but that exception is for the benefit of that limited class of importers and consignees that wish to keep their identity confidential⁵, and not for the benefit of carriers or a class of carriers that file the data. The more such data is made confidential, the more deterioration is caused to the data Congress has stated should be public.

We note that the NPR may be argued to be "neutral" in the sense that it would allow ocean carriers, as well as NVOCCs, to seek to file certifications for confidentiality on behalf of importers. While we recognize that this may be argued to be "even-handed" in that it treats all carriers alike, and would allow ocean carriers to seek authorization to suppress public access to this information as NVOCCs have stated their intent to do, the result of the rule would clearly encourage activity contrary to the explicit statutory policy

³ The statute also has another specific, narrow exception to the stated policy of public disclosure under which the government may suppress such information if "disclosure is likely to pose a threat of personal injury or property damage." 19 U.S.C. 1431(c)(2).

⁴ For example, the NVOCC comments which gave rise to this proposal state: "Customs should now assure *those who transmit the data* that it will be held in confidence, in particular, if *they* request it"; "Customs should permit *NVOCCs* to request confidential treatment pursuant to the proposed rules *for all of its shippers...*"; and, "the NVOCC community requests that the rules contemplate allowing the NVOCC to seek confidential treatment of the data *it* is supplying pursuant to the AMS system." (emphasis added) *Comments of the NVOCC-Government Affairs Conference*, filed in Docket No. RIN 1515-AD11, pages 24 and 25. See also, *Comments of the National Customs Brokers & Forwarders Association*, page 8.

⁵ Indeed, as the NVOCCs themselves point out: "Under the current law, NVOCCs may have no standing to request confidential treatment of manifest information because they are neither the importer nor the consignee..." NVOCC-GAC Comments at page 23.

that this trade data “shall be available for public disclosure” and is unsupported by any demonstration that existing information suppression authority is unavailable or difficult to use by importers and consignees.

III. Decades of Experience Demonstrate No Harm From Disclosure

The NVOCC argument that the information at issue is “confidential business information” is incorrect. To begin with, it is by law not confidential, but public. Furthermore, shipper and consignee information has been made public, subject to the exception discussed above, for many years. It would be wholly illogical to find that shipper and consignee information is “confidential” if filed by an NVOCC, but that there has been and is no confidentiality issue when the same information has been filed by ocean carriers for decades. According to the NVOCC argumentation, manifest information regarding an import shipment from Shipper A to Consignee B is confidential business information when carried by an NVOCC and its release would cause “harm” and “disadvantage”; however, public release of the same information for the same shipment is acceptable, as decades of experience has shown, when carried by an ocean carrier. This is clearly without any merit.

There are significant difference between ocean carriers and NVOCCs, including the fact that NVOCCs don’t own or operate ships, terminals or containers, don’t invest capital in these shipping assets, don’t have vessels that they have to fill for each sailing, and don’t have to coordinate the international network operations of these capital intensive assets. Nevertheless, as unique creations of U.S. law, NVOCCs hold themselves out to the shipping public as carriers, issue bills of lading as carriers, and some even market themselves using company names and logos implying that they are ocean carriers. NVOCCs have been very successful and control a significant portion of the containerized cargo in U.S. foreign waterborne trade; in some U.S. trade lanes NVOCC’s carry 35-40% of all containerized cargoes. Some NVOCCs carry as much, if not more, cargo volume as some ocean carriers. NVOCCs do not just carry small, individual shipments consolidated into a single container. A high percentage, perhaps up to 50%, of NVOCCs’ cargo is full container loads for single shippers – indistinguishable from full container loads transported by ocean carriers.

The Customs 24-hour rule simply requires NVOCCs to file their manifest data with Customs, just like ocean carriers have been doing for years. In fact, as the 24-hour advance filing regulatory record shows, NVOCCs clearly and forcefully advocated that they should be treated like ocean carriers and file their cargo manifests directly with Customs.

IV. Other Ancillary Arguments Not Reflected in the NPR Are Also Without Merit

The information at issue in this proposal, that is the names of the shippers and consignees of America’s import trades, has been made publicly available for decades,

without any consequential security problems, theft problems, or other documented, negative consequences.

Nevertheless, arguments from the NVOCC community on this issue in COAC and other fora, have been that somehow this trade data weakens the nation's security, facilitates cargo theft, or encourages shippers to lie about the cargo description provided to carriers. None of these arguments has merit. We recognize that Customs has not chosen to use them as a basis for the NPR, but we believe a short comment on them is appropriate.

First, Customs has already clearly dealt with any possible cargo security concerns in the final 24 hour rulemaking, stating that “[w]ith regard to the concern that release of advance information prematurely can raise new security concerns, Customs will not be releasing information from cargo declarations until the complete manifest is filed with Customs.”⁶ In other words, information from the CF 1302 cargo declaration (to the extent that its release is required by statute) will not be made publicly available until the filing of the entire and complete manifest with Customs at the time of formal entry of the vessel, i.e., after unloading of cargo in the U.S. port of discharge. In practical terms, this delay will typically mean that the cargo declaration information will only be publicly available after the cargo has been delivered to the consignee's facility. It is historical data. By the time PIERS or other such companies purchase, process, and resell the data, there is no security issue.

Second, the fact that the cargo information is not released until after the shipment is complete also addresses any concern that this data could facilitate cargo theft. The cargo will have been delivered by the time the data is publicly available. There is no evidence we are aware of that cargo theft has resulted from a person's acquisition and use of PIERS or similar data. Cargo theft is usually an “inside” job, involving an employee of a carrier, a trucker, a railroad, a stevedore, or a third party using information from shipping documents or computer systems; these sources of information will continue to exist and be available to such criminal sources under this proposal even if no manifest information were ever made public and even if PIERS and similar information sources did not exist. Arguing that the new 24-hour rules will facilitate theft is empty rhetoric with no factual foundation.

Third, NVOCC interests have stated: “There is a disincentive for actual shippers and the consignee/importer to provide accurate and timely information to U.S. Customs because of the lack of confidentiality...”⁷ Thus, the logic of this apparently is that, if NVOCCs could suppress the public release of their manifest data, somehow shippers' cargo descriptions would be more accurate and timely.

As to timeliness, this argument is mysterious at best. Without timely cargo descriptions under the new advance manifest regulations, cargo should not be loaded –

⁶ 67 *Fed.Reg.* 66322.

⁷ NVOCC-GAC Comments at p. 22.

period. Whether the information ultimately ends up in a historical, public information source is irrelevant.

As to cargo description accuracy, this argument simply has no relevance or bearing on this proposed rule. Cargo description is not a category of information that the law allows to be suppressed in any event; only information about the shipper and consignee may be suppressed.

V. Conclusion

A very wide range of commercial interests, including shippers, carriers, and NVOCCS, have access to U.S. import trade information today, purchase it, and use it in their business planning. Other entities, including state governments and port authorities, the Office of Naval Intelligence and the Customs Service itself, also purchase and use this information for planning and other purposes. They have been doing so for decades without significant problems.

Maintaining public access to this data is the stated policy of the law. Now, some NVOCC interests have requested Customs to grant them new authority to suppress the exact same information that ocean carriers have filed and had made publicly available for years. Ironically, this exact information that NVOCCs now incorrectly claim is “confidential business information” didn’t seem to be so confidential or sensitive when they were purchasing it when it was only filed by ocean carriers.

The policy of 19 U.S.C. 1431 is to make America’s import trade data public. The only exception is when importers or consignees wish to suppress their information, which they are fully able to do. There is no evidence that they have been unable to do so or had difficulty doing so. To the contrary, the facts demonstrate that importers and consignees are quite capable of exercising their rights and do so often. In addition, Customs has recently gone out of its way to inform importers and consignees of these rights. It would be as inappropriate as it is unnecessary to authorize carriers to take on the role set forth in the proposed rule.

The Notice of Proposed Rulemaking is not supportable and the proposed rule should not be adopted.