COMMENTS OF

THE WORLD SHIPPING COUNCIL

REGARDING

THE 3rd REVISED DRAFT COMMISSION REGULATION 1250/2005 TO AMEND COMMISSION REGULATION 2454/93 TO IMPLEMENT THE COMMUNITY CUSTOMS CODE:

AUTHORIZED ECONOMIC OPERATOR

March 1, 2006

The World Shipping Council and its Member shipping lines appreciate the opportunity to provide the below comments and observations regarding the Commission's development of an Authorized Economic Operator (AEO) concept in the 3rd revised draft Commission Regulation (undated).

I. General Comment: Applicability of the AEO Concept to Ocean Carriers

Both the Community Customs Code and the 3rd revised draft Commission regulation ("draft regulation") prescribe that "any economic operator established in the customs territory of the Community" is eligible for applying for and, if certain conditions are met, obtaining AEO status. Such status can take the form of one of the following three categories: 1) AEO status with customs simplifications; 2) AEO status with security and safety facilitation; and 3) AEO status with both simplification and security and safety facilitation.

While the term "economic operator" is not defined in the Community Customs Code, the draft regulation includes (in Article 1, sub-paragraph 12) the following definition of that term: "Economic operator means: a person who, in the course of its business, is involved in the import, transport or export of goods to or from the customs

territory if the Community, including also intermediary activities related thereto". While not explicitly stated, we assume that this definition is intended to encompass ocean carriers and port facilities. Further, we also assume, also in view of the clarification in footnote 4 to Article 14, paragraph 1 ("The new definition of "economic operator" already includes everybody in the supply chain"), that companies engaged in only intra-Community transportation of goods, would similarly qualify for AEO status, but further clarification on the scope of applicability of the AEO concept would appear warranted.

Both the Community Customs Code and the draft regulation provide that AEO status is not a condition for benefiting from simplified customs procedures; such status may, however, streamline the application and approval process in place in individual Member States for benefiting from specific simplified procedures under their respective customs rules.

Similarly, the granting of AEO status *with security and safety facilitation* should not be conditioned on the AEO applicant also qualifying for and/or seeking simplified customs procedures; in fact, the logic of creating these three different types of AEO certifications would dictate that such a condition not exist. However, it would appear that – in the case of non-Community based ocean carriers - the draft regulation would condition the granting of AEO status with security and safety facilitation on the applicant already qualifying *and* benefiting from simplified customs procedures.[1] If this is a correct reading of the draft regulation, we would see no logic for such a requirement, especially because Customs simplification benefits apply to cargo interests, not carriers. This is reinforced by the April 13, 2005 Commission paper, entitled "The Authorised Economic Operator", which states: "a sea carrier will not necessarily be interested in simplification for customs rules as he would never use them."

Because the AEO concept and its benefits appear primarily to be oriented towards shippers/importers, the portion of this program that would be of interest or relevance to ocean carriers is the Security and Safety portion.

We understand the intent of these regulations to be that AEO status with security and safety facilitation issued by one Member State should be recognized in all Member states without any additional authorization required. Specifically, Customs authorities should recognize such AEO status "as a factor during risk analysis and in the granting of any facilitation to the economic operator with regard to controls relating to safety and security" (Paragraph 4 in the preamble to Regulation (EC) 648/2005 of the European Parliament and of the Council, *Official Journal*, 4.5.2005). Similarly, the aforementioned Project Report on AEO notes that the benefit of such AEO status "could be a lower risk score and the quality marking of being a secure and safe partner for government and trading partners in the international supply chain" (page 9).

Considering both that ocean carriers in international commerce are already required under mandatory international conventions to have ISPS Code certificates, as well as International Safety Management (ISM) certificates, and that "the granting of any facilitation [benefits]" will be benefits conferred on the shipper/importer, not the carrier, it is not clear why ocean carriers would need to obtain AEO status, except when their shipper customers request that they do so as a condition of doing business.

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[1] See Article 14e(b) and Article 14i(2).

Recognizing that such commercial requests are probable once an AEO concept is implemented in the Community (as they have been in the United States under U.S. Customs' C-TPAT program), the Council and its Member carriers request that the draft regulations ensure that the AEO programs: 1) do not require multiple, potentially duplicative processes to qualify under various Community and/or national security programs, and 2) fully recognize and not duplicate the existing international security requirements established for ocean carriers in the ISPS Code and the ISM Convention.

II. Specific Comments Regarding AEO – Security and Safety Provisions

a) Recognition of ISPS Code and ISM Convention Compliance

Unlike many other types of "economic operators", ocean carriers and port facilities are already directly regulated by mandatory international and European Union requirements regarding security and safety, and are responsible to report and comply with procedures and requirements of multiple Member State agencies. While ocean carriers are not opposed to the establishment of voluntary customs-industry partnership programs to enhance cargo and supply chain security in accordance with the principles set out in the WCO Framework of Standards, we believe that these regulations should: 1) avoid creating redundant, duplicative, and/or overlapping requirements, and 2) establish consistent standards for such programs across various European national jurisdictions.

An AEO program for ocean carriers or port facilities should not cover vessel and port facility operational requirements -- subject matter that is already addressed by the existing ISPS and ISM regulatory regimes.

These objectives are fully consistent with, and reflect, the WCO Framework and its admonition that "Custom administrations should not burden the international trade community with different sets of requirements to secure and facilitate commerce, and there should be recognition of other international standards. There should be one set of international Customs standards developed by the WCO that do not duplicate or contradict other intergovernmental requirements". (WCO Framework, Introduction).

In this regard, we also note that the above-mentioned Project Report includes a discussion (pp. 3-4) of security standards for maritime and air transport. It notes that the various Commission services are working closely together "in the development of security requirements for operators concerning maritime, air cargo and inter modal transport. *In this way requirements can be compatible enabling the authorities to recognize each others' security certifications and avoid duplications*" (our emphasis).

The same report (on page 8) requires that: "If necessary to assess compliance with the criteria, [Customs] contact with other national competent authorities should be made…". This consultation requirement is included in Article 5 a, paragraph 1, of the Community Customs Code but is missing in the draft regulation.

For these reasons - and without prejudice to our overall assessment of the AEO concept's applicability to ocean carriers and port facilities– we suggest that ocean

carriers, who wish to apply for AEO certificates for Security and Safety, should be able to demonstrate compliance with the security criteria in Article 14i, paragraph 1, and in Article 14g, sub-paragraphs (d) – (h), through their ISPS certificates. The same should apply to port facilities. Similarly, such carriers should also be deemed to meet the criteria in 14g, sub-paragraphs (a) and (d), through their ISM certificates.

Admittedly, the provision in Article 14i, paragraph 4, goes part way towards meeting such an objective.[2] However, we respectfully submit that the current language should be improved in a number of important aspects:

First, the draft regulation states that ISPS certificates are to be "taken into account" (presumably by the national Customs administration to whom the application for AEO – Security and Safety status has been submitted). This language is non-committal and provides no assurance that ocean carriers seeking AEO status would not be saddled with measures already addressed by the ISPS and ISM Codes.

Second, the current qualification – "to the extent that the criteria are identical or comparable to those established in the present regulation" - could introduce an unpredictable discretionary element into a national Customs authority's decision, including the possibility of different treatment of similarly situated companies and vessels dependent on the country where the application is submitted. This discretionary element should be eliminated.

Based on these considerations, we respectfully suggest for the Commission's consideration that the language in Article 14i, paragraph 4, be amended to include a new provision specifically regarding shipping companies and port facilities, which would read: "Possession of internationally recognized security and safety certificates by shipping companies and, where applicable, port facilities established in the Community, which are issued on the basis of the international conventions governing the maritime sector, shall be deemed to constitute compliance with the criteria in Article 14i, paragraph 1, and in Article 14g, sub-paragraphs (a) and (d) – (h)". [3]

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[2] The paragraph currently reads: "If the applicant, established in the Community, is the holder of an internationally recognised security and/or safety certificate issued on the basis of international conventions, of an International Standard of the International Organization for Standardisation, or of a European Standard of the European Standards Organisation, the certificates are taken into account to the extent that the criteria are identical or comparable to those established in the present regulation".

[3] This clarity and predictability are particularly appropriate when the certifications are based on governments' implementation of their obligations under international maritime conventions, which the Member States themselves have ratified. We express no opinion on how ISO supply chain security standards should be utilized under this regulation, as those efforts are still in development; however, existing international conventions negotiated and ratified by governments should be given deference. If the Commission has a concern that ISPS certificates, issued by certain flag states, may not constitute sufficiently reliable compliance with these criteria, we submit for the Commission's consideration the following re-write of the last sentence in Article 14i, paragraph 2: "If the airline or shipping company is the holder of a certificate according to point a), the customs authority of the Member state granting the status of AEO shall consider the criteria described in paragraph 1 and in Article 14h, subparagraph (a) and (d) – (h) met, provided that the certificate has not been issued by a national administration which the Community has determined does not comply with the terms of the underlying international conventions". On a related, but separate, we note that this particular paragraph seems difficult to reconcile with the newly

b) "Explanatory Notes" for Uniform Interpretation of Criteria for AEO Status

It would appear from Article 14a, paragraph 2, of the draft regulation that Articles 14f – 14i provide a complete list of the criteria that an "economic operator" must meet in order to obtain AEO status. A similar conclusion would seem to arise from Article 14j, paragraph 1, which prescribes that "the Commission shall adopt explanatory notes for the purpose of ensuring the uniform interpretation of the criteria for the granting of [AEO status] and the uniform application of audits based on these criteria".

We agree with the Commission's objective that the final Commission regulation identify *all* the criteria that an "economic operator" must be meet in order to obtain AEO status. We also agree that "explanatory notes" may be a useful tool to provide Community-wide uniformity and clarity to the application of the criteria. We would, however, appreciate learning the Commission's intentions in regard to the development and content and scope of such "explanatory notes", including any consultative processes involving industry.

c) Application, Suspension and Withdrawal of AEO Status

According to Article 14 c, paragraph 1, of the draft regulation, the "economic operator" wishing to obtain AEO status shall submit an application to the Customs authority of that Member state where its "main accounts are held and accessible, including records and documentation enabling the customs authority to verify and monitor the conditions and the criteria necessary for obtaining AEO status, and where at least part of the operations to be covered b y the [AEO] certificate are conducted". That same Customs authority will, upon its determination that the criteria are met and, if needed, after consultation with customs authorities in other Member states, issue the AEO certificate (paragraph 4).

We assume that a Member State in which an international liner shipping company – whether Community-based or not - has established its principal European office would be the appropriate state in which to file an AEO application, but would welcome clarification of this point.

Footnote 3 in the 2nd revised draft Commission regulation – which has been deleted in the 3rd revised draft - discussed whether a group of companies can submit one single application that – if approved – would grant AEO status to all companies within that group. We understand the Commission's response to that earlier footnote to mean that such a single application by a group of companies would not be acceptable under the terms of the existing Community Customs Code. In support of this position, the Commission observed that "under the present [Community Customs Code], it is not possible that company X asks for the release of the goods in one [Member State] on the basis of a request launched by company Y in another [Member State]…. Nevertheless, European company law allows for establishment of companies on EU scale. This situation is addressed in Article 14c (2) and (3)".

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amended Article 14 e (b) in that the latter paragraph would not seem to require possession of internationally accepted certificates, whereas Article 14i (2)(a) would.

It is not clear to us why the current Community legal situation for the release of goods – which is a matter involving the obligations of an importer – should necessarily limit the application options for other "economic operators", including ocean carriers, regarding the granting of AEO – Security and Safety status. Ocean carriers are not the owners of the goods and are not the parties responsible for seeking the release of the goods. Procedures for the release of goods may have relevance for the filing of applications for AEO – simplified customs procedures status, but would intuitively seem to be of no relevance for a carrier's application for the AEO -- security and safety status.

Thus, we encourage the Commission to re-consider this issue, including whether a distinction can and should be made between importers seeking AEO status and other types of "economic operators". Furthermore, should such a re-consideration lead to a continued prohibition against a single application from a group of companies, we would urge the Commission to amend the draft Commission regulation to more clearly set out the procedures to be followed by the relevant national customs administrations regarding similar, but individual applications for AEO – Security and Safety status from companies in a group of companies to ensure that such administrations to the maximum extent possible rely on each others' assessments and determinations about the eligibility for AEO status for other companies within that group of companies in order to avoid duplicative audits and site visits. In this regard, we note that the draft regulation now provides that an applicant in its application form shall include information about storage or other facilities in another Member State "in order to facilitate the examination of the relevant conditions on the spot by the customs authorities of that [other] Member State" (Article 14c, paragraph 1, in fine). We see no reason why this provision could not be expanded to include information about other companies that belong to the same group of companies as the applicant and may already have obtained AEO status.

Turning to the suspension procedures, it would appear from Sections 2 and 3 in Chapter 2 of the proposed new Title IIA in Part 1 of the draft regulation that *any* Customs authority of a Member state may initiate a suspension procedure against an AEO and, eventually, withdraw its AEO status with the effect that the "economic operator" forfeits that status in all Member States. Admittedly, the language in those two sections could also be interpreted – insofar as the term "customs authorities" seemingly is used interchangeably with the term "competent customs authority" - to mean that at least the actual *decision* (but not necessarily initiation of the *process*) to either suspend and/or withdraw an economic operator's AEO status must be made by the issuing Customs authority.[4]

We respectfully request that the draft regulation be amended so as to prescribe clearly national customs authorities' competence and authority in these matters, which undeniably could have significant implications for both the AEO and its business partners. We believe it would not be unreasonable for such an amended Commission regulation: 1) to allow a Member State's Customs authority to notify the issuing Customs authority of its concerns about an AEO's continued compliance with the criteria for such a status, or 2) to require in such cases the issuing Customs authority, upon such a notification, to assess and determine whether the AEO continues to meet the criteria, or

[4] However, the amended Article 14q , paragraph 1, in the 3rd revised draft Commission regulation explicitly provides that any Member State's Customs administration can suspend the AEO status in situations "where, by virtue of the nature or the level of threat, the protection of the citizens' security and safety, of public health or of the environment so require".

3) even to allow a Member State to not recognize an AEO designation of an issuing Customs authority for commerce within that Member State, if it has reasonable grounds to be concerned about compliance. Considering the potential for confusion and resulting negative implications for the economic operator concerned, it would not seem reasonable to also allow a Customs authority (other than the issuing Customs authority) to initiate a suspension procedure and eventual withdrawal of that AEO status across the Community, when the issuing authority has not agreed. In this regard, we note that the aforementioned Project Report appears to recommend that a suspension decision can only be made by the issuing Customs authority (*see* page 11, 2nd and 3rd and 4th bullet points).

According to Article 14q suspension can also be triggered in situations "where perpetration of an act that can be punished as a criminal offence is sufficiently founded and is linked to an infringement of customs rules" (paragraph 1); paragraph 2 has an even looser wording, simply saying "in case of perpetration of an act which can be punished as a criminal offence".

The drafting of this provision raises a number of concerns. First, it would seem to allow a Customs official to suspend an AEO for an activity that might be punishable under a Penal Code, but for which no finding of criminal guilt has occurred. Second, the draft is not clear regarding the jurisdiction in which the possibly criminal activity needs to have occurred. In other words – would it have to be a criminal offense within the Community, would the offense have to relate to conduct relevant to the terms of the AEO program, or would any criminal offense anywhere in the world suffice?[5] For example would a criminal violation of an environmental law be a basis for suspension from a customs program? Third, as drafted, the provision does not appear to provide for legal recourse or appeal.

We suggest that these concerns could be addressed by amending the draft Commission regulation to provide for suspension when there has been perpetration of a criminal offense within the Community that is relevant to the subject matter of the AEO program, and for which the AEO has been *convicted* , except for cases of immediate danger (which is already included in Article 14q, paragraph 2). Such an amendment would also seem more consistent with Article 14d that prescribes that an application for AEO status "shall be rejected if the applicant is subject to serious criminal conviction, without any further right of appeal, related to an infringement of customs rules and linked to the activity of the company or the applicant, or…" (our emphasis).

We would also suggest that the underlined language immediately above be substituted for the current language in Article 14r, paragraph 1, regarding withdrawal of AEO status. Currently, that language does not explicitly require a serious *criminal* conviction; it could therefore be interpreted to allow for withdrawal simply upon an

[5] We note that Article 14f, paragraph 2, regarding persons, who exercise control over the management of the applicant but are established in a third (non-Community Member State), prescribes that such persons' compliance with customs requirements "shall be judged on the basis of records and information that are available", i.e. a global rather than a Community scope of compliance.

administratively determined serious infringement of the customs requirements not sanctioned by a court of law. [6]

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[6] "The status of AEO shall be withdrawn if the economic operator fails to comply with the measures foreseen in Article 14q (4), or in cases of serious infringement related to customs rules without any further right of appeal committed by the economic operator".