



**WORLD SHIPPING COUNCIL**  
PARTNERS IN AMERICA'S TRADE

**Comments of the**  
**World Shipping Council**

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**Before the**  
**Bureau of Customs and Border Protection**

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**In the matter of**  
**Required Advance Electronic Presentation**  
**of Cargo Information**

**Docket Number:**  
**RIN 1515-AD33**

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**August 22, 2003**

## **I. Introduction**

The Council appreciates the opportunity to provide comments to the Bureau of Customs and Border Protection (“Customs” or “CBP”) on its proposed regulations for Required Advance Electronic Presentation of Cargo Information (RIN 1515-AD33). The Council, a non-profit association of over forty international ocean carriers, was established to address public policy issues of interest and importance to the international liner shipping industry. The Council’s members include the full spectrum of ocean common carriers, from large global operators to trade-specific niche carriers, offering container, roll-on roll-off, car carrier and other international transportation services. They carry more than 93% of the United States’ imports and exports transported by the international liner shipping industry, or roughly \$500 billion worth of American foreign commerce per year.<sup>1</sup>

The World Shipping Council (the “Council”) and its member companies have supported – and continue to support -- Customs’ establishment of the “24 hour rule” by which carriers file advance shipment information with the U.S. government 24 hours before loading containerized cargo aboard a ship bound for the U.S., so that the government can conduct a risk-based screening of all such shipments. The industry has supported the Container Security Initiative, which establishes government-to-government agreements addressing data sharing, risk assessment, cargo screening, and, where appropriate, inspection. The industry has supported the deployment by governments of more non-intrusive container inspection equipment both here and at foreign loading ports so that any shipment of containerized cargo that warrants inspection can be inspected efficiently and quickly. The industry has supported Customs’ Trade Partnership Against Terrorism (C-TPAT) establishing a government-industry partnership designed to enhance the security of the entire shipment supply chain. In fact, all the Council’s Members are C-TPAT vessel carrier participants. The industry has supported the development of analogous efforts at the international level through the World Customs Organization. The industry has supported the Coast Guard’s vessel and port security initiatives internationally and in domestic rulemakings. The industry has supported the creation of the Department of Homeland Security. The industry supports the governments of trading nations establishing predictable, transparent, and mutually consistent security rules governing these issues.

In the continued effort to work closely with the government in establishing an effective and workable security infrastructure for America’s international commerce, the Council submits the following comments on this proposed rulemaking. As a general proposition, the Council supports the regulatory efforts of CBP and the proposed rules. We have the following specific comments, however, that address particular areas of concern. Our comments in Part II below address the proposed changes in the regulations affecting the documentation of U.S. import cargo. Our comments in Part III below address the proposed regulations dealing with the documentation of U.S. export cargo.

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<sup>1</sup> A list of the Council’s members is attached as Appendix A.

## **II. Vessel Cargo Destined to the United States**

The Trade Act of 2002 (the “Trade Act”) provides that “the Secretary shall promulgate regulations providing for the transmission to the Customs Service, through an electronic data interchange system, of information pertaining to cargo destined for importation into the United States or exportation from the United States, prior to such importation or exportation.”<sup>2</sup> Section 343(a)(3)(B) of the Act goes on to state that:

“In general, the requirement to provide particular information shall be imposed on the party most likely to have direct knowledge of that information. Where requiring information from the party with direct knowledge of that information is not practicable, the regulation shall take into account how, under ordinary commercial practices, information is acquired by the party on which the requirement is imposed, and whether and how such party is able to verify the information. Where information is not reasonably verifiable by the party on which a requirement is imposed, the regulations shall permit that party to transmit information on the basis of what it reasonably believes to be true.”

This statutory mandate -- that information reporting requirements be imposed on the “*party most likely to have direct knowledge of that information*” -- is at the core of the Council’s first two concerns. The first concern is the proposed regulation’s failure to apply section 343(a)(3)(B) properly to information held by non-vessel operating common carriers (NVOCCs). The second concern relates to a proposed change in the definition of “shipper” in proposed section 4.7a(c)(4)(viii). We address these two points separately below.

### **A. NVOCC Filings in AMS**

The proposed rule governing the filing of inbound cargo manifests and cargo declarations requires all vessel operating ocean carriers to file their cargo declarations electronically and in advance in the Vessel AMS system. This is consistent with the statutory electronic filing mandate, and we have no objection to this requirement. The proposed rules, however, continue to allow NVOCCs the ability to “present the required manifest information for the related cargo to the vessel carrier, which if automated, *is required to present this information to Customs via the vessel AMS system.*”<sup>3</sup> We strongly request that this provision be eliminated and that NVOCCs be required to provide the required information directly to Customs.

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<sup>2</sup> 19 U.S.C. § 2071 note.

<sup>3</sup> 19 C.F.R. § 4.7(b)(3)(i) (emphasis added).

When Customs promulgated the “24 hour rule” in October of 2002, it issued that rule under authority of 19 U.S.C. § 1431.<sup>4</sup> Because it relied on existing law regarding vessel manifests, a law that places the applicable requirements on vessel operators, Customs did not at the time it published the 24-hour rule believe that it had adequate statutory authority to require NVOCCs to file cargo declaration information.

Now that the Trade Act is in effect and Customs has initiated this rulemaking mandated thereunder, there can be no question that Customs has the statutory authority to require NVOCCs to file cargo declaration information directly with Customs through AMS. Customs should, and indeed must, exercise that authority. As noted above, section 343(a)(3)(B) provides that “the requirement to provide particular information *shall* be imposed on the party most likely to have direct knowledge of that information.” (emphasis added). The word “shall” when used in a statute is generally construed to state a mandatory requirement.<sup>5</sup> It is indisputable that it is the NVOCC, not the vessel operator, which has the most direct knowledge of the information related to its shipments. Indeed, one of the reasons most vigorously advocated by NVOCCs in support of their being allowed to participate directly in AMS was that vessel operators had no need or right to have access to that information. Accordingly, there can be no doubt that the Trade Act places the filing burden on NVOCCs for their shipments. Conversely, because the Act mandates in this case that NVOCCs file, it is equally clear that the Act does not authorize Customs to continue to require vessel operators to act as filers for NVOCCs.

The *only* exception to the Section 343(a)(3)(B)’s directive that the filing requirement shall be based on the party with direct knowledge applies to those situations in which such a requirement “is not practicable”. The implementation history of the 24-hour rule, however, proves without a doubt that direct NVOCC filing in AMS is entirely practicable, and is indeed preferred by many NVOCCs. In addition, the record demonstrates that there are ample electronic filing services available to NVOCCs to do this work for them if they need or wish to employ such services.

In addition to the Trade Act’s clear statutory directive discussed above, there are sound practical and policy reasons why the filing requirements should be imposed directly on NVOCCs.

First, NVOCCs and vessel carriers were advised last year that once an NVOCC became automated, it would be expected to automate in all ports of entry and would not be allowed to revert to a non-automated, paper-filing status for certain ports. Council Members have seen a large number of NVOCCs selecting to go on and off of AMS at various ports, for apparently no authorized reason. Vessel carriers are unable to audit or police this. Only if all NVOCCs are required to do their own electronic filing with CBP can this be effectively monitored and enforced.

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<sup>4</sup> See 67 Fed. Reg. 51519 (August 8, 2002); 67 Fed. Reg. 66319 (October 31, 2002).

<sup>5</sup> See, e.g., *Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977) (“The word ‘shall’ is the language of command in a statute. . .”).

Second, Council Members have been perplexed by companies that are NVOCCs informing the vessel carrier that for one shipment they are acting as an NVOCC and need to have their cargo declarations filed in AMS, and for another shipment they are acting as a non-NVOCC consolidator and there is no need for filing in AMS. Again, vessel carriers are unable to audit or police this. Only if NVOCCs are responsible themselves for their own filing obligations and are subject to CBP audit for compliance can this system have the integrity needed to serve its intended function.

For all of these reasons, we request that CBP amend 19 C.F.R. § 4.7(b)(3)(i) to delete all language from “in the alternative . . .” through the end of that subsection and amend 19 C.F.R. § 4.7(b)(5) to delete “, and NVOCCs electing to participate” and insert in lieu thereof “and NVOCCs”.

### ***B. Shipper’s Name***

The second set of issues involving the section 343(a)(3)(B) requirement -- that the party with “direct knowledge” of relevant information be required to provide that information – arise from the proposed regulation’s new definition of who should appear as the “shipper” on a bill of lading and on the corresponding cargo declaration. The proposed regulations would amend 19 C.F.R. 4.7a(c)(viii), which presently requires “the shipper’s complete name and address . . . from all bills of lading”, to add the following:

“At the master bill level, for consolidated shipments, the identity of the Non Vessel Operating Common Carrier (NVOCC), freight forwarder, container station or other carrier is sufficient; for non-consolidated shipments, and for each house bill in a consolidated shipment, the identity of the *actual shipper (the owner and exporter)* of the cargo from the foreign country is required.”<sup>6</sup>

We have several concerns about the proposed definition that we will discuss in detail. First, the proposed definition of the “shipper” in many cases would not be the “shipper” in any currently recognized commercial or legal sense, and it would in many cases be an entity with which the ocean carrier has no contractual relationship and about which the ocean carrier has no direct information. Second, the proposed definition of “shipper” in many cases would not be consistent with commercial practice and usage of a bill of lading, and would create substantial confusion with these commercial documents. Third, the proposal could require substantial reworking of carriers’ commercial documentation systems, would be very burdensome, and – if it were to have any chance of being effective -- would require CBP to mandate that all importers provide their carriers with an accurate list of all their suppliers. Fourth, the proposal impermissibly attempts to mandate that a particular person be named on a commercial bill of lading when the carrier may have no relationship with such person. Fifth, the proposal does not accurately represent how “house” bills of lading are issued and filed. And finally and importantly, the effort to obtain this information through a bill of lading could be easily

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<sup>6</sup> 68 Fed. Reg. 43954.

circumvented by the shipper. An alternative mechanism should be found to collect this information.

If CBP wishes to obtain information about certain of the entities included in the new definition of “shipper,” section 343(a)(3)(B) of the Trade Act requires that CBP obtain that information from a source other than the ocean carrier. Given the nature of the information sought, the Council respectfully suggests that the U.S. importer is likely to be the most appropriate party.

As an aid to understanding why an ocean carrier in many cases does not have and cannot verify information relating to the “shipper” as that term is defined in the proposed regulations, we provide below several examples of how shippers and consignees are designated and documented under current law and practice. Before doing so, however, we discuss the current commercial and legal meaning of the term “shipper” and explain why that commercial term is inconsistent in some cases with the information apparently sought by CBP.

### **1. Who is the “shipper” on a commercial bill of lading?**

Neither the Trade Act nor the Tariff Act contains a definition of “shipper.” The term “shipper” is, however, defined in federal law administered by the Federal Maritime Commission (FMC) as:

- “ (A) a cargo owner;
- (B) the person for whose account the ocean transportation is provided;
- (C) the person to whom delivery is to be made;
- (D) a shippers’ association; *or*
- (E) an [NVOCC] that accepts responsibility for payment of all charges applicable under the tariff or service contract.”<sup>7</sup>

This definition is crafted to recognize that the term is based on a commercial transportation relationship. One common and necessary element of the term is that a shipper is a party with whom the carrier has a contractual obligation arising out of a transportation relationship.<sup>8</sup>

That the shipper is the entity with which the carrier has a transportation contract has always been recognized by Customs and is explicitly recognized in the inward manifest rule itself, which requires the carrier’s cargo declaration to state: “The shipper’s complete name and address, or identification number, *from all bills of lading.*”<sup>9</sup> Similarly, consignees’ names and addresses are to be from “all bills of lading.” A bill of

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<sup>7</sup> Section 3(21) of the Shipping Act of 1984, as amended, 46 App. U.S.C. § 1702(21).

<sup>8</sup> Similarly, the UN Commission on International Trade Law (UNCITRAL) defines a shipper as: “a person that enters into a contract of carriage with a carrier.” United Nations Commission on International Trade Law, Transport Law, Preliminary draft instrument on the carriage of goods by sea, Section 1.19 (January 8, 2002).

<sup>9</sup> 19 C.F.R. § 4.7a(c)(4)(viii) (emphasis added).

lading is itself or evidences a transportation contract involving the carrier and the shipper.<sup>10</sup>

Accordingly, the proposed regulations' redefinition of "shipper" to include entities that are not parties to the transportation contract and the proposal to require that the shipper as so defined be reflected on the bill of lading would fundamentally change the purposes and commercial practice involving bills of lading.

The proposal is directly contrary to the twin mandates of Section 343(a) of the Trade Act that (1) the party with direct knowledge provide the information and (2) where it is impracticable that the party with direct knowledge provide the information, the procedures adopted "take into account . . . ordinary commercial practices. . . ."

**2. In many cases, the "shipper" is not the entity identified as the "shipper" in the proposed regulations.**

Consider the common situation where the ocean carrier's transportation contract<sup>11</sup> is with a U.S. importer. In this type of situation, a carrier will have entered into a transportation contract with Company A to move goods from Country X to the United States for delivery to Company A. The carrier will pick up the goods from a person or place in Country X as directed by Company A or its agent. In these cases, which can be characterized as "consignee controlled shipments," Company A is the "shipper" (i.e., the entity that entered into the transportation contract, and is so recognized by the FMC), but Company A will be listed as the "consignee" on the bill of lading. That designation is used on the bill of lading because Company A is this entity to which the carrier will deliver the goods when they arrive in the United States. The party that is listed as the "shipper" on the bill of lading in such a consignee controlled shipment will be the party that, on behalf of the importer, tenders the goods to the carrier for transport to the importer. This party will be acting at the direction of the importer. Although this party *might* be the "owner and exporter" as described in the proposed regulation, it is just as likely that the party listed as "shipper" on the bill of lading will be a third party, such as a logistics company or consolidator (acting as an agent for the consignee, who as noted above is the "shipper" as defined by the Shipping Act and commercial practice). Alternatively, the entity named as the shipper on the bill of lading could be the same entity as the consignee (Company A), without necessary reference to where title or ownership of the goods may lie. The proposed rules, however, would appear to seek to disallow those "shipper" parties from being listed in the shipper box of the bill of lading, and would seek to have other entities identified.

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<sup>10</sup> See, e.g., The Law of Admiralty, Gilmore & Black (2<sup>nd</sup> Ed., 1975) at page 93: "A bill of lading is, in the first instance and most simply, an acknowledgment by a carrier that it has received goods for shipment. Secondly, the bill is a contract of carriage. Third, if the bill is negotiable . . . it controls possession of the goods...."

<sup>11</sup> The "transportation contract" for a vessel carrier may be a "service contract" filed at the FMC or may be the bill of lading itself moving the goods pursuant to the vessel carrier's public tariff regulated by the FMC. Service contracts are filed at the Federal Maritime Commission in accordance with the requirements of the Shipping Act of 1984, as amended. The service contract will designate the importer as the "shipper" in the case of consignee controlled shipments.

Several points are important with respect to the consignee-controlled shipments described above. First, we estimate that the majority of the U.S. import cargo from Asia is controlled in this manner by the U.S. importer, as well as substantial portions of the import cargo in other trades. Accordingly, the substantive problems with attempting to collect data in the manner described in the proposed rules would affect a substantial amount of the cargo entering the United States and could impact hundreds of thousands of bills of lading.

Second, it appears clear that Customs is interested in determining the identity of the foreign entity that last owned the cargo prior to export. To the extent that the cargo is tendered to a consolidator or freight forwarder who in turn tenders it to the vessel operator, that original tendering entity will be two steps removed from anyone with whom the carrier has a direct business relationship. Even where the “exporter and owner” as described in the regulations tenders the cargo directly to the carrier, the carrier may have no contractual relationship with that entity, and no basis upon which to determine whether that tendering entity is in fact the “owner and exporter” as contemplated by the proposed regulations. A carrier deals with shippers from a transportation perspective, not from any knowledge of the ownership of the goods or who the exporter of record may be. It is no more able to know if the party tendering the shipment is the owner when it picks up the goods than it would be to know if the consignee is the owner of the goods when it delivers the goods.<sup>12</sup>

Third, because the ocean carrier has no means of knowing or verifying this information, its collection would appear to be of questionable utility for security purposes.

### **3. Commercial documentation does not function as described in the proposed regulations.**

As discussed above, a carrier in many instances has no commercial relationship with the entity that the proposed regulations would define as the “shipper”. Furthermore, the proposed rule incorporates several erroneous assumptions about the nature of commercial shipping documentation. These incorrect assumptions lead to conclusions about the availability of certain information that are likewise incorrect. One of the most serious misunderstandings involves the proposed rule’s discussion of the presumed issuance of “house” bills of lading in addition to “master” bills of lading.

The proposed regulation states: “at the master bill level, for consolidated shipments, the identity of the Non Vessel Operating Common Carrier (NVOCC), freight

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<sup>12</sup> As we discuss further below in section II.B.4, the proposed regulations contain no requirement that the importer or any other cargo interest provide the required “actual shipper” information to the carrier. Even in the absence of the other difficulties discussed herein with respect to the proposed system, this lack of any originating source for the information for which the carrier is to act as the conduit makes the proposed system entirely unworkable.

forwarder, container station, or other carrier is sufficient”.<sup>13</sup> “Master bill” is not a defined term in the proposed regulations, but the proposed rule’s Supplementary Information states:<sup>14</sup>

“Generally speaking, a master bill of lading refers to the bill of lading that is generated by the incoming carrier covering a consolidated shipment. A consolidated shipment would consist of a number of separate shipments that have been received and consolidated into one shipment by a party such as a freight forwarder or a Non Vessel Operating Common Carrier (NVOCC) for delivery as a single shipment to the incoming carrier. The consolidated shipment, as noted, would be covered under the incoming carrier’s master bill; and this master bill could reflect the name of the freight forwarder, the NVOCC or other such party as being the shipper (of the consolidated shipment). However, each of the shipments thus consolidated would be covered by what is referred to as a house bill. The house bill for each individual shipment in the consolidated shipment would reference the name of the actual shipper (which would be the actual foreign owner and exporter of the cargo to the United States)... It is this latter information as to the identify of the actual shipper from the relevant house bill that CBP is seeking for targeting purposes.”

When the vessel carrier’s customer is an NVOCC, the NVOCC will be the “shipper” on the vessel carrier’s bill of lading, which the carrier will file in AMS. The NVOCC in turn will list its shipper customers from its house bills of lading on its AMS filings with Customs. This situation appears to be the clearest scenario. This scenario would apply regardless of whether the container includes consolidated shipments or a full, non-consolidated load. We have no concerns with this scenario.<sup>15</sup> Beyond this scenario with NVOCC shipments, however, the proposed rule quickly becomes problematic.

First, a freight forwarder in U.S. international liner shipping cannot issue bills of lading.<sup>16</sup> If it did, it would be an NVOCC, not a freight forwarder. The issuance of a bill of lading indicates that the issuer has taken responsibility for the transportation of the goods. Indeed, it is this fact that makes the issuer a common carrier under the Shipping Act. Freight forwarders in international ocean commerce, in contrast, do not take ultimate responsibility for delivery of the cargo or payment of the freight. Accordingly, where a freight forwarder tenders either a consolidated or non-consolidated shipment to a vessel operator, there will be no house bill of lading issued by that freight forwarder. The

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<sup>13</sup> 68 Fed. Reg. 43594. More substantive concerns are addressed in the text below. Here, though, we note that a “container station” is a place, not an entity.

<sup>14</sup> 68 Fed. Reg. 43576.

<sup>15</sup> NVOCCs, however, may have concerns with the proposed rules, as vessel carriers do, with respect to whom they must show as the “shipper” on their house bills of lading.

<sup>16</sup> A “freight forwarder” in U.S. surface transportation modes may issue its own bills of lading. A “freight forwarder” in U.S. international liner shipping is a different kind of regulated business and cannot legally issue bills of lading.

assumption built into the rule, therefore, that information about the “actual shipper” will be available from such a house bill is incorrect.

By the same token, for a consolidated shipment tendered by a “consolidator” (which the proposed rule appears to identify as an entity other than an NVOCC or freight forwarder that tenders a shipment derived from multiple suppliers), there will not be any “house bills.” The consolidator may be issuing other documents, such as a forwarder’s cargo receipt, in lieu of a bill of lading, but these are not house bills and the AMS system does not accept such information for filing.<sup>17</sup> Accordingly, the assumption that there will be a “house bill” identifying the “actual shipper” is as erroneous with respect to shipments handled by consolidators as it is with respect to shipments handled by freight forwarders.

The erroneous assumption that consolidators and freight forwarders issue house bills of lading is repeated in Customs Ruling HQ 115944 (July 8, 2003). That ruling states that for consolidated shipments, “the freight forwarder and/or Consolidator must issue a separate bill of lading in favor of each foreign vendor (shipper) whose goods the freight forwarder and/or Consolidator collects for consolidation and shipment...” This is not correct and not possible. Under the terms of the Shipping Act, a freight forwarder or consolidator cannot legally issue bills of lading. Only an ocean carrier or an NVOCC may issue bills of lading for ocean cargo destined to the United States. Accordingly, the conclusion of that Customs Ruling is erroneous.

As is discussed above in the context of who is a “shipper” under the Shipping Act and international commercial practice, a bill of lading evidences a commercial transportation contract and relationship. A vessel carrier generally will have no relationship with the parties that have provided a consolidator with cargo because it is the consolidator and not the importer’s suppliers that have tendered the cargo to the carrier for transport. The carrier therefore does not issue the various suppliers separate bills of lading naming them as the “shipper”.

#### **4. Customs’ objectives and a proposed solution.**

It is evident from this proposed rule and the July 8, 2003, Customs Ruling that the CBP would like to gather more information about the details of U.S. import trade prior to vessel loading in a foreign port. In particular, it would appear that when an importer is consolidating cargo from different suppliers into a single shipment, Customs wants to know the names and addresses of the importer’s suppliers or “vendors.” Moreover, for non-consolidated shipments and for each shipment in a consolidated shipment, CBP seeks the name of the “actual” shipper, which CBP defines as the “owner and exporter” of the cargo.

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<sup>17</sup> The proposed rule’s Supplementary Information states: “parties identified as “consolidators”, even though they may also be NVOCCs, may not participate in Vessel AMS.” 69 Fed. Reg. 43577.

It is not entirely clear, but it would further appear that the proposed rule and the July 8 Ruling indicate that CBP wants this information about importers' "vendors" in cases where ownership of the goods has not yet passed to the importer, otherwise the supplier/vendor would not be the "owner" of the goods. If that is the case, there is in the proposed rule no substantive discussion about a security distinction based on ownership of the goods, and no articulated rationale about why such supplier information's security value would change depending on whether a sale and change in title to the goods had been completed prior to the carrier's receipt of the goods for transport.<sup>18</sup>

We do not believe that Customs can require a carrier to create a bill of lading -- which is a legal, commercial transportation document that can affect cargo liability rights and obligations, entitlement to possession of the goods, and the financing of the goods -- and name as a shipper on that document a party that neither has a relationship with the carrier as part of the transportation contract nor has been identified as the "shipper" by the party with whom the carrier has contracted -- the "actual" shipper/importer. If Customs wants to obtain information from importers about the names and addresses of their suppliers, we believe that a mechanism other than the carrier's bill of lading and carrier manifest should be found. This point is reinforced by the terms of the Trade Act, which in section 343(a)(3)(B) states: "In general, the requirement to provide particular information shall be imposed on the party most likely to have direct knowledge of that information." A carrier is not a party that will have "direct knowledge" of who its customers' suppliers are. A carrier has no direct knowledge of this information, has no relationship with these parties, cannot reasonably be expected to have knowledge of such information, and would have no ability to vouch for the accuracy or completeness of such information. It is in fact clear that the party "most likely" to have that information is the importer.

Furthermore, even assuming for the sake of argument that Customs were to try to require a carrier to obtain and file the names of an importer's suppliers when the importer was using a consolidator or freight forwarder, it is unclear how a carrier could effectively do this. Such an initiative could easily be avoided by the importer, which could simply name itself as the shipper and as the consignee on the bill of lading. If Company A arranges transportation of various goods it is obtaining from different vendors from a point in Asia to a point in the U.S. and lists itself as the shipper and the consignee on the bill of lading -- which it is entitled to do -- and provides an adequate cargo description, Customs would be denied visibility into the identity of the suppliers if it relies on a carrier's bill of lading to obtain this information. In such a case, would Customs seek to require that Company A provide an ocean carrier with a list of the names and addresses of all its suppliers for the carrier to transmit to Customs? That would not reflect the bill of lading, the transportation contract, or existing law. It would also transform ocean

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<sup>18</sup> This approach could also result in identical shipments of goods from identical sources being "manifested" differently depending on the commercial terms of sale. For example, an importer that consolidates goods and takes title in the foreign country (ex factory) would not enumerate the suppliers and have separate bills of lading for them, whereas the same importer transporting the same goods from the same suppliers might have separate bills of lading if it has arranged to take title after vessel sailing.

transportation documents into something that they were not designed to be – a mechanism to gain fuller transparency into trade information.

If Customs were to adopt the approach of the proposed regulations as drafted, it would at a minimum have to adopt a requirement that importers provide to carriers an accurate list of all the importer's suppliers to be included in the information that the carriers are to file in AMS. If Customs were going to adopt a requirement that importers collect and forward such information, it would seem more appropriate that the information should flow directly from the importer to the government.

In addition to having to adopt a requirement that importers furnish such information to carriers if the proposed rule were to be adopted as written, Customs would have to revise its definition of "shipper" to delete all cross-references to the bill of lading. If CBP were to burden carriers with filing the information described, carriers should not and cannot be required to create and issue actual bills of lading that purport to reflect transportation relations that do not in fact exist. In addition to being inconsistent with the terms the Trade Act, such requirements would have the potential to cause real commercial confusion, because bills of lading can, among other functions, act as documents of title. As such, bills of lading are part of the documentation required in order for international financing mechanisms such as letters of credit to function.

Creating "dummy" bills of lading would have the potential to undermine the entire system that depends upon valid bills of lading that commercial parties can rely upon. Such a requirement could create dozens, if not hundreds, of separate bills of lading for single containers. This would impose enormous costs and operational problems. CBP has witnessed the problems involved in getting NVOCC cargo efficiently released from U.S. discharge ports under the 24-hour rule. Consider the problems that would arise if single containers that today have a single bill of lading each had dozens of bills of lading. The proposed change is unworkable.

Finally, in the event that Customs were to retain the requirements in their current form notwithstanding our objections, the regulations must, at a minimum, be amended to include language that makes it absolutely clear that the "actual shipper" information sought by Customs is not within the direct knowledge of the carrier, and that the carrier is in no way liable for the transmission of incomplete or erroneous information provided to it by a third party. Such a provision is required by the last sentence of section 343(a)(3)(B) of the Trade Act, which states that:

"Where information is not reasonably verifiable by the party on which a requirement is imposed, the regulations shall permit that party to transmit information on the basis of what it reasonably believes to be true."

In the absence of some unlikely outside source of information, the carrier would have no reason to doubt that the information that is provided to it by its customer is true.

We understand from this proposed rule that the Customs Service would like to gather more information about the details of U.S. trade prior to vessel loading in a foreign port, including information about an importer's suppliers, and their identities, their addresses, and their cargo descriptions. We are sympathetic to this objective. Our concerns, however, involve the current proposal to obtain such greater transparency of trade through a transportation bill of lading rather than a system that acquires that data from the parties who know it and possess it.

A bill of lading evidences a transportation contract – an agreement by a carrier with a shipper to move goods from point A to point B. It does not necessarily show: ownership of goods, chain of title, exporter of record, origin of goods, manufacturer of goods, supplier of the goods, cost or value of the goods, financing of the goods, who ordered the goods, ultimate receiver of the goods, or the chain of physical custody of the goods. Each of these data elements might be of interest to the government in performing a security or law enforcement screening of a cargo shipment; however, these data elements are not part of the information that is shared between a shipper and a carrier, and are not part of a bill of lading. As the Council stated last September in its comments to Customs on the proposed 24-hour rule:

“We recognize that the cargo manifest has become a document that is used by the government to prescreen cargo for national security reasons. It was not designed for this purpose and has some limitations in this regard. We nevertheless recognize that currently the government does not feel that it has better information systems for this task, and thus the industry would like to cooperate to the extent practicable. It is essential, however, that the role, the limitations, and the ramifications of the manifest be kept in mind.”<sup>19</sup>

Our comments went on to state:

“As Customs considers new mechanisms and systems for gathering cargo information, we wish to stress the need to recognize both the limited scope of the cargo manifest and its operational implications. The ocean bill of lading and the corresponding manifest *only* reflect the contract of carriage. The name of the shipper, the consignee, and the cargo description are relevant to the transportation contract and have been required elements of cargo manifests for many years. The manifest should not be used, however, to acquire information beyond the present scope of a manifest or the transportation contract....”<sup>20</sup>

We now are addressing precisely the kind of issue our comments addressed last September. For the purposes of the 24-hour rule, which ocean carriers supported, carriers were able to stretch their systems – albeit with some continuing difficulties – to accommodate Customs' emergency rules. The proposed expansion of the definition of “shipper” to include the identities of parties with whom the carrier has no commercial relationship, and indeed in many cases no contact or knowledge, would exceed the ability

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<sup>19</sup> Comments of the World Shipping Council submitted to the Customs Service, September 9, 2002 (p. 4).

<sup>20</sup> Ibid.

of the current bill of lading system to accommodate Customs' information gathering needs. Furthermore, as noted above, the proposal would not effectively accomplish CBP's objective because it could be avoided by the shipper simply naming itself as the shipper and consignee on a bill of lading.

The Council therefore respectfully requests that CBP amend its proposed regulations either to delete the expanded definition of "shipper" or, more appropriately under the terms of the Trade Act, to place the information reporting requirements for "actual shipper" information on the parties to the underlying import transaction, not the carrier, which is a party only to the transportation contract.

### ***C. Ship's Log Data***

The proposed regulations would require two new data elements for carriers to file in AMS, namely the date of departure from the foreign port and the time of departure – both as reflected in the vessel log book.

We assume that this information, which is already available to the government by review of the vessel log, is being sought to facilitate CBP compliance checks on whether carriers have in fact complied with the advance filing of cargo declarations in a timely manner.

The Council has several comments and requests for clarification in this regard.

First, these will be new data fields in AMS, which do not presently exist. Clarity on when they will be operational and when carrier compliance will be required is requested.

Second, we recommend that this information be filed and collected via a single AMS "Event Message" which covers all of the bills of lading filing by the vessel operating carrier. As this information obviously cannot be filed with CBP until after the vessel has sailed, filing this data in an event message will prevent carriers from being unreasonably burdened with the requirement to amend each bill of lading after vessel departure to include these new data fields.

Third, because the filing of this information will be performed by the carrier's administrative offices that perform the AMS filing rather than the vessel master, there will be some delay from the time the vessel departs the foreign port and the vessel log entry is made, until the information is filed and received in AMS. Because we understand that these data elements will be used to monitor and enforce compliance with the timeliness of filing requirements—and not for security screening—we recommend that the final rule clarify that the deadline for filing these data elements to CBP be prior to vessel arrival in the first U.S. port of arrival.

### **III. Vessel Cargo Departing From the United States**

#### **A. High Risk Cargo**

The proposed regulations and the Supplementary Information state that, for outbound cargo that is identified as high risk, “if the cargo identified as high-risk as already departed, CBP will exercise its authority to demand that the export carrier *redeliver* the cargo....”<sup>21</sup> While we appreciate that CBP reserves this right, we urge the agency to also explicitly recognize that its concerns may be satisfactorily addressed by inspection of the goods at a CSI port, thus substantially reducing the time involved in ascertaining if there is a security issue, and also avoiding extensive additional transit of the goods.

#### **B. Reciprocity**

The Council does not object to the proposed rules governing export shipments by vessel carriers; however, we would urge the Department to consider an issue that the proposed regulations addressing vessel cargo departing from the U.S. may raise.

In the regulation of international commerce, governments often place considerable importance on the principle of reciprocity, or the equivalent treatment of trade that is originating in or destined for a particular country. This is not an ironclad rule of equality, but it is common principle that is often carefully considered and applied. The United States traditionally has been a proponent of this principle.

For compliance with requirements regarding the advanced electronic filing of inbound cargo information, CBP has established a comprehensive set of regulations that require advance documentation of all containerized import cargo regardless of commodity or shipper. In fact, these regulations even cover foreign-to-foreign commerce where there is no U.S. importer if the vessel calls at a U.S. port.

These proposed regulations addressing export shipments by vessel carriers would exempt large classes of containerized export shipments from having to comply with the 24-hour advance filing of shipment information, namely exporters who are “highly compliant”.<sup>22</sup> Exporters to the U.S. have no similar exemptions from compliance with the inbound cargo advance shipment information filing requirements.

While the Council has no desire to create additional burdens for U.S. export shippers, we note that foreign governments and foreign shippers may question how the U.S. government can justify this disparate treatment of similarly situated containerized shipments. For example, why can U.S. “known shippers” be entitled to an exemption

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<sup>21</sup> Proposed 19 C.F.R. § 192.14(c)(4) at 68 Fed. Reg. 43601 (emphasis added). *See also*, 68 Fed. Reg. 43591.

<sup>22</sup> 68 Fed. Reg. 43589.

from these advance export shipment filing requirements, when foreign “known shippers” are not exempt from advance filing of their export shipments to the U.S.? Why are U.S. exporters of products valued below a certain level eligible for exemption from these regulations, but comparable foreign shippers are not exempt from advance filing of their export shipments to the U.S.?

The U.S. government, especially Customs and Border Protection and the Coast Guard, have done a highly credible job of obtaining international support and cooperation in constructing a regulatory infrastructure to enhance the security of international commerce. The further development of this security infrastructure depends on continued international cooperation. We do not know what the reaction will be to these regulations by the governments of our trading partners, but we urge Customs to be prepared to address the possible questions that the nation’s trading partners may raise with respect to the principle of reciprocity in the development and application of these advance shipment filing regulations.

### **C. Timeframe for Filing of Export Cargo Information**

Section 192.14 (b)(i) of the proposed rule states: “For vessel cargo the USPPPI or its authorized agent must transmit and verify system acceptance of export vessel cargo information no later than 24 hours prior to the departure of the vessel.” This statement could be interpreted as meaning 24 hours prior to the departure of the vessel *from the last U.S. load port* or as meaning 24 hours prior to the departure of the vessel *from the U.S. port where the particular shipment is loaded*. Inasmuch as the upcoming rulemaking implementing Section 343 (b) will require that full documentation be transmitted and verified prior to the loading of a vessel, those regulations would have to address documentation on a port-by-port basis. Further, because the documentation so required would include the ITN or an appropriate exemption statement (which are required by the proposed rule in this current proceeding), in order for that information to be timely under the upcoming 343 (b) requirements, the information would have to be provided on a port-by-port basis. Therefore, as many vessels will make multiple U.S. port calls before departing on a foreign voyage, we request that the final regulations clarify that Section 192.14 (b)(i) of the proposed rule means no later than 24 hours prior to the departure of the vessel from the U.S. port where the particular shipment is loaded.

### **D. Filing of Export Cargo Information**

As discussed above, the proposed rule would require export cargo information to be filed by the USPPPI or its authorized agent prior to departure of the vessel. The proposed rule would also require that the outbound carrier annotate the proof of electronic filing citation (the Internal Transaction Number—ITN), the low risk exporter citation, or the exemption statement on the outward manifest, waybill or other export documentation. We support this requirement based on Customs officials’ explanation to the industry that the *manifest* filing obligation is the carrier’s, the *cargo information* filing

obligation is the USPPI's, that the carrier is not obligated to verify the correctness of the USPPI's filing, and that any penalties for incorrect filing of the cargo information are to be imposed on the USPPI.

### **E. \$2500 Export Exemption**

Currently, according to regulations promulgated by the Bureau of Census (Census), USPPI's are not required to file Shipper's Export Declarations (SEDs) for goods valued at \$2500.00 or less. CBP has stated in this proposed rule that it has chosen to use the Commodity Module of the Automated Export System (AES), which is jointly administered by Census, to implement the requirements of Section 343 (a) of the Trade Act. While we support CBP's plans to use AES for collecting electronic export cargo information, we do not understand why the government would retain the \$2500.00 SED exemption limit. First, since CBP and Census are using SED data to target export shipments for security reasons, this exemption creates a potential loophole for a party seeking to export high-risk cargo. Second, CBP and Census have acknowledged that this exemption has been widely abused by exporters seeking to avoid filing SEDs. Third, this exemption has created significant gaps in the trade statistics collected by the Foreign Trade Division of Census. We recommend that CBP and Census consider whether the \$2500.00 SED exemption should be retained in the final regulation.

## **IV. Conclusion**

The Council and its member companies recognize and appreciate the magnitude and difficulty of the effort to enhance the security of international commerce from the threat of terrorism. We also recognize and have supported the government's efforts to address this problem on multiple fronts, from the 24-hour rule, to the Container Security Initiative, to Customs' Trade Partnership Against Terrorism, to the Coast Guard's vessel and port facility security regulations.

We believe that Customs has done an admirable job in constructing an infrastructure to enhance the security of commerce. We believe the Coast Guard has performed with similar distinction in its areas of responsibility. Our comments above are not intended in any way to detract from that successful record, from the agency's objectives, or from the industry's continued commitment of support for the government's efforts. They are intended only to provide comments on those aspects of the proposed Trade Act regulations that raise questions or present significant difficulties, and to help the record reflect the fact that many of these issues are quite complicated.

The Council and its member companies recommend, particularly on the issues of changing the terms of bills of lading and determining which parties should be required to provide "actual shipper" information, that further dialogue involving CBP, carriers and

shippers would be helpful and appropriate in determining what additional options may be available to the government to address its objectives.

We appreciate the agency's consideration of our views.

Appendix A

**WORLD SHIPPING COUNCIL**  
MEMBER LIST

- APL
- A.P. Moller-Maersk Sealand (including Safmarine and Torm Lines)
- Atlantic Container Line AB
- CP Ships Holdings, Inc. (including Canada Maritime, CAST, Lykes Lines, Italia Lines, Contship Containerlines, TMM lines, and ANZDL)
- China Ocean Shipping Company (COSCO)
- China Shipping Group
- CMA-CGM Group
- Compania Sud-Americana de Vapores (CSAV)
- Crowley Maritime Corporation
- Dole Ocean Cargo Express
- Evergreen Marine Corporation Ltd. (including Lloyd Triestino and Hatsu Marine)
- Great White Fleet, Ltd.
- Hamburg Sud (including Columbus Line, Alianca and Crowley American Transport)
- Hanjin Shipping Company, Ltd.
- Hapag-Lloyd Container Linie GmbH
- HUAL AS
- Hyundai Merchant Marine Company, Ltd.
- Kawasaki Kisen Kaisha Ltd. (K Line)
- Malaysia International Shipping Corporation (MISC)
- Mediterranean Shipping Company, S.A.
- Mitsui O.S.K. Lines
- NYK Line
- Orient Overseas Container Line, Ltd.
- P&O Nedlloyd Limited
- United Arab Shipping Company
- Wan Hai Lines Ltd.
- Wallenius Wilhelmsen Lines
- Yangming Marine Transport Corporation, Ltd.
- Zim Israel Navigation Company, Ltd.