Before the

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

RIN 1651-AA49

Required Advance Electronic Presentation of Cargo Information

Petition of

The World Shipping Council, the National Industrial Transportation League, the
National Customs Brokers and Forwarders Association of America, Inc. and
the Retail Industry Leaders Association
For Reconsideration of Final Rule

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I. INTRODUCTION

On December 5, 2003, the Department of Homeland Security, Bureau of Customs and Border Protection ("CBP"), published a final rule relating to Required Advance Electronic Presentation of Cargo Information. Pursuant to 5 U.S.C. § 553(e), the World Shipping Council (the "Council"), the National Industrial Transportation League ("NITL"), the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") and the Retail Industry Leaders Association ("RILA") ("we") hereby petition CBP to suspend, reconsider, and amend the final rule in two respects: (1) amend that portion of the final rule that revised 19 C.F.R. § 4.7a(c)(4)(viii) to clarify that the only "shipper" entities to be reported are those that appear on actual bills of lading under established law and commercial practice; and (2) revise section 4.7a(c)(4)(ix) to clarify the requirements for providing consignee information on "to order" shipments and to remove inappropriate references to master and house bills of lading.

We commend CBP for its efforts to implement the provisions of the Trade Act of 2002, as amended by the Maritime Transportation Security Act (together the "Trade Act"), in a manner that recognizes the commercial needs of international commerce as required by the statute. We recognize that the rulemaking in Docket No. RIN 1651-AA49 was a very substantial undertaking. We also recognize that, because the 24 Hour Rule was already in effect for inbound ocean commerce prior to the Trade Act rules even being proposed, the majority of the issues in the rulemaking involved advance electronic presentation for inbound cargo carried by transportation modes other than ocean. As is discussed below, however, some portions of the final Trade Act regulations governing inbound ocean cargo declarations need to be revisited and amended, because they would

\footnote{68 Fed. Reg. 68140.}
have substantial adverse impacts on international commerce if allowed to remain in effect and because they fail to properly apply the statutory criteria specified in the Trade Act. As such, the final rule must be clarified or amended before CBP begins enforcement.

II. IDENTITY AND INTEREST OF THE PETITIONERS

The World Shipping Council, a non-profit association of over forty international ocean carriers, addresses 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 and logistics services. They carry more than 90% of the United States’ imports and exports transported by the international liner shipping industry, or roughly $500 billion worth of America’s foreign commerce each year.

The National Industrial Transportation League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. Founded in 1907, the League currently has over 600 company members. These members include some of the largest users of the nation’s transportation system, as well as smaller companies. While the great majority of the League’s members are shippers and receivers of goods, some transportation carriers are involved as well. Many members of the League engage in international ocean transportation and utilize the services of ocean common carriers and non-vessel-operating common carriers (“NVOCCs”) that are subject to the rule.

The National Customs Brokers and Forwarders Association of America, Inc. is a non-profit association that, along with its 30 local affiliates, represents approximately
1,000 licensed Ocean Transportation Intermediaries in the United States and abroad. The large majority of the NCBFAA’s members operate as NVOCCs and, as such, are directly affected by the final rule.

The Retail Industry Leaders Association (RILA) is an alliance of the world’s most successful and innovative retailer and supplier companies – the leaders of the retail industry. RILA members represent more than $1 trillion in sales annually and operate more than 100,000 stores, manufacturing facilities and distribution centers nationwide. Its member retailers and suppliers have facilities in all 50 states, as well as internationally, and employ millions of workers domestically and worldwide. Through RILA, leaders in the critical disciplines of the retail industry work together to improve their businesses and the industry as a whole.

III. DISCUSSION

A. Shipper Information.

1. Statutory and Regulatory Background.

The final rule implements § 343(a) of the Trade Act, which provides that “the Secretary is authorized to promulgate regulations providing for the transmission to the Customs Service, through an electronic data interchange system, of information pertaining to cargo to be brought into the United States or to be sent from the United States, prior to the arrival or departure of the cargo.”2 The exact nature of the information to be collected is left to the Secretary’s discretion, subject to, among other parameters, the following requirements:

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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 regulations 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.³

The rule in question, 19 C.F.R. § 4.7a(c)(4)(viii), was initially added to CBP regulations when the 24 Hour Rule was enacted. At that time, the regulation required the following information to be submitted as part of the cargo declaration:

(viii) The shipper’s complete name and address, or identification number, from all bills of lading. (The identification number will be a unique number assigned by U.S. Customs upon the implementation of the Automated Commercial Environment); . . . ⁴

We have had no difficulty with this portion of the regulation. Furthermore, we fully support CBP’s policy reasons for the 24 Hour Rule.

By Federal Register notice published on July 23, 2003, CBP proposed to revise the above requirements to include a parenthetical clarification:

(viii) The shipper’s complete name and address, or identification number, from all bills of lading. (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; the identification number will be a unique number assigned by CBP upon the implementation of the Automated Commercial Environment).⁵

The World Shipping Council filed comments explaining the problems with this proposal, including the fact that the proposed amendment's reference to the "actual shipper" as being the "owner and exporter" was not consistent with actual transportation contracts and bills of lading or with recognized international commercial practices. Moreover, by requiring the carrier to provide information about its customers' customers, the CBP would be seeking information from a party without any direct knowledge as to its accuracy. As pointed out in comments, the proposed rule failed in both of these respects to comply with the Trade Act parameters for obtaining information.\(^6\)

The final rule adopted by CBP amends 19 C.F.R. section 4.7a(c)(4) to require submission of the following "shipper" information:

(viii) The shipper's complete name and address, or identification number, from all bills of lading. (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 foreign vendor, supplier, manufacturer, or other similar party is acceptable (and the address of the foreign vendor, etc., must be a foreign address); by contrast, the identity of the carrier, NVOCC, freight forwarder or consolidator is not acceptable; the identification number will be a unique number assigned by CBP upon implementation of the Automated Commercial Environment); \(\ldots\)\(^7\)

\(2.\) The Problem with the Final Rule's Definition of "Shipper."

Although the final rule appears intended to clarify what parties may be named as "shipper," it in fact both exacerbates the problems that the Council raised with respect to the proposed rule and creates new problems. Cargo declaration information for inbound ocean cargo is derived, as the regulations clearly recognize, from carriers' bills of lading.

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\(^7\) 68 Fed. Reg. 68140, 68169 (December 5, 2003).
As is discussed in more detail below, these bills of lading are or evidence commercial transportation contracts and are issued and regulated by an extensive body of law and commercial practice.

One problem with the parenthetical clarification of the basic requirement that the shipper be reported from “all bills of lading” is that the clarification assumes that “house” bills of lading are created in circumstances in which they in fact are not created, and indeed could not be created under applicable federal law. Specifically, under the Shipping Act of 1984, as amended, through a combination of bonding, tariffing, and service contract regulation requirements, only “ocean common carriers” (ocean carriers) and “non-vessel-operating common carriers” (NVOCCs) may offer common carriage by water in the U.S. foreign trades. Accordingly, as a simple matter of fact, only ocean carriers and NVOCCs issue bills of lading for containerized cargo. Where the ocean carrier deals directly with the cargo interest, the ocean carrier will issue its bill of lading directly to that customer. This is the only bill of lading associated with the shipment, so the concept of “master” and “house” bills of lading does not arise in such cases. Where an NVOCC holds itself out to the cargo interest to provide ocean transportation, the NVOCC will issue a bill of lading to its customer, and the ocean carrier that is providing the physical transportation will issue its bill of lading to the NVOCC as the “shipper” of the ocean carrier. The ocean carrier’s bill issued to the NVOCC is commonly known as the “master” bill, while the NVOCC’s bill to its customer is known as the “house” bill. Customs is familiar with these entities and their documentation practices, especially in the context of the AMS system.

8 46 U.S.C. app. § 1701 et seq.
9 See, e.g., 46 U.S.C. app. §§ 1707, 1709(b), 1718.
Despite the fact that only ocean carriers and NVOCCs issue bills of lading for inbound containerized shipments, the final rule contemplates the existence of “house bills” in the case of “consolidated shipment[s],” a class of shipments that is not defined, but that appears to include shipments in which entities other than ocean carriers and NVOCCs have combined cargo from separate sources into a single shipment. In that situation, the regulation asks for shipper information from “house bills.” As noted above, however, there is no house bill for such shipments unless an NVOCC is involved.\textsuperscript{10}

The final rule could be read to mean either of two things. One interpretation is that in those cases where there is more than one bill of lading issued as part of a transportation transaction (i.e., an ocean carrier issuing a “master” bill to an NVOCC, and an NVOCC issuing a “house” bill to its customer), the shipper information from all bills of lading associated with that shipment must be transmitted through AMS. Under this interpretation, if an entity listed in the parenthetical explanation in the regulation (i.e., “foreign vendor, supplier, manufacturer, or other similar party”) is not reflected on a bill of lading as the “shipper,” then there is no requirement that information regarding that entity be transmitted, because the touchstone of the requirement of the rule is the transmittal of information “from all bills of lading. . . .” 19 C.F.R. § 4.7a(4)(viii). If indeed this meaning is the one intended, we request that CBP confirm this by issuing an

\textsuperscript{10} In this regard we note, as was pointed out in comments submitted by the Council in the proposed rulemaking, that Customs Ruling HQ 115944 (July 8, 2003) includes an erroneous assumption that consolidators and freight forwarders issue house bills of lading. 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 hold itself out as providing ocean transportation and therefore 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 and should be changed.
official clarification to that effect in order that affected parties may understand the extent of their obligations and take steps to fulfill them.

There is, however, another interpretation of the parenthetical description. That this second, broader interpretation is the one that CBP intended is suggested by the wording of the new rule, by the explanatory text at page 68146 of the December 5, 2003, Federal Register notice, and by recent discussions with some CBP personnel. Under this second interpretation, the rule imposes an affirmative obligation for ocean carriers and NVOCCs: (1) to obtain information from their customers about the identity of their customers’ “vendors, suppliers, manufacturers, or other similar parties,” even if that information would not under current commercial practice otherwise appear on a bill of lading and (2) to create separate bills of lading identifying each such entity as a “shipper” on a bill of lading.

For example, with respect to cargo that is consolidated by a third party logistics provider (which entity, acting at the direction of the holder of the transportation contract, would physically tender the cargo to the carrier for transportation and would therefore be listed on the bill of lading as the “shipper” under established commercial practice), the rule would require carriers to obtain the names of the persons or entities that supplied the goods to the consolidator and to provide that information via AMS to CBP. Further, under this interpretation of the rule, the rule would require that these “suppliers” be listed on bills of lading as “shippers.” This follows because the rule requires transmission of information “from all bills of lading,” and because the rule states that the identity of the consolidator is “not acceptable.” In other words, the rule inextricably links the bill of lading and the required vendor or supplier information.
If this is indeed the intended meaning, then the entity listed as the "shipper" today on the bill of lading (the third party logistics company consolidator in the example above that loaded the container and tendered the cargo to the carrier) would be replaced as the shipper on the bill of lading by multiple entities on multiple bills of lading that have no relationship to the transportation contract.

There are serious problems with this second interpretation. The problems involve both conflicts with the Trade Act and also interference with well-established international commercial practices. First, to the extent that the regulation is intended to require carriers in certain circumstances to obtain the names of their customers’ customers, the carriers have no first hand knowledge of that information. Accordingly, the rule would violate the directive of the Trade Act that “[i]n general, the requirement to provide particular information shall be imposed on the party most likely to have direct knowledge of that information.”\footnote{Pub. L. 107-210, § 343(a)(3)(B).} The second problem is that the final rule would require the bill of lading -- a commercial and legal document -- to reflect the names of entities in the chain of commerce that may have no relationship with the carrier or involvement in the transportation. Because these entities may have no relationship to the transportation contract with the carrier, information about those entities would not “under ordinary commercial practices” be “acquired by the party upon which the requirement is imposed,”\footnote{ld.} i.e., the carrier. In addition to violating the Trade Act, this second problem would impose substantial adverse legal and commercial effects on international commerce. Finally, the rule would generate massive confusion and uncertainty in the industry. We address these related problems separately below.
a. The Final Rule Improperly Fails to Obtain Information From the Party With Direct Knowledge.

Under the terms of the Trade Act, the general rule regarding the source of information may only be disregarded -- and information regarding the vendor, manufacturer, etc. can only be collected from carriers -- if certain conditions are met: (1) it must be impracticable for the information to be obtained from the party with direct knowledge; (2) the CBP must take into consideration how, under ordinary commercial practices, the information is received by carriers; and (3) the CBP must consider whether carriers can verify the information.\(^{13}\) None of these conditions has been met, or indeed even considered, in the final rule. As such, the rule would be invalid if it were interpreted to require carriers to submit information about entities with which they have no relationship and about which they have no information. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Texas Oil & Gas Ass'n v. EPA, 161 F.3d 923, 934 (5th Cir. 1998)("Although the [agency] has significant discretion in deciding how much weight to accord each statutory factor under the [act] . . . it is not free to ignore any individual factor altogether.").

i) It is not impracticable to obtain the information from the party with direct knowledge.

CBP can and does collect more detailed information regarding the supply chain from importers upon entry of the goods. In fact, it appears from the regulations and from conversations with at least some CBP officials that the identity of the parties sought under this interpretation of the rule is in fact presently received by CBP in the

\(^{13}\) P.L. 107-210 § 343(a)(3)(B).
merchandise entry process from the importer of the goods. Indeed, in the Department of Homeland Security’s December 11, 2003, letter to Senators Collins and Lieberman of the Senate Government Affairs Committee, the Department stated: “In the sea environment, it is also important to note that ATS [the Automated Targeting System] is able to access and analyze entry data when it is available. This data is the most detailed and accurate information currently available for targeting purposes.” Thus, CBP already receives the information that the rule seems to seek from other parties through a different filing system. It just receives it at a different time than it receives a carrier’s manifest information. If the issue CBP is trying to address is the earlier receipt of merchandise entry data that it already receives today, then we recommend that CBP work with the industry to review the best options for addressing that issue and that process.

Moreover, the Department of Homeland Security has, since the final rules were issued, confirmed that it is not practical to obtain this information from carriers via bills of lading and the AMS system, stating: “The AMS currently receives only data referencing the bills of lading aboard. It is not capable of receiving the more detailed data to be found in a purchase order or its rough equivalent, a Customs entry.” The Trade Act mandates that any requirement to report information “shall be imposed on the person most likely to have direct knowledge of that information.” If CBP needs to have earlier information about the identities of parties involved in the supply or sale of importers’ goods, the Trade Act provides that CBP should determine

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14 The entry information includes packing lists prepared by the foreign consolidator who loads the specific container.
15 Letter from DHS Assistant Secretary Pamela Turner to Senator Susan Collins, Dec. 11, 2003 at p. 2 (emphasis added).
16 Id. at p.3 (emphasis added).
how it can receive the relevant information in the time required from persons with direct knowledge. We commit to work closely with CBP in such a process.

ii) **Carriers do not receive the information under ordinary business practices.**

CBP has also failed to consider whether carriers receive the information sought in the ordinary course of business. As a matter of fact, carriers simply do not routinely receive information about their transportation customers' suppliers. Accordingly, this statutory factor argues strongly against obtaining from ocean carriers the information that CBP seeks.

iii) **Carriers could not reasonably verify the accuracy of such information.**

As noted above, carriers do not receive the information set forth in the rule in the regular course of business. If carriers were to try to collect information from their customers about the customers' suppliers, carriers would not have the resources or ability to verify the completeness or accuracy of such information. Thus, if carriers were to supply such information, they could only do so "on the basis of what [they] reasonably believe to be true." The information would be second hand at best. There is no statutorily permissible reason for the CBP to try to force carriers to change the identity of parties on transportation contracts in order to obtain this data, and, as discussed immediately below, there is no statutorily permissible reason why carriers' customers' rights as "shippers" under bills of lading should be compromised by deleting them from the contract of carriage.

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b. *The Final Rule Improperly Interferes with the Terms of Transportation Contracts and the Identities of the Parties to Such Contracts.*

The statutory requirement that information be obtained from the party with direct knowledge (and the inapplicability here of any of the exceptions to that rule) by itself provides ample reason for CBP to reconsider and amend the final rule. One aspect of the statutory test for when information reporting may be imposed on someone other than the party with direct knowledge warrants additional examination, however. Specifically, the requirement that "the regulations shall take into account how, under ordinary commercial practices, information is acquired by the party on which the requirement is imposed" is of special importance with respect to ocean bills of lading. The record of this rulemaking is completely inadequate in this regard with respect to this issue.\(^{19}\)

As discussed above, the broader of the two interpretations of the parenthetical language in the "shipper" description in section 4.7a(c)(4)(viii) would mean that CBP is:

(1) seeking to compel issuance of additional bills of lading to entities not involved in the

\(^{19}\) The Supplementary Information accompanying the final rule does not indicate that CBP considered the commercial implications of the regulation. Rather, CBP summarily dismissed commercial concerns with the following statement:

Cargo information collected under this rule is not intended for commercial purposes, but rather for purposes of ensuring cargo safety and security as part of an antiterrorism national security initiative (see 19 U.S.C. 2071 note, section (a)(3)(F)). Otherwise stated, it is essential that CBP receive house level information on the identity of the shipper that will enable an accurate national-security risk assessment concerning the related cargo.

68 Fed. Reg. at 68146. We understand that CBP does not collect the information for commercial purposes. Section 343(a)(3)(B) of the Trade Act, however, is concerned with methods used, not the purpose to which the government puts the information. Permissible purposes for collecting data are separately addressed by § 343(a)(3)(F) as CBP noted in the preamble. Purposes aside, then, the fact remains that CBP is attempting to obtain the desired information through fundamental changes to an existing commercial document that has well established meaning and is extremely important to the flow of international commerce. If it wishes to take such a step, CBP must meaningfully address the Trade Act criteria that govern when it is appropriate for information to be required from entities that do not have direct knowledge of the information. That inquiry and analysis did not occur here.
transportation contract, (2) seeking to substitute the names of such entities for the real parties in interest on bills of lading that are currently issued, or (3) seeking to require both (1) and (2). Either way, that interpretation of the regulation would irreparably alter the well-defined role of the bill of lading in international commerce, with substantial negative impacts on control of cargo in transit, cargo liability regimes, contractual responsibilities, and international sales financing transactions. These impacts are discussed further below.

i) The bill of lading as a cargo receipt.

The bill of lading serves as a cargo receipt and documents the contents of a shipment and the party from whom the carrier received the cargo (i.e., the shipper). The regulations would undermine this function of the bill of lading if the carrier were required to name as the “shipper” a party from whom it did not actually receive the cargo.

A long-standing and accepted way for carriers to control their liability for cargo delivered to them in sealed containers (i.e., containers that the shippers have loaded or “stuffed” and sealed prior to delivery to the carrier) is to include a notation on the bill of lading that the goods listed are “shipper’s load and count.” Such a notation indicates that the carrier has not independently verified the quality or quantity of the cargo, thus providing some liability protection if upon delivery it is discovered that the shipper improperly loaded or counted the contents of the container. The term is accepted and used in the very CBP cargo declaration regulations at issue here.20 The practice reflects the fact that the shipper named on the bill of lading is the party tendering the cargo to the carrier and is thus the party with direct knowledge of what merchandise was loaded into the container. This method of apportioning liability and indicating to Customs the

20 See 19 C.F.R. § 4.7a(c)(3).
source of the information being provided on the cargo declaration could no longer be used if the "shipper" to be named on the bill of lading is not the party that loaded the container. This means that in every instance where the "shipper" as defined in the final rule was not the party from which the carrier took delivery, the carrier would either have to accept an uncontrollable commercial and regulatory liability or be required to inspect the contents of the container. Imposing such requirements on carriers would disrupt the flow of international trade, significantly reduce the efficiency of container operations, and increase costs to customers. From the CBP's security perspective, such additional container openings would also substantially impair in-transit security.

ii) The bill of lading as a contract for transportation.

Contracts for transportation involve three parties: the shipper, the carrier, and the consignee (although the shipper and consignee can in some instances be the same party). The bill of lading is a legal document that either is itself the contract or evidences that contract. Mandating the inclusion of a new entity as a "shipper" interferes with the contract and makes that new entity a party to the contract of carriage. This mandatory change in commercial contract terms is beyond the statutorily authorized scope of any CBP regulation implementing the requirements of the Trade Act. Such a change would also have significant legal consequences that CBP does not appear to have considered. For example, as a party to the contract, the new "shipper" would have a right to make a claim against the carrier in the event of loss of or damage to the cargo even though that party no longer has any legal interest in the goods.

In addition to bestowing legal rights on the new "shipper," removal of the real shipper (i.e., the entity from which the carrier takes possession of the cargo) from the bill
of lading would remove that entity from coverage by the Carriage of Goods by Sea Act (COGSA) in the U.S. and similar laws in foreign countries, thus preventing the carrier from limiting its liability with respect to claims by that entity. This is the case because the bill of lading is the touchstone for applicability of COGSA. Allocation of risk through limitation of liability is a major factor in setting transportation rates and obtaining insurance coverage. Undermining the well-established international regime in this area would have serious economic consequences.

In addition, under both the Uniform Commercial Code and the Federal Bills of Lading Act, the “consignor” (shipper) is entitled to direct that goods be stopped in transit. By mandating replacement of the real commercial party in interest with a party whose involvement with the cargo has almost certainly ended before the cargo is tendered to the carrier, the regulations would empower an entity with no interest in the cargo to stop its transportation. The possibilities for mischief and fraud are obvious.

Finally, because a bill of lading reflects a transportation contract, certain obligations and information may flow with the contract, such as the payment of ocean freight and other transportation and documentation charges. We do not see how CBP can reasonably require a party that has previously not been a party to the transportation contract to become one and to bear the accompanying obligations of a shipper.

Moreover, some shippers place considerable importance on keeping the terms of their transportation contracts confidential. Requiring an importer’s suppliers to become

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21 See 46 U.S.C. app. § 1300 ("Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act.").
22 U.C.C. section 2-705(3)(d).
"shippers" on bills of lading could result in their gaining access to commercial transportation terms that have not previously been available to them.

iii) The bill of lading as a document of title.

Many international transactions are financed through letter of credit arrangements in which payment is made against tender of documents to the issuing bank. Typically, presentation of a bill of lading that is consistent in all respects with the underlying contract for purchase and sale of the goods is one of the documentary requirements. Under the regulations as written, there could be situations in which the name of the "shipper" listed on the bill of lading would not match the name of the seller in the underlying purchase and sale documents. Under those circumstances, the issuing bank will not pay under the letter of credit, and the transaction will be thwarted. That rejection would likely occur after the cargo is loaded and on the water, which would exacerbate the commercial and security disruptions.

iv) The bill of lading is an internationally recognized legal document.

The final rule is, for the above reasons, inconsistent with international trading practice, and further may not be compatible with the laws governing bills of lading in other nations. Every international convention governing bills of lading of which we are aware defines "shipper" differently than the regulations.\(^\text{24}\) International comity does not appear to have been considered in the regulations, and conflicts of law may arise.

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\(^{24}\) 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). Similarly, the Hague Convention, the Hague-Visby Rules, and the Hamburg Rules define "shipper" as the party who has entered into a transportation contract with a carrier.
Because of these features of bills of lading, as documents of title, as receipts for cargo, as contracts establishing rights and responsibilities, bills of lading must be treated with great care. The need for such care is evidenced by the U.S. criminal code, which establishes federal criminal penalties for knowingly and falsely making a bill of lading.

The record is clear that the Trade Act’s requirement that the regulations consider how they would relate to and affect ordinary commercial practices was not adhered to.


The regulations, if implemented, would result in the name of an entity with control of the cargo (the shipper as that term is understood today) being dropped from the bill of lading documentation, dropped from the information filed in AMS, and becoming unavailable to the Automated Targeting System’s cargo screening process. In many instances, that entity will be the one that physically loads the container. Losing access to that information could, we believe, impair security screening efforts. We believe CBP should want to know who is consolidating shipments in a container, and who the present shipper is on bills of lading. For example, if this regulation were implemented and intelligence sources were to indicate that sufficient information existed about a consolidator to increase the security risk of a shipment handled by that entity, CBP would lose all visibility about shipments involving such a entity.

Implementation of these regulations would in effect remove consolidators, logistics companies, and other third parties who presently appear as "shippers" on bills of lading and on AMS cargo declarations from the review and scrutiny of the Automated Targeting System. We seriously question whether that is appropriate, or whether it is consistent with the Act’s objectives.

\[ d. \quad \textit{The Rule Would Generate Massive Confusion and Uncertainty in the Industry.} \]

In addition to the problems discussed above, the rule will cause substantial confusion and uncertainty in the industry.

For example, as noted above, the final rule requires, for non-consolidated shipments and for each house bill in a consolidated shipment, the identity of the "foreign vendor, supplier, manufacturer, or other similar party. . . ." But it is entirely unclear what entity could properly be named in these categories. These are not necessarily the same party, and they may be three separate parties. Which one would it be and why? Would any one of them suffice? Furthermore, it is not clear what a "similar party" to these parties would mean or include. Indeed, for goods that undergo multiple stages of processing there may be multiple vendors, suppliers, and manufacturers.

There are numerous other examples of the confusion that is created by the regulation. For example, is a shippers’ association, which is defined in the Shipping Act to be a "shipper,"

\[ ^{27} 46 \text{ U.S.C. app. § 1702(21)(D).} \]

an acceptable "shipper" on a bill of lading under these regulations? Would the shippers’ association’s "suppliers" have to be issued separate bills of lading? Another example of the confusion is whether a trading company that has a transportation contract with a carrier would be an acceptable "shipper" on a bill of lading. Would the
trading company's vendors have to be issued separate bills of lading? For example, if an importer takes title to the goods before tendering the cargo to the carrier, could it be listed as the "shipper," or does title not make any difference, with the importer's vendors still required to be separately identified? If a foreign exporter does not produce or manufacture the merchandise it is shipping to the U.S., must each of its suppliers be issued separate bills of lading naming the supplier as a "shipper"? Underlying all such kinds of questions, is there a consistently applied security objective being met by the regulation? Before such information can properly be requested from the carrier in any form, such issues needs to be clearly addressed.

The final regulation also includes a clause that states: "by contrast, the identity of the carrier, NVOCC ... is not acceptable...." It is very unclear to which situations this "contrast" clause is intended to refer. Furthermore, the identity of an NVOCC should never be unacceptable as the shipper named on a bill of lading issued by an ocean carrier, when the ocean carrier is transporting the cargo for the NVOCC. Indeed, CBP recognized the confidentiality concerns NVOCCs have in providing the underlying shipper/consignee information to carriers when it originally proposed and ultimately promulgated the 24 Hour Rule. In doing so, CBP authorized NVOCCs to submit the relevant shipment manifest data directly to CBP through the AMS system. And, with the implementation of the so-called Special Bill procedure, the rule specifically recognizes that an NVOCC can properly be named as the shipper on an ocean carrier's bill of lading.

These uncertainties and confusion in the text of the rule are not simply a matter of the need for clarification, but they highlight the fundamental problems with the rule itself.
e. **Recommended Change to the Final Rule's Treatment of "Shipper."**

For all of these reasons, it is not permissible for CBP to instruct carriers to name as “shipper” on a bill of lading a party that is not in fact the “shipper” as that term is used in international commerce. Nor is it permissible for CBP to direct carriers to issue bills of lading to entities that would not ordinarily receive bills of lading by requiring “house bill” information where there is in fact no house bill. Because of these problems, the only reasonable reading of the revised § 4.7a is that it requires carriers to submit information regarding vendors, suppliers, etc. only if that information is found on bills of lading in the regular course of business. In order to clarify that this is the intent and scope of the requirement, we request that CBP revise the final rule in one of two ways.

As a first alternative, the language at 19 C.F.R. § 4.7a(c)(4)(viii) could be returned to the version published on October 31, 2002.\(^28\) Coupled with subsequently published guidance in the form of Frequently Asked Questions (“FAQs”), we believe that this option would meet CBP’s objectives. Alternatively, the language could be amended to track more closely the language of the proposed rule (with the deletion of the “actual shipper” and “owner and exporter” language) as published on July 23, 2003.\(^29\)

Specifically, the language could be revised to read as follows:

> (viii) The shipper’s complete name and address, or identification number, from all bills of lading. (For Non Vessel Operating Common Carrier (NVOCC) shipments, whether consolidated or not, the identity of the NVOCC is sufficient at the master bill of lading level; for bills of lading associated with non-NVOCC shipments, and for each house bill of lading for NVOCC shipments, the shipper on the bill of lading must have a foreign address; the identification number will be a unique number.

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\(^28\) 67 Fed. Reg. at 66332.  
\(^29\) 68 Fed. Reg. at 43594.
assigned by CBP upon the implementation of the Automated Commercial Environment.)

This language makes clear that where there are both master and house bills of lading, the information from all such bills must be transmitted. It also makes clear that the entity listed as the shipper must have a foreign address, which insures that CBP obtains the desired foreign origin information. Moreover, this formulation properly describes the relationship between master and house bills of lading. Because all of the requirements embodied in this suggested text were part of the proposed rule, we believe that CBP may, consistent with the Administrative Procedures Act, make the requested clarification without the need for additional notice and comment. We also believe that good cause exists to proceed without notice and comment in the interest of timely publication of a security rule that is understandable and enforceable.

B. Consignee Information.

The final rule as it applies to consignee information suffers from the same flaw with respect to its assumption that master and house bills of lading are issued for consolidated shipments not involving an NVOCC. Specifically, section 4.7a(c)(4)(ix) makes reference to “each house bill in a consolidated shipment,” and also makes references to non-NVOCC consignees in the discussion of consolidated shipments. As is discussed with respect to the shipper issue, there is a “house bill of lading” only in the context of NVOCC shipments. This discussion could be clarified by amending the first two sentences of the parenthetical to read as follows:

For NVOCC shipments, whether consolidated or not, the NVOCC may be listed as the consignee at the master bill of lading level; for bills of lading associated with non-NVOCC shipments, and for each house bill of lading for NVOCC shipments, the consignee is the party to which the carrier or
NVOCC will deliver the cargo in the United States, with the exception [remainder unchanged]. . . .

In addition, the definition in the final rule is potentially inconsistent with the language regarding “to order” shipments in Customs’ 24 Hour Rule FAQs (#32) and in the preamble to the final rules. The final rule would require in all cases that the “to order” party be listed in the “consignee” field, and any other party on the bill of lading for delivery or contact purposes must be listed in the “notify party” field. The FAQs stipulate, however, that the words “to order” are alone acceptable in the consignee field, and in such cases the notify party field must contain the name and contact information for the U.S. owner or owner’s representative. On page 68146 of the Federal Register, the text of the preamble to the final rules is consistent with the FAQs and states: “if the cargo has not yet been sold or is shipped ‘to order,’ and there is no consignee information, then the Notify Party field must include the identity of a responsible party in the United States.” We understand the “to order” requirement in the final rule to apply only where there is a named “to order” party, as is suggested by the bracketed “[a named party]” provision in the final rule. We request that CBP clarify that this understanding is correct.

IV. CONCLUSION

We recognize that CBP faced a very substantial challenge in the development of these Trade Act regulations governing advance electronic presentation of cargo information for all transportation modes. We commend the agency for its efforts, and each of us is committed to working with CBP to address the government’s security objectives in this regard, while also ensuring that the international movement of goods and the commercial instruments that govern their transportation continue to operate efficiently and effectively, and in accordance with existing commercial law.
Changing the identity of the shipper on a bill of lading is not a viable way to obtain information about the parties selling goods to an importer. The bill of lading was adopted as the vehicle for gathering the information desired in the original 24 Hour Rule because it was already referenced by existing regulations regarding cargo declarations. Indeed, in the absence of the statutory authority provided by the Trade Act, the bill of lading was seen as the only option. For a limited purpose (i.e., the original 24 Hour Rule and the reasonable level of existing commercial information there required), the bill of lading is an appropriate instrument. As CBP seeks to expand its information gathering efforts under the Trade Act, however, the scope of the information sought goes well beyond anything that the bill of lading was designed for or can accommodate.

We therefore respectfully request that the amendments to § 4.7a(c)(4)(viii) (regarding “shipper”) be repealed and that either the previous version of the regulation be reissued or the modified language set forth above be substituted for the language in the final rule. We also request that the changes suggested above regarding consignee information be adopted. During the pendency of Customs’ review of this request for reconsideration, we request that enforcement of the rule as it applies to the definitions of “shipper” and “consignee” be based on the language of the rule as promulgated on October 31, 2002. We look forward to working with CBP to address these issues in the best way practicable.
Respectfully submitted,

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