



WORLD SHIPPING COUNCIL  
PARTNERS IN TRADE

## **Statement Regarding Legislation to Require 100% Container Scanning**

July 30, 2007

The first session of the 110<sup>th</sup> Congress has enacted H.R. 1, the “9/11 Commission Recommendations” legislation, which the President has said he will sign. Included in that legislation is a provision, which was *not* a recommendation of the 9/11 Commission, that requires, effective July 2012, that all maritime cargo containers being imported into the United States must be “scanned” at foreign ports of loading or they will be denied entry into the country.

This so-called “100% scanning”, or “100% container inspection” requirement as it is sometimes called, was opposed by the Department of Homeland Security (DHS), Customs and Border Protection, present and former government security experts, the U.S. Chamber of Commerce, all major cargo shipper organizations, the ocean carriers transporting the cargo, as well as the European Commission and the governments of America’s trading partners, including Belgium, Canada, Denmark, Finland, France, Germany, Greece, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Singapore, Spain, Sweden, and the United Kingdom.

Why was such a proposal opposed by virtually all elements of the global trading system? Was it because of cost? No. Was it because of a lack of commitment to enhancing cargo security? No. It was in the words of the *Washington Post* “a bad idea” and “a slogan not a solution”. It was because the legislation is not only unworkable, but that the Congress failed to even try to address fundamentally critical questions about how such a system would actually operate.

### **The New Law**

The legislation provides:

*“(1) In General.—A container that was loaded on a vessel in a foreign port shall not enter the United States (either directly or via a foreign port) unless the container was scanned by nonintrusive imaging equipment and radiation detection equipment at a foreign port before it was loaded on a vessel. (2) Application.—Paragraph (1) shall apply with*

*respect to containers loaded on a vessel in a foreign country on or after the earlier of –(A) July 1, 2012; or (B) such other date as may be established by the Secretary under paragraph (3).”*

## **The Problems**

The House passed H.R. 1 without having Committee hearings or allowing floor amendments on this issue. The Senate did not have a hearing on these issues.

Nevertheless, every one of the following issues was repeatedly brought to the attention of the Congress by numerous parties, but without effect.

1) Pilot Programs Ignored: Pursuant to the SAFE Port Act passed by the Congress just last year, the Department of Homeland Security has established pilot programs under the “Secure Freight Initiative” in a number of ports around the world to test the concept of scanning containers loaded onto ships destined for the U.S. Those pilots are still underway, and their lessons have not been examined or considered.

2) Failure to Define Who is To Perform the Container Scanning: It would seem elementary that U.S. legislation requiring every container to be scanned before being loaded onto a vessel in a foreign port would address the issue of who is to perform this activity. This legislation fails to do so. It does not require U.S. Customs to do this, as it is clearly impossible for the Congress to require U.S. Customs to undertake such activities within the jurisdiction of other sovereign nations. It does not require foreign governments to do so, as it has no such authority. The legislation simply says that containers shall be scanned. By whom? By governments? By foreign port facility operators? The Members of Congress sponsoring this legislation took the position only last Congress that one of the largest port facility operators in the world, Dubai Ports World, was an unacceptable security risk to buy a U.S. marine terminal operating company and hire U.S. workers to service vessels in U.S. ports. Is that company, and other private terminal operating companies, now who Congress looks to scan U.S. bound containers in foreign ports? Does Congress care who performs this activity? If Dubai Ports World now undertook this role, would the Congress approve such a role? One would think such a basic question would have been subject to some examination by the Congress and some answers.

3) Failure to Define Who is to Purchase, Operate and Maintain the Technology: Related to the above question, is the failure of the legislation to define who is expected to undertake the substantial capital commitments and operational responsibilities to implement such a system.

4) Failure to Address Health and Safety Issues: The legislation fails to recognize the need to address the health and safety issues relating to the use of this equipment. Even if the equipment performs to the U.S. government’s health and safety regulatory requirements, other governments have different standards. Furthermore, labor and

workforce acceptance of driving through non-intrusive imaging (NII) equipment remains a significant issue. U.S. port labor will not do so. As a practical matter, this legislation requires the rest of the world to do what cannot be done today in U.S. ports.

5) Failure to Seek or Obtain the Necessary Cooperation of Other Governments: No expansion of overseas container inspection will occur without the cooperation and consent of foreign governments. This law fails to even acknowledge the need for their cooperation. Customs and Border Protection has spent considerable effort since 9/11 to build cooperative bilateral Customs-to-Customs working agreements at seaports around the world through its Container Security Initiative (CSI). The success of CSI is based on mutual respect, recognition of other nations' sovereignty, cost sharing, and targeted priorities. This legislative mandate is devoid of those qualities.

6) Failure to "Practice What You Preach" – No Reciprocity: Congress was repeatedly advised of the difficulty of this legislation's requiring 600 ports around the world to approve, implement and utilize such technology, systems and processes for all cargo destined for the U.S. or effectively face an embargo on their exports, when the U.S. government does not even try to perform this function on its export cargo, scans virtually zero U.S. export containers, and has no plans to do so. If implementation of this law is actually pursued, it is entirely possible, if not highly likely, that foreign governments would establish "mirror image" requirements on the U.S., forcing all American export containers to undergo radiation and NII scanning before vessel loading at U.S. ports -- requirements which the U.S. government and U.S. port facility operators are presently and for the foreseeable future incapable of meeting.

7) Failure to Define the Scanning Requirement: Congress recognized that 100% container "inspection" is impractical and therefore requires instead that every container be "scanned by nonintrusive imaging equipment and radiation detection equipment at a foreign port before it was loaded on a vessel." This by itself would be pointless. The law fails to address what is to be done with the scanning data generated, whether or when the data from the scanning equipment is transmitted to the U.S. government, or who is to analyze the data generated.

8) Failure to Address Scanning Analysis Responsibility: The law fails to address whether the scanning data actually has to be reviewed and analyzed, and if so, under what circumstance, when and by whom? In essence, it fails to identify how the technology is to be used. Will the images of every scanned container have to be reviewed? If not, when are the images to be reviewed and by whom? Are they simply to be filed in an electronic library somewhere? If so, is it reasonable to ask other nations to invest hundreds of millions of dollars in such equipment, plus labor, maintenance and operating costs, if these images will only be used on an exception basis or for "forensics"? This cost/benefit question is even more relevant in light of Members of Congress' criticisms of the efficacy of the equipment currently being used for these purposes by DHS, especially after questions about such equipment were recently raised by the Government Accountability Office. Further, the law fails to try to address what is done if one of the scans identifies an anomaly that requires secondary inspection – a common occurrence

with the use of these technologies. These are fundamentally important issues with difficult operating protocols and significant costs associated with them – all of which the legislation does not address.

### **“Extension” Authority**

Recognizing that this legislation has fundamental problems, some have noted that the law grants the Department of Homeland Security discretion to extend the effective date of the requirement. Before examining that part of the legislation, it is important to note that the law does not allow DHS to amend or adjust the law’s requirement, only to extend the effective date of the 100% container scanning requirement.

The law provides:

*“Extensions.—The Secretary may extend the date specified in paragraph (2)(A) or (2)(B) for 2 years, and may renew the extension in additional 2-year increments, for containers loaded in a port or ports, if the Secretary certifies to Congress that at least two of the following conditions exist:*

*“(A) Systems to scan containers in accordance with paragraph (1) are not available for purchase and installation.*

*“(B) Systems to scan containers in accordance with paragraph (1) do not have a sufficiently low false alarm rate for use in the supply chain.*

*“(C) Systems to scan containers in accordance with paragraph (1) cannot be purchased, deployed or operated at ports overseas, including, if applicable, because a port does not have the physical characteristics to install such a system.*

*“(D) Systems to scan containers in accordance with paragraph (1) cannot be integrated, as necessary, with existing systems.*

*“(E) Use of systems that are available to scan containers in accordance with paragraph (1) will significantly impact trade capacity and the flow of cargo.*

*“(F) Systems to scan containers in accordance with paragraph (1) do not adequately provide an automated notification of questionable or high-risk cargo as a trigger for further inspection by appropriately trained personnel.”*

It is presumably the ambiguity and flexibility of this language that has allowed the President to sign this legislation, as it might be used to extend these requirements, perhaps indefinitely, although that is not clear and could be arguable.

Criteria (A) would seem meaningless as a justification for extension, as radiation and NII scanning systems are “available”. Criteria (C) is of limited application because ports’ “physical characteristics” are not generally among the principal issues involved with implementing such a concept. Criteria (D) does not define what “existing systems” means. Criteria (B) and (F) are confusing because NII scanning equipment, unlike radiation scanning equipment, neither produces “alarms” nor “automatic notification of questionable or higher risk cargo”. So what does this mean?

Without belaboring the point, the “extension” authority portion of the legislation is unclear, but the Administration would seem to have some ability to avoid application of the implementation date of the law.

It is therefore odd, disconcerting, yet entirely predictable that this legislation produces both statements from Members of Congress that the law will require 100% container scanning at foreign ports by 2012, and statements from other observers that the law is wholly impractical and thus it is unlikely to be applied because the U.S. government will not cut off its own commerce with countries that do not implement 100% container scanning before vessel loading.

This provides little comfort or certainty to governments and ports around the world that are trying to understand what this legislation passed by the Congress of the United States actually means and what its implications are.

### **The Path Forward**

Roughly \$500 billion of annual American commerce is affected by this law.

What is clear is that this issue deserved a more open process of analysis and debate, that other governments resent the unilateral dictates and hypocrisy in the law, and that there are over 600 ports around the world trying to figure out what this legislation means.

The issue of how to continuously improve containerized cargo security is important to the American public, to American commerce, and to the shippers and carriers and ports involved.

There are a range of existing efforts to address this challenge, including:

- the “24 Hour Rule” and the advance screening and risk assessment of cargo shipment information before vessel loading for 100% of all containers coming to the U.S.:

- the Container Security Initiative noted earlier;
- the Customs Trade Partnership Against Terrorism initiative;
- the radiation screening of virtually every container arriving at a U.S. port;
- the inspection of every container that Customs and Border Protection believes presents a significant security question;
- security plans overseen by the Coast Guard for every vessel entering a U.S. port and every port facility;
- the Department of Energy’s “Megaports initiative”, which provides radiation detection equipment and trains personnel abroad to check for nuclear materials. In exchange, DOE requires that data be shared on detections and seizures that resulted from the use of the equipment. This initiative and the CSI initiative are collaborative efforts by two different U.S. agencies, DOE and DHS, working with host countries to reduce the risk of terrorism.
- the International Port and Security Program (IPSP) initiative, under which the U.S. Coast Guard and host countries work together to evaluate compliance with the International Ship and Port Facility Security (ISPS) Code. This information improves U.S. and foreign security practices, and helps assess if additional security precautions will be required for vessels arriving in the U.S. from other countries.
- as well as two major emerging DHS initiatives – the “10 plus 2” program, under which Customs and Border Protection will require importers to provide 10 additional data elements before vessel loading for enhanced security targeting and 2 additional streams of operating data from ocean carriers to assist in the tracking of container movements, and the Transportation Worker Identification credential that will provide DHS security screening of transportation workers.

Neither the government nor the industry is ignoring the enhancement of maritime security.

To the extent a vision for 100% container scanning of containers on a global basis is to be moved forward, it will require a more open, consultative examination of the real world issues involved than what transpired in the debate and enactment of H.R. 1.

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