

**Treasury Advisory Committee on Commercial Operations of the US
Customs Service (COAC)**

Report and Recommendations on Confidentiality of US Manifest Data

Background

Current law provides for public disclosure of data contained in a vessel manifest. Under 19 USC 1431, certain manifest information, when contained in a vessel manifest, shall be available for public disclosure. The statute identifies the data elements to be made public:

- Name and address of each importer or consignee and the name and address of the shipper to such importer or consignee.
- General character of the cargo.
- Number of packages and gross weight.
- Name of the vessel.
- Seaport of loading.
- Seaport of discharge.
- Country of origin.

The implementing regulation, 19 CFR 103.31, outlines the procedures for public access. The list of data elements to be provided to the public includes "Shipper name," "Shipper address," "Consignee name," "Consignee address," and "Description of goods." Also, as the statute provides, the regulation sets forth the procedure for an importer or consignee to request confidential treatment of certain identifying information. Although the "opt out" process can be inefficient and individual certifications must be updated every two years, more than 1,700 importers make use of the procedure. (Although not specifically tied to the current rule under consideration, there are flaws in the current "opt out" process and we encourage Customs to work with the trade to develop a better process.)

Ocean carriers' manifest information has been made public for many years. A wide range of commercial interests have access to that information today, purchase it, and use it in their business planning. Other entities, including state governments, port authorities and the Customs Service itself, also purchase and use this information. There are many legitimate uses for the data, including identifying markets, developing customers; uncovering import quota violations, as well as fighting counterfeiting and patent infringement.

How the New Advance Manifest Requirement Changes the Status Quo

Technically, the new rule does not change the underlying statutory provision as to data elements available to the public. However, the new rule does change the information required to be provided under certain data elements and the timing of data submission. Thus, implementation of the new rule may dramatically increase the detail in the merchandise descriptions and thus affect the information available in the public domain.

First, the new rule requires a more precise description of the cargo. While the statute requires disclosure of the "general character of the cargo," compliant descriptions under the new rule will generally include more information. In fact, the increased detail which Customs requires for security reasons is far more detailed than the "general character" that the statute authorizes to be disclosed.

Second, different and additional parties are allowed to submit manifest information to Customs under the new rule. Manifest information was previously submitted to Customs by carriers. Application of the rule to Non Vessel Operating Common Carriers (NVOCC's) would, for the first time, require publication of the shipper/consignee data on NVOCC traffic. Under the new rule, house bill of lading detail will be available for public scrutiny.

Third, the new rule requires that manifest information be provided to Customs at an earlier point in time, i.e., at least 24 hours before lading at the foreign port.

Potential Concerns

The new rule has raised two broad areas of concern among some entities in the international supply chain: security and business confidentiality.

a. Security

The requirement that more precise data be provided at an earlier point in time raises concerns that the information, in the wrong hands, could heighten security risks. Others have pointed out that many, perhaps even most, security losses are inside jobs. Even so, more information provided earlier could increase opportunities for insider theft and could afford easier cargo access to terrorists, exactly the risk that the rule is designed to address. Customs has stated that "[w]ith regard to the concern that release of advance information prematurely can raise new security concerns, Customs will not be releasing information from cargo declarations until the complete manifest is filed with Customs." In other words, information from the CF 1302 cargo declaration will not be made publicly available until the filing of the entire and complete manifest with Customs at the

time of formal entry of the vessel, i.e., after unloading of cargo in the U.S. port of discharge. In practical terms, this will typically mean that the cargo declaration information will only be publicly available after the cargo has been delivered to the consignee's facility.

Some parties have indicated that the security and theft concerns attendant to the new rule are not alleviated by the delayed publication. Some believe that unless some further substantial delay on publication is made, potential terrorists or thieves could use the more detailed cargo descriptions and shipper/consignee information to possibly ascertain shipping patterns and take advantage of this to further their own goals.

The subcommittee recommends that Customs adhere to the statute and only release "general" descriptions of the character of the cargo, and not the more detailed text or 6-digit HTS numbers on the manifest.

b. Business confidentiality

Ocean carriers' manifest information has been made public pursuant to existing law for decades. Arguably, the rule would result in a leveled playing field, where both carrier and NVOCC information would be made public.

On the other hand, some parties feel that their manifest information should be viewed as confidential business information. While the statutory data elements remain unchanged, the information to be disclosed will now require actual underlying shipper/consignee identification for NVOCC movements and more precise product descriptions for all sea cargo. While carrier information is routinely disclosed, NVOCC's view their underlying shipper/consignee information as commercially sensitive. It is unclear whether the NVOCC information, with bill of lading detail, should be viewed as more commercially sensitive than that provided by the ocean carriers.

The NVOCC's and carriers are not similarly situated in the supply chain. In some respects, they are competitors. At the same time, the NVOCC's are dependent on the vessel operating carriers for carriage of the goods. Because of this complex business relationship, it may or may not be appropriate to treat the sensitive information of both parties the same.

Notice of Proposed Rulemaking

In the January 9, 2003 Federal Register (Tab 6), Customs published a notice of proposed rulemaking to address cargo manifest confidentiality. The change would allow any party that electronically transmits sea vessel cargo manifest information directly to Customs to request confidentiality with respect to the

identity of the importer or consignee. Currently, only an importer or consignee (or authorized employee, attorney or official of the importer or consignee) may submit a certification requesting confidentiality.

The proposed rule expands the scope of who may file such a request. Under the proposed rule, the claim for confidential treatment may be submitted by any party that transmits the manifest data to Customs. If that party is not the importer or consignee, then the request for confidentiality may be submitted only on behalf of an importer or consignee, and then only if the importer or consignee designates such party as its attorney-in-fact authorized to submit a certification on the importer's or consignee's behalf. A letter of authorization must be submitted with the request. The proposed rule could allow NVOCC's to request confidentiality by addressing this in their contractual agreements with importers or consignees, unless, of course, the importer or consignee wants the information made public.

Status and Recommendations

As discussed above, issues regarding the confidentiality of cargo manifest information remain unresolved. Some argue that these concerns can be alleviated by the provisions allowing biennial requests for confidentiality. Others argue that the proposed rule change allowing requests to be filed by parties other than the importer could alleviate some concerns, but it may create other issues for other parties. Others argue that there is no reason to change existing law or policy. The notice of proposed rulemaking was published on January 9, 2003, with a comment period extending through February 10, 2003.

An important underlying policy issue remains unresolved. For many years, ocean carriers have been providing shipper/consignee information that is ultimately made public. Now that NVOCC's are required to file their own manifests, there are differences of opinion over whether there should be changes to public access to shipper/consignee information. There are important legitimate business interests involved, both in preserving confidentiality and in promoting public access to information. The two business models are different. It is unclear whether applying the same confidentiality rules to both truly results in a level playing field.

The subcommittee received written opinions from parties interested in this issue. These memos are attached at Tabs 7, 8, 9 and 10.

COAC is not in a position to recommend whether the information should be made public, but we do recommend that the underlying policy issue be carefully analyzed and addressed. Simply viewing the statute as requiring disclosure and preserving the *status quo* misses the point. The new advance manifest rule does change the information that will fall into the public domain. These changes must

be carefully considered. If the information should not be subject to public disclosure, then the law should be changed. If the information should be disclosed, then the existing law may be adequate. In either case, enforcement activity should be suspended until the underlying policy issue is addressed.