

## Conclusion

Deviations are the result of operational decisions. Masters, officers, and personnel in both shipowner's and charterer's offices, are reminded of the significant legal consequences that may arise.

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## THINK DIFFERENT: IF A CONTAINER COULD BE THE "21ST-CENTURY TROJAN HORSE", MUST THE U.S. MANDATE 100% SCANNING OF ALL U.S. BOUND CARGO CONTAINERS?

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Presently, the U.S. scans 100% of cargo containers bound for the U.S. that are deemed *high risk*. This is scheduled to change in July, 2012, when all U.S.-bound containers are to be scanned pursuant to a 2007 law regardless of perceived risk. Will this occur? Is it possible given today's technology and other logistical challenges? Most maritime industry insiders have long said the deadline is impossible to meet and Department of Homeland Security officials recently acknowledged as much. It now appears the U.S. Congress agrees. Notwithstanding the fact Senator Susan Collins of Maine is concerned a container may be the "21<sup>st</sup> Century Trojan Horse", her co-sponsored bill, the SAFE Port Reauthorization Act of 2011, will eliminate the mandate to screen 100% screening of all U.S. bound containers.

When reviewing the SAFE Port Reauthorization Act of 2011 bill, S. 832, it is unlikely anyone would think of Apple Computer's iconic ad campaign from the 1990's, Think Different. But with the untimely passing of visionary Steve Jobs on October 5, 2011, all things Apple are rerun by the media. And it happens to be that the Think Different campaign can be tied to today's port security debate.

The Apple ad campaign begins by stating, "[h]ere's to the crazy ones. The rebels. The troublemakers. The ones who see things differently..." In the United States in particular, September 11, 2001, forced us to "see things differently" concerning security issues. On that day, airports were the gateway regions used by terrorist to attack the United States. Seven years later, terrorists used the Port of Mumbai as a gateway region to carry out attacks in India. Fortunately, the U.S. government did not need events in Mumbai to focus its attention on increased security measures in the nation's ports.

Before September 11, the concept of a U.S. port being used as a gateway for a terror attack was mostly limited to discussions by a handful of maritime security specialist and Tom Clancy's novel and later movie, *The Sum of All Fears*. In Tom Clancy's world, you may recall a bomb was hidden within what appeared to be a cigarette vending machine which entered the U.S. by vessel in the port of Baltimore. After September 11, the U.S. began to reevaluate all potential targets within its boundaries and in particular, U.S. ports which are overflowing with foreign vessels on a daily basis. This reevaluation resulted in the U.S. Congress passing critical port security laws.

Of the laws passed, maritime attorneys are likely most familiar with the Maritime Transportation Security Act of 2002 which, among many other things, required people in and around a port, including attorneys, to obtain a Transportation Worker Identification Credential ("TWIC"). TWIC cards allow certain access to restricted areas in ports. On a larger scale, U.S. Customs also implemented two critical initiatives; the Container Security Initiative ("CSI"), and the Customs-Trade Partnership Against Terrorism ("C-TPAT").

CSI is not only a popular television program. The maritime-related CSI focused on tackling security issue overseas by identifying high risk containers both technologically with x-ray machines and with more careful human inspection by looking for signs of container seal tampering. C-TPAT put the onus on private companies in the supply chain. If companies wanted containers to move as swiftly as possible, they could enter the C-TPAT program and agree to follow certain guidelines and accept increased security measures. By submitting an application to U.S. Customs to join the program, the company subjected itself to careful scrutiny of all aspects of its supply chain. It was no longer too invasive to inquire about certain practices of business partners; companies were now required to ask delicate questions and provide the information to the federal government.

### SAFE Port Act of 2006

When Congress passed the Security and Accountability for Every Port Act of 2006 (known as the SAFE Port Act), it codified the CSI and C-TPAT initiatives and added new security measures. Pub. L. No. 109-347 (2006); codified at 6 U.S.C. § 901 *et seq.* Among the SAFE PORT Act initiatives are:

- Unannounced inspections of maritime facilities (Section 103);
- Port security grants to allocate funds for port infrastructure (Section 112);
- Random Searches of Containers (Section 123); and
- Establishment of a Domestic Nuclear Detention Office (Section 501)

The Act also has other curious provisions tacked on at the end, such as requiring a study of the movement of methamphetamine chemicals in and around the U.S. (Section 707), and a controversial Internet gambling enforcement prohibition (Section 802). Ironically, these two tack-on provisions have resulted in almost as much legal analysis as the port security measures.

The most notable provisions, however, concern the domestic radiation detection (Section 121) and imaging and screening and scanning of cargo containers (Section 232). The latter provisions ensured that 100% of “high risk” containers are scanned by “nonintrusive imaging equipment and radiation detection equipment.” (Section 232(a)-(b)). The Secretary of Homeland Security is required to submit a report to congressional committees every six months concerning the effectiveness of the screening equipment based on six enumerated criteria. Of course, one would expect that all containers deemed “high risk” would be screened in some fashion (and they already were thanks to the CSI initiative). The real difficulty for the maritime industry was contained in the former provision; the goal of 100% screening of U.S. bound containers by the end of 2007. Section 121(a) provides:

*Subject to section 1318 of title 19, United States Code, not later than December 31, 2007, all containers entering the United States through the 22 ports through which the greatest volume of containers enter the United States by vessel shall be scanned for radiation. To the extent practicable, the Secretary shall deploy next generation radiation detection technology.*

Almost immediately, the 100% screening expectation was loathed by the maritime industry as impossible

to implement with the current technology, too expensive, and would cause inordinate delays up and down the security chain. A year later, Congress implicitly agreed that December, 2007 was too ambitious and the Section was amended. The Implementing Recommendations of the 9/11 Commission Act of 2007, amended the SAFE Port Act by extending the 100% screening deadline from December 31, 2007 to July 1, 2012. Pub. L. No. 110-53, Section 1701, codified at 6 U.S.C. § 101 *et seq.* Moreover, if the Secretary of Homeland Security stated to Congress an earlier deadline could reasonably be set, it would be. Or the Secretary may request extensions in two-year increments. Suffice to say, an earlier deadline was never set.

The balance between increased security and commercial practicalities has been difficult to achieve since the passing of the SAFE Port Act. For example, on December 14, 2007, U.S. Customs published a Notice of Proposed Rulemaking which would “require both importers and carriers to submit additional information pertaining to cargo before the cargo is brought into the United States by vessel.” 42 Cust. B. & Dec. 4 (Customs), 2007 WL 4754810. The Notice contains many comments by commercial interests over specific requirements, especially with respect to the costs expected to be incurred in procuring and submitting the additional information for vetting. In almost all cases, U.S. Customs disagreed with the comments proffered and ensured the industry that it has consulted with the maritime community and organizations (as required under the SAFE Port Act), when developing its proposal and made the proposals as cost efficient as possible. *Id.*

At bottom, there are some security measures which are vital enough that the U.S. will push for the requirements and offer incentives to offset the administrative infrastructure necessary for maritime companies to comply with the law. However, there are other instances where cost is not necessarily the issue – 100% screening of containers may be one of them. U.S. officials recognize during the last few years that the technology is simply not in place to complete the screening of all U.S.-bound containers overseas no matter how much money is spent. Incidentally, the European Commission is only now assessing a 100% screening target and is not expected to call for such an implementation anytime soon. With the to July 1, 2012 deadline in the 9/11 Act, now in place, members of Congress are presently seeking to eliminate the 100% screening provision altogether.

### **SAFE Port Reauthorization Act of 2011**

Last year, U.S. Senators Patty Murray (Washington), and Susan Collins (Maine), both representing important gateway port regions on the West and East Coast, respectively, introduced a bill which among other things revised the 100 % screening date. Though that bill died in committee, on April 14, 2011, the Senators introduced a new bill, S. 832, entitled the SAFE Port Reauthorization Act of 2011. It is expected the new bill has a better chance at passing because the July 1, 2012, deadline is inching closer. The bill was referred to the Committee on Homeland Security and Governmental Affairs and remains in committee.

Leaving nothing to chance, Senator Collins delivered an impassioned speech from the Senate floor on April 14 which put in stark terms the importance of the port security measures. She reminded her colleagues they need to, to borrow Apple's phraseology, "think different" when it comes to container security at ports. Containers do not merely deliver U.S. consumers' precious TVs and iPods — they could be rigged to carry hidden weapons of mass destruction:

*The scope of what we need to protect is broad. America has 361 seaports – each vital links in our nation's transportation network. Our seaports move more than 95 percent of overseas trade. In 2010, United States ports logged 57,600 ports-of-call by foreign-flagged cargo vessels, bringing 11 million shipping containers to our shores.*

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*Maritime shipping containers are a special source of concern. A single obscure container, hidden among a ship's cargo of several hundred containers, could be used to conceal a dirty bomb. In other words, a container could be turned into a 21st-Century Trojan horse. The shipping container's security vulnerabilities are so well known that it has also been called "the poor man's missile," because for only a few thousand dollars, a terrorist could ship a weapon or explosive across the Atlantic or the Pacific to a U.S. port.*

Senator Collins notes the proposed bill will reauthorize CSI and C-TPAT, bolster other aspects of the original Act, and most notably, completely "eliminate" the 100% screening deadline. She argues that with the current technology, the requirement is "misguided and provides a false sense of security." Senator Collins explained:

*This legislation also addresses the difficulties in administering the mandate of x-raying and scanning for radiation all cargo containers overseas that are destined for the United States by July 2012. Until x-ray scanning technology is proven effective at detecting radiological material and not disruptive of trade, requiring the x-raying of all U.S. bound cargo, regardless of its risk, at every foreign port, is misguided and provides a false sense of security. It would also impose onerous restrictions on the flow of commerce, costing billions with little additional security benefit.*

*Under the original provisions of the SAFE Port Act, all cargo designated as high-risk at foreign ports is already scanned for radiation and x-rayed. In addition, cargo entering the U.S. at all major seaports is scanned for radiation. These security measures currently in place are part of a layered, risk-based method to ensure cargo entering the U.S. is safe.*

*This legislation would eliminate the deadline for 100% x-raying of containers if the Secretary of Homeland Security certifies the effectiveness of individual security measures of that layered security approach. This is a more reasonable method to secure our cargo until a new method of x-raying containers is proven effective and feasible.*

Though most of the attention surrounding the bill has focused on the elimination of the 100% screening of U.S.-bound containers, there are other key proposals which the maritime industry had sought or which were expected to be included based on experiences with the 2006 Act:

- Unannounced inspections of a C-TPAT partner's security measures based on previously identified deficiencies (Section 3);
- Congressional oversight of arrangements between the U.S. and foreign governments for increased security measures in exchange for certain benefits (Section 4);
- Individuals and authorized officials who in good faith report suspicious activity in and around a port may be immune from civil liability (Section 6); and
- Requiring quicker determinations of port security grant application extensions (Section 7)

The elimination of the 100% screening requirement is addressed in the bill as permissive so long as the 100% screening of high risk cargo containers inbound to the U.S. is proceeding properly. (Section 5).

### Conclusion

Most of the SAFE Port Reauthorization Act of 2011 provisions are not controversial. Having found the original Act to be most effective, it is a simple reauthorization of proven security measures and appropriation of suitable funding for the measures. The interesting choice the Senators have made is to reject fully the concept of setting a goal for 100% screening of all containers. Though proven to be unrealistic, the target dates set by the 2006 Act and the 9/11 Act spurred technology companies and start-up initiatives using venture capital money to invest in screening technology that could meet the mandated demand. By removing a target date altogether, it eases pressures and raises the concern of negatively impacting the security technology race for developing what Senator Collins has called, "new method of x-raying containers [that] is proven effective and feasible."

Without the U.S. government stick of mandated screening by a date certain with the concomitant carrot of government monies to purchase the technology, will someone in the maritime technology industry be motivated to "see things differently" and continue the massive time and fiscal expenditures associated with technology needed to achieve 100% screening? The answer is likely yes because of the growing need for heightened port security measures in all regions of the world. PwC recently published a white paper entitled *Transportation & Logistics 2030, volume 4: Securing the Supply Chain*. It provides a comprehensive review of current security measures and risk assessments in the decades to come which can impact the cargo chain. In particular, it highlights the importance of 39 "major gateway regions which account for 90 percent of world trade" with the most important gateway system in North America being the Los Angeles/Long Beach port system.<sup>2</sup>

Citing a Congressional Research Service report, PwC notes that a nuclear bomb being set off in a gateway region or harbor could result in "\$50 to 500 billion in direct property damage, \$100 to 200 billion losses due to trade disruptions and additional \$300 billion to \$1.2 trillion in indirect costs." With the amount of money at stake, let alone the potential loss of life, risks such as this should provide enough internal motivation to spur x-ray technologies. However, it would not be surprising if a new target date for 100% screening of all U.S. bound containers finds its way

into the final version of the SAFE Port Reauthorization Act voted on by Congress.

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2. The PwC/AON figure annexed herein highlights the "Supply Chain Security Map – Global Gateway Regions." (*see graphic on the top of page 12*)

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THE ARBITRATOR (ISSN# 1946-1208) is issued quarterly, 4 times a year; published by The Society of Maritime Arbitrators, Inc., 30 Broad Street, 7<sup>th</sup> Floor, New York, NY 10004. The publication is posted on our website and the subscription is free. To join our mailing list please register your email address at <http://www.smany.org>.

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