S. HRG. 111–971

CUSTOMS FACILITATION AND TRADE ENFORCEMENT ACT OF 2009

HEARING

BEFORE THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

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CUSTOMS FACILITATION AND TRADE ENFORCEMENT ACT OF 2009

TUESDAY, OCTOBER 20, 2009

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, DC.

The hearing was convened, pursuant to notice, at 10:09 a.m., in room SD–215, Dirksen Senate Office Building, Hon. Max Baucus (chairman of the committee) presiding.

Present: Senators Wyden and Grassley.

Also present: Democratic Staff: Bill Dauster, Deputy Staff Director and General Counsel; Amber Cottle, Chief International Trade Counsel; Ayesha Khanna, International Trade Counsel; Hun Quach, International Trade Analyst; and Ryan Nalty, Associate. Republican Staff: Stephen Schaefer, Chief International Trade Counsel; and Claudia Poteet, International Trade Policy Advisor.

OPENING STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM MONTANA, CHAIRMAN, COMMITTEE ON FINANCE

The CHAIRMAN. The committee will come to order.

The Scottish historian John Buchan warned reformers to learn from the past. He counseled: "History gives us a chart."

The Bureau of Customs and Border Protection, or CBP, has a long and rich history. As we reform CBP for the 21st century, we would do well to study the chart that this history gives us.

In 1789, one of the first five laws enacted by the first Congress established a Collector of Customs. This organization ultimately became the United States Customs Service, and then CBP. For 220 years, it has collected duties and enforced America's trade laws.

In 2002, CBP got a new job. It still has to fulfill its traditional trade mission, but in addition CBP must also secure our Nation's borders. These two missions are not mutually exclusive. CBP must do a better job of balancing them. The Agency's security mission is certainly vitally important, but I am concerned that CBP has badly neglected its trade mission.

In recent years, CBP simply has not made trade facilitation and enforcement a priority. CBP has devoted fewer people to stopping illegal and counterfeit goods from crossing our borders, it has imposed burdensome paperwork and reporting requirements on American businesses, and it has failed to consult with Congress or businesses before imposing sweeping policy changes.

To address these problems, Senator Grassley and I introduced the Customs Facilitation and Trade Enforcement Reauthorization

Act of 2009. Our bill would direct CBP to re-prioritize its trade mission, and our bill would give CBP the tools to do so.

For example, our bill would create new high-level positions within CBP to focus solely on trade facilitation and enforcement. It would establish sophisticated commercial enforcement practices to target those imports that are most likely to violate American laws, including our intellectual property and safety laws.

Our bill would provide speedy Customs clearance for importers with a strong history of complying with U.S. laws. It would require CBP to do a better job consulting with American businesses affected by its policies, as well as with this committee and Congress as a whole.

Our bill would provide important benefits for border States, like Montana. Montana has not received the personnel or funding that it needs to facilitate the substantial volumes of trade that cross its borders every day.

The bill directs CBP to launch a pilot program to designate certain land border ports as 24-hour commercial ports of entry, and I hope that this provision will drive additional trade and other economic resources to the areas that need them the most.

And our bill would accomplish all of these objectives without diverting resources from CBP's vital security efforts. As a Senator from Montana, I understand the crucial importance of CBP's national security mission. Montana's border with Canada stretches over 500 miles. I have fought long and hard for adequate resources to secure it.

But CBP needs to balance its security mission with its trade mission. We should look to CBP's own rich history for guidance on how to do so. This history and this bill can help CBP to chart a course to better serve the interests of American businesses, the States, and the American people.

Senator Grassley is not here, as you can tell, but he will be here shortly. When Senator Grassley arrives, I will ask him if he wants to give his statement.

In the meantime, we are pleased to begin our hearing today with Jerry Cook, vice president for government and trade relations for Hanesbrand, Inc. Following Mr. Cook is Rick Cotton, executive vice president and general counsel for NBC Universal. Our third witness is Ted Sherman, director for global trade services with Target Corporation. Finally, we welcome back Mary Ann Comstock from Sweet Grass, MT. Mary Ann serves as brokerage compliance manager for UPS Supply Chain Solutions, and Ms. Comstock appeared before this committee in 2002 and has been helpful to our efforts ever since. Thank you very much, Mary Ann, for again making this trip.

Thank you all for coming. As is our usual practice, your prepared statements will be included in the record, and I ask each of you to summarize your statements in about 5 minutes.

We will begin with you, Mr. Cook.

STATEMENT OF JERRY COOK, VICE PRESIDENT, GOVERNMENT AND TRADE RELATIONS, HANESBRAND, INC., WINSTON-SALEM, NC

Mr. COOK. Good morning. Thank you, Chairman Baucus, Ranking Member Grassley, and honored members of the Senate Finance Committee.

I am pleased to be here today, before you. I am the vice president for Hanesbrands, with responsibility for our customs and trade operations. We value our partnership with U.S. Customs and Border Protection and view the relationship as an integral collaboration in our business success.

Seven years ago, in June of 2002, I was sitting in this same chair testifying on the transfer of U.S. Customs Service to the Homeland Security Department. I emphasized the importance of keeping enforcement and commercial operations together.

As I said in 2002 and still believe today, "The process of enforcing trade laws advancing a hybrid solution that both informs the trade community of the respective programs and seeks joint ownership in these critical areas" is essential. It is essential that the integrity of the enforcement and commercial nexus remain intact.

Over the past years, Customs has been largely successful in creating a culture of knowledge, discipline, and professionalism. My remarks today should be understood to help refine the line and improve the current partnership.

Seven years ago, I stressed the importance of accelerating the implementation of the Automated Commercial Environment (ACE) and the need to provide trade industry input to senior levels of the Customs Service. And in 1993, Congress passed and enacted the Customs Modernization, or Mod Act. While targeting implementations had been developed, only 4 of the 30 provisions that were originally enumerated had been fully delivered.

I applaud the provisions in section 205, which authorized funds until 2012. I look forward to a time when all data interfaces will be electronic, and the U.S. Government will be the single portal, as intended in the International Trade Data System (ITDS) model.

As stated in the 2002 testimony, communication between CBP and industry is essential for both parties, and I applaud you for addressing this issue, specifically in section 101, with the new Office of Trade and the new Principal Deputy Commissioner. These additions and positions will give renewed support and invigorate the balance to advocate for trade and commercial concerns and the challenges we face. The other part of this equation, though, is to further enhance industry input into the participation.

I strongly support the language that you have included in section 101, where you establish the Interagency Customs Review Board, as well as section 204, where you address the need for specific industry input.

There needs to be greater connectivity with Customs between security and law enforcement, and trade facilitation. For example, even with all of the activity at the WTO surrounding trade facilitation, trade facilitation is so fully lacking in the conversations at the World Customs Organization (WCO).

I would like to applaud you for addressing the coordination, though, between the U.S. agencies that may become involved in the

business trade. You address this issue specifically in section 206 of the bill, directing the Secretary to work with the head of each agency partner in the International Trade Data System.

Mr. Chairman, there is a tool which could be used to bring the security and commercial sides of Customs matters together, as well as improve targeting and facilitate commerce. It is called the Account Management Program. The AMP is supposed to provide uniform, consistent, and efficient treatment of importers willing to continue their investment in CBP compliance programs.

When the Account Management Program is fully deployed, along with ACE, the expected dividends of the Mod Act, ACE, and security, can assist in yielding a more robust and compliant commerce in the United States.

I appreciate that in section 201 you direct Homeland Security to develop and implement trade benefits for Customs-Trade Partnership Against Terrorism (C-TPAT) partners. The Customs Facilitation Partnership, which you proposed to create in section 202, represents another step forward to enhance communication and cooperation between trade and the industry.

The Account Management Program model could also provide benefits to the so-called "trusted trade" importers that have heavily invested in security and commercial compliance programs. We need to seek the benefits of utilizing known and repetitive account-based information to reduce the cost of compliance and security.

I want to thank you again, Mr. Chairman, Ranking Member Grassley, and distinguished members of the committee, for this opportunity to appear before you today.

We want to thank CBP for their outstanding efforts and partnership they have provided. I welcome any questions you have, and am submitting a copy of my complete comments for the record.

Senator GRASSLEY. Thank you, Mr. Cook.

[The prepared statement of Mr. Cook appears in the appendix.]

Senator GRASSLEY. Mr. Cotton?

STATEMENT OF RICK COTTON, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, NBC UNIVERSAL, NEW YORK, NY

Mr. COTTON. Thank you, Chairman Baucus, Ranking Member Grassley, Senator Wyden.

I appreciate the opportunity to testify today on behalf of the Coalition Against Counterfeiting and Piracy, which consists of more than 650 companies and associations from nearly every sector of the U.S. economy. We work closely on these issues with organized labor, both the AFL–CIO, and Change to Win.

Mr. Chairman, our message today is simple. We must move from a perspective where counterfeiting is a 4-syllable word to one where it is a 4-letter word, from where counterfeiting is regarded as morally ambiguous to where it is recognized as a reprehensible job killer in a U.S. economy that is starved for high-wage employment.

Over the last 20 years, the experts agree that cross-border IP theft has mushroomed from a cottage industry into a global network that endangers our economy, kills our jobs, threatens our citizens' health and safety, and nourishes organized crime.

In our view, an accurate estimate of the scale of the problem would probably be between half a trillion and a trillion dollars a year. CBP and ICE, especially since 9–11, simply have not had the resources, the necessary organizational focus and dedicated high-level leadership positions, or the statutory tools, to make headway against this growing tsunami.

As a government, and as a society, we have allowed the scale and sophistication of the counterfeiters to outrun our law enforcement resources. We regard chapter 3 of the Baucus-Grassley bill as heralding a new era in the expanded role of CBP and ICE in protecting the future economic well-being of the U.S.

We commend you and your able staff for crafting this landmark piece of legislation. This bill recognizes that CBP and ICE must take bold organizational and resource initiatives in order to ensure that the fruits of the innovation, ingenuity, invention, and creativity of U.S. industry are not hijacked, but instead used to produce jobs here.

I would like to make a particularly important point. The Baucus-Grassley bill will make our Customs Agency a model that we can call upon our trading partners to emulate. Internationally, we are most persuasive in convincing other nations to act if we lead by example. Why should others act if we have not done so?

Like the Prioritizing Resources and Organization for Intellectual Property, or PRO–IP Act enacted last year, the Baucus-Grassley bill recognizes that effective IP protection requires upgrades in three areas: the creation of high-level dedicated leadership positions, dedicated enforcement resources, and the enhancement of statutory authority. We applaud the high-level leadership on IP issues at CBP that would be created by merging the international and commercial offices into a single office headed by an Assistant Commissioner.

Likewise, we commend the provisions that establish the National Intellectual Property Coordinating Center as a permanent fixture under the leadership of an Assistant Director.

Mr. Chairman, the Baucus-Grassley bill also recognizes that in this world of skilled organized crime, counterfeiters, and pirates, we need dedicated IP experts assigned to the ports and to ICE. We would only suggest that the number of such experts be increased from the 10 currently in the bill to a sufficient number to cover all high-volume ports.

We vigorously endorse the bill's mandate for a Joint Strategic Plan, with special provisions to address IP infringement. We ask the committee to consider expanding the IP elements of the plan, as detailed in my written statement.

We also support, strongly, the bill's provisions enabling CBP to work smarter. These include the establishment of national targeting and analysis groups, enabling CBP to target suspect shippers and shipments. We further endorse the bill's creation of a list of persons who deserve special scrutiny by virtue of their past infringing conduct, and a corresponding list of trustworthy partners whose goods can be approved speedily and move through the ports without delay.

We also greatly applaud a landmark provision in the bill that requires the Department of Homeland Security to initiate an edu-

cation campaign for travelers on the harms visited by IP theft, countering the pernicious canard that it is just a victimless nuisance crime. We do suggest that the campaign would be enhanced considerably if the bill also required a declaration on the Customs Form stating that the traveler is not knowingly bringing illegal counterfeit physical goods into the U.S.

Last year, Laura Tyson, former Chair of the Counsel of Economic Advisors, conducted a major study that documented the far-reaching corrosive impact of counterfeiting and piracy on the U.S. economy. But the Tyson study also documented that adopting the kind of sensible and effective measures this bill contains would return more than $5 in Federal tax revenues for every dollar spent on enforcement and likely create a minimum of 200,000 new jobs in 3 years.

In conclusion, this committee knows all too well the far-reaching impact of the recession and of today's unacceptably high unemployment rates. Every day we delay, we lose more jobs and sap more economic vitality that could help us get out of today's economic ditch.

We urge rapid passage of the Baucus-Grassley bill and express the hope that the committee will carefully evaluate the few, but important, suggestions we have made today.

Thank you very much.

The CHAIRMAN. Thank you very much, Mr. Cotton.

[The prepared statement of Mr. Cotton appears in the appendix.]

The CHAIRMAN. Mr. Sherman? You are next.

STATEMENT OF TED SHERMAN, DIRECTOR, GLOBAL TRADE SERVICES, TARGET CORPORATION, MINNEAPOLIS, MN

Mr. SHERMAN. Chairman Baucus, Ranking Member Grassley, and members of the Finance Committee, thank you for inviting Target to testify before you today.

My name is Ted Sherman, and I am the director of Global Trade Services for Target. I also currently serve as the co-chair of BACM, the U.S. Business Alliance for Customs Modernization.

At Target, I lead a team of 100 team members responsible for all customs operations, compliance, brokerage, and trade finance activities within Target. Target is active in the Retail Industry Leaders Association, the American Association of Exporters and Importers, the American Apparel and Footwear Association, and a number of other trade groups.

I want to thank you for giving us this opportunity to have our voice heard in the discussions of the Customs Facilitation and Trade Enforcement Act of 2009. My testimony will specifically address the areas of facilitation, partnership programs, and automation.

For background, Target is a $62-billion U.S.-based retailer operating approximately 1,700 stores in 49 States. We currently employ approximately 350,000 team members. Our import volumes include more than 160,000 individual Customs filings each year, making us one of the largest U.S. importers by transaction volume.

We strongly support efforts by Congress to encourage U.S. Customs and Border Protection to increase its focus on trade facilitation, while at the same time fulfilling its border security mission.

A focus on true trade facilitation should eventually yield processes that are consistent, reasonable, and simple for importers such as Target. To effectively plan our business, we need to be able to operate with some degree of certainty as to the regulatory landscape we will need to navigate in the near-to-medium-term.

Decisions to formulate new rules and regulations should be made as part of a holistic view of the requirements currently being placed on importers. New requirements, such as the Importer Security Filing and the Lacey Act declaration, will by definition place strains on the resources of even the healthiest companies.

Given the necessity of carrying out these requirements, consideration should be given to any current initiatives and requirements impacting importers before new rule changes are implemented. This will not only ease the burden on importers, but will improve compliance, as importers will be able to direct resources to what is most important for the country.

Target has partnered with CBP to improve security practices and reduce supply-chain risks. Target is a charter member of the Customs-Trade Partnership Against Terrorism, or C-TPAT, and participates in the Importer Self-Assessment Program, meaning our internal controls have been validated and found to be best in class by CBP.

When correctly structured and administered, voluntary partnership programs can deliver benefits to both industry and government. For example, the Customs Facilitation Partnership Program should be as broad as possible and should include tangible benefits for importers found to have the best handle on trade compliance.

Companies involved in such partnership programs could be among the first to benefit from a transition to true account management. They could eventually move toward account-based processing, where most information is submitted to Customs on a periodic basis rather than transaction-by-transaction.

True periodic reporting will take time and a considerable amount of partnership between CBP and the trade. In the near term, we have concerns surrounding the potential use of advance filing data for commercial compliance targeting purposes. There are different standards and penalty regimes for filing of advance data used for security and the filing of data used for Customs entry purposes.

If advance data is to be used for commercial targeting purposes in the near term, there must be safeguards in place to ensure the two penalty regimes are recognized and kept separate. That is, the use of Importer Security Filing (ISF) data for commercial compliance targeting must not lead to new penalties or to the wholesale use of traditional commercial enforcement tools as a remedy for ISF discrepancies or omissions.

With regard to automation, we strongly favor the full funding and completion of the Automated Commercial Environment and the implementation of the International Trade Data System. Large importers, such as Target, must plan their systems resources over a long period of time. The certainty and timing of ACE's full functionality is critical to these planning efforts.

Complementary to the vision for completing ACE, we support efforts to provide a single window for the entry and release of import transactions. A holistic, systematic approach is needed for col-

lecting information at the border. Currently, in some cases, disparate communication methods are used for interacting with the various other government agencies that have a role in determining admissibility of merchandise into the U.S. To that end, we support continued funding for the International Trade Data System.

Before I conclude, I would like to recognize Chairman Baucus, Ranking Member Grassley, and the Senate Finance Committee for introducing the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009. In general, this Act seeks to renew the commercial operations mandate for CBP and to provide increased predictability and efficiency for the import community. We share these objectives and welcome the opportunity to be a partner as the process moves forward, contributing to our mutual goals of enhancing trade facilitation and our Nation's security.

Thank you for the opportunity to speak to you today, and I welcome any questions.

The CHAIRMAN. Thank you, Mr. Sherman.

[The prepared statement of Mr. Sherman appears in the appendix.]

The CHAIRMAN. Ms. Comstock? Welcome.

STATEMENT OF MARY ANN COMSTOCK, BROKERAGE COMPLIANCE MANAGER, UPS SUPPLY CHAIN SOLUTIONS, INC., SWEET GRASS, MT

Ms. COMSTOCK. Chairman Baucus, Ranking Member Grassley, and members of the committee, I appreciate the opportunity to discuss components of the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009.

My name is Mary Ann Comstock, and I am a native Montanan employed in the customs brokerage business. I live and work in Sweet Grass, MT, which is by volume the eighth-busiest port of entry on the northern border.

I have been a licensed customs broker for more than 30 years, and I bring a unique perspective, having owned my own small brokerage firm. And I now work as a compliance manager for UPS, one of the world's largest brokerage firms.

UPS would like to thank the committee for its work on this significant piece of legislation. We view this bill as a way to enhance the relationship between the public and private sectors through increased trade facilitation.

The committee's continued focus and support of the Automated Commercial Environment, or ACE, and the International Trade Data System is very welcome.

I would like to focus on three topics today, the first of which is of utmost importance to UPS. We strongly support the increase in de minimis and informal entry values. We commend the committee for recognizing the importance of this issue.

To meet the demands of inflation and the global economy, we suggest the de minimis amounts for section 321 be raised from $200 to $800, and the informal entry limits from $2,000 to $5,000, both of which have not been changed since 1993 and 1998, respectively.

The Trade Act of 2002 provided for an increase in the return travelers' personal exemption from $400 to $800. This is an appro-

priate benchmark for increasing the de minimus. We recommend that the Secretary of Treasury periodically consider adjusting these values to ensure the limits are consistent with the rate of inflation.

Increasing the value thresholds offers benefits to U.S. Customs and Border Protection and the importing public. ACE has allowed Customs to focus their efforts on security and high-risk targeting, and this value change offers all levels of business, particularly small and medium-sized, the opportunity to reduce brokerage expenses and provide for simplified procedures for entry and release.

The second topic relates to Account-Based Management, which is an existing Customs program. The concept of Account Management was developed by Customs in 1994 to work with importers and brokers handling significant volumes of goods entering the United States.

The goal of the public-private partnership was to achieve a high-level of compliance and focus on trade issues. The current program can be improved upon, as suggested by the May 7, 2009, "COAC (Commercial Operations Advisory Committee) Report of Account-Based Processing" publication.

Revitalizing the existing program would be an immense step forward in trade facilitation, without hindering security. The program should include commercial, security, interagency, and information technology components with an enhanced role for the Customs' National Account Managers.

My third topic is the pilot program for establishing 24-hour land border ports of entry. Coming from the fourth-largest State in the Union that has only two commercial ports on our 550-mile-long northern border, this proposal can benefit the borders. State and local governments eligible for a new 24-hour land border port must be willing to commit resources and infrastructure improvements to support a commercial port designation.

A new commercial port could benefit importers by cutting down on transit times, while providing local economies a boost from increased traffic. The proposal also fosters dialogue with Canada and Mexico, our closest trading partners.

The written testimony submitted for the record also addresses the use of trade data for commercial targeting purposes, Commercial Customs Operations Advisory Committee appointee terms, C-TPAT benefits, ACE ITDS implementation, intellectual property rights, and the Importer of Record program.

In closing, I would like to applaud the committee for their renewed focus on trade. By providing Customs the tools to facilitate legitimate trade and reorganizing their structure to emphasize trade's importance to the U.S. economy, you have taken a huge step at re-balancing the border. Security and Trade Facilitation should be of equal concern.

On behalf of more than 415,000 UPS employees world-wide, and over 900 located in Montana, thank you for allowing me the opportunity to testify today.

The CHAIRMAN. Thank you, Ms. Comstock.

[The prepared statement of Ms. Comstock appears in the appendix.]

The CHAIRMAN. Senator Grassley?

OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM IOWA

Senator GRASSLEY. Yes. I am sorry that I was late getting here, because I had some high school kids I was visiting with.

Mr. Chairman, you and I have worked together productively on Customs oversight for many years. In 2002, we reauthorized the Customs Service's part of the Trade Act of that year. That same year, we worked to transition the Customs Service into the newly-established Department of Homeland Security. In 2006, we introduced a Customs Reauthorization Bill, and our efforts contributed to the development of the SAFE Port Act that year. That effort also served as the basis for our work this year to produce legislation subject to our hearing.

During our years of oversight, we have generally enjoyed a good working relationship with dedicated personnel of U.S. Customs and Border Protection. We all know them as the CBP and the U.S. Immigration and Customs Enforcement, known as ICE. But in the 3 years since we enacted the SAFE Port Act, some new concerns have come before us.

One concern is that the balance at CBP between protecting our Homeland Security and safeguarding our economic security via trade facilitation is not quite right. So, our bill beefs up the trade facilitation vision of CBP by a restructuring of the Office of Trade and authorizing dedicated Customs Facilitation and Trade Enforcement personnel to the Office of Field Operations.

Another concern is that there has not been sufficient political accountability to Congress by Customs, so our bill establishes a Senate-confirmed position of a Principal Deputy Commissioner to oversee commercial operations in that subdivision. And more generally, our bill updates Customs laws to reflect the existence of CBP and ICE within the Department of Homeland Security.

Another concern is that consultation between Customs and the public, as well as between Customs and other Federal agencies, has not been as robust as it should be, so our bill reconstitutes the Commercial Customs Operations Advisory Committee (CCOAC) to provide greater independence of the committee.

Our bill establishes a new interagency review board to ensure that changes in Customs rules and regulations are consistent with our international trade obligations. And, separately, our bill strengthens the commercial targeting functions performed by Customs and ICE by authorizing commercial targeting groups and repealing the firewall between use of information for security purposes and commercial enforcement purposes.

In particular, our bill contains provisions intended to strengthen enforcement of intellectual property rights and import product safety measures. We have continued to hear concerns that more can be done by CBP to facilitate trade.

So, the bill disciplines the development and implementation of the Automated Commercial Environment computer system and the International Trade Data System for obtaining cargo clearance for other government agencies. The bill also includes a duty drawback modernization provision to simplify drawback for both government and the private sector.

The bill includes a number of miscellaneous provisions, the most significant of which is an update of the ban on importing goods made by convict labor. During Finance Committee consideration of legislation to implement our trade agreement with Oman in 2006, I committed to working with Senators Conrad and Baucus for an update on this ban. Our bill reflects the product of our effort to work together to expand the ban to prohibit importation of goods made by convict labor, forced or indentured labor, coerced labor, and the labor of trafficked persons.

In sum, our bill beefs up the commercial operations at CBP without detracting from the agency's dual Homeland Security mission, and it provides for greater cohesion between CBP, ICE, and other Federal agencies with a stake in the process of clearing cargo for entry. Those were our motivations in introducing this legislation.

I thank all of our witnesses, as well. I am glad I was here to be able to hear all of you.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Senator, very much.

One question I have, basically, for want of a better way to express this is, how much will this bill really help? We establish new positions, confirmed by the Senate, to give more power to the Customs trade side. We are also setting up this trade enforcement state-of-the-art mechanism, and some other provisions as well.

What do you think is the most—I am going to ask all of you—important part of this bill, and what more might you add? Here is your chance. What else would you suggest?

I will start with you, Mr. Cook.

Mr. COOK. To start with, I think this is an outstanding bill. I think it reconnects the whole commercial operation with security, it invigorates the industry input, and I think the creation of the new positions in the Commerce section putting up, specifically the Secretary, having the Commissioner report to the Secretary of Homeland Security, brings the commercial side directly into the whole Homeland Security.

The only piece that I would look at adding is having the Field Ops report into the Office of Trade directly so that the policy, as it is designed, also includes the full implementation, because, if there is a malfunction, it is typically getting policy fully implemented.

The CHAIRMAN. That is a good point. So, would Homeland Security have a problem with that, or not? Most might have a problem with that.

Mr. COOK. I do not think so. I think one of the great things that you are doing is re-envisioning where in Homeland Security Commerce is, and that the U.S. business groups need the commercial facilitation. And the way you and Senator Grassley have outlined this, the second appointed position, so that you have double time to talk, is a great envisioning.

The CHAIRMAN. But you would extend that down so the Field Officer, you say, would report directly to the new Principal Deputy?

Mr. COOK. I would.

The CHAIRMAN. All right.

Mr. Cotton?

Mr. COTTON. Well, Mr. Chairman, I think the bill is critically important, and I think, if I can speak on behalf of all of the sectors who are members of the Coalition Against Counterfeiting and Piracy, I can report to you that every single sector has reported in our deliberations that the problem of counterfeiting is getting worse, not better.

And it is against that background that I think the reforms contained in your bill are so critically important. It is clear that if enforcement of laws with respect to counterfeiting and piracy are left to law enforcement officers of general authority, given the history here, they simply fall to the bottom of the priority list.

So, I think that the dedicated leadership and the itemization of specific dedicated agents to IP enforcement is critically important. So point one I would make, is that I think that right now the bill mandates 10 at 10 ports. I think that having specialized resources at all of the high-volume ports would be very important.

The second point, which again the bill addresses, is I think we are not going to make progress in this area without enhanced technology. I think words and enforcement resources not backed up by technology, in terms of being able to separate shipments that need inspection from those that do not, without that, it is simply not likely that we are going to make progress.

So, I think all of the emphasis on technology and on cooperation between Customs and the private sector is critically important.

The third point I would make is that the Joint Strategic Plan that the bill contains right now, I think is excellent, because what is needed is a strategic approach and a smart approach to these issues. I would simply urge, in the bill, that there be clarification that the strategic elements which are currently, in general, identified with respect to broad enforcement of trade provisions, that there be a specific subset of the Joint Strategic Plan which addresses each of the critical elements in terms of technology, in terms of cooperation with the private sector, in terms of transfer of best practices, which is an observation that the GAO made that is not taking place today. The imposition and the requirement on CBP and ICE to think about these issues strategically and report to the committee and the Congress on that would be critically important.

The fourth point I would make, which actually is a point that I think has come out in conversations, frankly, with some CBP personnel themselves, is that, on the terrorism side and the security side, the thought process is to make our borders the last line of defense, not the first line of defense.

I think that that same strategic approach to the issue of counterfeiting and the protection of IP would really represent a major step forward, so that the investigative resources in terms of identifying shippers, identifying warehousers, identifying importers, and enabling ICE to investigate those essentially from start to finish, so that you identify those before they reach our borders and scrutinize those shipments coming from suspicious sources or going to suspicious receivers, would be a major advance in terms of the investigative approach to IP crime.

The CHAIRMAN. All right.

Mr. Sherman?

Mr. SHERMAN. Yes, Senator. I think this absolutely will help, and I think that it addresses one of our major concerns, and that is predictability. Over the last several years, we have had our hands full as importers with things that we all know we need to do to deal with security issues, safety, things like the Lacey Act, and one of the things that has been challenging is that, at times, there has not been that situational awareness of everything importers are dealing with. New initiatives are introduced, for example, to change the Rules of Origin, do away with First Sale, and that is very difficult to administer with limited resources.

And so, to the extent we could have greater visibility to what changes are contemplated, better predictability, that will be very beneficial. One thing I think that could be emphasized more in the bill, potentially, is this new facilitation program could eventually become a springboard to true account-based processing where we move away from this transaction-by-transaction interaction with government agencies and move towards a more holistic account-based approach where we would periodically provide information.

The CHAIRMAN. Well, my time has expired to spare. I will get to you, Ms. Comstock, next time around.

Senator Grassley?

Senator GRASSLEY. Mr. Sherman? I would like to have you describe some of the biggest challenges that Target has faced over the past few years. I guess you are one of the largest U.S. importers. I should probably know that for sure. By the way, you have a big facility in Cedar Falls, IA.

Mr. SHERMAN. Yes, Senator. A couple of them.

Senator GRASSLEY. Thank you for putting that there. I wish I had something to do with it getting there. [Laughter.]

Could you identify, then, provisions in our bill that would address or mitigate some of these challenges? Parallel to that, could you identify improvements that might be needed to address and mitigate some of these challenges?

Mr. SHERMAN. Thank you, Senator. I touched on it briefly a moment ago. It is the lack of predictability. If you really look at what happened over the last, say, 3 to 4 years, right when we are in the throes of trying to work on the importer security filing, we had this potential doing away with the first-sale rule.

Then we were working through the Lacey Act and the Consumer Product Safety Improvement Act, and then we had to deal with the potential change in Rules of Origin. And in any big importer, it is the same people working on all of those issues. It is the same skill set, the same people, who have to direct their attention away from Importer Security Filing for a while to go figure out the impact of Rules of Origin.

And so, to the extent there could be more coordination and more situational awareness of all the rules at any given time, the changes that are being contemplated so that we could all get on the same page. If you have any hope of executing these, that would be very helpful. To the extent that kind of oversight is in the bill, it is very much appreciated.

So to the extent that could be firmed up, and again, carrying forward in the automation efforts, things like ACE, ITDS, and the

move towards account-based processing would be very, very helpful in overcoming a lot of these challenges.

Senator GRASSLEY. All right. Then, for Ms. Comstock, but I would like to have Mr. Cotton listen to what Ms. Comstock says, and then maybe you could add to it.

You raised concerns with respect to section 234, which would require CBP to maintain a confidential list of persons who repeatedly attempt to import goods that infringe intellectual property into our country. CBP is then directed to use the information in its commercial targeting methodologies.

In your view, could this provision be improved by adding an intent requirement? In other words, what if the provision required CBP to maintain a confidential list of persons who repeatedly attempt to import goods into the United States, knowing that such goods infringe upon intellectual property rights? Will that change address your concerns?

Ms. COMSTOCK. Yes, Senator. I think it would.

I think that the bottom line is, for UPS and many of our counterparts, whether they are small, medium or large customs brokers or couriers, we are hired to facilitate trade. We carry goods, we help goods move across the border. We do not buy the goods, we do not sell the goods, we often do not know the contents. In fact, we normally, other than the declaration on the paperwork that we receive, do not know the contents of the package.

So, if there is an infringed copyrighted article in a package and it simply says it is a teddy bear, we do not know that it is an infringed-upon article. We would like to work with Customs and Border Protection, and we would like to help get rid of the bad actors that are out there. I think having a willful knowledge and intent added to the bill would probably alleviate many of our concerns.

Senator GRASSLEY. Now, Mr. Cotton, you have a little different product that you are having infringed upon. Do you have a view, in addition, or agreement with, Ms. Comstock?

Mr. COTTON. I would begin by saying that I think it is important that the criteria by which individuals or our shippers are put on such a list be clear. But I think such a list is critical if we are asking CBP to act smarter, so that there is a clear set, there is a black list and there is a white list in terms of being able to distinguish between shippers that have had a bad record, others who have had a bad record, and those who are clearly trusted and whose shipments can move through ports quickly.

I think the one question that deserves some attention, which is one that I think we face throughout the economy, is that there are many sectors which are intermediary sectors, which are infrastructure companies which are the bloodlines, the arteries through which our commerce flows.

And what we are seeking here in terms of supply chain and in terms of those sectors, is that they not facilitate the easy distribution of counterfeit goods and, therefore, my best analogy here is money laundering, which is that we do impose on banks and other financial institutions the obligations to know their customers. It is not acceptable simply for banks to receive cash from anyone who

walks in the door without certain reporting requirements and without certain investigation requirements.

So, I think, in general, in the question of what would the eligibility requirement extend to, it probably should be based on experience. It should be based on some sense that there is a repeated issue of Customs identifying counterfeit goods coming from particular shippers or others. So I think that knowing requirement is not unreasonable, but it should be informed by the fact that it should not also permit a see-no-evil, hear-no-evil, simply take-the-money-and-run approach to facilitating shipments over the border.

Stopping counterfeiting really has to become some degree of best practices on the part of importers-exporters to take commercially reasonable steps. No one is asking for people to do things that are unreasonable, but there should be some degree of effort to ensure that no one is easily or simply closing their eyes to obvious counterfeiting practices.

Senator GRASSLEY. Mr. Chairman, I am going to submit the rest of my questions for answering in writing.

The CHAIRMAN. Thank you, Senator.

[The questions appear in the appendix.]

The CHAIRMAN. Senator Wyden?

OPENING STATEMENT OF HON. RON WYDEN, A U.S. SENATOR FROM OREGON

Senator WYDEN. Thank you, Mr. Chairman.

Mr. Chairman, I strongly endorse this bill. I think it is a very, very important bill, and your legislation, if anything, is even more timely given what Mr. Bernanke said yesterday when he was talking about the trade imbalance. So, you will have my strong support.

Folks in the Pacific Northwest, Mr. Chairman, are also concerned about intellectual property rights, if we could work with you in that area. American innovators and entrepreneurs are concerned that they are getting ripped off by people who are trying to skirt the trade laws because they cannot create anything on their own.

If we could work with you on the computer processor issues, Customs sharing information with innovators about potential fake exports, and also some of the questions relating to patents, that would be great.

I think it is a very important bill and look forward to working closely with you and getting it passed just as soon as we can.

Mr. CHAIRMAN. Good.

Senator WYDEN. Mr. Chairman, just a question, if I could, for the panel.

I think one of the parts of the trade debate that always baffles me is, we are always about tariffs. So much of the discussion comes back to the question of tariffs, and saying something is duty-free is not all that important if you cannot get goods in and out of the country because of unnecessary administrative hurdles, and so often you have all of these varied and sundry trade barriers, and those issues simply are not recognized.

Now, I read the written testimony last night, and my sense was—and we can just go right on down the row—that each of you

believes that this bill will significantly make it easier to facilitate the movement of goods in the international trade area.

Is that correct? Anybody disagree with that?

[No response.]

Senator WYDEN. All right. Good.

Now, with respect to the borders, can you give us some ideas about steps that we could take to reduce time-in-transit costs to our exporters? And, I think, let us have, for purposes of this question, Ms. Comstock, perhaps you and Mr. Sherman could give us your suggestions with respect to steps we could take to reduce time-in-transit costs to exporters.

Ms. COMSTOCK. Well, thank you. Time-in-transit costs to exporters are exponential depending upon where the goods originate, what countries they have to pass through, and how they move into the United States. I am on the northern border, so you could get in your vehicle in Calgary, Alberta, with a truckload of oil field equipment, and head to Sweet Grass, MT, and probably cross the border within a matter of 25 or 30 minutes. That is not true at other ports of entry.

One of the things that has occurred, at least on the borders, is that early on Customs was able to roll out e-manifest for the truck mode of transportation. Therefore, we have electronic manifest reporting occurring on the borders, both the northern and the southern borders, and we have electronic filing of entries. So, those marry up together. Customs can do their targeting, their risk assessments, be able to determine whether to examine the goods, and move the cargo fairly quickly.

I do not think that is the case in the air and ocean environment, simply because there is not a multi-modal manifest situation out there yet. And I am hoping that when multi-modal manifest—and they have to pick up the rail manifest as well—once those things get married up with the brokers' entries, or the importers' own entries, I think that will help facilitate trade movement.

Senator WYDEN. Good point. Time matters, and especially for us in the West.

Mr. Sherman?

Mr. SHERMAN. Senator, given the diversity of products that we import, my thinking on this is that, to the extent that the methods of communication and the standards on the part of different government agencies that regulate trade at the border, to the extent that those could be harmonized and automated and made as much as possible one process and one single window that importers have to use to bring merchandise into the country, off the top of my head, I think that is the thing that would be the most helpful to increase the speed of merchandise flow.

Senator WYDEN. I think that makes a lot of sense, to the extent you can harmonize or standardize these kinds of concerns. That is what I hear our shippers and traders talking about again and again.

Would either of the other two of you like to comment on it? I do not want to coerce you into it. I thought the comments of Ms. Comstock and Mr. Sherman were very good. Would either of the other witnesses like to comment on that?

Mr. COOK. I would be happy to. If you look at it as an exporter out of the U.S., there are two ideas. One is certainly running the ports 24 hours, 7 days a week, would reduce the infrastructure cost, but it would also let trade move. A lot of trade becomes idle at night because things tend to work only in banking hours.

The other is to give small, medium, and even the large size, a single Customs bond that works around the world. That would be a great facilitator that then mandates with other countries if they let those goods in and have direct delivery.

Senator WYDEN. My time is up.

The CHAIRMAN. Go ahead, Senator.

Senator WYDEN. Yes, please?

Mr. COTTON. I would just offer, just very briefly, that our concern in terms of the coalition is on IP enforcement, but we think that would be enormously enhanced by smarter-working, better technology, really all of the recommendations that the other witnesses have made, so that Customs concentrates on what are the problem shipments and allows the trusted shipments to get through more expeditiously.

Senator WYDEN. Very good.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

On that point, how do you distinguish between the trusted shipments and those that are not trusted? I suppose that Homeland Security works on that on the security side. I am just curious what that might be. How do you implement that with goods on the Customs side?

Mr. COTTON. Our reaction really has two points. One is what is in the bill, which is the creation of two lists in terms of entities that have a bad history, and on the other hand, companies and operations that have an excellent history and live up to certain security and other commitments, so that you do wind up with clarity in terms of being able to move shipments from a trusted shipper quickly, while you focus your efforts on shippers that have a checkered history. And I would say that, if one could move in that direction quickly, one would make a huge impact. I have to say, I have participated in many international conversations where that is a big, big element of the discussion.

I think the second point, the big point here, is technology. That underlies everything in the web-enabled world that we currently inhabit in terms of the RFID technologies that exist where one has to move over time to technology-based authentication techniques, which involve cooperation between the private sector and Customs, where the ability of Customs quickly to authenticate shipments and distinguish those that clearly have a good pedigree from those that either have none or a bad pedigree, really has to be technology-based.

So, our suggestion, as in particular, again, in terms of the strategic plan that the Baucus-Grassley bill envisions, is a heavy emphasis on what are the technology tools, and there are many in process that exist, and strategically looking forward, what would enable one really to get at exactly the question, Chairman Baucus, that you asked, which is technologically being able to identify trusted shipments from those that are not.

The CHAIRMAN. Well, the thought is that the additional emphasis in this bill on the Principal Commissioner, and also we pointed out other targeted areas—that will more likely happen than not.

Mr. COTTON. I think with high-level leadership that is focused on acting smart, acting strategically, and employing technology that exists today, it should happen much more quickly.

The CHAIRMAN. Ms. Comstock? Would you just address some of the unique problems that rural ports have?

Ms. COMSTOCK. Well, the unique problems of rural ports really are that—well, I was visited by some of the staff members from the Senate Finance Committee, and one of the things that they asked me is, how do you live here? You are from Montana, Senator. You understand. We live in a very big State with fewer people than we have cattle.

We have long distances to travel, we have challenges with weather, and we are in remote places, particularly—and I live in one of the bigger ports—east of us, and there are some very small ports west of Sweet Grass as well.

Finding Customs officers who are willing to relocate to those places when they are from urban areas is a real challenge for the U.S. Customs Service. And I think, locally, the people who are working in those ports, they have determined, especially the leadership has determined, that, if they can hire people from those remote areas to become Customs officers, they are going to be more successful.

So, there are some real challenges. One of them is in the infrastructure of a big State like Montana. We are fortunate in Sweet Grass—we have Interstate 15 that comes right up through there, but there are other parts of Montana that do not have the benefit of the Interstate system, and so that, in itself, is a challenge moving around the State.

I hope I have answered your question.

The CHAIRMAN. You have. Tell me about these pilot projects we are setting up.

Ms. COMSTOCK. The pilot program, as far as the port goes, I really envision it as being able to move goods through multiple ports in Montana, and perhaps other States, that do not have the ability to move through today. We often, in our day-to-day business in Sweet Grass, have customers who want to cross in Wild Horse, MT, who want to cross in Morgan, MT, who want to cross in Roosville, MT, and those are considered "permit" ports; they are not commercial centers. So we are forcing those people who have goods north of those ports to actually go out of their way and funnel down through Sweet Grass, MT to be able to enter at a commercial port of entry.

I think that in itself is a barrier, a drawback. Being able to move through Wild Horse or Roosville or any of the other ports really facilitates trade. It cuts down on the transit times, it gives the opportunity for Montana to work with Alberta, our largest trading partner, Province-to-State, as well as the U.S. and Canada.

The CHAIRMAN. Yes. It is very interesting to me. It is quite sad. I have gone to some of those borders. They once were open, now closed. For example, up in North Fork Flathead. That was just totally closed. Now, you could tell that once was fairly thriving, the

size of the buildings there at one point. It is just very unfortunate, because it does, as you said, restrict trade.

Ms. COMSTOCK. The other thing I will just point out is that many of the facilities that are on the northern border are Customs-owned facilities. They are not owned by GSA, and they are in sad need of repair. And I do know that the Department of Homeland Security Subcommittee is looking at that as well.

The CHAIRMAN. Could you just address a little bit the Account-Based Management concept and how that——

Ms. COMSTOCK. Sure. Actually, I feel like what Customs started in 1994, the Account-Based Management program, really is what the committee may be envisioning for the trade facilitation partnership piece. It is there, but it is not well-implemented.

For example, UPS has an Account Manager with Customs. They work with us to provide us information about our compliance rates; they provide some raw data that we can analyze to make better decisions on our own compliance needs and our issues.

I believe that other members of the panel also have a National Account Manager. They actually have a lot of tools that they can utilize, but they are probably a little overworked in that they have a number of clientele and they cannot devote a lot of time to us.

I think that with Account-Based Management, if the implementation of the COAC recommendations occurred—you could rename the program for all I care—I really think it would facilitate trade and that you would drive compliance, and that is what the committee, and obviously, all of us, want.

The CHAIRMAN. Well, thank you all very much.

We want to promote trade, and that is the whole point of all this. We have done our best to draft a bill that accomplishes that purpose. My trade staff and Senator Grassley's trade staff have worked together, talking to a lot people, to try again to achieve that. I might say, though, after today's hearing, the record is going to be open for another 10 days, and I am hopeful that you all will take advantage of that.

You know, say what you have to say. This is your shot. We do not have many opportunities to pass new trade legislation, and this is it. So if you have some new ideas in addition to those you have already submitted, or you want to restate something that you have already stated, say it again. Sometimes repetition helps, so just take advantage. The record is open for 10 more days, and I encourage you to say what you want to say to help make sure we do the best job we possibly can.

Thank you very much.

The hearing is adjourned.

[Whereupon, at 11:25 a.m., the hearing was concluded.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Hearing Statement of Senator Max Baucus (D-Mont.)
Regarding the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009

The Scottish historian John Buchan warned reformers to learn from the past. He counseled: "History gives us a . . . chart."

The Bureau of Customs and Border Protection — or CBP — has a long and rich history. As we reform CBP for the 21st century, we would do well to study the chart that this history gives us.

In 1789, one of the first five laws enacted by the first Congress established a Collector of Customs. This organization ultimately became the U.S. Customs Service, and then CBP. For 220 years, it has collected duties and enforced America's trade laws.

In 2002, CBP got a new job. It still has to fulfill its traditional trade mission. But in addition, CBP must also secure our nation's borders.

These two missions are not mutually exclusive. CBP must do a better job of balancing them. The agency's security mission is vitally important. But I am concerned that CBP has badly neglected its trade mission.

In recent years, CBP simply has not made trade facilitation and enforcement a priority. CBP has devoted fewer people to stopping illegal and counterfeit goods from crossing our borders. It has imposed burdensome paperwork and reporting requirements on American businesses. And it has failed to consult with Congress or businesses before imposing sweeping policy changes.

To address these problems, Senator Grassley and I introduced the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009. Our bill would direct CBP to re-prioritize its trade mission. And our bill would give CBP the tools to do so.

For example, our bill would create new high-level positions within CBP to focus solely on trade facilitation and enforcement. It would establish sophisticated commercial enforcement practices to target those imports that are most likely to violate American laws — including our intellectual property and safety laws.

Our bill would provide speedy customs clearance for importers with a strong history of complying with U.S. laws. And it would require CBP to do a better job consulting with American businesses affected by its policies, as well as with this Committee and Congress as a whole.

Our bill would provide important benefits for border states like Montana. Montana has not received the personnel or funding that it needs to facilitate the substantial volumes of trade that cross its borders every day.

The bill directs CBP to launch a pilot program to designate certain land border ports as 24-hour commercial ports of entry. I hope that this provision will drive additional trade and other economic resources to the areas that need them most.

And our bill would accomplish all of these objectives without diverting resources from CBP's vital security efforts. As a Senator from Montana, I understand the crucial importance of CBP's national security mission. Montana's border with Canada stretches over 500 miles. I have fought long and hard for adequate resources to secure it.

But CBP needs to balance its security mission with its trade mission. We should look to CBP's own rich history for guidance on how to do so. This history — and this bill — can help CBP to chart a course to better serve the interests of American businesses, the states, and the American people.

WRITTEN TESTIMONY OF MARY ANN COMSTOCK

UPS Supply Chain Solutions, Inc.

Sweet Grass, Montana

Before the Senate Finance Committee

"The Customs Facilitation and Trade Enforcement

Reauthorization Act of 2009" (S.1631)

October 20, 2009

Chairman Baucus, Ranking Member Grassley, and Members of the Committee, on behalf of the more than 415,000 UPS employees worldwide, I appreciate the opportunity to appear before you today to discuss components of the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009. My name is Mary Ann Comstock, and I am a native Montanan who has been involved in the Customs brokerage business on the northern border since 1971. I live and work in Sweet Grass, Montana which is by volume, the 8th busiest port of entry on the northern border. I've been a licensed Customs broker since 1978 and bring a unique perspective having owned my own small brokerage firm. I am currently a compliance manager for UPS. As you are probably well aware, UPS operates one of the world's largest, most sophisticated, intermodal transportation service networks and is one of the world's largest customs brokerage firms. On a daily

basis, UPS delivers more than 15.5 million packages and documents to 7.9 million customers in more than 200 countries and territories around the globe. UPS handles more than 6% of the U.S. GDP and 2% of the global GDP every day. In Montana, UPS employs 926 employees, has 14 operating facilities and 5 UPS Supply Chain Solutions locations.

UPS would like to thank the Committee for its work on this significant piece of legislation. We appreciate the services provided by U.S. Customs and Border Protection (CBP), and view this Bill as a way to enhance the relationship between the public and private sector through increased trade facilitation. The Committee's continued focus and support of the implementation of the International Trade Data System (ITDS) through the Automated Commercial Environment (ACE) will only help to make this relationship stronger.

I would like to focus on three topics today, the first of which is of utmost importance to UPS. UPS, along with express couriers and numerous supply chain partners, strongly support the increase in de minimis and informal entry values. We commend the Committee for recognizing the importance of this issue. In order to meet the demands of inflation and the global economy, we suggest the de minimis amount for Section 321 be raised from $200 to $800, and the informal entry limits from $2000 to $5000, both of which have not been changed since 1993 and 1998 respectively. We believe the Trade Act of 2002, which provided for an increase in

the personal exemption of goods from $400 to $800 for those travelers returning to the U.S., is an appropriate benchmark for increasing de minimis. In addition, we recommend that the Secretary of Treasury periodically consider adjusting these values to ensure the limits are consistent with the rate of inflation as measured by the Consumer Price Index. Increasing the value thresholds offers significant benefits to CBP, the Trade and the importing public. ACE has allowed CBP to focus their efforts on security and high risk targeting, and this value change offers all levels of business, particularly small and medium sized, the opportunity to reduce brokerage expenses and provide for simplified procedures for entry and release. By increasing de minimis and informal values, the U.S. will act as a role model to other countries, such as Canada, to increase their values, and thereby promote trade.

The second topic relates to Account Based Management, which is an existing CBP program. UPS strongly supports the concept of an integrated comprehensive account based processing program. The concept of Account Management was developed by CBP in 1994, with the idea of creating a platform for CBP to work with importers and brokers handling significant volume of imports into the U.S. The goal of the public-private partnership between CBP, importers and brokers was to achieve a high level of compliance and focus on trade issues. We believe the current program can be improved upon as suggested in a

May 7, 2009, "COAC Report on Account Based Processing" publication, produced by the Commercial Operations Advisory Committee (COAC). Revitalizing the existing program would be an immense step forward in trade facilitation without hindering security, and would bring cohesion between the Government and the Trade by establishing multiple components, including the enhanced role of National Account Managers. The program would include commercial, security, interagency and information technology account components.

The third topic regards the pilot program for establishing 24 hour land border ports of entry. Coming from the 4th largest state in the Union that has only 2 commercial ports of entry on our 550 mile long northern border, I believe this proposal will benefit the borders. State and local governments eligible for a new 24 hour land border port must be willing to commit resources and infrastructure improvements to support the commercial designation of a port. This is a trade facilitation opportunity that could benefit importers by cutting down on transit times, and provide local economies a boost from increased traffic. The proposal also fosters dialogue with Canada and Mexico, our closest trading partners.

Before closing, I would like to discuss a few additional areas of interest for UPS.

UPS would like to thank the Committee for your continued support and firm deadlines imposed for the ACE project. CBP is challenged to meet mission

responsibilities and a key component is information technology. The brokerage community has been waiting for a number of years to have the functionality to file entries in ACE. Due to legislative reporting requirements, CBP has been forced to make modifications to the legacy Automated Commercial System (ACS). ACS and ACE have numerous disconnects, therefore its imperative that CBP complete the core entry and post entry modules of ACE, so the Trade can take advantage of the benefits of the ACE portal. The next big step around the corner from ACE is the ITDS process. ACE is the conduit envisioned to provide trade data to Participating Government Agencies (PGA). The PGA's must have funding resources to update their internal systems to effectively communicate in the ACE environment. ITDS will provide paperless processing to streamline the admission of goods. It allows PGA's to work from centralized locations where they can receive, review and maintain data on imported goods, while providing trade facilitation and security oversight. ITDS through ACE provides a single platform to be utilized by multiple agencies, and sharing the cost of development and implementation makes sense from a business perspective. The implementation of ITDS will benefit the movement and release of goods exponentially. By having a system that provides for a multi-Government Agency single release, commerce will flow allowing goods to reach the marketplace at a faster pace.

We would like to address Section 211(e) "Use of Trade Data for Commercial Targeting Purposes". We believe risk based targeting can be a real asset to CBP in their work to prevent intellectual property and copyright violations, interdiction of illegal drugs or goods not meeting Consumer Product Safety Commission standards, and a host of initiatives designed to ensure the safety and security of the United States and its citizens. UPS works closely with CBP and other Government Agencies on risk based targeting and how it can be improved. However, the repeal of Section 343(a)(3) of the Trade Act of 2002 does not insulate or protect legitimate businesses (importers and brokers alike) from potential penalties based on the results of the advanced targeting and subsequent inspection of the imported goods on arrival. Allowing security related information to be used for commercial enforcement purposes undermines the role of the Customs broker and exposes importers to potential penalties because the information submitted was not prepared by the Importer or Record (IOR) or a party licensed to perform customs business.

With regard to Section 215 "Importer of Record Program", UPS and the brokerage community are very familiar with the existing process to identify a unique number for the (IOR). We also know the drawbacks to the current process, therefore we recommend that CBP work with the brokerage and trade community to fix the existing system or agree upon a new solution. The problems that arise

with trying to obtain a Social Security number to use under the existing rules are well documented. This will be particularly difficult in the ACE environment, which requires an identifying number for not only the IOR, but also the "ship to" party for formal as well as informal entries. We are more than willing to work with CBP, importers and the brokerage community to help resolve the issue.

With respect to Section 303 "Penalties for Customs Brokers", we believe the existing law under 19 USC 1641 already provides for fines, revocation or suspension of a customs brokers license if a broker has been convicted of committing or conspiring to commit an act of terrorism. Those acts would be considered at minimum a felony under the law. We would like to request clarification that the revocation of a broker's license under this section is only for individual licensed brokers so convicted. Corporate licenses and brokers acting in a supervisory capacity of a brokerage employee who is convicted of an act of terrorism should not be affected.

Section 204 "Commercial Customs Operations Advisory Committee (CCOAC)", addresses the terms to which an individual may be appointed to CCOAC. Currently, individuals are appointed for two (2) year terms and may be reappointed to a succeeding two (2) year term. In Section 204(b)(2) of S.1631, appointees would be appointed to a four (4) year term with the opportunity to be reappointed for a subsequent term, thereby totaling eight (8) years on CCOAC.

We oppose extending the term to four (4) years, with the opportunity for a second four (4) year term. This is a highly coveted appointment and the opportunity to serve should remain available to a wide range of people on a frequent basis. The Committee benefits from an infusion of new people, who bring with them original ideas and innovative viewpoints from a broad assortment of companies across the supply chain and other associations. Therefore, we request that the current limit of two (2) years, with the opportunity for a second term remain, and Section 204(b)(2) along with Section 204(f)(3) of the Bill be deleted.

Section 234 "Repeated Import – Related Infringement of Intellectual Property Rights", outlines the creation of a "confidential" list of persons described as having a history of attempting to import goods that infringe on intellectual property rights. While we support the Committee's focus on this important issue, we are not convinced that creating a list of potential violators without considering the total universe of data available is the best course of action. For example, UPS may handle 12% of all imported goods entering the U.S. The odds of UPS as a carrier or UPS Supply Chain Solutions as a Customs broker appearing on this confidential list are reasonably high. We stake our reputation on our ethical behavior and compliance record, however due to the volume of imports we handle, our services as a carrier, contract logistics provider, forwarder and Customs broker, we could be the victim of a scheme to import IPR violation goods without our

knowledge. Therefore, we request that CBP and/or other Government Agencies inform UPS of the potential IPR violators so that we may take appropriate action as a company.

The current wording under Section 201(a) "Trade Benefits Under the Customs-Trade Partnership Against Terrorism" denotes that C-TPAT benefits will be provided to Tier 1, Tier 2 and Tier 3 participants, which implies the C-TPAT tier structure applies only to importers. We would like to see the wording changed to read that all participants in the C-TPAT program are eligible to receive additional benefits. This change would insure that carriers, brokers, and the other categories of C-TPAT membership receive C-TPAT benefits.

In closing, UPS would like to applaud the Committee for their renewed focus on Trade. By providing CBP the tools to facilitate legitimate trade and reorganizing their structure to emphasize trade's importance to the United States economy, you have taken a huge step to re-balancing the border. Security and Trade Facilitation should be of equal concern. Thank you again for allowing me the opportunity to testify in front of this Committee.

FINANCE COMMITTEE QUESTIONS FOR THE RECORD

United States Senate
Committee on Finance

Hearing on
"The Customs Facilitation and Trade Enforcement Act of 2009"
Tuesday, October 20, 2009

QUESTIONS FOR MARY ANN COMSTOCK FROM CHAIRMAN BAUCUS

Question 1

CBP has been entrusted with the vital mission of ensuring that international trade runs smoothly. But in recent years, the agency has placed less priority on facilitating trade and on enforcing U.S. trade laws at the border. S. 1631 directs CBP to re-prioritize its trade mission, in part by creating new high-level trade positions throughout the agency. How do you think these new trade positions will benefit American exporters and importers? Are they a step forward? What else should we do to ensure that CBP prioritizes its trade mission?

As the committee was reminded by the written testimony of Mr. Jerry Cook, Customs & Border Protection's (CBP) Mission Statement includes the language "We steadfastly enforce the laws of the United States while fostering our Nation's economic security through lawful international trade and travel." We believe the changes proposed in S.1631 will allow CBP to re-prioritize its trade mission to benefit trade facilitation. While we recognize CBP's role in safeguarding U.S. borders, we believe their focus for the past 8 years has been primarily on security, not trade facilitation. CBP does work with the Trade through the Customs Operations Advisory Council (COAC), the Trade Support Network (TSN), and numerous other organizations. However, many recommendations or "great ideas" put forth by these organizations are not acted upon on a timely basis, if at all. The new CBP trade positions should allow CBP to move forward and act on these recommendations. We hope the new trade positions will be filled with individuals whose goals include identifying and removing the barriers to smooth the flow of goods across our borders. By creating high level trade positions throughout the agency, CBP will be able to refocus on trade.

In addition, the role of the CBP National Account Managers assigned to work with brokers and importers should be expanded to provide greater facilitation on an account level. This will remove unnecessary and inconsistent practices across the various ports of entry. In order for CBP to truly manage trade participants on an account level, the National Account Manager's roles will become more critical.

We strongly believe that the completion of ACE and moving forward with the ITDS process will help ensure CBP prioritizes its trade mission. In order for ACE and ITDS to operate at

maximum performance for CBP and the Trade, other government agencies must participate in the process and implementation of ITDS. Until ACE is completed, CBP will not have the tools needed to balance the tasks of security and trade. Unless CBP has a fully integrated, automated process to gather trade data for risk assessment, they will not be as effective in securing our borders under current constraints, interdicting imports that are not safe, violate Intellectual Property Rights or fail to comply with other government agency requirements.

Question 2

CBP has developed state-of-the art programs to detect imports that may threaten our national security, but goods that threaten the health and safety of American consumers or violate U.S. intellectual property rights continue to cross our borders undetected. S. 1631 directs CBP to apply its well-honed national security targeting methods to detect health, IP, and other trade violations. How will improving CBP's targeting efforts affect your businesses? And given CBP's limited resources, how can CBP best implement this risk-based targeting approach?

UPS supports the use of risk based targeting systems to detect and interdict imports that threaten the health and safety of American consumers or violate U.S. intellectual property rights. One of our concerns is the penalty actions that could apply to importers and customs brokers when utilizing shipping or manifest data instead of the actual entry data for the goods.

UPS believes that CBP's targeting efforts will not significantly affect our business, provided their risk assessment tools are properly calibrated to identify and target inspections and data reviews. For example, CBP's targeting systems should have historical data to "expect" shipments of pharmaceuticals going to a legitimate pharmaceutical company; however, the targeting system should identify anomalies if pharmaceuticals are going to a non-recognized importer or unexpected delivery location.

CBP should be mandated to monitor targeting methods and criteria on a regular basis to ensure risks are a true reflection of the current environment to avoid unnecessary exams and inspections

Working through the existing Account Management Program, CBP should build profiles of legitimate companies into their targeting systems, in order to identify legitimate shipments and prioritize release of these goods. CBP has published that Trade Partnership participants (including managed accounts and large importers) tend to have higher compliance measurement rates than the overall national rate. CBP has reported the top 100 importers import 20% of the total entries, and the top 1000 importers import 53% of the total entries. If these legitimate business entities are properly managed, it would seem that CBP could easily focus its limited resources towards the other 50% of importers whose imports pose higher risks.

Regarding the scoring mechanism utilized by CBP in their current targeting system, we are concerned that many shipments are being targeted at the first port of arrival as opposed to the actual clearance port. This appears to duplicate efforts as the goods may be examined in the port of arrival as well as the port of clearance. CBP should continue to evaluate what is truly a

national security risk. In our opinion, CBP's continued efforts in terms of "tiered" enforcement makes sense as there is not one targeting method that will work all of the time – they must utilize a layered approach.

Question 3

In recent years, U.S. companies have been subject to a host of new requirements to ensure that imports comply with U.S. trade laws. These programs impose significant costs on American businesses, and these businesses should be recognized for their long record of compliance. S. 1631 establishes a voluntary Customs Facilitation Partnership Program that directs CBP to provide trade benefits to importers that have a history of complying with U.S. customs and trade laws. In your opinion, how would a program like this help improve compliance? How would it help improve trade facilitation?

The establishment of a voluntary Customs Facilitation Partnership Program (CFFP) that directs CBP to provide trade benefits to importers with a history of compliance with U.S. Customs and trade laws does two things: promotes compliance (which translates into less work for CBP) and incentivizes the importer with trade benefits (which we hope translates to fewer examinations, clearance via a green or express lane, more interaction with CBP account managers to promote better understanding of the importer's business and other yet to be identified benefits).

As recommended in my oral testimony, CBP created a National Account Managers program in 1994. The COAC Report on Account Based Processing made very good recommendations on how the current program should take a more integrated, comprehensive approach that includes trade compliance, informed compliance, security, IPR and product safety, and information technology.

Whether we are talking about a program called the CFFP or the existing Account Management Program, with the right incentives, the program will improve compliance across the board. Properly managed, CBP could utilize information provided by participants to build out its risk based tools. Expansion to medium sized importers/brokers would drive compliance into new areas not currently addressed by CBP. Trade facilitation would improve as CBP would know more about the importers they are dealing with, the importers' business focus and importing history so CBP could better utilize their risk based targeting systems.

Question 4

Cross-border trade is vital to Montana's economy, but Montana and other rural areas don't receive enough resources to keep this trade flowing. S. 1631 establishes a two-year pilot program to expand the number of 24-hour commercial ports along under-served portions of our land borders. What impact will this pilot program have on Montana? How will it improve the flow of trade across our borders?

Historically, CBP has designated commercial centers where the majority of trade flows across the border. When the two (2) commercial centers in Montana were named (Sweet Grass and

Raymond, MT), the remaining ports of entries became known as "permit ports". A permit port is not open to free flowing trade per se. The goods crossing at a permit port have to be going to a destination south or in close proximity to the port. The permit versus commercial designation allows CBP to place their resources for commercial examinations in key facilities, instead of having to maintain all resources in all ports. While this was a business decision on CBP's part, it has stifled access and natural growth of ports on the Canadian and Mexican borders, and has not allowed for development of new traffic patterns. The pilot program provides the opportunity for communities and states to open up trade through their areas by committing resources and infrastructure improvements. The program will improve the flow of trade by allowing new lanes to develop, shedding miles from origin to destination, avoiding bottlenecks at congested ports, and eliminating trade barriers (as the newly designated port will have the same equipment and facilities as an existing commercial port).

The impact for Montana is having the ability to clear goods between the 340 mile distance east of Sweet Grass, MT to Raymond, MT. CPB has now designated the port of Roosville, MT as a commercial center effective November 1, 2009. This addresses the 200 mile stretch west of Sweet Grass, MT, and provides a border crossing west of the Rockies that allows access to the Pacific Northwest from the province of Alberta. Roosville has been a 24 hour port of entry without the commercial center designation for a number of years. We applaud CBP for making this change as it opens up a needed trade corridor in Western Montana.

Question 5

ACE and ITDS are the keystones to trade facilitation. These programs will significantly reduce paperwork and expenses for American companies and these programs will provide the government with real-time data and improved information sharing among agencies. We have invested billions of dollars in these programs over the years, and it is about time they are completed. S. 1631 provides additional funding for these programs. And it requires CBP to complete these programs by 2012. How important is the timely completion of ACE and ITDS to your business?

Without the electronic tools that ACE and the ITDS process bring, CBP cannot effectively secure our nations' borders or facilitate legitimate trade. It is physically impossible to inspect all goods entering the United States; therefore CBP should have the use of risk based targeting systems with a layered approach that is fully completed and functional. We currently experience issues due to part of the entry processing occurs in the old Automated Commercial System (ACS) while the electronic truck manifest occurs in the Automated Commercial Environment (ACE). Issues arise with data sharing between these two systems (not to mention their technology platforms differ significantly).

Decommissioning of ACS and completion of ACE would fulfill the promise of end to end transportation processing and visibility through one consolidated manifest and entry processing system. ACE is extremely important not only to UPS but the Trade as a whole. Multiple benefits will be achieved by consolidating many disparate systems including ACS, Ocean/Rail Automated Manifest System (AMS), Air AMS, E-manifest and Cargo Release under one multi-

modal system. ACE will also facilitate electronic communication between Participating Government Agencies (PGA), CBP and the Trade. ACE capabilities will increase and improve paperless trade, enhance border security, and foster national economic security by facilitating legitimate international trade.

The benefits:

- Paperless entries provide cost reductions in the areas of record retention, forms, couriers, printers, and labor for trade and the government
- Promotes compliance by providing accurate data for reporting and targeting
- Expanded remote location filing allows for efficient use of resources
- Electronic post summary corrections provide efficient means to correct invalid data for both the Trade and CBP
- ITDS will provide the PGA's with real time data for admissibility decision making or reporting.
- eBond will provide better visibility to revenue risk, and speed entry processing
- In-bond transit improvements will provide enhanced tracking and control of cargo movements

These benefits will only be fully realized by CBP providing a solid operational foundation that includes all major entry types (01, 11, 03, 02, 06, 21, 22, and 23), release including PGA interfaces, and a true multi modal manifest in one system.

Finally, we agree a deadline should be imposed to have ACE/ITDS fully functional and operational by 2012.

Question 6

CBP, along with the Consumer Product Safety Commission, Food and Drug Administration, Animal and Plant Health Inspection Service and other federal agencies, share the important responsibility of ensuring the safety of imported products and foods. Because these agencies lack significant presence at our ports of entry, it is important to establish a working relationship with CBP. S. 1631 establishes an Interagency Import Safety Working Group to improve communication and coordination among these agencies and CBP. It requires CBP, in consultation with the Interagency Import Safety Working Group, to establish a plan to respond to imports that pose a threat to U.S. consumers. Do you think this interagency working group will improve coordination and response?

The proposal to establish an Interagency Import Safety Working Group is a step in the right direction. CBP's responsibility has always been to ensure the safety of imported products and food, acting in tandem with other government agencies, many of whom do not have a presence at our ports of entry. The ability to share information and data (i.e. through ITDS data mining opportunities provided with ACE) and coordinate activities can only improve the safety and well being of the American public. The Interagency Import Safety Working Group needs to engage with a significant cross section of the trade community to get input on proposed new policies. The trade community can assist the Interagency Import Safety Working Group by providing an

insight into their common business practices, which in turn can focus the Safety Working Group's efforts and help shape policy. We believe an interagency working group, with the proper electronic tools in place, will be able to identify and detain suspect imports. Open lines of communication and cooperation between all parties (CBP, Interagency Import Safety Working Group agencies and the importing public) are what are needed.

Question 7

Several federal agencies, including CBP, share the responsibility of ensuring the safety of imported products and foods. Each agency establishes separate, and sometimes duplicative, data requirements and requires importers to utilize different information technology systems to submit this data. Congress, however, has made significant investments in ACE and ITDS to streamline the data submission process for importers and provide agencies, including CBP, on real-time information about cargo shipments. S. 1631 requires the Secretary of Treasury to work with the head of each agency participating in ITDS to utilize ACE and ITDS as a single-window. How can other federal agencies utilize ACE and ITDS? What benefits can the federal agencies gain through their participation in ACE and ITDS? What benefits can importers gain?

ACE is the platform to collect, process and store trade data. ITDS is the window into ACE that government agencies will utilize to collect, review, and perform data mining. Federal agencies need to understand what information is available currently and work to ensure the available data meets their needs. ITDS standardizes the information available which some agencies may view as limiting (for example an agency requiring a specific product code identifier instead of using an established ITDS Standard Data Set), however, it is imperative that there is a "single window" of information that can be agreed upon for ITDS to be successful. Many agencies don't have a presence at ports of entry or border locations. ITDS allows them to data mine information, review pertinent information on pending imports, raise any issues or concerns and work with CBP to deal with imports in real time, before the goods move beyond the border. With ITDS, CBP is in a position to offer a "single release" for imported cargo, meaning that when CBP issues a cargo release message, all regulatory agencies' needs have been addressed and the cargo is admissible into the commerce of the United States.

Federal agencies who participate in ACE and ITDS will have the ability to address any regulatory requirements for the imported goods, prioritize their workload, deploy personnel as needed and more effectively manage imports proactively instead of in a reactive mode.

Importers can be assured that any other government agency requirements have been met because a review by that agency has already taken place. In theory, this should improve time in transit, avoid delays at the port of entry and expedite cargo movements. ACE/ITDS will also provide the opportunity to reduce a manual paper process and move to automation. This will of course support improvements in time and transit but also reduce cost for importers/brokers/etc.

QUESTION FOR MARY ANN COMSTOCK FROM SENATOR GRASSLEY

Question 1

Ms. Comstock, you raised a concern with respect to section 211 of the bill, which would repeal the current firewall in law between using information for security purposes and using it for commercial enforcement purposes. I don't understand this concern. If the government is already receiving this information, and use of the information leads to the identification of goods that don't conform to the customs and trade laws of the United States, why shouldn't liability attach as it otherwise would under our laws? And why should legitimate importers harbor concerns over this provision of the bill?

The information that CBP currently receives under the Importer Security Filing is received from a variety of sources, some of which are from offshore or overseas entities. The importer is ultimately responsible for this information. One part of the Importer Security filing requirements is the transmission of at minimum 6 digits of the harmonized tariff schedule (HTS) for the imported goods. The ISF filing requires only 6 digits of the normal 10 digit HTS for a reason. The application of the HTS has always been considered "customs business" and must be performed by a licensed Customs broker (operating on U.S. soil, within the boundaries of the United States) or by the importer themselves through the self filing entry process.

Enforcement of current U.S. laws is predicated on a licensed customs broker or the importer providing the tariff classification of the imported goods. We see the use of HTS data assigned by a non-licensed party for commercial enforcement purposes as undermining the role of the Customs broker. As you are well aware, CBP licenses and regulates Customs brokers, holding us accountable for the information we provide. CBP also holds importers accountable for the information provided on their behalf by other parties. The ISF information source is often beyond the boundaries of the United States: how can CBP hold the importer accountable for that data? While it is beneficial for CBP to use the ISF information for commercial enforcement targeting purposes, the importer should not be held accountable under 19 USC 1592 unless an entry is also filed supporting the HTS information provided by the ISF.

Legitimate importers can have their "identity" stolen much like individuals who have experienced identity theft. A bad actor could steal information about a legitimate importer, and ship counterfeit product to the United States, delivering to a false address. The legitimate importer won't know a shipment is coming, therefore will not file an entry with CBP either directly or through their appointed Customs broker. The bad actor could set up a clearance with an unsuspecting Customs broker or perform a self filing of entry data. The goods could enter U.S. commerce without the legitimate importer being aware of the entry (ACE will hopefully prevent this from occurring to large importers, but will not protect small and medium importers who may not have an ACE account).

Legitimate importers should not be held accountable through penalty action for the results of targeted examinations for commercial enforcement purposes based on Importer Security Filing information. Importers and Customs brokers must retain their role of applying the 10 digit Harmonized Tariff Schedule classification to imported goods. Only after the entry is filed, should an importer or a Customs broker (acting as the Importer of Record) be subject to potential 19 USC 1592 penalties.

QUESTIONS FOR MARY ANN COMSTOCK FROM SENATOR MENENDEZ

Question 1

Ms. Comstock, Section 215(b) of the bill mandates CBP to develop criteria and a process for assigning importer of record numbers. However, such a database already exists within CBP. This is certainly a worthwhile endeavor to address the database issues raised by a 2008 GAO report, but I have concerns about the potential for CBP to create/implement a NEW data field for tracking when an established numbering system already exists. In your view, how can CBP improve the operational effectiveness of the current importer of record database? What else should CBP do to ensure the accuracy and usefulness of this database?

Currently 19 CFR 24.5 contains language stating that each person, business form, government agency or other organization shall file a Customs Form 5106 Notification of Importer's Number or Notice of Change of Name or Address with the first formal entry that is submitted or the first request for services. The identification number utilized on the CBP Form 5106 is the Internal Revenue Service employer identification number (commonly referred to as the IRS or EIN number). In the event that no IRS number has been assigned, a Social Security number is used for individuals or sole proprietors. When no IRS or SSN is available for some entities (for example a non-resident corporation), CBP "assigns" an importer identification number.

The existing system of identification numbers has some flaws which I will try to succinctly outline:

ABC Corporation has an EIN number, and their headquarters is in Atlanta, GA. Their EIN number is assigned to the Atlanta, GA office location. ABC Corporation also has multiple warehouses and stores around the United States, all of which receive cargo from their overseas vendors. Currently CBP gathers the EIN number of ABC Corporation as the Importer of Record.

In order to identify the Ultimate Consignee address of the location receiving the cargo, ABC Corporation or its' Customs Broker will assign a suffix to the EIN number and the EIN number and suffix will be placed on file with CBP.

ABC Corporation HQ	22-1010101-00
ABC Corporation Montana warehouse	22-1010101-M1
ABC Corporation Nevada store	22-1010101-01
ABC Corporation New York outlet	22-1010101-NY

While the suffix system is limited to 2 alpha/numeric digits, it is possible to identify many locations belonging to an individual corporation.

NOTE: IRS suffix codes are NOT required to further define locations and divisions owned or operated by a corporation. The IR Tax Code does NOT require corporations to identify all

locations with a suffix, therefore CBP cannot mandate that corporations identify each location they have offices, retail outlets, warehouses and other entities. This is the major flaw to the existing system utilizing the IRS or EIN number because it does not identify each location where an individual, corporation, partnership, LLC or legal entity may receive imported goods.

Utilizing the IRS or EIN number assigned by the IRS allows CBP to be relatively certain that the importing entity is a legitimate individual, partnership, corporation or other organization.

Because CBP utilizes the EIN number whose original data is owned by the Internal Revenue Service, CBP has on a number of occasions, tried to match the information they have on file to the IRS database. In performing this exercise they have found that some data on file does not match the IRS database because:

- Corporation Name has changed
- Corporate Address has changed
- Corporation Name is not an exact match to the IRS database
- Corporation Address is not an exact match to the IRS database
- IRS number was transmitted to CBP with transposed numbers therefore CBP's record for the Corporation does not match the IRS database

The current database on file with CBP has been accumulating data for many years. If an EIN number is not utilized for a period of time, CBP inactivates the number in their system. The number can be reinstated or activated again, but requires intervention by CBP to do so.

Customs brokers do not have the ability to look up the IRS EIN data for an importer or consignee in CBP's system. We do have the ability to send a query to CBP, hoping we have "word for word, space for space," queried the correct name & address of the US party – if we are successful, CBP sends us an encrypted number which allows us to clear the shipment at hand. Automated edits prevent customs brokers from utilizing an encrypted number for cargo release more than three times – CBP expects us to telephone the customer or consignee and obtain the correct information for future shipments.

While there are flaws to the existing IRS identification number, I believe the establishment of a new importer number system will have the same pitfalls and problems the current system has. There will still be imperfect names & addresses filed to obtain a new number and we will eventually have the same duplicate records or incorrect data we have today with the existing system.

So what can CBP do to improve the existing system? We suggest the following:

- Establish a fuzzy logic query to return data (not an encrypted number) to the broker performing the query, noting the query must have sufficient information for CBP to determine it is a legitimate query by a licensed customs broker in the performance of their customs business
- No longer require filing a SSN for an individual or a sole proprietorship – CBP should issue an ACE ID for those individuals who do not utilize an EIN

- Retain the existing IRS EIN identification number, but also allow for an alternate identification number: An ACE Account ID
- Allow the Customs broker to reactivate an inactive IRS or EIN number electronically, without intervention by CBP
- CBP should allow the broker to query their system for an EIN, CBP would return an encrypted number to the broker, who can utilize the encrypted number without limits to its use.
- CBP should loosen up the query criteria, sending back to the broker the name/addresses that very closely match the query data, along with an encrypted number – the broker could then determine whether the parties are a match and whether or not to utilize the encrypted number.
- Currently the broker cannot correct an EIN number in CBP's system without filing a paper 5106 form and documented proof as to the correct EIN number. CBP should allow the Customs broker to electronically edit, update or delete data in the existing system. This process should be automated, and CBP could track who filed the number in the event there are questions or concerns about the information filed.
- Work with the IRS to require suffixes to identify all locations for the importing entity, so CBP's targeting system can hone in on all parties to the transaction: Importer of Record, Ultimate Consignee, Deliver to Party etc.

We are not in favor of abandoning the existing identification system. The flaws in the existing system should be addressed. Tackling the existing issues sounds more onerous than just starting a new system, however, it makes much better business sense to fix what we have (maintaining the historical information for targeting purposes) than start a new system that will (in our opinion) ultimately have the same issues that the current system does.

Regardless, confidentiality of information is an issue in the current system, and we anticipate any new scheme for importer identification will have confidentiality issues as well.

Question 2

Sections 205 and 206 of the bill clearly outline a timeline for completion of the Automated Commercial Environment (ACE) system and International Trade Data System (ITDS). The bill also requires CBP to provide a report to Congress on its plans for ACE completion by September 20, 3012 and to operationalize ITDS. I believe that the completion of both ACE and ITDS is critical for the flow of trade and the functionalities are vital for U.S. importers and exporters. For your companies, how important is the completion of ACE and ITDS? For both systems, how do we ensure on-time completion?

The completion of ACE, including all entry modules, the multi-modal manifest and other key components is critical to the success of UPS and other supply chain companies as we leverage our technology in providing our customers with end to end solutions. The electronic manifest system is fairly complete for movements across our northern and southern borders; however, we do not have the ability to file all types of entries in ACE as these modules are not yet complete. CBP needs to complete work on the ocean, air and rail manifest systems to bring in all modes of

transportation. After the multi-modal component is complete, we need a manifest system that moves goods from one type of transportation to another so CBP has full visibility to the movement of goods.

In the mean time, the Trade is forced to file some information via ACE and other information via the legacy Automated Commercial System (ACS). Information does not readily move from one system to another and this presents a trade barrier to carriers, customs brokers and importers alike.

ITDS is a critical piece of the puzzle, as it finally gives other government agencies import visibility in real time. They can monitor imports, as well as utilize and deploy their resources in a more effective manner than before. Without the ITDS interface with other government agencies, CBP is missing a critical piece in improving enforcement of all import requirements for a particular good, potentially leaving the nation less safe and secure.

There is no magic wand that can be waved to ensure on-time completion of ACE and ITDS. We would suggest:

- Agreed upon benchmarks with CBP: What will be delivered in what timeframe
- Seek input from the Trade on what we feel are the priorities for ACE development and deployment
- More focused deployments regarding functionality of ACE. Currently, ACE "drops" are deployed representing several programming and functional changes. When these occur, often times certain items will be fixed but others "broken" during the process.
- Regular reporting from CBP to the Senate Finance Committee on the agreed upon benchmarks that details progress, roadblocks, system issues and failures to deliver as expected. This task could be delegated to a non-profit oversight group to ensure open communication.
- OMB monitoring of cost estimates, actuals and overruns. Perhaps a risk and reward scenario: CBP would be penalized for its' failures and rewarded for its' successes.

Question 3

Duty-drawback is important to U.S. competitiveness, allowing exporters to reclaim duties paid on imported products used to produce products that are subsequently exported. Section 302 of the bill provides for updates to the duty drawback process by providing a more streamlined and simplified program, including automation of the claims process, to reduce the cumbersome and overly complex system that currently exists. Do you believe that the duty drawback program proposed in the bill will increase the competitiveness of U.S. companies?

Duty drawback allows U.S. companies to compete in foreign markets by reducing their duty and tax burden where goods are subsequently exported or processed and exported. For over two centuries, drawback has made our businesses more competitive, created jobs, facilitated trade, improved the balance of trade and generally provided significant benefits to the U.S. economy.

In fact, drawback is the only WTO-legal export incentive program, with all of our major trading partners providing similar incentives to their exporters.

While the current drawback law has served us well, over time it has become a cumbersome, paper-based system that is not capable in its current form of taking advantage of automation advancements offered by the ACE computer system. This has made the program difficult for CBP to administer. The current law is complex, making it difficult for many U.S. companies to take advantage of the important benefits provided by program.

The proposed law is the culmination of joint efforts by both CBP and members of the Trade through the Trade Support Network to modernize drawback and integrate this vital program into ACE. Through years of discussions and review, CBP and Trade representatives have reached an historic compromise in developing a modernized drawback law that is simpler for CBP to administer, easier for U.S. companies to understand, and more accessible for exporters of all sizes to use this important program to make their companies more competitive in the world marketplace.

Question 3 Continued

Are there other steps we can take to further streamline and simplify the program?

Implementation of the proposed law through regulations will be an extremely important step in effectuating the intent of Congress. The current drawback regulations are very technical and quite complex, making it difficult for U.S. businesses, particularly small and medium-sized companies, to take advantage of this important benefit. Many in the Trade involved with the 1998 revisions to the drawback regulations believe that the final product issued by CBP was far too complicated and resulted in a process that is simply beyond the reach of many U.S. companies. While the new law provides for simplification and streamlining of the drawback law and processes, regulations governing the drawback process need to take a new tone. While it is certainly important for CBP to ensure that those claiming drawback are doing so properly, this objective does not need to be achieved at the expense of the clearly expressed Congressional intent - making drawback understandable and available to all U.S. businesses that qualify. We urge Congress to make its intent known to CBP and other regulating agencies that the drawback law should be interpreted and implemented in a manner that effectuates the intent of Congress in making drawback less complex and more available to companies that qualify for the program.

The changes proposed in Section 302 of the Customs Facilitation and Trade Enforcement Act of 2009 (S.1631) will greatly help to increase U.S. competitiveness. Noting this, we believe that Congress has the opportunity to significantly further U.S. competitiveness *in the short-term* for these trying economic times: allow for the clarifying and simplifying 8-digit HTS duty drawback rule on substitution to go into effect on the *date of enactment* of this bill, thus speeding these benefits to U.S. manufacturers to improve U.S. competitiveness and create related job opportunities. The benefits of this change are too straightforward and too important to be delayed by other changes in any large-scale computer system such as ACE, especially in these trying economic times.

Before the

Committee on Finance

United States Senate

Statement of

Jerry Cook

Vice President of Government and Trade Relations

Hanesbrands Inc.

October 20, 2009

HbI
HANESbrandsINC

Chairman Baucus, Ranking Member Grassley and Honored Members of the Senate Finance Committee:

I am pleased to appear before you today. My name is Jerry Cook. I am Vice President, Government and Trade Relations for Hanesbrands with responsibility for our Customs and Trade operations. I am a licensed Customs broker. Hanesbrands is a global consumer goods company with more than a century of history and a portfolio of leading apparel essentials including T-shirts, bras, panties, men's underwear, kids' underwear, socks, hosiery, casualwear and activewear. We operate under many of the special trade programs and FTAs this committee so successfully developed and passed.

We value our partnership with US Customs and Border Protection and view the relationship as an integral collaborator in our business success.
We are a charter member of CTPAT (Customs and Trade Partnership Against Terrorism);
We are an early member of the BASC (Business Alliance for Secure Commerce);
We were involved in the pilot program of Operation Safe Commerce;
We are one of the first ACE Accounts;
We are one of the early Customs Accounts;
We are a filer under PMS;
I am a member of the Trade Support Network and current Chair of the USCIB Customs Committee along with active membership in key trade groups such as ECAT, USCIB, AAEI, AAFA, NCTO, Cotton Council and other North Carolina state organizations and a former member of COAC.

In 2006, Hanesbrands was spun off from Sara Lee Corporation. CBP played a very supportive role in their ability to accumulate our account history/data and successfully re-deploy the associated account data for a seamless start-up. It is just one of the commercial successes we have experienced with the partnership with CBP.

Seven years ago I was representing Sara Lee Branded Apparel and was sitting in this same chair, here before you, testifying on a very similar subject. On June 26, 2002, we were discussing the transfer of U.S. Customs Service to the Homeland Security Department. On that occasion, I emphasized the importance of keeping enforcement and commercial operations together. As I said in 2002 and still believe it today, "the process of enforcing trade laws and advancing a hybrid solution that both informs the trade community of the respective programs and seeks joint ownership in critical areas" is essential. In other words, Customs and the trade community have worked, and are continuing to work together to ensure compliance and improve enforcement.

This partnership is critical to Customs security and commercial targeting operations, allowing them to focus on higher-risk goods and shipments and then to rapidly release/facilitate low-risk trade. And it provides a transparent and predictable environment in which business can operate smoothly and efficiently. As I will describe later, this interaction can be improved upon, but it is essential that for whatever policy changes are contemplated, the integrity of the enforcement and commercial nexus remain intact. I believe the leadership at Customs recognizes the importance of this interaction and has sought policies and practices to support that connection. Over the past years, Customs has been largely successful in creating a culture of knowledge, discipline and professionalism. My remarks today should in no way be construed as a call for a wholesale reorganization of the agency. Rather, they should be understood as appreciating that culture of partnership with the trade and my comments are intended to be recommendations for helping to refine, realign and improve the current partnership.

In my presentation seven years ago, I also stressed the importance of accelerating the implementation of the Automated Commercial Environment (ACE) and the need to provide for trade industry input to senior levels of the Customs Service. As I enumerated before, input

from the trade community in fora such as the Trade Support Network (TSN), the Customs Operations Advisory Committee (COAC) and through programs such as BASC and C-TPAT have greatly improved the effectiveness of enforcement operations and the efficiency of commercial transactions. That said, in both the areas of ACE implementation and industry input, much more work is still needed. In fact, in some areas, we have seen a degradation of the relationship between government and industry, which has led to a worsening of the trade environment. This is certainly the case with the expectation of ACE and its operational support to both the trade and government.

As you know, the Mission statement for Customs and Border Protection is:

"We are the guardians of our nation's borders.

We are America's frontline.

We safeguard the American homeland at and beyond our borders.

We protect the American public against terrorists and the instruments of terror.

We steadfastly enforce the laws of the United States while fostering our Nation's economic security through lawful international trade and travel.

We serve the American public with vigilance, integrity and professionalism."

I would purport that CBP and Congress through their focus on funding and legislation over the past 7 years have greatly enhanced CBPs ability to achieve successes in the first four statements. However, I believe the one that we need to focus on and bolster is "fostering our Nation's economic security through lawful international trade". During these economic difficulties companies need to be able to rely on predictable costs and processing. Every day merchandise is not on store shelves means millions of dollars in lost potential revenue to a company. We applaud your efforts to refocus CBP on its mission to facilitate trade and provide the following comments.

Renew Commitment to the Automated Commercial Environment (ACE)

In 1993, Congress passed and enacted the Customs Modernization Act. It enumerated 30 key provisions that were to be incorporated in ACE. It has now been more than a decade since this Congressional mandate was established. While targeted implementations have been developed and large expenditures have been made on ACE implementation; nevertheless, only four of the 30 provisions that were originally enumerated have been fully delivered in ACE. The following statement is made in every CBP Report to Congress on ACE:

> "The Customs Modernization Act (Mod Act) outlined requirements for automation and emphasized electronic trade processing. The delivery of ACE capabilities will fulfill the Mod Act by enabling trade community users and CBP officers to electronically submit and retrieve import transaction data through an intuitive, standards-based, secure Web portal. ACE is providing new capabilities to Government users and the trade community by streamlining CBP business processes, reducing requirements for paper documentation, and strengthening Screening and Targeting (S&T) systems. ACE is also providing the technology backbone for ITDS, which will provide a "single window" for submitting trade information to Federal agencies that share responsibility for facilitating international trade and securing America's supply chain. These are key requirements for enhancing border security and expediting legitimate trade."

To Date, there are only 4 of the 30 measures that are even partially implemented: Electronic Entry of Merchandise; Electronic Entry Summary; Electronic Manifest; Electronic Payment of Duties and Fees. As I said, these four elements are not fully functioning for all methods of transportation or in all entry processes.

When the Modernization Act was being debated, the trade community agreed to undertake expenditures and changes with the hopes of realizing benefits. That is why we supported the bill in 1993 with the 30 provisions to be implemented and accepted the new concept of "reasonable care" thus taking more responsibility for legal importation of goods.

However, each and every one of the original Mod Act provisions are critical to the international business community to establish efficient supply chains, not to mention the basic modernization of Customs. As a member of the trade community, I can greatly appreciate the adjustments that have been made by CBP to incorporate new and urgent concepts of security, but the trade's expectation for a robust and effective commercial system is struggling.

I applaud the provisions in Section 205 of your "Customs Facilitation and Trade Enforcement Reauthorization Act of 2009" (S. 1631) which authorize funds until 2012 and require reports from Customs regarding the plans and deadlines to roll out ACE as was congressionally mandated. Oversight of Customs in this matter is desperately needed to help bridge the competing demands on CBP's development of the full commercial functionality and the importance of implementing ACE to the business community cannot be overly stressed. We want to urge the Committee to ensure that funding continues at the levels historically provided and that are necessary to implement the full system. indeed, I look forward to a time when all data interfaces with the U.S. government will be electronic and CBP is permitted to be the single portal for entry with any Federal agency import requirements as intended in the ITDS model. We also look forward to achieving a robust data-base that the trade and CBP can each utilize for validation, compliance and operating in a true paperless environment.

Support effective input to CBP from industry

As I stated before this Committee in 2002, communication between CBP and industry is essential for both parties. Some observers may see the relationship between enforcement and commercial activity as being necessarily antagonistic. This could not be farther from the truth. Our experience with CBP is most appreciated from either the critical insights on how better to protect and secure our cargo, to assistance with understanding complex trade regulations and commercial issues. Interaction is beneficial for both. Transparency from Customs provides a compliance roadmap from industry, and input from industry allows Customs to further refine

rules and regulations. Unfortunately, this beneficial exchange of information has been challenged by some of the recent developments. The complexity of issues necessitates industry involvement, but by CBPs reductions of industry involvement in program development and implementation problems are increased rather than decreased. We need for CBP to an active partner in the encouragement of trade and commerce as opposed to being strictly an enforcement agency.

You address this issue to an extent in S. 1631, specifically in Section 101 with the creation of the positions of Principle Deputy Commissioner, Deputy Commissioner, Assistant Commissioner and the new Office of Trade. The addition of these positions will give renewed support and organization balance to advocate for commercial trade concerns and challenges. I also support the creation of the Trade Advocate, although I would recommend that the Advocate report directly to the Principle Deputy, if not directly to the Commissioner. Requiring the Advocate to report through additional layers will lessen the position's effect to provide critical input and balance for commercial facilitation among the many competing challenges that the senior team a CBP is managing.

Broadly speaking, the trade community and associations endorse the reorganization proposed by S. 1631 and echo strongly the opportunity for enhanced organizational changes in CBP to emphasize CBP's trade facilitation responsibilities and programs. In that vein, I would recommend an additional structural change - that the commercial resources and staff in the field components of CBP be incorporated into the new Office of Trade. This is a critical element for the effective implementation of new policies. The Office of Trade would be able to set policies, but could not ensure proper and effective application of the policies without direct control of the import specialists and entry specialists that perform the revenue and commercial functions in the ports.

The other part of this equation is to further enhance industry input and participation. As I stated earlier, the success of programs like C-TPAT can be attributed to the highly successful inclusion of the trade on day one and by validating it with input from industry. CBP deserves full respect for the shear involvement, working partnership and sustained attention with the industry via a volunteer program to help secure America's cargo. That said, over reliance on communicating to CBP – through COAC – has been diminished with the re-alignment of COAC within CBP's organization and the lack of strong interplay within DHS. The resulting challenge is how to restore COAC to its vital and robust role. The current arrangement needs adjusting to seek more industry contributions into the agenda but also on the future state of the organization and its role. One example is the COAC members are required to go through CBP in order to communicate to Members of Congress their concerns. Further, DHS is nearly detached from this process which further reduces the effectiveness of advocating strong commercial-security effective policies/implementations when DHS is not a co-owner. We believe that for an advisory body to be effective, it must also be independent and able to operate independently from the agency to which it is providing advice, critical or otherwise. The current situation – in which industry is not an active partner on the design concept through full operation is limiting COAC's effectiveness, and thus preventing the progress that we originally envisaged by Congress. Further, it limits the overall effectiveness of the partnership. I am pleased to see that Section 204 addresses many of these issues; I trust that these standards will apply to COAC as well as whatever new advisory committees are established.

Industry is not the only outside voice that needs to have input. The actions that Customs takes can have sweeping effects over other U.S federal agencies, and accidentally impeding other government functions and policy objectives. For example, CBP's office of rulings and regulations recently undertook the issuance of new interpretations of trade provisions that had been effectively functioning in the trade community for over two decades: CBP's proposal to reverse prior practice and court decisions on the ability of a US company to use the firsts sale doctrine and its proposal to reverse the applicability of a Chapter 98 provision

to prevent the double taxation of goods that are merely exported for warehousing or sales and then returned to the commerce of the United States. These two provisions were both long standing policies that had been determined by Customs as allowable through prior binding rulings but apparently due to increased use of the provisions and the additional burdens on customs to review such actions, CBP unilaterally determined to revoke the privileges to use them. This proposed revocation was despite court rulings as well. Such actions were proposed without consulting the industry and realizing the negative financial impact such actions will have on companies in a very tough economic time.

Given the trade leadership this committee has so strongly supported and sought, CBP needs to be a vested partner in the inter-agency process to insure its decisions that may impact trade policy/practice remain consistent with the robust development of trade and as were intended either by Congress or by other agencies that may have negotiated the provisions. We strongly support the language that you have included in Section 101, where you establish an Interagency Customs Review Board and mandate that "[b]efore the U.S. Customs and Border Protection Agency may publicly propose or adopt a proposed change to a customs regulation, interpretation, or practice, the interagency Customs Review Board shall review the proposed change to determine if the proposed change conforms to the international trade obligations of the United States." In general, I am concerned that Customs has become accidentally isolated from the other trade-related agencies of the U.S. government. This situation has led to the overly enforcement-focused rulings described above at the expense of trade development. CBP needs your support for engaging the trade partners in the other agencies to support robust trade policies and resulting practices More needs to be done to include Customs in conversations regarding trade policy to encourage Customs to assume its role and responsibility as trade facilitator with the same enthusiasm that is has for law enforcement. I would recommend that CBP be directed to establish an organizational unit within the Office of Trade that specifically addresses interagency coordination and that this office have more than the current handful of staff support.

There needs to be greater connectivity in general between security and law enforcement and trade facilitation discussions. For example, even with all the activity at the World Trade Organization (WTO) surrounding trade facilitation, trade facilitation has not been raised at the World Customs Organization (WCO). When Customs participates in these types of international fora, it must remember to wear both the trade promotion and law enforcement hats. CBP has an incredible history and abundance of talent that is well trained and highly disciplined as we can see from their success to manage trade and protect cargo. But, CBP needs your active over-sight and encouragement to engage in commercial development programs in addition to cargo security.

Direct CBP to take the lead role in coordinating USG trade-related enforcement

The final topic I would like to discuss is coordination between U.S. agencies which are involved, or may become involved in the business of trade. You address this issue in Section 206 of the bill, directing the Secretary to work with the head of each agency participating in the International Trade Data System (ITDS). Paragraph" iii" is particularly important – ensuring that the agencies provide admissibility criteria and data elements required by the agency to authorize the release of cargo by the U.S. Customs and Border Protection Agency for incorporation into the operational functionality of the Automated Commercial Environment computer system. In addition, I would recommend that the legislation include a mandate that 1) all agencies that are authorized to regulate cross-border commerce participate in the ITDS and 2) all data elements that are provided from the ITDS agencies to Customs be submitted electronically. We must avoid scenarios like the one industry experienced last year with the amendments to the Lacey Act, which required an import declaration but did not provide for an electronic interface for that declaration. Paper documents in this new economy are worse than useless – they are costly and wasteful. Having said this, I recognize that for some economic

operators paper is the only means available to them. With that in mind, I would recommend that an electronic interface option be mandated for all entry documents.

We all have read the challenges related to the safety problems of imported foods, consumer products, and pharmaceuticals. The prior Administration created an Interagency Working Group to focus on the problem and their recommendations highlighted the role of CBP, ACE, and ITDS as fundamental to interagency cooperation. There are several talented individuals who have done a superb job in helping to understand and craft a process for CBP. Nevertheless, I understand that at CBP Headquarters they are challenged to take this to the next level given the current deployment of employees available as only a handful of people are dedicated to interagency coordination on import safety and ITDS. It would seem appropriate for CBP to have a well-staffed Office dedicated to these programs. This office could also serve as the secretariat for the Interagency Import Safety Agency Working Group. I am not convinced that when new requirements are mandated affecting international trade like Lacey or the CPSIA that CBP is always incorporated in the full implementation requirements. This exclusion impacts not only CBP's ability to be effective but also stymies legitimate commerce. CBP is a critical interface, source and partner that the trade relies on for interpretative and effective compliance requirements to insure that it meets the objectives of those new mandates.

There is, in fact, a tool which could be used to bring the security and commercial sides of customs matters together, to enhance communication between Customs and industry, and to oversee the use of security and commercial data to improve targeting and facilitate commerce. It is called the Account Management Program. The AMP is supposed to provide uniform, consistent, and efficient treatment of importers willing to invest in CBP compliance programs and participate in CBP partnership programs. The business community, in fact, has lived up to its end of the bargain by investing resources and time and by voluntarily joining several CBP programs including C-TPAT, pilot programs like ATDI, but CBP has struggled where and how to fully implement and staff National Account Managers. The role of the Account Manager today

has shifted from the original concept and now often you have two account managers (Security and Commercial). In fact, I believe there are fewer CBP Commercial Account Managers today than there were a decade ago. The robust Account Concept fully embraces the marriage of security and commercial risk and can provide a vital commercial and security facilitation beneficial to government and industry. Industry seeks to fully comply with CBP rules but wants a more predictable, simplified process to move goods across our borders. But sometimes, the goal of perfection becomes the enemy of success. Account managers can provide a clearinghouse of information regarding Customs rules, security enhancements/advice and the rules of other agencies, in order to facilitate that process. When the Account Management is fully deployed along with ACE, the expected dividends of the Mod ACT, ACE and Security can assist in yielding a more robust and compliant commerce for the United States.

From the perspective of industry, any import requirement – be it commercial or security related - effects business at the border. As I said before, industry's top priorities are transparency and predictability. If this Committee can provide those elements then it will have accomplished much on the trade facilitation agenda. We recognize that there are inherent limitations to your jurisdiction and that you do not have the authority to address the security ledger of the customs equation. That said we appreciate that in Section 201 you direct the Secretary of Homeland Security to develop and implement trade benefits for Tier 1, 2 and 3 C-TPAT participants. As I just said, however, one of the biggest benefits that you could provide the trade is creating a system that coordinates the disparate actors of the importing environment related to security and commerce. The Customs Facilitation Partnership which you propose to create in Section 202 represents another step toward enhancing communication and cooperation between Customs and Industry. While understanding, again, that you have limited jurisdiction over security matters, I would recommend that language be included in the legislation that points to coordination between security programs like C-TPAT and commercial programs like the CFP. From the industry perspective, the two are simply two sides of the same coin.

If it is not possible to house benefits of each in the same program, then you should at least allow the other points of interfacing to address both. The Account Management Program could be used to oversee and manage that interface. That could include, for example, the management of security data and commercial data. There are a lot of concerns in industry about the use of proprietary commercial data. A robust AMP could allow CBP to use data for improved targeting, while at the same time assuring its protection and assuaging the concerns of industry. If we look at the C-TPAT program again as a model, what has made it successful is the interaction and confidence building that has developed over time. The same focus and energy should be applied on the commercial side.

The Account Management model could also provide benefits to so-called "trusted traders", importers that have invested heavily in security and commercial compliance programs, and have demonstrated time and time again that their shipments are secure and safe. Qualified importers should be able to benefit from programs which allow for pre-admissibility and self-determination, which will reduce costs, time and energy. Companies that are importing the same product from the same sources, with a strong track record and high predictability should be granted a path toward expedited release of goods. Having to file before entry and then repeat the process by filing post entry history is burdensome and unnecessary. Everything should be done to complete documentation before entry, and Congress is in the position to create incentives to move companies in that direction. These kinds of programs would not be for everyone. Only the companies with a proven track record of consistent compliance could participate. But creating such a system would provide the trade facilitation benefits that Congress wants to deliver.

Compliance with trade programs should be rewarded through enhanced entry benefits. However, programs that are put in place to ensure compliance with trade programs should be applauded and not penalized. In other words, if a company implements an internal process to

ensure compliance with a preferential trade program and the system implemented uncovers errors that the company then seeks to remedy, the process should be rewarded and the company should not be penalized. Trade enhancement and compliance need to be the focus versus penalizing companies as they try to comply.

In closing, from 2002 till today, an integrated CBP of Commercial and Security focus provides the highest commercial benefit and safety. Since 2002, the need of knowing of what shipped has changed dramatically to needing to know "what is going to be shipped and from and to." We need to shift to a full and robust account structure along with enhanced organizational changes in CBP to provide the trade and commerce dialogue equal perspective to the challenges CBP faces and has successful met over the years.

CBP needs to be incorporated as a full partner and challenged to have respective policies, regulations and implementations to support commercial facilitation and robust development of trade utilizing their demonstrated experience of secure cargo and understanding of the trade accounts they manage.

We need to assess past requirements that detract CBP, the trade and other agencies from looking at past shipments and shift the focus to perspective commerce and current commerce to have a highly integrated business environment.

We need to seek the benefits of utilizing known and repetitive account based information to reduce the cost of compliance, cost of CBP's operation and development and fully implement efficient and lean practices that enable the US to be the most effective and secure commerce in the world-

Mr. Chairman and members of the Committee please understand that Hanesbrand has been and will remain committed to working with CBP as a partner. Compliance is one of the

pillars of our policy. However, when we are compliant and serving as models in the industry we need to have concrete recognition for our efforts and to benefit from the additional costs and burdens of being a "good actor" warrant. My comments today are meant to help you in helping CBP become a better partner for the trading community. We will make ourselves available to provide additional input as you deem necessary.

Again, thank you Mr. Chairman and distinguished members of the Committee for this opportunity to appear before you today. We also want to thank CBP for the outstanding efforts, professionalism and partnership that they have provided to us, and the trade, over the years and we look forward to continuing to work with them. I welcome any questions you may have and am submitting a more complete copy of my comments for the record.

FINANCE COMMITTEE QUESTIONS FOR THE RECORD

United States Senate
Committee on Finance

Hearing on
"The Customs Facilitation and Trade Enforcement Act of 2009"
Tuesday, October 20, 2009

QUESTIONS FOR JERRY COOK FROM CHAIRMAN BAUCUS

Question 1

CBP has been entrusted with the vital mission of ensuring that international trade runs smoothly. But in recent years, the agency has placed less priority on facilitating trade and on enforcing U.S. trade laws at the border. S. 1631 directs CBP to re-prioritize its trade mission, in part by creating new high-level trade positions throughout the agency. How do you think these new trade positions will benefit American exporters and importers? Are they a step forward? What else should we do to ensure that CBP prioritizes its trade mission?

Section 101 creates the positions of Principal Deputy Commissioner, Deputy Commissioner, Assistant Commissioner and the new Office of Trade. The addition of these positions will give renewed support and organization balance to advocate for commercial trade concerns and challenges. I also support the creation of the Trade Advocate, although I would recommend that the Advocate report directly to the Principal Deputy, if not directly to the Commissioner. Requiring the Advocate to report through additional layers or through layers that are also dealing with security issues will lessen the position's ability to provide critical input and balance for commercial facilitation among the many competing challenges that the senior team a CBP is managing. One issue that has struck many in the trade community is the lack of political appointments in the CBP hierarchy. This lack of liaison between the agency and the Administration allows the career service employees to conduct business without sufficient oversight to ensure their work conforms to the Administrations objectives. I would submit that most of the trade community and associations support reorganization. However, I would go one step further and recommend that the commercial resources and staff in the field components of CBP, such as the import specialists and entry teams, be incorporated into the new Office of Trade. This is a critical element for the effective implementation of new policies. The Office of Trade would be able to set policies, but could not ensure proper and effective application of the policies without direct control of the import specialists and entry specialists that perform the revenue and commercial functions in the ports or in the field.

It is equally important that the Commissioner of Customs Border Protection to report directly to the Secretary of Homeland Security. In the current structure of Homeland Security, only the Commissioner of CBP has the voice of trade and commerce. Absent the Commissioner's direct presence, it is unlikely the critical input of trade will be vitally incorporated in risk planning and

risk analysis that includes the insurance that commerce operates with a few impediments and risk-free as possible.

Question 2

CBP has developed state-of-the art programs to detect imports that may threaten our national security. But goods that threaten the health and safety of American consumers or violate U.S. intellectual property rights continue to cross our borders undetected. This bill directs CBP to apply its well-honed national security targeting methods to detect health, IP, and other trade violations. How will improving CBP's targeting efforts affect your businesses? And given CBP's limited resources, how can CBP best implement this risk-based targeting approach?

One of the most difficult issues that arise between our company and CBP is the requirement to prove innocence and the resulting impact of un-intended consequences. CBP assumes the position that importers are culpable and therefore have to prove their innocence, versus our judicial system which is the opposite. We have been forced to deal with proving the negative – that is proving that we did not do something that CBP thinks we might have done. If CBP enacts additional measures to detect IPR, health or other trade violations, we submit that there has to be a sense of "innocent until CBP proves guilty." Using data that is made available currently such as the 10+2 data for security measures has not yet been tested as to efficacy in risk based assessments. Sometimes in supplying such information it is costly and difficult to provide in the timely manner required for admission. If in targeting methods to protect health, IP and other trade violations it is necessary to require additional data elements, it may be prudent to test the current system before requiring any additional data elements be added.

Under the MODACT, Congress sought to inspire and encourage companies to make investments in reasonable care for conducting customs business. The joint partnership programs that have emerged with industry-CBP as partners have successfully advanced trade and compliance. However, where the balance shifts from the standard of "reasonable" can result in the trade bearing an excessive burden of proof/assurance that in an account structure would not be as burdensome as the individual transaction.

Given the limited resources available to Customs, it seems prudent for CBP to build upon some of its successes. Voluntary participation in programs such as the C-TPAT has yielded significant benefits to CBP and the security of our country's borders. As you rightly recognize in your bill, however, the benefits to the companies which have undertaken the expenses related to establishing a secure chain of supply have not materialized. Thus, we think that creating a "single portal" for trade through CBP would benefit all importers the most. If there is a single voluntary program into which trusted importers are able to demonstrate to the relevant governing agencies that they have established measures, testing, certification, etc. that meet or exceed that agency's requirements, they should be considered trusted importers and able to reap tangible benefits. Unfortunately, this type of program shifts the costs to the importers, but if there are tangible benefits, the cost benefit analysis may prove workable to get participation from the largest percentage of traders.

One of the best ways for CBP to distinguish between highly compliant importers and higher-risk companies is to adopt Account-Based risk management. The Commercial Operations Advisory Committee (COAC) proposed this approach to CBP in May 2009 but CBP has been very slow or reluctant to implement the recommendations.

Question 3

In recent years, U.S. companies have been subject to a host of new requirements to ensure that imports comply with U.S. trade laws. These programs impose significant costs on American businesses, and these businesses should be recognized for their long record of compliance. S. 1631 establishes a voluntary Customs Facilitation Partnership Program that directs CBP to provide trade benefits to importers that have a history of complying with U.S. customs and trade laws. In your opinion, how would a program like this help improve compliance? How would it help improve trade facilitation?

As stated above, one of the biggest benefits that you could provide the trade is creating a system that coordinates the disparate actors of the importing environment related to security and commerce. The Customs Facilitation Partnership which you propose to create in Section 202 represents another step toward enhancing communication and cooperation between Customs and Industry. While understanding, again, that you have limited jurisdiction over security matters, I would recommend that language be included in the legislation that points to coordination between security programs like C-TPAT and commercial programs like the CFP.

From the industry perspective, the two are simply two sides of the same coin. As we have seen with the C-TPAT, legitimate US companies have undertaken expense and effort to ensure supply chain security. We can build on that voluntary program to incorporate compliance with other regulatory requirements such as CPSC requirements – ensuring the safety of a consumer product from cradle to grave; or compliance with preference programs using the same trusted importer, self evaluating and voluntary initiatives. However, there must be clearly defined benefits. Such benefits could include pre-notification of cargo arrival at ports, the ability to conduct all transactions with all agencies electronically, allowing all certificates, licenses, declarations to be maintained on electronic file and required only if requested post entry; allowing these "good actors" to self certify/verify/test provided such methodology meets or exceeds the regulating agencies requirements; allowing these companies to be exempt from any fees related to new programs or testing, etc. to account for the expenses they have incurred to become compliant and clearance of goods within 24 hours of arrival at the ports. These benefits, these trade facilitation mechanisms will save US companies more money than the elimination of tariffs on goods. Each day we have cargo sitting on the dock or being held by CBP for verification costs money. We need to be able to move and clear goods quickly, then work in a post entry environment that is only based on risk assessment for examination, etc.

Question 4

In recent months, CBP has introduced several new policies without fully assessing the effectiveness of the programs or the compliance costs involved. I am concerned that some of these programs may harm the competitiveness of American companies, and I strongly believe CBP should consult with U.S. businesses before imposing these sweeping changes. S. 1631 creates a Trade Advocate, who is responsible for ensuring these consultations happen. And it reforms the Customs Advisory Committee, known as the COAC, to make it more effective. How do you think these reforms will benefit the trade community?

Hanes brand has been one of the U.S. companies that has been hit by several of the CBP actions proposed in 2009. The first incident was the "reinterpretation" of long standing practice and court rulings with respect to using the first sale. The "First Sale Rule" not only provides crucial commercial basis of valuation, but it is the essential commercial valuation that aligns with the specific origin, antitransshipment rules and FTA requirements as well security. The focus on the producer/shipper location for value, security and validation of origin conferring operation/location.

This legally recognized mechanism allows U.S. companies to minimize their exposure to duty assessment. We still pay duties on our imports. However, we do not have to add in the cost associated with the goods passing through one, two or more vendors hands upon arrival. We are able to use the value associated with the first sale of the goods as the value to be used when assessing tariffs upon importation into the U.S. Especially during these difficult economic times, it is essential that we are able to provide the most value at a competitive price to our consumers. This valuation provision helps us to do that. Further, the reasons given for making the change seemed to indicate that CBP did not have the resources to effectively audit importers using the first sale doctrine due to the increased use of the program and because other countries at the World Customs Organization (WCO) were not allowing the use of the first sale. Of course it is understandable that many other countries would not want to use this valuation methodology since they depend on tariffs as their primary source of income (thus our problems at the WTO in NAMA tariff reduction discussions). However, for the U.S. and the E.U., these two economies have matured beyond reliance on foreign tariffs and should seek to provide legitimate means for importers to remain competitive.

In a second instance, CBP proposed again to reinterpret long standing practice and court rulings that allowed the use of Chapter 98 to re-import goods without having to re-pay goods if such goods were exported from the United States without being advanced in value. Under this provision, many U.S. companies were warehousing goods or sending goods to retail operations in other countries and then when such goods were needed in the U.S. or if they were not selling in those other markets returned to the U.S., upon re-importation, these goods would not be subject to paying tariffs a second time. In your bill, you provide some remedy to this problem but it is incomplete. For example, the current bill needs to be amended to provide that if a good is entered into the U.S. duty free under any of the FTAs or preference programs that upon reimportation it does not have to pay duties. Additionally, a provision needs to be inserted which allows generally acceptable accounting methods to be used for goods that are reimported. Currently, CBP does not allow this methodology thus making it virtually impossible to use.

Further, a provision needs to be included that will allow apparel specifically to be re-entered without having to link the individual manufacturer identification to a specific product. Possibly allowing multiple MIDs to be used upon reimportation. The actual MID was already provided to CBP upon initial importation, thus it is redundant, unnecessary and extremely burdensome to provide it upon re-importation.

The requirement that CBP consult with the trade community, other agencies and Congress prior to proposing any action is helpful. In addition the requirement in your bill that comments be available on line is equally helpful, however, as you may know, CBP publishes its own document that includes rulings, decisions etc. This document, called the Customs Bulletin, is not a publicly available document as is the Federal Register. One must subscribe to the publication in order to receive it. It is in this document that several of the proposed actions were "published". It is only through the diligence of those monitoring CBP that their actions were brought to light. I would suggest that the legislation be improved to require that CBP's Bulleting be available free on line, that comments be available on line and that the outcome of the proposed action also be available on line. Such transparency will help to facilitate the trading community in compliance as well.

Question 5

CBP, along with the Consumer Product Safety Commission, Food and Drug Administration, Animal and Plant Health Inspection Service and other federal agencies, share the important responsibility of ensuring the safety of imported products and foods. Because these agencies lack significant presence at our ports of entry, it is important to establish a working relationship with CBP. S. 1631 establishes an Interagency Import Safety Working Group to improve communication and coordination among these agencies and CBP. It requires CBP, in consultation with the Interagency Import Safety Working Group, to establish a plan to respond to imports that pose a threat to U.S. consumers. Do you think this interagency working group will improve coordination and response?

As I stated in my testimony, I appeared before the Committee when the Customs Modernization Bill was being considered. The trade community supported that measure because of the hoped for benefits. However, every year, CBP issues its report to Congress on the Automated Customs Environment with the same statement that has yet, more than a decade and half later been realized. "The Customs Modernization Act (Mod Act) outlined requirements for automation and emphasized electronic trade processing. The delivery of ACE capabilities will fulfill the Mod Act by enabling trade community users and CBP officers to electronically submit and retrieve import transaction data through an intuitive, standards-based, secure Web portal. ACE is providing new capabilities to Government users and the trade community by streamlining CBP business processes, reducing requirements for paper documentation, and strengthening Screening and Targeting (S&T) systems. ACE is also providing the technology backbone for ITDS, which will provide a "single window" for submitting trade information to Federal agencies that share responsibility for facilitating international trade and securing America's supply chain. These are key requirements for enhancing border security and expediting legitimate trade."

The law has been passed; CBP and the other agencies have not been held accountable for achieving the objectives of Congress. The single window process that allows clearance to trusted importers subject to all these various agency requirements is vital to moving goods in an expeditious manner. Currently, while we might satisfy the requirements of C-TPAT for CBP to give us green lane status, we may find ourselves with goods being held, inspected and tested by CPSC for lead which could take a month or more. We need mechanisms to allow goods to move efficiently for those companies that undertake the commitment to verify, certify and test their products for agency compliance prior to importation and these agencies must be made to accept these programs and allow the goods to clear the ports.

Quite frankly, one would expect CBP to have an entire office dedicated to working with other agencies and to focus on import safety issues. The reality is that there are only a handful of people at the national headquarters actually engaged in building cooperative programs with other agencies and working on ITDS.

Question 6

Several federal agencies, including CBP, share the responsibility of ensuring the safety of imported products and foods. Each agency establishes separate, and sometimes duplicative, data requirements and requires importers to utilize different information technology systems to submit this data. Congress, however, has made significant investments in ACE and ITDS to streamline the data submission process for importers and provide agencies, including CBP, on real-time information about cargo shipments. S. 1631 requires the Secretary of Treasury to work with the head of each agency participating in ITDS to utilize ACE and ITDS as a single-window. How can other federal agencies utilize ACE and ITDS? What benefits can the federal agencies gain through their participation in ACE and ITDS? What benefits can importers gain?

Please see my comments to number 5 above. We support the concept of the ITDS as a single window, we need for all agencies to be required to buy into this program. Other serious trading partners such as Singapore with a huge amount of trade have managed to create a single portal. The United States should be able to accomplish a similar program.

There are concerns in the industry of using security data for commercial compliance by CBP, I will not dispute that fact. However, the data that is submitted to CBP should be considered sufficient to allow other agencies to grant CBP the authority to release the goods. We are aware for example, that under the current Lacey Act amendment requiring a certificate declaring species, genus, origin, quantity and value of any products that are made from plants or products thereof is being collected by CBP electronically, but such data is then downloaded onto a disc and via the "sneaker network" is shared with the USDA. This type of "data sharing" is unbelievable in this day and age. Other agencies can use the data that is submitted for entry to CBP to enforce compliance with their regulations. The single portal would give them greater access to all related entry data, more timely review and the ability to link with CBP's enforcement team to access importers post entry.

However, if such a portal is not possible, then maybe enhancing the role of the Account Management Program would provide the necessary link between security and regulatory compliance that is needed. The Account Management model could also provide benefits to so-called "trusted traders", importers that have invested heavily in security and commercial compliance programs, and have demonstrated time and time again that their shipments are secure and safe. Qualified importers should be able to benefit from programs which allow for pre-admissibility and self-determination, which will reduce costs, time and energy. Companies that are importing the same product from the same sources, with a strong track record and high predictability should be granted a path toward expedited release of goods. Having to file before entry and then repeat the process by filing post entry history is burdensome and unnecessary. Everything should be done to complete documentation before entry, and Congress is in the position to create incentives to move companies in that direction. These kinds of programs would not be for everyone. Only the companies with a proven track record of consistent compliance could participate. But creating such a system would provide the trade facilitation benefits that Congress wants to deliver. The one note of caution I would make is that we need to be careful about the burden required of companies to submit documentation/data to the regulating agencies so that it is not so difficult it becomes a barrier to garnering compliance and participation from the trading community.

QUESTIONS FOR JERRY COOK FROM SENATOR GRASSLEY

Question 1

Section 102 of the bill requires the new Trade Advocate to report directly to the Assistant Commissioner of the Office of Trade. In your testimony, you recommend instead that the Trade Advocate report directly to either the new Principle Deputy Commissioner or to the Commissioner. Are you at all concerned, though, that if the Trade Advocate reports to the Principle Deputy Commissioner or to the Commissioner, the Trade Advocate will have less of an ability to influence policies as they are being shaped within the Office of Trade? Please respond.

I advocate for direct reporting to the new Principal Deputy Commissioner or to the Commissioner because I believe that the direct line will allow the Trade Advocate the necessary access and level within CBP to influence policy. Requiring the Advocate to report through additional layers or through layers that are also dealing with security issues will lessen the position's ability to provide critical input and balance for commercial facilitation among the many competing challenges that the senior team a CBP is managing. One issue that has struck many in the trade community is the lack of political appointments in the CBP hierarchy. This lack of liaison between the agency and the Administration allows the career service employees to conduct business without sufficient oversight to ensure their work conforms to the Administrations objectives. I would submit that most of the trade community and associations support reorganization. However, I would go one step further and recommend that the commercial resources and staff in the field components of CBP be incorporated into the new Office of Trade. This is a critical element for the effective implementation of new policies. The Office of Trade would be able to set policies, but could not ensure proper and effective application of the policies without direct control of the import specialists and entry specialists that perform the revenue and commercial functions in the ports or in the field.

Question 2

Section 102 of the bill creates a new position of Principle Deputy Commissioner that is appointed by the President and Senate-confirmed. Section 102 also designates the Assistant Commissioner of the new Office of Trade as a political appointee. The intent of these provisions is to improve the accountability of CBP to both Congress and to the public. What is your view? Do you think we will achieve improved accountability by establishing these two positions as political positions at CBP?

I support the requirement that CBP become more accountable to both Congress and the public. I also think it is extremely important that CBP be required to consult with the agencies that were responsible for negotiating free trade agreements to ensure "intent" prior to seeking its own interpretation of agreement provisions. CBP has recently issues rulings on the CAFTA-DR, the Singapore FTA and the Jordan FTA that are all contrary to the intent of the negotiators and risk having these countries demanding restitution through the agreement. It also places at risk previously negotiated terms of the agreements for US goods entering these countries. The same

is true of CBP in its implementation and interpretation of several Congressional programs such as our preference programs. They unilaterally interpret the programs without consultation with Congress or the authors of the legislation and trying to use the plain language of the statute as the justification for their actions. However, any entity that was involved in the creation/negotiation/drafting of such programs generally has the institutional knowledge that would result in actions contrary to CBPs position. We applaud your efforts to make them more accountable but would encourage direct oversight also be included. Perhaps the creation of additional positions that are responsible to the Administration and Congress will help as well.

Question 3

Some have raised a concern with respect to section 211 of the bill, which would repeal the current firewall in law between using information for security purposes and using it for commercial enforcement purposes. I don't understand this concern. If the government is already receiving this information, and use of the information leads to the identification of goods that don't conform to the customs and trade laws of the United States, why shouldn't liability attach as it otherwise would under our laws? And why should legitimate importers harbor concerns over this provision of the bill? Please respond.

There are concerns in the industry of using security data for commercial compliance by CBP; I will not dispute that fact. However, I would agree that compliant importers should not worry that the data they are submitting for security purposes would put them at risk for regulatory compliance because they are supposed to be compliant companies. That being said, I do think that part of the concern in the trade community stems from the fact that CBP has a "guilty until proven innocent" mentality and enforcement credo. Thus, we have to prove the negative when CBP alleges noncompliance. For example, if CBP determines that the pockets on T-shirts are required to have documentation or a paper trail demonstrating the origin of the fabric and yarns to ensure compliance with a free trade program, we would be unable to provide such documentation. Not because our pocketing fabric is any different from the fabric used to make the T-Shirt but because we use the material that is left over when cutting out the neck of a T-shirt to form the pocket. This "remnant" is used to make the pocket. We do not have origin certificates for "remnants" and we would be hard pressed to demonstrate to CBP that the pocket is made from the same fabric as the T-shirt. Thus, in the absence of being able to prove our innocence we are therefore deemed guilty. Meanwhile, CBP does not have to demonstrate or prove that our pocketing is of non-qualifying origin. The inequity in the manner in which CBP has historically enforced trade compliance is what fuels the fears of the trading community.

QUESTIONS FOR JERRY COOK FROM SENATOR MENENDEZ

Question 1

Mr. Cook, Section 215(b) of the bill mandates CBP to develop criteria and a process for assigning importer of record numbers. However, such a database already exists within CBP. This is certainly a worthwhile endeavor to address the database issues raised by a 2008 GAO report, but I have concerns about the potential for CBP to create/implement a NEW data field for tracking when an established numbering system already exists. In your view, how can CBP improve the operational effectiveness of the current importer of record database? What else should CBP do to ensure the accuracy and usefulness of this database?

I do not understand fully the intent of this provision for assigning importer of record numbers. I am aware that OMB is discouraging the use of EIN and Social Security numbers to identify companies. The primary CBP identifier is the EIN for importers of record. CBP should consider adopting the practice advocated by the ITDS Board of Directors and the FDA to utilize DUNS numbers to identify all business entities in the global supply chain, to include importers.

Question 2

Section 234(a) of the bill requires the Assistant Commissioner of Trade to identify and maintain a confidential list of persons that have a history of attempting to import goods that infringe IPR. While I don't object with the list and the intent behind it (to dissuade import of IPR-violating materials), I have concerns about the application of this list and available recourse for companies who are placed on it erroneously. What safeguards should be included in the legislation to ensure the appropriate Application of this list? Should the legislation provide recourse for removal and redress for those put on it erroneously? If yes, what is the best approach to do so?

One additional element that should be considered is to add the concept that the entity being placed on the list is a "known" or proven entity. There must be some requirements for CBP to demonstrate that an entity is a known violator of IPR. This list reminds me of the CBP list used for illegal trans-shippers when apparel goods were subject to quota. There were in fact two lists that CBP maintained of those involved with illegal transshipment of goods to circumvent quotas. One list was the "known" violators. That list only encompassed those entities which had been found guilty of illegal transshipment by the Department of Justice. This list was published twice a year. It was illegal for importers to source from these entities. However, there was s second list. This second list was comprised of entities that were believed to be illegally transshipping and that had been identified by our trading partners as participating in what is deemed by the U.S. as illegal transshipping. This list was provided to the importing public on a regular basis, almost weekly, available on line and because of the Mod Act requirement to exercise due diligence and reasonable care when importing, importers knew to check their sources of apparel against this list to determine if they should exercise additional review/ inspection, etc. to ensure that their goods were not being illegally transshipped. This second list served a greater purpose as well.

Though negotiations between the US and foreign customs agencies agreement was reached that these entities would police their territory and share their findings with the US. Such a level of cooperation could be used with respect to IPR, developing greater cooperation between the two countries and pushing out from our borders compliance requirements much like we have pushed out security compliance to outside our borders. Perhaps for IPR there could be two lists those of known violators (and found guilty of such offense in US courts) or those found guilty by exporting country entities.

There should also be a clear mechanism of appeal for any entity that appears on the list as the legislation is currently written. If it is amended as I have suggested, then possibly there is no need for redress other than a policy that states an entity can be removed from the list after a period of one or two years.

Question 3

Sections 205 and 206 of the bill clearly outlines a timeline for completion of the Automated Commercial Environment (ACE) system and International Trade Data System (ITDS). The bill also requires CBP to provide a report to Congress on its plans for ACE completion by September 20, 3012 and to operationalize ITDS. I believe that the completion of both ACE and ITDS is critical for the flow of trade and the functionalities are vital for U.S. importers and exporters. For your companies, how important is the completion of ACE and ITDS? For both systems, how do we ensure on-time completion?

As I mentioned at the hearing, more than 15 years ago, Congress had the foresight to establish the Mod Act and seek the implementation of the ACE. However, every year since that time, CBP submits almost the exact same paragraph in its report to Congress:

> "The Customs Modernization Act (Mod Act) outlined requirements for automation and emphasized electronic trade processing. The delivery of ACE capabilities will fulfill the Mod Act by enabling trade community users and CBP officers to electronically submit and retrieve import transaction data through an intuitive, standards-based, secure Web portal. ACE is providing new capabilities to Government users and the trade community by streamlining CBP business processes, reducing requirements for paper documentation, and strengthening Screening and Targeting (S&T) systems. ACE is also providing the technology backbone for ITDS, which will provide a "single window" for submitting trade information to Federal agencies that share responsibility for facilitating international trade and securing America's supply chain. These are key requirements for enhancing border security and expediting legitimate trade."

We have yet to see this implementation. Granted in 2001, the programming to date for ACE did a 180 degree turn and became focused on security, and rightly so. Nonetheless, the past 8 years' focus on security has left the other mandate of Customs, "to facilitate legitimate trade" to completely atrophy. It is our hope that this bill will re-ignite the fire in CBP to quickly bring about full electronic interface in the ACE and that the ITDS will truly be a single portal through which entry can be made regardless of governing agency regulations.

You address this issue in Section 206 of the bill, directing the Secretary to work with the head of each agency participating in the International Trade Data System (ITDS). Paragraph" iii" is particularly important – ensuring that the agencies provide admissibility criteria and data elements required by the agency to authorize the release of cargo by the U.S. Customs and Border Protection Agency for incorporation into the operational functionality of the Automated Commercial Environment computer system. In addition, I would recommend that the legislation include a mandate that 1) all agencies that are authorized to regulate cross-border commerce participate in the ITDS and 2) all data elements that are provided from the ITDS agencies to Customs be submitted electronically. We must avoid scenarios like the one industry experienced last year with the amendments to the Lacey Act, which required an import declaration but did not provide for an electronic interface for that declaration. Paper documents in this new economy are worse than useless – they are costly and wasteful. Having said this, I recognize that for some economic operators paper is the only means available to them. With that in mind, I would recommend that an electronic interface option be mandated for all entry documents.

We all have read the challenges related to the safety problems of imported foods, consumer products, and pharmaceuticals. The prior Administration created an Interagency Working Group to focus on the problem and their recommendations highlighted the role of CBP, ACE, and ITDS as fundamental to interagency cooperation. There are several talented individuals who have done a superb job in helping to understand and craft a process for CBP. Nevertheless, I understand that at CBP Headquarters they are challenged to take this to the next level given the current deployment of employees available as only a handful of people are dedicated to interagency coordination on import safety and ITDS. It would seem appropriate for CBP to have a well-staffed Office dedicated to these programs. This office could also serve as the secretariat for the Interagency Import Safety Agency Working Group. I am not convinced that when new requirements are mandated affecting international trade like Lacey or the CPSIA that CBP is always incorporated in the full implementation requirements. This exclusion impacts not only CBP's ability to be effective but also stymies legitimate commerce. CBP is a critical interface, source and partner that the trade relies on for interpretative and effective compliance requirements to insure that it meets the objectives of those new mandates.

These programs are very important to our company and trade facilitation. In order to ensure that the stated timeline is met, I think it is imperative that appropriate funding, resources and oversight by Congress be allocated to CBP.

Question 4

Duty-drawback is important to U.S. competitiveness, allowing exporters to reclaim duties paid on imported products used to produce products that are subsequently exported. Section 302 of the bill provides for updates to the duty drawback process by providing a more streamlined and simplified program, including automation of the claims process, to reduce the cumbersome and overly complex system that currently exists. Do you believe that the duty drawback program proposed in the bill will increase the competitiveness of U.S. companies? Are there other steps we can take to further streamline and simplify the program?

Current U.S. Drawback laws and regulations are complex. Many companies still opt not to pursue drawback due to the complexities. It is estimated that over 80% of duties subject to drawback go unclaimed due to the effort and complexities involved. Simplifying and modernizing drawback procedures will encourage greater participation in the U.S. Drawback program.

By participating in the drawback program, U.S. exporters are more competitive in the global market due to the fact that they are able to offer their product at a lower price. A lower price results in more sales. More sales result in greater productivity and manufacturing within the U.S.

In 2008, the U.S. exported approximately $2 trillion in products. The production of these exported products aided in maintaining 6 million U.S. jobs. The National Unemployment Rate rose to
10.2% in October, 2009. By promoting export from the U.S., it is estimated that 3 million U.S. jobs could be created for every $1 trillion in exported products. As 95% of the world's population resides outside of the U.S., U. S. companies must change their paradigm by reaching out to 95% of the global
consumers that don't reside within U.S. borders. Improvements within lawful export promotion programs such as drawback are critical to the overall competitiveness of the US in the global marketplace.

Are there other steps we can take to further streamline and simplify the program?

Within certain other programs such as NAFTA, drawback procedures are very complex and restricted.
Any efforts made to ease those restrictions and complications would be welcome by the trade

TESTIMONY OF

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AND

CHAIRMAN OF THE COALITION AGAINST COUNTERFEITING AND PIRACY

ON

S. 1631,

THE CUSTOMS FACILITATION AND TRADE ENFORCEMENT
REAUTHORIZATION ACT OF 2009

BEFORE THE

COMMITTEE ON FINANCE

OF THE

UNITED STATES SENATE

OCTOBER 20, 2009

I. Introduction

Chairman Baucus, Ranking Member Grassley, and distinguished members of the Finance Committee: thank you for inviting me to testify on S.1631, the "Customs Facilitation and Trade Enforcement Reauthorization Act of 2009."

While I serve as Executive Vice President and General Counsel at NBC Universal, I appear today primarily on behalf of the Coalition Against Counterfeiting and Piracy, or CACP, for which I have served as Chairman for the last three years.

The CACP is a cross-sector coalition of over 650 companies and associations who have come together to fight the vital economic battle against intellectual property theft. Since the beginning of this year alone, the CACP's membership has grown by nearly 150 members. There are companies from nearly every sector of our economy in our coalition, from the copyright sectors – which produce movies, music, video games and software – to pharmaceuticals, auto parts, aircraft parts, consumer goods, footwear, fashion apparel, luxury goods, toys, electronics, food products, medical devices and health products, machine tools, and many more. The breadth of our coalition stands as an eloquent reminder of the extent of the counterfeiting and piracy problem.

We vigorously applaud S.1631, and, in particular Chapter 3 – Import-Related Protection of Intellectual Property Rights (§§ 231- 242), as a critically important step in heralding a new era in the role of the Bureau of Customs and Border Protection (CBP) and the Immigration and Customs Enforcement Bureau (ICE) in protecting the future economic well-being of the U.S. This bill recognizes that CBP must reshape itself as a bulwark to ensure that the innovation and creativity of U.S. industry is used to produce jobs here and is not stolen abroad -- endangering our economy, killing our jobs, threatening our citizens' health and safety, and nourishing organized crime. We commend the Chair and Ranking Member and their able staff for crafting such a forward-thinking bill, and offer some suggestions for its improvement.

In particular, we applaud the provisions of the bill that:

- *Establish high-level leadership on IP issues* by combining the international and commercial office under a single Assistant Commissioner at CBP, and formally authorizing the National Intellectual Property Coordinating Center (NIPCC) under an Assistant Director at ICE (Sections 102 and 232);
- *Increase resources devoted to IP enforcement* by requiring the Strategic Plan to assess the optimal allocation of personnel to ensure that CPB and ICE are effectively enforcing IP; to assign, in the meantime, at least one full-time IP specialist at each of the 10 top ports; to ensure CBP personnel are effectively trained to detect and identify IP infringing imported goods; and by requiring at least three IP-dedicated CBP agents to join with IP-dedicated agents from ICE, the FBI, other agencies at the NIPCC (Sections 232, 233, 235, 236); and
- *Enhance the IP Enforcement Capabilities of CBP and ICE*, by requiring a Joint Strategic Plan that addresses, among other priorities, IP enforcement; establishing

of "National Targeting and Analysis Groups" (NTAGS) to help port inspectors work smarter; directing the creation of a list of persons who have had a history of attempts to import infringing goods; directing the creation of a list of "trustworthy" partners; instituting reforms that reduce unnecessary barriers for sharing information between rights holders and CBP; and calling for an information campaign to inform travelers of the many pernicious effects of trafficking in IP theft (Sections 202, 234, 237, 238, 239, 240).

II. Statement of the Problem

A few years ago, I heard Michael Danet, then Secretary General of the World Customs Organization, speak about the transformation of the counterfeiting and piracy problem during his tenure as head of the organization. He said that the manufacture and distribution of phony goods had begun as a cottage industry, but that over the last 20 years has metastasized into a global network with deep infiltration by organized crime. He called the scale and sophistication of today's systems of copying, transporting and distributing illicit goods "a second industrial revolution." Likening the battle against this crime to a tennis match with vital stakes, he said that we have already lost the first set, are behind in the second set and are in grave danger of losing the match.

The call-to-arms sounded by Mr. Danet should be heeded in every country, but especially here in the United States. The U.S. is simply not a low-cost manufacturing economy. The economic future of the U.S. depends on innovation, ingenuity, invention and creativity. Global competition in the world of the 21st Century will depend on the technical sophistication of our products, the global recognition of our brands for quality, and the appeal of our creative industries. These intangibles will determine our competitiveness in the global markets. Historically, U.S. companies—large and small—have been the most innovative in the world. And it is the economic fruits of this innovation that strong IP enforcement protects, and what IP theft erodes. If we are to get the U.S. economy back on its feet and grow jobs here in the U.S., we must capture the fruits of our own ingenuity and innovation; and not allow them to be hijacked by counterfeiters and pirates operating outside the rule of law.

We must recognize IP theft for what it is: a stealth job killer stymieing progress on the road to economic recovery. If we fail to take bold steps now to attack this cancer at its roots, the U.S. will be committing slow-motion economic suicide.

Equally important, we must establish our customs functions as a model for the rest of the world in protecting IP. We cannot call upon our trading partners to take extraordinary measures to protect intellectual property if we are not willing to give the customs agencies all the resources and statutory tools they need to enable them to safeguard our borders against infringement.

Last year's PRO-IP Act, expanding the government's ability to respond to this peril with better laws, leadership, and dedicated resources, was a necessary and promising first step. Strong action to shore up the ability of CBP and ICE to protect our

borders from IP theft is the next essential step. This is not merely a question of good government; it is whether we have the will to protect our economic well-being and the future economic well-being of our children.

There is ample evidence of the tidal wave of counterfeiting and piracy that is swamping the borders of every country, including ours. In 2008, for example, after a comprehensive study, the OECD estimated that the amount of counterfeit goods smuggled across borders amounts to at least $200 *billion* per year worldwide. But it is important to note that the $200 billion only represents *cross-border* counterfeiting and piracy. It does not purport to estimate counterfeit and pirated goods manufactured and sold within the same country. It does not purport to measure Internet piracy, the scourge of my company and other movie, music, software, games and book companies. And it does not try to account for the upstream and downstream loses suffered by suppliers to and customers of the companies whose legitimate sales are displaced by counterfeiting and piracy. When these missing pieces are added to the puzzle, it is fair to estimate that the amount of economic harm inflicted by IP theft easily surpasses *a half-trillion dollars* every year.

And it is clear that U.S. companies, whose products are stolen by pirates and whose good names and reputations are sullied by counterfeiters, suffer disproportionally from this tsunami. Statistics released by CBP earlier this year show that from FY07 to FY08 the number of IPR seizures increased by 9.7%, from 13,657 to 14,992, and the domestic value of the goods CBP seized for IPR violations increased by 38.6% to $272.7 million from $196.7M in FY 2007.[1] This is no doubt to some extent attributable to CBP doing a better job identifying and seizing counterfeit goods. But from the reports of our member companies, it primarily reflects the fact that the economic assault on the worldwide marketplace in every sector is simply out of control.

Counterfeits pouring across our borders not only cost money; they cost jobs. This is why organized labor has rightly been up in arms to ensure that good jobs in this country are not lost to the growing influx of illegal counterfeit products.

Additionally, IP theft is a health and safety issue that presents a clear and increasing danger to the public, from counterfeit toothpaste laced with antifreeze to exploding batteries to phony medicines that can kill patients, and other dangerous consumer goods. Sectors where IP theft threatens health and safety include automobile parts, airplane parts, food, medical devices, medical supplies, electrical supplies, pharmaceuticals and many more. CBP reports that in 2008 IPR seizures of products posing potential safety and security risks increased by over 124% in domestic value, from $27.8M to $62.5M.

Finally, IP theft is the new face of organized crime. Organized crime goes where the money is, and today that means piracy and counterfeiting, where criminals can engage, with minimal risk, in high-value commerce such as manufacturing millions of bootleg

[1] http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/seizure/fy08_final_stat.ctt/fy08_final_stat.pdf

DVDs or bottles of counterfeit medicine. Their activities can also have far-reaching consequences for national security. Just last week, for example, counterfeiters were indicted for a scheme to import more than 10,000 phony integrated circuit computer chips to the U.S. Navy, which could have caused sophisticated military and government systems to fail."[2]

III. The Solutions

While there is ample cause for alarm, there are also plenty of reasons for hope that our Congress and our country can muster an adequate and timely response to the threat that IP theft poses.

Just a few weeks ago, the President's Innovation Strategy explicitly recognized the importance of IP protection, noting that "Intellectual property is to the digital age what physical goods were to the industrial age. We must ensure that intellectual property is protected in foreign markets and promote greater cooperation on international standards that allow our technologies to compete everywhere."[3]

And almost exactly one year ago, the President signed into law the PRO-IP Act, a bi-partisan bill with the strong support of both business and labor, which the Senate passed by unanimous consent. That Act recognized that countering IP theft requires a new enforcement paradigm. No longer could IP enforcement be regarded as a mere nuisance, and relegated to the bottom of the priority list. Instead, Congress in the PRO-IP Act recognized that a three-pronged approach was necessary to turn the tide.

First, effective enforcement requires high-level leadership, on both an Agency and a government-wide level. Thus, the PRO-IP Act established a Senate-confirmed "Intellectual Property Enforcement Coordinator," or IPEC, to have a major role in setting governmental IP policy and supervising the development of a government-wide strategic plan to ensure that the IP enforcement programs of the many Departments and Agencies who play critical roles in this area are synchronized and working in harmony. We were pleased that the Administration recently nominated Victoria Espinel as the first IPEC, and look forward to seeing the benefits of a more coordinated approach to IP enforcement.

Second, effective enforcement requires dedicated resources, and the PRO-IP Act authorized new IP-dedicated FBI agents and prosecutors. If IP enforcement remained one of many priorities for an agent or prosecutor, experience teaches that sustained and effective enforcement efforts are unlikely to come to pass.

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[2] http://www.washingtonpost.com/wp-dyn/content/article/2009/10/09/AR2009100902021.html

[3] A STRATEGY FOR AMERICAN INNOVATION: DRIVING TOWARDS SUSTAINABLE GROWTH AND QUALITY JOBS (page 15), http://www.whitehouse.gov/assets/documents/sept_20__innovation_whitepaper_final.pdf

Third, and finally, the PRO-IP Act updated many of the laws that the rapid march of technology had made obsolete, and which no longer produced adequate deterrence to IP theft.

IV. Challenges at CBP and ICE

The PRO-IP Act's resource provisions addressed enforcement resources within the Justice Department. The CBP and ICE also have critical roles to play in IP enforcement.

Today, CBP and ICE are the single-most important enforcement barriers to an ever-increasing flood of counterfeit and pirated products. Through no fault of the hard-working but overburdened CBP and ICE personnel, however, the enforcement strategies and resources of the agencies have unfortunately fallen far behind scale and skill of the counterfeiters and pirates. In the past the agencies considered protecting IPR to be primarily the responsibility of the rights holders, who are the victims of this extraordinary crime wave. ICE and CBP saw their primary task to be collecting and protecting the revenue of the United States, ensuring that imports met the requirements of federal laws, and protecting America's homeland security from such scourges as illegal drugs and terrorism. Relegated to a much lower priority were the enormous economic, health and safety costs of IP crime.

Unfortunately, as the IP crime problem and its impact has mushroomed, CBP and ICE have been slow to adapt their mindset and undertake the policy changes and resource allocations necessary to counter it.

Among the most prominent problems at CBP are those highlighted in recent reports by the Government Accountability Office, which include the following:

- CBP lacks agency-wide performance measures in its strategic plan and an integrated approach across key offices to guide and improve IP enforcement.

- CBP does not adequately analyze variances in port enforcement outcomes or share data that could help to identify potential IP enforcement improvements. For example, GAO found that some of the largest IP-importing ports had very small seizure rates relative to other top-IP importing ports. A lack of integration between the Office of Trade (OT) and Office of Field Operations (OFO) impedes using this type of analysis to identify potential IP enforcement improvements.

- Certain procedural weaknesses limit CBP's ability to enforce exclusion orders, which stop certain IP-infringing goods from entering the country.

- CBP staff that carry out IP enforcement activities operate in an environment that is plagued by staffing challenges, including staffing shortages, difficulty hiring and retaining staff, and fatigue among its workforce.

- CBP does not track the amount of time their staff spends on IP enforcement, making it difficult to determine if they are balancing their resources appropriately.[4]

Based on these findings, GAO recommended that CBP include measures to guide and assess IP enforcement outcomes in CBP's strategic plan; improve its IP enforcement data; use existing data to better understand ports' IP enforcement activities and outcomes, and link ports' performance to measures in CBP's strategic plan.

The reauthorization process presents an ideal opportunity for Congress to jumpstart these needed changes and ensure that the IP enforcement capabilities at CBP and ICE are upgraded.

V. The Baucus-Grassley Customs Authorization Bill (S. 1631)

Like the PRO-IP Act, S.1631 focuses on three fundamental areas that can help improve intellectual property enforcement: 1) establishing leadership with the responsibility to make IP enforcement a priority; 2) increasing IP resources with better training for those in the field; and 3) making statutory changes that will enable more effective enforcement for CBP inspectors and ICE investigators.

In most instances, the current bill fully hits the mark. In a few other areas, we suggest ways that the bill can be strengthened. And, finally, there are IP-related deficiencies that this bill does not address, which we strongly encourage the Committee to consider incorporating as this legislation moves forward.

A. Leadership

The bill calls for changes in CBP's organizational and leadership structure that promise to do much more than simply shift responsibilities. It is crafted to create increased sensitivity to commercial operations, including IP protection, reflecting the Committee's resolve to address these needs, without detracting from our Nation's homeland defense. It creates a structural means for CBP to solve those problems itself, rather than having Congress dictate the path forward. It requires CBP and ICE to be more accountable to Congress and this Committee. It demands that more officials have greater sensitivity to private sector interests. It enhances the public's leverage, forcing the agency to listen better than it has in the past.

Of particular value to the intellectual property community, section 102 of this bill combines the international and commercial operations in a single office, merging the two functions under one assistant commissioner. As CBP improves its own performance, the Office of Trade will be in a position to consult with and train other nations' customs

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[4] U.S. Government Accountability Office (GAO), *"Intellectual Property: Better Data Analysis and Integration Could Help U.S. Customs and Border Protection Improve Border Enforcement Efforts"*, GAO-07-735 (Washington, D.C.: April 2007); U.S. Government Accountability Office (GAO), *"Intellectual Property: Federal Enforcement Has Generally Increased, But Assessing Performance Could Strengthen Law Enforcement Efforts"*, GAO-48-157 (Washington, D.C.: March 2008)

services, leading by example and harmonizing IP enforcement practices. Counterfeiting and piracy are global in scope and require a global response, with CBP working cooperatively with other customs services.

Another provision in section 102 establishes a "Customs Facilitation and Trade Enforcement Division" within Field Operations, headed by a deputy assistant commissioner. This connects headquarters' commercial trade interests with port operations throughout the country, promising vastly improved communications between port directors and Washington. It also paves the way for increased attention to imports, exports and transshipments of counterfeit and pirated merchandise. We hope headquarters' interest in strengthened enforcement will incentivize the field to carry out this mission.

An additional very important structural change, contained in section 232, is formal authorization for the National Intellectual Property Coordinating Center (NIPCC) within ICE, headed by an Assistant Director. Making the NIPCC a permanent fixture with high-level leadership will go a long way towards strengthening its capabilities and enlisting support from the necessary participating agencies. The NIPCC in the past has suffered from a lack of high-level commitment participation by ICE and other enforcement agencies, undermining the goal of a centralized, cooperative and coordinated IP enforcement entity. Undermanned, its primary function has been outreach; yet, it needs to do much more in combining IP investigative efforts cross-agency. While this bill, for jurisdictional reasons, cannot reach many of the necessary agencies, it will boost the NIPCC's stock in the eyes of those enforcement agencies, permitting it to become a valuable coordination link to support investigations.

Finally, we support the provision directing CBP to work with state and local officials to develop formalized referrals of information on detained and seized merchandise. And, as Section 232 requires, the NIPCC will play an important role in making this partnership a reality.

B. Increased Resources

CACP has long espoused assigning personnel dedicated to IP enforcement at the ports of operation. Our experience has taught that Customs officials with many priorities to weigh generally give IP enforcement short shrift , and that effective enforcement requires staff that is trained and experienced in *intellectual property*. Yet, we do recognize that a shortage of qualified port staff and the understandable insistence of CBP to be able to exercise its management prerogatives have to date stood in the way of achieving this goal.

Our concern has been partly addressed by sections 233 and 235 of the bill, which require that a Joint Strategic Plan (discussed more fully below) establish a list of ten ports, with at least one full-time employee with "principal responsibility" for IP assigned to each. Further, the bill requires an assessment of the optimal allocation of personnel,

resources and technology to adequately enforce intellectual property rights. This is a major step forward.

We submit, however, this provision would be improved if the selection of these ten ports were not based solely on the volume of seizures, as this criterion may prove not to be the most efficient or effective way to proceed. Generally, the most aggressive ports with respect to IP enforcement will have the most seizures, and thus would remain on the list. Ports that may have high rates of undetained counterfeit and pirated goods, but have not undertaken aggressive enforcement, will not be staffed. Port attention often varies not only by the volume of counterfeits and pirated goods, but also by the experience and interest of its personnel and by port leadership. And, of course, as a port becomes effective in seizing goods, criminals ship their contraband elsewhere. Accordingly, there should be dedicated personnel at all high volume ports.

As noted above, we are strongly supportive of the commitment made by this bill to the National IPR Coordinating Center. It is for that reason that we commend the Committee for the provision requiring at least three full-time CBP employees to be assigned to the Center (sec. 235).

Finally, under the broad rubric of resourcing, we include training (section 236). In this calendar year, we understand CBP has cancelled its IP training in order to construct a "more comprehensive" product. This leaves the training conducted by the private sector as the only real training to be conducted this year.

Companies with resources that enable them to provide highly-specific, product-oriented training for CBP personnel are more than willing to do their part. But training cannot be conducted only by the biggest players. CBP must vastly expand its intellectual property enforcement training for inspectors, making its subject matter experts freely available to the ports. This, in turn, requires a corresponding and expanded resourcing at the Office of Trade and Office of Training and Development.

C. Other Statutory Changes

Leadership and dedicated resources are two critical components necessary for enhanced protection of IP at the borders; the third necessary factor is a clear plan on how to utilize the additional resources and legal tools in the most effective manner possible.

In what should be regarded as the mainstay of this bill, Section 131 requires the CBP Commissioner and ICE Director to create and submit to this Committee a comprehensive biennial Joint Strategic Plan (the "Plan"). The Plan must address (1) a summary of action taken to better enforce such laws; (2) a statement of the objectives and plans to further improve enforcement of such laws and trade facilitation; (3) an identification of priority trade issues that pose a specific risk to public health and safety or revenues; (4) a description of efforts to improve consultation and coordination among Federal agencies regarding trade facilitation and the enforcement of U.S. customs and trade laws; (5) a description of existing commercial training efforts and methods to improve such efforts; and (6) an identification of domestic or international best practices to improve trade facilitation or

enforcement of U.S. customs and trade laws. The provision calls for consultation with private sector entities, among others, as part of the preparation of the Plan.

Section 233 makes clear that IP enforcement must be part of the Plan. In addition to the considerations enumerated above, the IP enforcement provisions of the Plan must include (1) a description of DHS's IPR enforcement efforts; (2) a list of the top ten ports, by volume, where CBP seized IPR infringing goods in the preceding two years; and (3) a recommendation of the optimal allocation of personnel to ensure CBP and ICE are effectively enforcing IPR.

We ask the Committee to expand these IP provisions to ensure that the Strategic Plan also ensures that other key measures are addressed, both in the near term (6-12 months) and the longer term (3-5 years). We ask that the bill be amended to require the Joint Strategic Plan to include the following:

1. A list of agency-wide performance metrics to be developed by CBP that set port-by-port and overall goals for IPR-related seizures, as measured against agency performance in the preceding two years. These metrics should reflect the complexity of the enforcement challenge and not rely on any single factor, such as seizure rates;

2. A description of the specific steps to be taken to promote substantially better information exchange with the affected sectors, including specific steps to establish clear channels of communication by rights holders of information about infringing goods, and including specific steps to remove unnecessary barriers to Customs enforcement officials communications to those rights holders concerning CBP's enforcement actions that were based on the information received;

3. A description of CBP's plan for developing and implementing technology strategies, such as those referenced in Section 236(b), enabling CBP to employ state-of-the-art authentication techniques to discern between counterfeit and legitimate goods for each of the top 20 sectors affected by counterfeit imports;

4. A list of best practices to interdict infringing IP goods at individual ports, as recommended by GAO, and a timeline for implementing those practices at all ports; and

5. A list of obstacles to effective IP enforcement that CBP and ICE identifies, and recommendations to Congress for any enhanced statutory authority necessary to enable CBP and ICE to be fully effective.

In addition to the provisions relating to the Plan, the CACP applauds other sections of the bill that should help the CBP and ICE become more effective in protecting our borders against the influx of counterfeit and pirated goods.

Specific Provisions that CACP Supports

- **NTAGs:** We note with approval the recognition at CBP and in this bill (section 211) of the "National Targeting and Analysis Groups" (NTAGs). Targeting helps port inspectors "work smart." It sorts through imports based on risk, identifying shipments that have a higher probability of violating security, product safety or IP laws. With the enormous volume of imports that enter the country today, discovering IP violations can be like "finding a needle in a haystack." In the words of CBP, targeting "makes the haystack smaller." Use of targeting has long been necessary for the effective IP enforcement by CBP and it has been slow in emerging as a robust tool for the inspectors. We are encouraged by the bill's attention to this tool and by its recognition of the responsibilities of the NTAGs. We urge the committee also to insist that the IP NTAG be fully resourced so that it can do its job.

- **List of Prior Offenders.** In a related provision (Section 234), the legislation requires CBP to establish a list of persons who have a history of importing goods that infringe intellectual property into the United States. We believe that this is a critically important database that is crucial to the NTAG effort. We encourage the development of clear criteria for being placed on the list and for removal.

- **List of Trustworthy Persons.** A corollary to this is the provision (Section 202) which establishes a "Customs Facilitation Partnership Program" comprised of supply chain participants who will receive facilitated entry of merchandise. CACP agrees that CBP targeting must separate trusted responsible participants in the supply chain from high risk shippers, carriers and other bad actor participants in order to be effective. We urge that CBP be required to develop clear criteria for applying this provision as well in order to give the necessary guidance to the private sector.

- **Copyright recordation.** Section 237 authorizes recordation of certain works for which a copyright is *pending*. This implements an earlier CBP proposed regulation, 69 FR 59562(October 5, 2004), that has languished for a half-decade. Recordation is the process whereby rights holders can register their intellectual property with CBP and have information about that related product incorporated in a database available to customs inspectors. The provision recognizes the vulnerability of copyrightable works during the time an application for registration is pending at the Copyright Office. This provision permits recordation and enforcement by CBP as soon as an application for registration is properly submitted to the Copyright Office, providing an important added measure of protection for rights holders and a critical enforcement tool for CBP. CACP wholeheartedly supports this provision.

- **Education Campaign.** Section 240 calls on the Secretary of DHS to develop and carry out an educational campaign to inform travelers about "the legal, economic, and public health and safety implications of acquiring goods that infringe on

intellectual property rights outside the United States and importing such goods into the United States in violation of United States law." We applaud the bill's authors for understanding the key role education plays, and look forward to seeing strong anti-counterfeiting and antipiracy messages communicated in such a campaign. We do suggest, however, that the most effective educational campaign would be to include a declaration on a passenger's entry form stating that the person is not knowingly bringing illegal counterfeit physical goods into the U.S.

- **DMCA Implementation.** Section 239 specifically authorizes seizure of circumvention devices that violate the Digital Millennium Copyright Act, requires subsequent publication of that seizure on the CBP website, and provides procedures for disclosure to the aggrieved party. CACP fully supports this provision.

- **Samples Valued at Under $100.** In addition to the provision cited above, the legislation provides in section 238 that no bond will be required if the value of a sample is less than $100. In many instances, samples of counterfeit or pirated merchandise are critical to a rights holder being able to identify merchandise as violating IPR. A bond protects the importer from losing his property; however, individual bonds for small amounts are often unavailable, costly, or take too long to process. CACP supports this provision.

Provisions that CACP Would Like Added or Revised

The CACP submits that additional changes in statute would enhance the ability of CBP port inspectors to intercept counterfeit and pirated merchandise. In some instances, existing statutes and regulations are counterproductive to conducting their mission; in others, steps can be taken to empower the field staff with information and improved authority

- **Trademark recordation.** Section 242 provides for a *Sense of the Congress* stating that CBP should work with the U.S. Patent and Trademark Office to establish a one-step process for registering a trademark and then recording the mark with CBP. CACP supports this concept; however, we prefer the Committee to simply authorize this process directly. There is little reason for reluctance in directing this project: the IT changes are modest; registration/recordation should be as seamless as possible; and, these enforcement tools should be readily available to inspectors needing detailed information about specific merchandise.

- **Detention/Seizure Protocols.** CACP supports Section 238, which allows CBP to provide a sample of suspect merchandise to rights holders to determine if the product infringes a copyright or trademark. To be effective in thwarting counterfeit and pirated products, however, this premise, the provision must provide more explicit authority to CBP officers. Until recently, CBP routinely sought the assistance of trademark and copyright owners in authenticating suspect products detained or seized at the border. With the increased sophistication of counterfeiters, it can be very difficult for even a rights holder, let alone a CBP officer, to know for sure what is real and what is not. Unfortunately, after questionable but aggressive threats of lawsuits against individual officers under the Trade Secrets Act, CBP changed its policy in 2008. Now, deterred by threat of liability from providing rights holders with even a simple unredacted photo of the product or packaging to help spot the fakes, CBP officers are often unable to verify that the suspect product is indeed a counterfeit and, therefore, the shipment is released into U.S. commerce despite questions about its legitimacy.

  This lack of authority can have grave consequences when the products involve fake microchips, transponders or other critical components that could end up in a sophisticated transit system or aircraft landing gear -- counterfeit products that pose significant safety concerns and products that require the rights owner's expertise to identify what is real and what is a potentially dangerous fake. These products should never be allowed to poison the stream of commerce.

  Some have asserted that CBP inspectors should not initiate contact with rights holders and exchange information about the seized goods in order for CBP to determine whether goods are counterfeit or pirated. They claim that this information could be used by rights holders to enforce their contractual rights regarding jurisdiction for sales. It is, however, vital for CBP to be able to seek the best assistance available in distinguishing between illegal and legitimate goods. We should not tie Customs' hands in conducting enforcement activities, particularly based on speculative concerns that somehow information might be used for another purpose – especially where that other purpose is itself legal.

  We therefore urge the committee to provide CBP officers with the clear authority to seek meaningful help from the rights holder when faced with a suspected counterfeit or pirated product.

- **Samples After Seizure.** The bill does not address the interest of a rights holder having access to samples at the end point of the CBP seizure process: *after* goods have been determined to be counterfeit or pirated and are destined for destruction. Samples of the seized and forfeited merchandise often provide useful information to identify the parties responsible for those IPR crimes and to help rights owners develop proactive strategies to prevent future theft of their IP. CACP supports adding language to make those samples available, without the requirements for posting bond or for return of the product (since a thorough examination often results in the counterfeit product being damaged or destroyed).

- **Enhanced Administrative Procedures.** CACP requests the inclusion of provisions that provide administrative authority for CBP to seize products bearing registered, but unrecorded, marks. While recordation with CBP is of course the preferred process, there are often instances where the CBP inspectors encounter goods that from the packaging alone appear to be counterfeit. Yet, if the trademark has for whatever reason not been recorded, CBP officers cannot seize them under their *administrative* seizure authority (19 U.S.C. § 1526(e)). Instead, CBP's only option would be to seek a federal attorney to provide *criminal* enforcement authority – a far more arduous process with higher thresholds of proof and other rigorous legal requirements that make it impractical for day-to-day civil border enforcement. As a result, obviously counterfeit goods bearing registered but unrecorded trademarks are often simply released. Correspondingly in the instance of copyright violations, administrative authority is not available to CBP to seize clearly infringing sound recordings, motion pictures and similar audiovisual works that are registered at the Copyright Office, but not recorded at CBP. CBP officers should not be constrained by such technical limitations. CACP supports enhanced administrative seizure authority for CBP officers.

- **Passenger Importations of Counterfeits and Pirated Goods.** Current law affirmatively permits a passenger to enter the United States bearing counterfeit or pirated products *for personal use*, without fear of confiscation. This is the wrong message for the statutes to communicate and it rewards overseas street sales of IP-infringing goods. That provision of the law should be repealed. Moreover, the Customs Form should be revised to include a declaration on a passenger's entry form stating that the person is not knowingly bringing illegal counterfeit physical goods into the U.S.

VI. Conclusion

Chairman Baucus and Ranking Member Grassley, the CACP commends you for recognizing the importance of enforcing intellectual property rights at the Nation's borders. The IP-related provisions in S. 1631 are a bold step in the right direction, and we commend you and your staff who have toiled so hard to make better IP enforcement a major component of this bill.

In introducing this bill, you are charting the course for Congress to change CBP's mindset toward this critical task. You are also making a sound investment that will improve the safety of the American public and the competitiveness of American businesses. Two years ago, An "Economic Analysis of the Proposed CACP Anti-Counterfeiting and Piracy Initiative" (the "Tyson Report"), by Laura Tyson, former Chair of the National Economic Council, assisted by the respected economics firm, LECG, evaluated the costs and benefits of the type of prudent investment in enhanced IP protection that is embodied in the PRO-IP Act and this bill. It concluded that:

• For every dollar invested, federal tax revenues would increase significantly with an intermediate range of $4.9 to $5.7;

• Each dollar would increase U.S. economic output approximately between $64 and $75;

• The increase in output would result in the creation of between 174,000 and 348,000 new jobs during the third year of the program; and,

• State and local governments can expect to receive incremental revenues between $1.25 billion and $1.50 billion, in present value terms over three years.

The Tyson Report also concluded that, based on the success of other similar types of government programs, the CACP's approach could reasonably be expected to reduce losses attributable to piracy and counterfeiting somewhere between five and ten percent over three years. If the measures were to succeed even modestly beyond those assumptions, the return on investment – in terms of business, tax revenue, health and safety, and our economic future – would be much higher.

Your bill helps give CBP and ICE the structure, the resources, the tools, and – most importantly – the direction to address the global problem of IP theft. Your bill is strategic as well as tactical; it solves problems as well as demands results; it commands attention to this costly assault on America's economic well-being.

The CACP appreciates the opportunity to have worked with the Committee closely in developing this legislation and we hope for a continued dialogue regarding ways to add to and improve this legislation in the areas I've outlined in my testimony.

FINANCE COMMITTEE QUESTIONS FOR THE RECORD

United States Senate
Committee on Finance

Hearing on
"The Customs Facilitation and Trade Enforcement Act of 2009"
Tuesday, October 20, 2009

QUESTIONS FOR RICK COTTON FROM CHAIRMAN BAUCUS

Question 1

CBP has been entrusted with the vital mission of ensuring that international trade runs smoothly. But in recent years, the agency has placed less priority on facilitating trade and on enforcing U.S. trade laws at the border. S. 1631 directs CBP to re-prioritize its trade mission, in part by creating new high-level trade positions throughout the agency. How do you think these new trade positions will benefit American exporters and importers? Are they a step forward? What else should we do to ensure that CBP prioritizes its trade mission?

S.1631 raises trade positions to higher levels of authority within the CBP organization. It also strategically places those positions to allow trade facilitation and enforcement personnel to have greater impact on the processing of merchandise. For example, a new office is created within the Office of Field Operations that will serve as a headquarters focal point on commercial trade and be part of the Office's lines of communication with port directors. A new deputy commissioner will focus on commercial operations and share second-in-command status with the agency's deputy commissioner for security matters. The trade ombudsman will be lifted from within an assistant commissioner's office and now report directly to the CBP Commissioner.

This enhanced status for commercial operations will place vastly greater emphasis on intellectual property enforcement at higher levels of CBP. There will be a formal link between headquarters and the field in providing resources and direction to inspectors at the port. There will be an official responsible for IP matters at the highest levels in the agency. And there will be a trouble-shooter with the ear of the Commissioner who can listen to the voices of the IP community, articulate those concerns to the Commissioner, and then facilitate resolution within CBP on important issues.

The next important step is for this Committee to exercise periodic, persistent and demanding oversight. S.1631 cannot be simply put on the shelf once enacted into law. Instead, this Committee, as well as the US Intellectual Property Enforcement Coordinator (USIPEC) and others within the Administration, must ensure that the new provisions are effectively put into place.

Question 2

CBP has developed state-of-the art programs to detect imports that may threaten our national Security, but goods that threaten the health and safety of American consumers or violate U.S. intellectual property rights continue to cross our borders undetected. S. 1631 directs CBP to apply its well-honed national security targeting methods to detect health, IP, and other trade violations. How will improving CBP's targeting efforts affect your businesses? And given CBP's limited resources, how can CBP best implement this risk-based targeting approach?

Risk-based targeting will be the key to enforcing IP rights at a time of dramatic increases in the volume of goods – legitimate and especially counterfeit and pirated – arriving at our ports every day. Without technology and risk-based targeting, inspectors at the ports cannot possibly efficiently discern the container containing counterfeits among the mass that accumulate daily in high volume ports.

Targeting pulls together the data garnered from CBP's past experience with participants in the supply chain, the characteristics of a particular shipment, and information from other enforcement sources, then analyzes it for potential anomalies and assigns a risk score to individual shipments. An inspector can then focus his enforcement activities on shipments presenting the greatest risk. The inspector can prioritize the work to meet the challenges of finding that "needle in the haystack." As CBP itself has said, targeting simply makes the haystack smaller.

CBP can vastly improve its IPR targeting capabilities. This will require integrating the data described above into a robust IT process. It will require incorporating the names of repeat violators of customs IPR law into its data base. It will also require training CBP personnel to make those targeting decisions. In short, CBP will need to commit to IPR targeting, just as it has committed to homeland security targeting.

Targeting promises to bring greater success to CBP's interdiction of counterfeit and pirated goods. For a limited expenditure of resources, it will yield a very high return, and result in the merchants of illicit goods facing the consequences of vastly improved enforcement.

Question 3

In recent years, U.S. companies have been subject to a host of new requirements to ensure that imports comply with U.S. trade laws. These programs impose significant costs on American businesses, and these businesses should be recognized for their long record of compliance. S. 1631 establishes a voluntary Customs Facilitation Partnership Program that directs CBP to provide trade benefits to importers that have a history of complying with U.S. customs and trade laws. In your opinion, how would a program like this help improve compliance? How would it help improve trade facilitation?

The Customs Facilitation Partnership Program can be a valuable tool for all importers by rewarding those importers employing best practices by reducing their hurdles for entry to U.S. commerce. This in turn provides CBP with the ability to apply more of its resources to those who pose a greater risk of violating our laws.

For intellectual property owners, the program can prove of even greater value if sufficient emphasis is placed on best IPR practices among the factors required for participation. In evaluating the criteria for entry, CBP must closely examine an applicant's supply chain(s) to determine that they have been free of involvement with sources of counterfeit or pirated goods in the past and have implemented tangible safeguards to thwart IP theft. In permitting continuing participation and ongoing benefits, CBP must establish IPR importer best practices and periodically revalidate membership based on these criteria. In other words, IPR must be prominently included among the criteria for entry and ongoing participation in the program.

Question 4

American innovation and intellectual property are key drivers of the U.S. economy. In order to keep goods that violate U.S. intellectual property rights from crossing our borders, CBP must have more trained personnel at our borders. S. 1631 directs CBP to put additional trained personnel at our ports to interdict infringing goods. How do you think these provisions will help protect American intellectual property rights? What more can we do to safeguard IPR?

We applaud the provisions of S. 1631 that aim to increase trained personnel at our high-volume ports to interdict infringing goods. As noted in our testimony, CBP must have at least one well-trained inspector at such ports with a dedicated focus on IP protection. By reposing knowledge and experience in at least one inspector, each high volume port can have expertise available to assist other inspectors with complex enforcement decisions.

Second, training is essential to the IPR enforcement effort. CBP inspectors may be prompted to open containers by high risk targeting scores; however, they must be able to identify counterfeit and pirated goods in order to initiate a seizure. Training by CBP personnel expert in identifying violative merchandise, and brand-specific education programs initiated by rights holders, are basic to enforcing IPR in the field. At the present time, inadequate resources are being made available for training, both in terms of personnel and funding. In addition, we are told that the curriculum is not sufficiently comprehensive, although we are assured that improvement is coming. CBP can and must do better.

Third, even the best trained inspectors can do little without adequate recourse to rights holders. When an inspector has a reasonable suspicion that goods violate IPR, that CBP officer must be able to confer with the rights holder in order to identify merchandise as illegal. Due to uncertainty as to the legal authority of CBP officers at the border, however, CBP last year placed significant restrictions on CBP officers' ability to provide information to rights holders. Under this new policy, even a picture of the product packaging cannot be shared unless every marking or label is redacted. This is counterproductive to good enforcement and, unless reversed, threatens to gut the effectiveness of the program..

Finally, inspectors need a more robust recordation data base. By simplifying the processes for recording trademarks and copyrights, as we suggest in the testimony, more data will be available to inspectors intent on identifying counterfeit and pirated goods.

Question 5

Our bill requires CBP to assign at least one full-time employee to the top ten U.S. ports of entry, by volume, where CBP seized IPR infringing goods. These employees would have the primary responsibility for preventing the importation of infringing goods. Given CBP's limited resources, do you think that providing at least one full-time IP inspector at each of the top 10 ports adequately responds to the need for increased resources at the border?

As indicated in our testimony, CACP believes that the allocation of a dedicated IPR inspector at each of the 10 top ports, while an improvement over the current situation, is not sufficient. We have recommended instead that a full-time IP inspector be stationed at *all* high volume ports, i.e., the 40 ports that have over 50,000 entries filed annually.

We also urge that CBP be given more flexibility on where to place these inspectors. In its current form, the bill requires that the inspectors be placed at the 10 ports with the highest number of recent seizures. Locking in the placement of IPR staff in this way invites criminal rings to find new avenues of entry. Moreover, using seizure numbers as the sole criterion means these dedicated resources would be applied where CBP is most successful, rather than where additional enforcement activity may be better utilized.

QUESTIONS FOR RICK COTTON FROM SENATOR GRASSLEY

Question 1

In your testimony you urge us to consider expanding the number of ports at which there would be dedicated personnel with principal responsibility for enforcement of intellectual property rights. Right now, the bill calls for such personnel at the top 10 ports in terms of the volume of infringing goods seized. You argue that this number should be expanded to all high-volume ports. Do you have a threshold in mind? What is "high-volume" in your view? Can you estimate the number of ports that would meet the threshold that you suggest?

As indicated in our testimony, CACP believes that the allocation of a dedicated IPR inspector at each of the 10 top ports, while an improvement over the current situation, is not sufficient. We have recommended instead that a full-time IP inspector be stationed at all high volume ports, i.e., the 40 ports that have over 50,000 entries filed annually.

We also urge that CBP be given more flexibility on where to place these inspectors. In its current form, the bill requires that the inspectors be placed at the 10 ports with the highest number of recent seizures. Locking in the placement of IPR staff in this way invites criminal rings to find new avenues of entry. Moreover, using seizure numbers as the sole criterion means these dedicated resources would be applied where CBP is most successful, rather than where additional enforcement activity may be better utilized.

Question 2

In your testimony you offer broad support for the provisions on enforcement of intellectual property rights that are in the bill. And, you voice support for the PRO-IP Act which Congress enacted last year. Are there any ways in which we can improve our bill so that it optimally meshes with the PRO-IP Act?

Customs Reauthorization is an important complement to the PRO-IP Act. Just as the PRO-IP Act focused on dedicated resources, high-level leadership, and strategic, coordinated planning in the Justice Department and at the White House, S. 1631 focuses on these same objectives to improve the ability of CBP and ICE to reduce counterfeit and pirated goods flowing across our border.

We believe that there are several ways that S.1631 can be fine-tuned to accomplish this objective.

First, the National Intellectual Property Rights Coordination Center (NIPRCC) is emerging as a key operations and intelligence center in which information about violations of customs and criminal law involving IP can be shared among the wide range of federal, state and local enforcement agencies. While this Committee cannot mandate that all appropriate investigative agencies participate at the NIPRCC and work cooperatively, it can encourage that outcome to help lower the silos that currently exist in IPR enforcement.

Additionally, the PRO-IP Act prohibits the exportation and transshipment of counterfeit goods. Giving this provision effect, however, requires implementing language in Title 19 to provide corresponding authority for CBP officers to seize exported and transshipped counterfeit goods. This language is not presently included in the introduced version of S.1631.

Finally, the PRO-IP Act creates an "US Intellectual Property Enforcement Coordinator" (USIPEC) who is placed at OMB and who will chair an inter-agency intellectual property enforcement advisory committee to develop a strategic plan. DHS, CBP and ICE are among those agencies specifically required by the Act to provide Senate-confirmed representatives to the advisory committee. While S. 1631 need not be amended to address this issue, this Committee should exercise its oversight to ensure the active participation and strong role of those agencies in that inter-agency coordination.

QUESTION FOR RICK COTTON FROM SENATOR MENENDEZ

Question

Section 234(a) of the bill requires the Assistant Commissioner of Trade to identify and maintain a confidential list of persons that have a history of attempting to import goods that infringe IPR. While I don't object with the list and its intent to dissuade import of IPR-violating materials, I am concerned about the application of this list and available recourse for companies that placed on it erroneously. What safeguards should be included in the legislation to ensure the appropriate application of this list? Should the legislation provide recourse for removal and redress for those put on it erroneously? If yes, what is the best approach to do so?

CACP believes that Section 234(a), creating a confidential list of persons with a history of attempting to import IP-infringing goods, will significantly enhance the ability of CBP to properly focus its interdiction efforts. We appreciate and share your concerns that the list be kept confidential and that those entities inappropriately placed on the list have access to redress. We suggest, however, that rather than attempting to prescribe the precise procedures for erecting those safeguards in the legislation, CBP be directed to promulgate rules and regulations that address these issues.

We note first, as provided in the legislation, the list must be maintained as a confidential document by CBP, available for specific law enforcement investigative purposes only, to agencies such as CBP, ICE, the Justice Department, or other cooperating federal, state and local agencies. In addition, it could be used by CBP to guide its focus on interdiction of infringing goods.

Second, we are confident that CBP can promulgate appropriate safeguards to ensure that the list focuses only on those entities that are involved in a pattern of infringing behavior, and that fail to follow best practices to avoid involvement in infringing materials. In many cases, such violations will have resulted in a finding under Section 592 or comparable provision of law.

Third, the regulations should permit notification and expedited appeal, thereby affording the person an opportunity for redress in the event of error, with removal from the list an appropriate remedy.

Fourth and finally, the existence of such a list should in no way inhibit the ability of CBP to assess risk and target suspect shipments for entities *not* on the list. There will be instances where information, not included on the IPR list, is appropriately used for targeting purposes.

United States Senate
Committee on Finance

Sen. Chuck Grassley · Iowa
Ranking Member

Opening Statement of Sen. Chuck Grassley
Hearing, S.1631—The Customs Facilitation and Trade Enforcement
Reauthorization Act of 2009
October 20, 2009

Thank you, Mr. Chairman. We have worked together productively on customs oversight for many years. In 2002, we reauthorized the Customs Service as part of the Trade Act of 2002. Later that year, we worked to transition the Customs Service into the newly-established Department of Homeland Security. In 2006, we introduced a customs reauthorization bill, and our effort contributed to the development and enactment of the SAFE Port Act later that year. That effort also served as the basis for our work this year to produce the legislation that is the subject of today's hearing.

During our years of oversight, we've generally enjoyed a good working relationship with the dedicated personnel of U.S. Customs and Border Protection—also known as CBP, and U.S. Immigration and Customs Enforcement—also known as ICE. But in the 3 years since we enacted the SAFE Port Act, some new concerns have arisen and others remain.

One concern is that the balance at CBP between protecting our homeland security and safeguarding our economic security via trade facilitation is not quite right. So, our bill beefs up the trade facilitation mission of CBP by restructuring the Office of Trade and authorizing dedicated customs facilitation and trade enforcement personnel to the Office of Field Operations.

Another concern is that there hasn't been sufficient political accountability to Congress at CBP. So, our bill establishes a Senate-confirmed position of Principal Deputy Commissioner to oversee commercial operations within CBP.

More generally, our bill updates customs laws to reflect the existence of CBP and ICE within the Department of Homeland Security.

Another concern is that consultations between CBP and the public—as well as among CBP and other federal agencies—haven't been as robust as they should. So, our bill reconstitutes the Commercial Customs Operations Advisory Committee to provide for greater independence of the committee. And, our bill establishes a new interagency review board to ensure that changes in customs rules and regulations are consistent with our international trade obligations.

Separately, our bill strengthens the commercial targeting functions performed by CBP and ICE by authorizing commercial targeting groups and repealing the firewall between use of information for security purposes and commercial enforcement purposes. In particular, our bill contains provisions

intended to strengthen enforcement of intellectual property rights and import product safety measures.

We've continued to hear concerns that more can be done by CBP to facilitate trade. So, our bill disciplines the development and implementation of the Automated Commercial Environment computer system and the International Trade Data System for obtaining cargo clearance from other government agencies. Our bill also includes a duty drawback modernization provision to simplify drawback for both the government and the private sector.

In addition, our bill includes a number of miscellaneous provisions, the most significant of which is an update of the ban on importing goods made from convict labor. During the Finance Committee's consideration of legislation to implement our trade agreement with Oman in 2006, I committed to working with Senator Conrad and Senator Baucus on an update of this ban. Our bill reflects the product of our efforts to work together to expand the ban to prohibit the importation of goods made from convict labor, forced or indentured labor, coerced labor, or the labor of trafficked persons.

In sum, our bill beefs up the commercial operations at CBP without detracting from the agency's dual homeland security mission. And, it provides for greater cohesion between CBP, ICE, and the other federal agencies with a stake in the process of clearing cargo for entry into the United States. Those were our motivations in introducing this legislation. Now, I look forward to the hearing the views of our witnesses on the specifics of the bill—and, I invite public comment from any interested parties for inclusion in the record. Please note that Committee rules afford 10 days after today's hearing for the submission of any public comments. Such input will be helpful as we move to a markup of the legislation, which I hope will occur later this year. Thank you, Mr. Chairman.

Before the

Committee on Finance

United States Senate

Statement of

Ted Sherman
Director of Global Trade Services
Target

October 20, 2009

33 South Sixth Street
Minneapolis, MN 55402

INTRODUCTION

Chairman Baucus, Ranking Member Grassley and members of the Finance Committee, thank you for inviting Target to testify before you today. My name is Ted Sherman. I am the director of Global Trade Services for Target and I also currently serve as the co-chair of the U.S. Business Alliance for Customs Modernization. At Target, I lead a team of 100 people responsible for all Customs operations, compliance, brokerage and trade finance activities in support of Target's operating companies. Target is also active in the Retail Industry Leaders Association, the American Association of Exporters and Importers, the American Apparel and Footwear Association, and a number of other trade groups. I want to thank you for giving us this opportunity to have our voice heard in the discussions of the Customs Facilitation and Trade Enforcement Act of 2009. My testimony will specifically address the areas of Facilitation, Partnership Programs and Automation.

BACKGROUND

For background, Target is a 62 billion dollar U.S.-based retailer operating approximately 1700 stores in 49 states. We employ more than 350,000 team members. Our import volumes include more than 160,000 individual Customs filings each year, making us one of the largest U.S. importers by transaction volume.

FACILITATION

We strongly support efforts by Congress to encourage U.S. Customs and Border Protection (CBP) to increase its focus on trade facilitation, while at the same time

fulfilling its border security mission. A focus on true trade facilitation should eventually yield processes that are consistent, reasonable and simple for importers such as Target. To effectively plan our business, we need to be able to operate with some degree of certainty as to the regulatory landscape we will need to navigate in the near-to-medium-term. Decisions to formulate new rules and regulations should be made as part of a holistic view of the requirements currently being placed on importers. New requirements such as the Importer Security Filing (ISF) and the Lacey Act Declaration will by definition place strains on the resources of even the healthiest companies. Given the necessity of carrying out these requirements, consideration should be given to any current initiatives and requirements impacting importers before new rule changes are implemented. This will not only ease the burden on importers, but will improve compliance, as importers will be able to direct resources to what is most important for the country.

PARTNERSHIP PROGRAMS / MANAGEMENT BY ACCOUNT

Target has partnered with CBP to improve security practices and reduce supply-chain risks. Target is a charter member of the Customs-Trade Partnership Against Terrorism (C-TPAT) and participates in the Importer Self Assessment program, meaning our internal controls have been validated and found to be best in class by CBP. When correctly structured and administered, voluntary partnership programs can deliver benefits to both industry and government. For example, new partnership programs such as the bill's Customs Facilitation Partnership Program, should be as broad as possible and should include tangible benefits for importers found to have the best handle on trade

compliance. Companies involved in such partnership programs could be among the first to benefit from a transition to true account management. They could eventually move toward account-based processing, where most information is submitted to Customs on a periodic basis rather than transaction by transaction.

True periodic reporting will take time, and a considerable amount of partnership between CBP and the trade. In the near term, we have concerns surrounding the potential use of advance filing data for commercial compliance targeting purposes. There are different standards and penalty regimes for filing of advance data used for security purposes and the filing of data used for customs entry purposes. If advance data is to be used for commercial targeting purposes in the near term, there must be safeguards in place to ensure the two penalty regimes are recognized and kept separate. That is, the use of ISF data for commercial compliance targeting must not lead to new penalties or to the wholesale use of traditional commercial enforcement tools as a remedy for ISF discrepancies or omissions.

AUTOMATION

With regard to automation, we strongly favor the full funding and completion of the Automated Commercial Environment (ACE) and the implementation of the International Trade Data System. Large importers such as Target must plan their systems resources over a long period of time. The certainty and timing of ACE's full functionality is critical to these planning efforts.

Complementary to the vision for completing ACE, we support efforts to provide a single window for the entry and release of import transactions. A holistic, systematic approach is needed for collecting information at the border. Currently, in some cases, disparate communication methods are used for interacting with the various other government agencies that have a role in determining admissibility of merchandise into the United States. To that end, we support continued funding for the International Trade Data System.

CONCLUSION

Before I conclude, I would like to recognize Chairman Baucus, Ranking Member Grassley and the Senate Finance Committee for introducing the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009. In general, this Act seeks to review the commercial operations mandate for CBP, and to provide increased predictability and efficiency for the import community. We share these objectives and welcome the opportunity to be a partner as the process moves forward, contributing to our mutual goals of enhancing trade facilitation and our nation's security.

Thank you for the opportunity to speak to you today. I welcome any questions.

FINANCE COMMITTEE QUESTIONS FOR THE RECORD

United States Senate
Committee on Finance

Hearing on
"The Customs Facilitation and Trade Enforcement Act of 2009"
Tuesday, October 20, 2009

QUESTIONS FOR TED SHERMAN FROM CHAIRMAN BAUCUS

Question 1

CBP has been entrusted with the vital mission of ensuring that international trade runs smoothly. But in recent years, the agency has placed less priority on facilitating trade and on enforcing U.S. trade laws at the border. S. 1631 directs CBP to re-prioritize its trade mission, in part by creating new high-level trade positions throughout the agency. How do you think these new trade positions will benefit American exporters and importers? Are they a step forward? What else should we do to ensure that CBP prioritizes its trade mission?

Setting the right direction for any organization is just as important, if not more important, than the titles associated with certain jobs, or where those jobs are located in an organization. However, in general we do view it as a positive development to have high-level positions with responsibility for trade facilitation. This helps to ensure that the goals of trade facilitation, trade enforcement, and security are not viewed as mutually exclusive, and that facilitation is not subordinated to other missions without careful consideration of the ramifications for CBP and the trade. It is important that officials responsible for trade facilitation are placed within the organization in a manner that best allows them to have to have their voices heard when new policies are being developed.

Question 2

CBP has developed state-of-the art programs to detect imports that may threaten our national Security, but goods that threaten the health and safety of American consumers or violate U.S. intellectual property rights continue to cross our borders undetected. S. 1631 directs CBP to apply its well-honed national security targeting methods to detect health, IP, and other trade violations. How will improving CBP's targeting efforts affect your businesses? And given CBP's limited resources, how can CBP best implement this risk-based targeting approach?

We welcome improved targeting of imports that may raise IP concerns or pose safety issues for consumers, so any improvements CBP makes to its process can only help us do a better job protecting our guests. We think it makes the most sense to target high-risk shipments and to develop procedures that allow goods to be cleared as quickly as possible for companies that have

strong import compliance systems and processes in place. We would also recommend the development of a system that is as transparent as possible – companies like ours that have high standards of compliance with trade compliance, safety, and security standards can assist CBP in identifying unsafe or non-compliant goods as quickly as possible, and we would hope that CBP is able to share information with these highly-compliant companies to ensure that CBP and the trade can meet our shared objectives.

Question 3

In recent years, U.S. companies have been subject to a host of new requirements to ensure that imports comply with U.S. trade laws. These programs impose significant costs on American businesses, and these businesses should be recognized for their long record of compliance. S. 1631 establishes a voluntary Customs Facilitation Partnership Program that directs CBP to provide trade benefits to importers that have a history of complying with U.S. customs and trade laws. In your opinion, how would a program like this help improve compliance? How would it help improve trade facilitation?

We have suggested using the Customs Facilitation Partnership Program as a chance to move toward management-by-account, which would allow participating companies to be reviewed periodically rather than on a transaction-by-transaction basis, an obvious trade facilitation benefit. This will help CBP by freeing resources to focus on companies without strenuous compliance procedures in place, and by encouraging the trade to participate in these partnership programs. In general, consideration must also be given to existing programs such as the Importer Self Assessment program, in order to determine how they relate to each other in terms of requirements and benefits.

Question 4

When an incident occurs that slows or stops the flow of trade, it is critical that we must resume the flow of trade as quickly and safely as possible. S. 1631 directs CBP to work with other federal agencies to develop a plan for resuming trade once the threat has passed. In your opinion, what are the key components of such a plan?

The biggest components of the plan are transparency, close communication with other agencies and the trade, and coherent interagency plans for dealing with these situations. It is our hope that all agencies with the ability to halt trade can work to develop the wherewithal not only to target shipments that should be stopped or inspected, but also to let through the shipments that should be allowed to enter the U.S. commerce, and to communicate these decisions in a timely way to each other and to the trade. To ensure a plan for trade resumption that is executable in the real world, the development of such a plan must include participation by private sector entities across the import supply chain, including importers, carriers, brokers, and transportation service providers.

Question 5

CBP, along with the Consumer Product Safety Commission, Food and Drug Administration, Animal and Plant Health Inspection Service and other federal agencies, share the important responsibility of ensuring the safety of imported products and foods. Because these agencies lack significant presence at our ports of entry, it is important to establish a working relationship with CBP. S. 1631 establishes an Interagency Import Safety Working Group to improve communication and coordination among these agencies and CBP. It requires CBP, in consultation with the Interagency Import Safety Working Group, to establish a plan to respond to imports that pose a threat to U.S. consumers. Do you think this interagency working group will improve coordination and response?

The working group will improve coordination and response time if it focuses on developing a system for linking the targeting efforts of CPSC, FDA and APHIS with the capability of CBP to track and inspect shipments. As discussed below, ITDS would be a critical component in such linking. Again, we think the trade can play a role here as well and would hope that any system developed includes open communication with the affected private sector entities.

Question 6

Several federal agencies, including CBP, share the responsibility of ensuring the safety of imported products and foods. Each agency establishes separate, and sometimes duplicative, data requirements and requires importers to utilize different information technology systems to submit this data. Congress, however, has made significant investments in ACE and ITDS to streamline the data submission process for importers and provide agencies, including CBP, on real-time information about cargo shipments. S. 1631 requires the Secretary of Treasury to work with the head of each agency participating in ITDS to utilize ACE and ITDS as a single-window. How can other federal agencies utilize ACE and ITDS? What benefits can the federal agencies gain through their participation in ACE and ITDS? What benefits can importers gain?

We strongly support the "single window" data submission process that ITDS offers, because it reduces the time the trade spends sending redundant information to different federal agencies. Other federal agencies that use ACE and ITDS will be able to make quicker and better informed decisions on admissibility of goods, a benefit for both government and trade. We already hear from the federal agencies that have started using ACE that they see their targeting and import processing becoming much more efficient and streamlined.

QUESTIONS FOR TED SHERMAN FROM SENATOR GRASSLEY

Question 1

Mr. Sherman, section 202 of the bill requires CBP to establish a new, voluntary partnership program that provides benefits to qualifying participants. In your testimony, you state that any new partnership program should include tangible benefits. What benefits do you have in mind? Can you provide some examples of tangible benefits for importers that could be incorporated into the program under section 202?

Yes. Such benefits might include mitigation of fines and penalties for non-egregious errors, reduced transaction data sets when supplemented by account filings, head-of-the-line treatment in appropriate circumstances, the use of blanket declarations in certain situations, and information from partner agencies when problems are detected.

Question 2

Some have raised a concern with respect to section 211 of the bill, which would repeal the current firewall in law between using information for security purposes and using it for commercial enforcement purposes.

I don't understand this concern. If the government is already receiving this information, and use of the information leads to the identification of goods that don't conform to the customs and trade laws of the United States, why shouldn't liability attach as it otherwise would under our laws? And why should legitimate importers harbor concerns over this provision of the bill? Please respond.

The concern is based on the different requirements and different legal standards of an ISF security filing prior to export from the foreign country versus that of the entry data, which can be filed later after the goods have already been physically introduced into the United States. ISF data is based on "best available" information at the time of filing, and it can be updated and adjusted later in the process. In contrast, entry data is filed later by the U.S. importer after it has had the opportunity to vet the information received from the exporter. The entry filing is subject to a higher legal standard than "best available", and the importer is responsible for the filing being complete and fully accurate.

The ISF regime already has an enforcement mechanism. CBP has developed a liquidated damages scheme to address ISF errors or omissions. That scheme is separate from the traditional tools that CBP utilizes for commercial enforcement. The concern with section 211 in its present form is that it arguably would remove the fence separating security enforcement from commercial enforcement. Because the underlying statutory bases for security filings and entry filings are so different in terms of purposes, processes, timing and legal standards, it would be unfair to subject importers to commercial penalties based solely on ISF discrepancies.

Question 3

Section 205 of the bill provides for funding to complete the Automated Commercial Environment computer system. Section 206 similarly provides for funding to complete the International Trade Data System. In your testimony, you offer support for the full implementation of these systems. Please describe the benefits that Target anticipates will accrue once the Automated Commercial Environment computer system and the International Trade Data System are fully implemented.

We see ACE and ITDS as critical upgrades to CBP's information systems that will allow all federal agencies to process trade more quickly and efficiently, and to better target shipments that pose a threat. As one of the largest U.S. importers, Target would see our own internal processes work more smoothly. It would free us from the inefficiencies inherent in providing the same information to different federal agencies through different systems and in different formats. There are certain functions within ACE that we are currently able to leverage, for example using periodic monthly payment of duties and tracking of bond sufficiency. New functionality that importers such as Target could benefit from would include on-line management of requests for information received from CBP. Full rollout of ACE would presumably also allow CBP officials to have a holistic view of an importer's activities, eliminating the need for redundant actions and information requests. Finally, ACE and ITDS would form the platform that eventually would permit periodic entry activity reporting, rather than the transaction-by-transaction requirements currently in place.

Question 4

Title I of the bill provides for various changes to CBP's organizational structure in order to increase the accountability of the agency to both Congress and to the public, and to elevate its trade mission. Do you support these changes? Do you have any recommendations for otherwise improving CBP's organizational structure?

We support the dedication of staff to facilitation, and in general would support any structure that ensures a focus on trade facilitation, and that serves to give the trade a voice in the formulation of new policies.

QUESTIONS FOR TED SHERMAN FROM SENATOR MENENDEZ

Question 1

Mr. Sherman, Section 215(b) of the bill mandates CBP to develop criteria and a process for assigning importer of record numbers. However, such a database already exists within CBP. This is certainly a worthwhile endeavor to address the database issues raised by a 2008 GAO report, but I have concerns about the potential for CBP to create/implement a NEW data field for tracking when an established numbering system already exists. In your view, how can CBP improve the operational effectiveness of the current importer of record database? What else should CBP do to ensure the accuracy and usefulness of this database?

Our understanding is that the intent of the bill is to encourage CBP to fix the existing problems it has had with its importer of record registration program, such as the issuance of duplicate IOR numbers. We would support fixes to the current system, and like you, see no need for a separate IOR database.

Question 2

Section 234(a) of the bill requires the Assistant Commissioner of Trade to identify and maintain a confidential list of persons that have a history of attempting to import goods that infringe IPR. While I don't object with the list and its intent to dissuade import of IPR-violating materials, I am concerned about the application of this list and available recourse for companies that are placed on it erroneously. What safeguards should be included in the legislation to ensure the appropriate application of this list? Should the legislation provide recourse for removal and redress for those put on it erroneously? If yes, what is the best approach to do so?

We strongly support the intent of the bill to bolster IPR enforcement, but we agree that there should be safeguards concerning the confidential list of persons with a history of attempting to import goods that infringe IPR. We would recommend that the bill provide more detail on how a party would get on the list, and equally important what redress such party might have to get off the list. At a minimum, such processes should include clear standards for being put on the list, notice to any party and opportunity to respond prior to being added to the list, an appeal step to a higher authority if the party is added to the list, and a time limit or other criteria after which a party is eligible to being removed from the list.

Question 3

Sections 205 and 206 of the bill clearly outlines a timeline for completion of the Automated Commercial Environment (ACE) system and International Trade Data System (ITDS). The bill also requires CBP to provide a report to Congress on its plans for ACE completion by September 20, 3012 and to operationalize ITDS. I believe that the completion of both ACE and ITDS is critical for the flow of trade and the functionalities are vital for U.S.

importers and exporters. For your companies, how important is the completion of ACE and ITDS? For both systems, how do we ensure on-time completion?

As noted above, we see the completion of ACE and ITDS as invaluable contributions that should help both government and the trade streamline the process of importing goods, targeting goods that might be suspect, and managing trade in the event that certain shipments must be subjected to closer scrutiny. We think your bill includes key elements to assist in the completion of these projects – adequate funding and frequent congressional oversight. We would hope that these two principles, combined with established project management principles, would be sufficient to get the job done.

COMMUNICATIONS

AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

The Voice of the International Trade Community Since 1921

Written Testimony of the American Association of Exporters and Importers for the Record

Senate Finance Committee
Hearing on the Customs Facilitation and Trade Enforcement Act (S. 1631)
held on October 20, 2009

1. Introduction and Overview

AAEI appreciates the opportunity to offer this written testimony to the Senate Finance Committee to be included in the record for its October 20, 2009 hearing on the "Customs Facilitation and Trade Enforcement Act" (S. 1631). This written testimony summarizes and supplements AAEI comments submitted to Senate Finance Committee staff on October 7, 2009.

AAEI has been a national voice for the international trade community in the United States since 1921. Our unique role in representing the trade community is driven by our broad base of members, including manufacturers, importers, exporters, wholesalers, retailers and service providers, including brokers, freight forwarders, trade advisors, insurers, security providers, transportation interests and ports. Many of these enterprises are small businesses seeking to export to foreign markets. With promotion of fair and open trade policy and practice at its core, AAEI speaks to international trade, supply chain security, export controls, non-tariff barriers, import safety and customs and border protection issues covering the expanse of legal, technical and policy-driven concerns.

As a trade organization representing those immediately engaged in and directly impacted by developments pertaining to international trade, trade facilitation and the costs of regulatory compliance, we are very familiar with the operational impact of policies and programs on customs compliance and trade facilitation. Therefore, AAEI is deeply interested in the S. 1631 "Customs Facilitation and Trade Enforcement Act."

2. Areas of Support

We applaud the Senate for giving trade facilitation equal billing with enforcement, especially after many years of focus exclusively on security and enforcement. We wholeheartedly support the reorganization of CBP, and hope that the intention of the proposed structure will result in a smoothly operating agency is realized as a result of these proposed changes without creating an additional layer of bureaucracy.

AAEI supports the Committee's goal to see the Automated Commercial Environment ("ACE") system is complete in a timely matter. See, section 205. Moreover, we agree that ACE must become the electronic system of record. Likewise, we recommend that the Committee consider making a change to Section 206 so that the International Trade Data System ("ITDS") the electronic system of record for all participating government agencies with "release and hold" authority.

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As for the product safety provision in Section 221, AAEI fully supports codification of the Import Safety Working Group designating the Secretary of Homeland Security as the chair.

AAEI supports the prohibition of importation of forced labor goods, but believes that this situation is already adequately covered in other areas of the law.

AAEI fully supports raising the de minimis ceiling from the current $250. We boldly suggest that the ceiling can even go from the proposed $500 limit to a $1000 limit.

3. Areas of Concern

In relation to Section 201 of the bill, AAEI believes that the Customs-Trade Partnership Against Terrorism ("C-TPAT") and any other Customs facilitation partnership program that exists must have tangible and measurable commercial benefits as a result of the passage of this piece of legislation. AAEI believes that mutual recognition must be given to any program that meets the requirements of the World Customs Organization's SAFE Framework. Otherwise, U.S. companies which volunteer to join C-TPAT will receive little reciprocity for their efforts.

AAEI is deeply concerned about using security data collected for security being used for compliance as set forth in Section 211(e). As for section 214, AAEI believes that the in bond trade is critical and must become automated.

AAEI fully supports the enforcement of intellectual property rights ("IPR") by CBP. However, we remain deeply concerned about a secret "Black List" of IPR violators, as described in Section 234. We believe that such a list is a blunt instrument which may harm legitimate importers. Rather, AAEI suggests that the Committee focus the language giving CBP authority to release samples of potential copyright goods to ensure that only the IP holder will have access to the sample goods.

As for Section 302, the modernization and simplification of drawback remains AAEI's highest priority in supporting the passage of S. 1631. We sincerely hope that the Committee will consider correcting the calculation of drawback. Also, we urge Congress to set a specific implementation date for the predictability of both CBP and the trade community.

Account Management

AAEI is heartened by the testimony of three (3) out of the four (4) witnesses which testified before the Committee on October 20th prominently discussed the importance of having a system of account management as part of the statute. We believe that the trade facilitation goals of the Committee as embodied in S. 1631 will never be realized with Congress setting a statutory framework directing CBP to leverage its resources using account-based management.

Currently, account-based management has been limited to importers who voluntarily join C-TPAT or the Importer Self-Assessment ("ISA") program, a post-entry compliance program. Although C-TPAT covers approximately 10,000 companies it is

focused on trade security while ISA is a much broader based compliance program, it has approximately 200 members. Therefore, we recommend that the Committee direct CBP to extend account-based management to the top 1,000 importers regardless of whether they are in C-TPAT or ISA since these companies import the vast majority of commercial cargo into the United States. Additionally, we suggest that the Committee establish "account managers" arranged on an industry specific basis (e.g., pharmaceuticals, chemicals, retailers, petroleum, etc.) to provide a single point of contact and decision-maker on trade security and compliance matters for the companies within the account manager's portfolio.

Finally, AAEI believes that the Committee should consider adding the following provision to S. 1631 which extend a benefit to companies while increasing compliance with the customs laws.

> "Notwithstanding 19 U.S.C. § 1603 or any other provision of law, enhanced prior disclosure benefits shall be extended to companies in CBP's account management programs to afford them an opportunity to correct any compliance issues brought to the company's attention by the account manager. 'Enhanced disclosure' shall mean that upon notice by the account manager to the company that a compliance issue has arisen or is outstanding, the company shall have 30 days to fully disclose and correct the issue under 19 U.S.C. § 1592."

4. <u>Conclusion</u>

In conclusion, we thank you for considering AAEI's written testimony concerning this important legislation. We greatly appreciate the continued efforts by the Committee to ensure that CBP meets its two missions of facilitating legitimate trade as well as homeland security. AAEI looks forward to working with the Committee to demonstrate our commitment to support a partnership approach to trade compliance and facilitation.

Statement for the Record

From

b a c m
BUSINESS ALLIANCE FOR
CUSTOMS MODERNIZATION
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In connection with the October 20, 2009 Senate Finance Committee hearing on S. 1631, the Customs Facilitation and Trade Enforcement Act of 2009

BACM Comments on S. 1631,
the Customs Facilitation and Trade Enforcement Act of 2009

The U.S. Business Alliance for Customs Modernization (BACM) supports efforts in Congress to reinvigorate the profile of trade facilitation at U.S. Customs and Border Protection (CBP), and thus welcomes S. 1631 as a productive and long-needed step toward this goal. There has not been specific legislation to authorize CBP since this agency was made part of the Department of Homeland Security in 2002, and the legislation proposed by Senate Finance Committee Chairman Max Baucus and Ranking Member Charles Grassley provides an excellent opportunity to update the security, enforcement, and trade facilitation goals that we all share.

Ted Sherman, Director for Global Trade Services at Target Corporation and BACM Co-Chair, noted in your October 20 hearing that the goal for all importers is a predictable, transparent and seamless regulatory environment, and that government-industry partnership programs offer a means to move toward a management-by-account environment. BACM believes that this bill takes many good steps in those directions.

The following comments address particular sections of the bill with which we have questions and/or recommendations.

1. Trade Benefits for Participation in Security, Enforcement Programs

BACM supports any and all efforts to reward companies that work with authorities on security and enforcement benefits, as long as the benefits are tangible.

Section 201 of S. 1631 calls on the Secretary of Homeland Security to work with companies to develop trade benefits for participants in the C-TPAT program, and Section 202 requires CBP to establish a voluntary Customs Facilitation Partnership Program for companies with a history of compliance with U.S. trade laws. However, the bill as written leaves it up to DHS and CBP to determine what benefits are granted.

BACM believes it would be appropriate to direct DHS and CBP to begin moving to a "management-by-account" system for companies that meet the conditions of Sections 201 and 202, and ask that you consider naming this benefit explicitly in S. 1631. Under a management-by-account system, CBP would consider importers holistically, weighing factors such as trade security and trade law compliance, and ease customs clearance procedures for companies in good standing.

BACM and others believe that this is the goal CBP is and should be trying to achieve, and that naming this as an explicit goal in the bill would not only help CBP get there faster, but would prompt more importers to work toward compliance with CBP's import security programs.

2. The Use of Security Data for Commercial Targeting Purposes

BACM supports CBPs move away from the current transaction-by-transaction system and toward the management by account approach which will include a system allowing data to

be inputted by the importer once for and referenced by various government entities for import-related purposes. However, Section 211(e) of the bill would strike section 343(a)(3)(F) of the Trade Act of 2002, which provides that ISF data "shall be used exclusively for ensuring…transportation safety and security, and shall not be used for determining entry or for any other commercial enforcement purposes." BACM opposes Section 211(e) in its present form for the same reasons it supported Section 343(a)(3)(F) of the Trade Act of 2002.

There are legitimate fears by both BACM and trade community members that the change proposed in Section 211(e) could lead to costly penalties against companies despite their efforts to work with CBP on security and trade enforcement. ISF data collected by CBP is "best available," prior to export" and often provided not by the U.S. importer but by the foreign exporter. This is a substantially lower standard that reflects the accepted realities of getting CBP this data 24 hours before goods are laded on board at the foreign port for export to the United States. As was the case with the 24-Hour Rule, such data contrasts sharply with entry data which is vetted and filed by the U.S. importer later in the import process and which is most accurate. As in 2002, BACM members are concerned that the use of ISF data could lead to inappropriate commercial enforcement.

3. COAC Restructuring

BACM supports the attempt to raise the profile of the Advisory Committee on Commercial Operations of CBP (COAC), as the Senate Finance proposal does by creating a new group that is chaired by the Assistant Secretary of Treasury for Tax Policy and the Assistant Secretary of Homeland Security for Policy and Planning.

However, BACM believes it is important for any new committee structure to continue to allow non-committee advisors to participate in subcommittee work, something that is not explicitly provided for in S. 1631.

4. ACE Funding and ITDS

Funding levels for the Automated Commercial Environment (ACE) and the International Trade Data System (ITDS) are broadly supported by BACM, which hopes that these funds can revitalize industry participation in the Trade Support Network meetings over the next few years.

BACM notes that Congress is in the process of approving DHS appropriations for FY 2010, which would only fund ACE at $228 million, far less than the $300 million envisioned in this bill.

5. Joint Strategic Plan on IPR Enforcement

S. 1631 would require DHS and CBP to identify the top 10 U.S. ports for seized IPR-infringing goods and adjust personnel accordingly, maintain a confidential list of persons with a history of trying to import pirated goods, increase personnel and training for IPR enforcement, allow right holders to record their rights with CBP, give CBP the discretion to provide samples of goods that may violate IPR laws, and other steps aimed at improving IPR enforcement.

BACM supports the IPR provisions strongly, but we would like to suggest some clarifying revisions to a few aspects of these measures. First, BACM supports further legislative clarification of the process officials would use to place entities on the list of known IPR violators, and the process for removing entities from the list.

Second, while we believe that current law already gives CBP discretion to provide suspect samples to rights holders, BACM supports any legislative or regulatory changes that make clear the authority of CBP to provide to rights owners samples or any information that is on the product or packaging to allow rights owners to identify them as authentic or not. Concern has been raised, however, that confidential business information may be divulged through this process. Industry should work closely with CBP to design changes to the current rules to allow CBP to provide the necessary information to the rights holder without the risk or threat of Trade Secret Act sanctions, but to also ensure that confidential business information is not divulged when samples are provided to private parties other than the importer.

6. Technical Correction on Voluntary Reliquidation

BACM recommends adding to the bill a technical correction that would bring section 501 of the Tariff Act (19 USC 1501) into alignment with section 514 (19 USC 1514) on the issue of voluntary reliquidation.

Title II of the Miscellaneous Trade and Technical Corrections Act of 2004 revised section 514 by providing that importers have a window of time in which they can protest a Customs decision, starting from the "date of liquidation," rather than from the "date of notice of liquidation." But section 501, which allows CBP to voluntarily reliquidate any liquidation, says CBP's window of time for this decision starts at the date of notice of the liquidation. The language in section 501 has the potential to frustrate the statutory scheme for the finality of liquidations. That is, if CBP were to generate a notice of liquidation long after the actual date of liquidation, it arguably would then have the authority to reliquidate under current section 501. BACM supports amending section 501 to bring it into alignment with section 514 in this regard.

Written Statement Submitted to the Senate Finance Committee

On behalf of

The Grocery Manufacturers Association (GMA)

Pertaining to the Hearing of the Customs Facilitation and Trade Enforcement

Reauthorization Act of 2009 (S.1631) Held October 20, 2009

GROCERY MANUFACTURERS ASSOCIATION

1350 I Street, NW :: Suite 300 :: Washington, DC 20005 :: ph 202-639-5900 :: fx 202-639-5932 :: www.gmaonline.org

The Grocery Manufacturers Association (GMA)[1] appreciates the opportunity to submit comments on the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009 (S.1631). GMA is generally supportive of this important legislation and the role it plays in not only strengthening our domestic security, but also in promoting an environment where trade facilitation is prioritized. Trade continues to play a crucial role in the stability and health of our nation's economy and the timely introduction of this legislation delivers a clear message that Congress is serious about looking to create an environment where U.S. importers and exporters can remain competitive even in difficult economic times.

The food, beverage, and consumer product industry strongly supports the overall objectives of Congress expressed in S.1631, including but not limited to:

1.) Enhancing the role of trade facilitation within the Customs and Border Protection (CBP) Agency through the creation of new, high level trade positions and the re-establishment of the Advisory Committee on Commercial Operations of Customs and Border Protection (COAC)
2.) Creating new tools and directing additional attention to the enforcement of Intellectual Property Rights (IPR) and the enforcement of existing U.S. trade laws
3.) Formally establishing the Import Safety Working Group
4.) Calling for the continued modernization and development of electronic data entry, collection, and information sharing systems such as the Automated Commercial Environment (ACE) and the International Trade Data System (ITDS)
5.) Improving interagency communication with the end goal of reducing congestion at the ports of entry for importers, enhancing the level of efficient functionality within CBP, and creating a predictable regulatory and operational environment for the private sector to act in.

Although GMA is generally supportive of this legislation, several proposals in S.1631 could benefit from additional legislative direction and guidance to ensure their implementation is not only beneficial to the food, beverage, and consumer product industry, but also to help satisfy the mutually established goals of stimulating a competitive economic environment while simultaneously enhancing national security. With that in mind, GMA recommends the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009:

Expressly provide the private sector with the opportunity to provide input into the activities of the Import Safety Working Group.

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[1] GMA represents the world's leading food, beverage and consumer products companies. The association promotes sound public policy, champions initiatives that increase productivity and growth and helps to protect the safety and security of the food supply through scientific excellence. GMA board of directors is comprised of 52 chief executive officers from the Association's member companies. The $2.1 trillion food, beverage and consumer packaged goods industry employs 14 million workers, and contributes over $1 trillion in added value to the nation's economy.

Under section 221, the Import Safety Working Group is tasked with reviewing foreign manufacturers and importer's compliance with import safety requirements and with identifying best practices for private sector importers to ensure the safety of their imports (amongst other duties).

Unfortunately, the legislation fails to provide the private sector with the opportunity to provide input into the development of these compliance requirements and identification of best practices for import safety. Since the private sector, and specifically the food, beverage, and consumer product industry imports a significant quantity of goods set to be subjected to these new enforcement activities/best practices, it is imperative industry be included in the formulation and development of these activities/best practices. GMA recommends establishing a private sector advisory group for the Import Safety Working Group to: provide additional expertise in the development of any new best practices, help avoid the potential creation of duplicative directives, improve transparency, and assess the consistency with any recommendations or best practices to be developed by the Import Safety Working Group with the United State's international trade obligations.

Expressly provide the private sector with the opportunity to provide input into the development of the Joint Import Safety Rapid Response Plan.

The Secretary of Homeland Security, in consultation with the Import Safety Working Group, is required to develop protocols and practices for CBP to use in cases where cargo destined for the United States has been identified as posing a threat to the health and/or safety of consumers under section 221.

Although the recommendations and protocols to be developed through the Joint Import Safety Rapid Response Plan are required to be shared with the private sector, industry is given no role in the formulation of the Joint Import Safety Rapid Response Plan. Since the private sector, and specifically the food, beverage, and consumer product industry imports a significant quantity of goods set to be subjected to these new recommendations and protocols, it is imperative industry be included in the formulation and development of the Joint Import Safety Rapid Response Plan. GMA recommends the aforementioned private sector advisory group for the Import Safety Working Group also be consulted in the development of the Joint Import Safety Rapid Response Plan.

Expand the role of the Interagency Customs Review Board and where possible further direct government to enhance interagency communication, coordination, and information sharing.

The food, beverage, and consumer product industry commends the drafters of the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009 for establishing the Interagency Customs Review Board (section 6). Improving interagency communication is essential to ensure the government operates in an efficient and productive fashion. However, GMA members are concerned that the establishment of this board in its current form may not be sufficient to ensure that interagency communication and collaboration is adequate.

GMA recommends broadening the role of the Interagency Customs Review Board to include evaluating how proposed changes to a CBP regulation, interpretation, or practice might impact other existing regulations, interpretations, or practices under the jurisdiction of other government agencies. Additional representatives from other government agencies should be appointed to the Interagency Customs Review Board, including but not limited to, The Food and Drug Administration (FDA) and The United States Department of Agriculture (USDA).

In addition, the food, beverage, and consumer product industry recommends the Interagency Customs Review Board be mandated to review the JISRRP and other recommendations made by the ISWG (see section 221) to ensure their potential impact on existing regulations and practices under the jurisdiction of relevant government agencies does not create any duplicative or conflicting operational directives.

Finally, GMA recommends section 221 includes the following under sub-section (c):

(6) "where appropriate, CBP should use accepted government and industry developed standards used by the agency of primary jurisdiction for determining admissibility."

Provide further guidance under section 202, calling for the creation of a "Customs Facilitation Partnership Program" in S.1631.

The food, beverage, and consumer product industry commends Congress for looking to create new customs facilitation benefits for good importers. Similarly, GMA members remain committed to working in conjunction with the government to ensure the safety and security of imported products. However, GMA members are concerned gaining admission to the Customs Facilitation Partnership Program will place additional and significant information gathering and compliance burdens on industry while resulting in the creation of few new benefits for companies. Previous private sector border related expediency and security programs have promised similar benefits for members only to fall short of expectations.

GMA recommends providing additional guidance in section 202 of the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009 further specifying the intent behind the establishment of the Customs Facilitation Partnership Program. Providing further clarity as to what the proposed benefits should accomplish in section 202 would help alleviate private sector anxiety involving the creation of an additional border program when other similar proposals have failed to live up to expectations.

Ensure the preservation of the long standing "consumptive demand exemption" removed from the Tariff Act of 1930 under section 308 of the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009.

Section 308 of the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009 makes several amendments to section 307 of the Tariff Act of 1930, including the removal of the consumptive demand exemption. The consumptive demand exemption has existed for nearly a century and arose through recognition by Congress that in some cases the United States does not produce any or enough of certain raw materials that are used in domestic manufacturing and that access to such materials for U.S. importers must be guaranteed (regardless of other existing laws that might prevent the importation of such goods).

GMA is supportive of government efforts to prevent the importation of goods and materials made using child, forced, or indentured labor and condemns the employment of such labor practices. GMA members have engaged in and lead numerous education and standard of living improvement programs around the world to help eradicate illegal labor practices. Economic sanctions or even the threat of sanctions will not correct these labor issues. With this in mind, the food, beverage, and consumer product industry fears the proposed amendments will serve to not only endanger access to critical imports for U.S. manufacturers that cannot be supplied through domestic production, but will also work to unravel much of the work and progress industry has made in eradicating instances of illegal labor practices in threatened areas of the globe.

Thank you for considering these recommendations. GMA would like to again commend Senator Baucus (D-MT), Senator Grassley (R-IA), and other members of the Senate Finance Committee for their timely introduction and consideration of this important legislation. The food, beverage, and consumer product industry supports the main proposals S.1631 establishes in the legislation and looks forward to working with Congress and the Administration as it is considered for adoption into law.

Statement for the Record of the International Association of Professional Numismatists ("IAPN") (14, rue de la Bourse, 1000 Brussels, Belgium or P.O. Box 1057, Clifton, New Jersey 07014), the Professional Numismatists Guild ("PNG") (3950 Concordia Lane, Fallbrook, California 92028) and the Ancient Coin Collectors Guild ("ACCG") (PO Box 911, Gainesville, MO 65655) for Hearing on S.1631, the Customs Facilitation and Trade Enforcement Act of 2009[*]

S. 1631 Sec. 310- Training Should Include Other Perspectives and be Accessible to All

By Peter K. Tompa[†]

October 20, 2009

S. 1631 Sec. 310 (a) mandates that "that appropriate personnel of the U.S. Customs and Border Protection Agency are trained in the detection, identification and detention of archaeological and ethnological materials the importation of which violates the customs and trade laws of the United States." Subsection (b) authorizes "U.S. Customs and Border Protection to accept training and other support services from experts outside of the Federal Government in the detection, identification, and detention of archaeological or ethnological materials described in subsection (a)."

While IAPN, PNG and ACCG support the concept of training in principle, they are concerned that members of the archaeological community with "an ax to grind" against collectors will take advantage of this legislation to indoctrinate U.S. Customs personnel with their anti-collecting ideology. To ensure that any such training is performed as fairly as possible, IAPN, PNG and ACCG propose that the following be added as subsection (c) to the legislation:

> ***(c) Transparency, Fairness and Accountability- The Commissioner of U.S. Customs and Border Protection shall require any training described in subsections (a) and (b) to incorporate the views of museums, archaeologists, collectors and members of the trade in archaeological or***

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[*] The IAPN is a nonprofit organization of the leading international numismatic firms. It was founded in 1951 in an effort to help reestablish friendships between professional numismatists that had been badly frayed during World War II. The objects of IAPN are the development of a healthy and prosperous numismatic trade conducted according to the highest standards of business ethics and commercial practice. The IAPN has 113 member firms, situated in five continents and 21 countries.

The PNG is a nonprofit organization founded in 1955. The PNG's motto, "Knowledge, Integrity, Responsibility" continues to reflect its aims, and is expressed in the strict requirements for election to membership to the PNG. The PNG has over 300 members across the United States and abroad.

The ACCG is a Missouri based nonprofit organization committed to promoting the free and independent collecting of coins from antiquity through education, political action and consumer protection. The goal of this guild, founded in 2004, is to foster an environment in which the general public can confidently and legally acquire and hold any numismatic item of historical interest regardless of date or place of origin. Membership of the ACCG is comprised of collectors and numismatic professionals who care passionately about preserving, studying and displaying ancient coins from all cultures. In addition to individual memberships, the guild is supported by 20 Affiliate Member organizations representing an aggregate of more than 5,000 ancient coin collectors.

[†] Of Counsel, Bailey & Ehrenberg PLLC (1015 18th Street, N.W., Suite 601, Washington, D.C. 20036; Telephone: 202-331-4209; email: pkt@becounsel.com). Registered lobbyist for IAPN and PNG. ACCG Board Member.

ethnological materials. Such training material shall also be posted on the Internet to ensure that it is made available to the public.

A. Coin Collecting Brings Diverse Peoples Together to Foster Scholarship and to Preserve Millions of Small Artifacts from the Past

Elements within the archaeological community typically portray all collectors in a negative light. However, numismatics is a peaceable pursuit that fosters the appreciation of other cultures and that brings peoples of diverse nations together through a shared common interest at international coin fairs, through a vast universe of numismatic publications, and through modern communication media like the Internet.

Historical coins are so numerous with millions of examples extant that stewardship of the world's numismatic heritage requires interested members of the public to collect, study, conserve, record and publish historical coins both individually and collectively through membership in and support of organizations such as The American Numismatic Association, The American Numismatic Society, The Ancient Coin Collectors Guild, The Royal Numismatic Society, The Swiss Numismatic Society and hundreds—if not thousands—of local numismatic clubs. There is little, if any, public financial support for the study of numismatics. Without private efforts, our understanding of the historical coins would be much the poorer.

B. The Issue

The small businesses of the numismatic trade and collectors are entitled to fair enforcement of import restrictions on cultural artifacts. Mandates for training of Customs agents "in the detection, identification, and detention" of banned material should encourage fair enforcement, but the use of trainers from the archaeological community with "an ax to grind" against the trade and collectors carries with it the danger that unfair enforcement will actually result.[‡]

Low net worth small businesses of the numismatic trade and collectors cannot afford to hire lawyers to contest Customs seizures, particularly when, as is typical, the artifacts in question are themselves of low value. Numismatic groups suspect most cultural artifacts seized by U.S. Customs have been abandoned by the importer. Unfair enforcement based on biased training will likely lead to many more uncontested seizures of artifacts that may very well be perfectly "legitimate."

C. Causes for Concern

By way of example, the numismatic groups are concerned that the following "factoids" will creep into any training that is exclusively performed by members of the archaeological community:

- The archaeological establishment regularly claims that undocumented artifacts "must be stolen." In fact, historical coins have been traded for at least 500 years as collectibles and

[‡] Archaeologists also have a built-in conflict of interest in providing training or support services related to artifacts from countries in which they undertake archaeological investigations. These archaeologists depend on the governments of those countries to approve excavation permits. This provides a powerful incentive against advocating positions favorable to museums, collectors and members of the trade that might offend the cultural bureaucracies in such countries.

have been held traditionally without provenance and, it is therefore, unreasonable to assume that a coin is "stolen" or "illegally imported" merely because the holder cannot establish a chain of custody beyond receipt from a reputable source. *Compare* AIA Cultural Heritage FAQ (available at http://www.archaeological.org/media/docs/AIA%20Frequently%20Asked%20Questions.doc) (last checked, 10/19/09) ("The essential disagreement between museums, private collectors and archaeologists is whether museums and private collectors should acquire ...undocumented artifacts; archaeologists believe most undocumented antiquities are the product of recent site looting and therefore museums should not acquire them.... If such an artifact is dug up and removed from the country without permission it is stolen property....") *with* the following confidential admission in an official Cypriot Department of Antiquities document, FOIA Release Case Nos. 200402941, 200704168, 200704596, 20076194 (March 18, 2009), Letter from Pavolos Flouretzos, Director, Cypriot Department of Antiquities to [Redacted], dated 14 May 2007, Appendix II Coin Collections Introduction ("Florentzos FOIA release) (Exhibit A) ("The continuous circulation of coins for many centuries amongst collectors and between collectors and museums make any attempt to locate their exact find spot extremely difficult. For the same reasons, in most cases it is impossible to pinpoint the provenance of the coins belonging to private collections sold during auctions.").

- The archaeological establishment often ignores the reality that a particular kind of object can potentially have several different "find spots." This may result in artifacts being detained merely because they "look" like an artifact on the "designated list" for import restrictions. In fact, certain artifacts like historical coins traveled widely in ancient times as hard currency and in more recent times as collectibles. One cannot reasonably assume they were found where they were thought to be made. *Compare* Jeremy Kahn, "U.S. Imposes Restrictions Importing Cypriot Coins," N.Y. Times (July 18, 2007) (available at http://jeremy-kahn.com/articles/18Jul07-CypriotCoin.pdf) (quoting the President of the Archaeological Institute of America ("AIA") as stating, "Coins minted in Cyprus were very rarely taken from the Island in antiquity.") *with Florentzos* FOIA release (Exhibit A) (admitting, "It is true that Cypriot coins shared the same destiny as all other coins of the ancient world. As a standard media of exchange they circulated all over the ancient world due to their small size, which facilitated their easy transport... The continuous circulation of coins for many centuries amongst collectors and between collectors and museums make any attempt to locate their exact find spot extremely difficult.").

- The archaeological establishment also claims that artifacts should be treated as "stolen" under foreign cultural patrimony laws even where identical "unprovenanced" artifacts are openly available for sale in such countries. For example, the AIA successfully lobbied for import restrictions on a wide variety of "unprovenanced" cultural artifacts from

China—including some coins – despite the existence of a massive, open internal market for the very same artifacts within China itself. *Compare* Letter from Jane C. Waldbaum, President of AIA, to Jay Kislak, CPAC Chair (Feb. 3, 205) (available at http://www.archaeological.org/pdfs/archaeologywatch/China/AIA_CPAC_China_letter.pdf) (last checked, 10/19/09) *with* Don Yanchunas, *Coin Collecting in China,* Coinage Magazine 40 (May 24, 2006) (discussing the internal Chinese market for ancient coins).

D. The Solution

In order to allay these concerns, Congress should require any training to incorporate the views of museums, collectors and members of the trade. Such training should also touch on other issues of concern to these groups. For example, numismatic groups are concerned about counterfeit U.S. and Foreign collector coins entering the U.S. from China. Such coins should be marked as "copies' under applicable law, but this requirement is often ignored. These fakes can be deceptive to coin collectors and even some numismatic dealers. *See Inside a Chinese Coin Counterfeiting Ring,* About.com: coins (available at http://coins.about.com/od/worldcoins/ig/Chinese-Counterfeiting-Ring/) (last checked, 10/19/09). Training U.S. Customs in their detection can help keep such items from the U.S. marketplace.

Congress should also require that training to be posted on-line to promote transparency and help ensure accuracy. Collectors, museums, dealers and their representatives on the State Department's Cultural Property Advisory Committee have raised serious concerns about transparency and fairness of process in the State Department's program for imposing import restrictions. *See* Declaration of Jay I. Kislak (April 20, 2009) *filed in Ancient Coin Collectors Guild, et al. v. United States Department of State,* C.A. No. 07-2074 (D.D.C) (Exhibit B) (without attachments). *See also The Who, What, Why and How of the Cultural Property Advisory Committee (CPAC),"* 10 IFAR Journal Nos. 3 &4 2008/2009 at 24; Jeremy Kahn, *Art; Is the U.S. Protecting Foreign Artifacts? Don't Ask,* N.Y. Times (April 8, 2007) (available at http://jeremy-kahn.com/articles/08Apr07-ProtectingForeignArtifacts.pdf) (last checked, 10/19/09); Jeremy Kahn, *Coin Dealers Sue State Dept. for Details on Import Bans,* N.Y. Times (Nov. 17, 2007) (available at http://jeremy-kahn.com/articles/17Nov07-CoinLawsuit.pdf) (last checked, 10/19/09).

These concerns expressed by others suggest U.S. Customs may also refuse to release details about this training unless it is posted on-line. Unfortunately, prior experience also strongly suggests that Freedom of Information Act requests for such training materials are likely to be ignored or denied. Although U.S. Customs administers import restrictions on cultural goods, the decision to impose them is made by the U.S. State Department. It is instructive to note that the State Department only processed many of the numismatic group's FOIA requests—some of which were three (3) years old—after the numismatic groups filed a lawsuit. That lawsuit remains pending before the U.S. District Court for the District of Columbia.

UNCLASSIFIED

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Tel.: 22865889
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MINISTRY OF COMMUNICATIONS AND WORKS
DEPARTMENT OF ANTIQUITIES
NICOSIA-CYPRUS

14 May 2007

B6

RELEASED IN PART
B6

Subject: Request by the Government of the Republic of Cyprus for the renewal of the Memorandum of Understanding with the USA Government, concerning the imposition of import restrictions on pre-classical and classical archaeological objects and Byzantine period ecclesiastical and ritual ethnological material.

As far as the introduction to part III is concerned, I would like to inform you that there has been a mistake, which is now rectified. Initially the idea was to divide the chapter in part 1 and 2 but as work proceeded it became apparent that it was better to have a unified corpus. In our rush to finish the introduction was not accordingly modified.

We are now attaching the corrected paragraph and hope that it will be accepted.

(Pavlos Flourentzos)
Director
Department of Antiquities

c.c.: - Embassy of Cyprus
2211 R Street NW
Washington, DC 20008
Fax: 202 483 6710

EXHIBIT A

- Ministry of Foreign Affairs
(Through General Director of
Ministry of Communications and Works)

FH/NN

APPENDIX II
COIN COLLECTIONS
Introduction

Following the Memorandum of Understanding (MoU) between the Republic of Cyprus and the Government of the United States of America, the Department of Antiquities of Cyprus requests the Government of the United States to reconsider including coins in this agreement.

It is true that Cypriot coins shared the same destiny as all other coins of the ancient world. As a standard media of exchange they circulated all over the ancient world due to their small size, which facilitated their easy transport. Their size and intrinsic value, as well as their role as a primary source for the documentation of ancient history made them an attractive object to collectors since ancient times (e.g. collections of Ptolemies and Roman Emperors). The renewal of the interest of wealthy noblemen, in the post Medieval times, in the creation of private collections led them to spend much time traveling in Europe and the Mediterranean to collect "beautiful" objects and coins.

Most of the collections assembled in the eighteenth century had different destinies as time passed. Many of them were donated to public museums at the turn of the 20th century and constituted the subject of many catalogues. Other collections were sold and changed hands between collectors, while other collections passed into the hands of the heirs of collectors, who had no interest in keeping them and therefore these were divided, sold and added to already existing private collections.

For the same reasons, size and intrinsic value, coins are an attractive object to looters in modern times as they have been in the past. Nowadays, that archaeological excavations are conducted scientifically, coins can be extremely useful tools for the archeologist, and therefore for the history of the excavated area. The information they provide can be a significant instrument for the dating of a building or of the different phases of a building, for the knowledge of the economic contacts of the specific place or of the religious beliefs and practices of the area, etc.

Many articles of the Antiquities Law of 1935, chapter 31, of the Republic of Cyprus, provide for the prevention of illegal trading and circulation of coins. Under section I, articles 3 and 4 the Law specifies the Government as the owner of any antiquity laying under or upon any land. Under section VII, articles 26 and 27, the Law forbids the possession, dealing or export of any antiquity without the relevant license and provides for imprisonment and/or a fine in the case of breaking the law.

The continuous circulation of coins for many centuries amongst collectors and between collectors and museums makes any attempt to locate their exact find spot extremely difficult. For the same reasons, in most of the cases it is impossible to pinpoint the provenance of the coins belonging to private collections sold during auctions. The only case in which the provenance of the coins could be ascertained is when they form part of a homogeneous ensemble of a hoard, coming in general from systematic excavations, which are usually published and are thus well known.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANCIENT COIN COLLECTORS GUILD et al.,	)	
Plaintiffs,	)	
v.	)	Civil No. 07-2074 (RJL)
UNITED STATES DEPARTMENT OF STATE	)	
Defendant.	)	

DECLARATION OF JAY L. KISLAK

1. I was appointed by President George W. Bush to serve as the Chairman of the United States Cultural Property Advisory Committee ("CPAC"). I served in that capacity from 2003 to 2008. During that period, CPAC reviewed among others applications by the People's Republic of China for new import restrictions on cultural artifacts and requests made by the Republic of Italy and the Republic of Cyprus for the extension of then current restrictions.
2. As Chairman of CPAC, I became generally familiar with the operation of U.S. law related to the imposition of import restrictions on cultural artifacts, including the Convention on Cultural Property Implementation Act ("CPIA").
3. CPAC was constituted under the CPIA to recommend an informed balance between efforts to control looting at archeological sites and the legitimate international exchange of cultural artifacts.
4. The U.S. Department of State Bureau of Educational and Cultural Affair's Cultural Heritage Center acts as CPAC's secretariat. During my tenure as Chairman of CPAC, I

EXHIBIT B

became concerned about the secretive operations of the Cultural Heritage Center and its lack of transparency in processing requests for import restrictions made on behalf of foreign states. I believe this lack of transparency has hampered the ability of museums, private parties and others to make useful presentations to CPAC. I also believe that this lack of transparency has also hampered the ability of CPAC to provide recommendations to the executive branch about the best way to balance efforts to control looting at archeological sites against the legitimate international exchange of cultural artifacts.

5. I believe that the release of details of foreign requests for import restrictions could promote transparency and allow CPAC to be better able to make recommendations. I also believe that the release of CPAC's reports in full could also promote the same goals. I do not believe that release of this material after a decision has been made will discourage CPAC members from discussing the merits of each case. To the contrary, release of CPAC reports will allow interested parties to frame their arguments more effectively when import restrictions come up for renewal every five (5) years. In addition, release of this documentation will also promote the accountability of Cultural Heritage Center Staff to both CPAC and the public at large.
6. Release of more details about the Chinese, Italian and Cypriot requests at the time the requests were made could have encouraged better informed public comment about the requests at CPAC's public sessions. Now that decisions on the Chinese request and the Italian and Cypriot renewal have been made, I fail to see any reason why this material should be withheld from the public any longer.
7. I am told that Section 303 (g) of the CPIA requires the State Department to report to Congress any differences between CPAC's recommendations and the State Department's

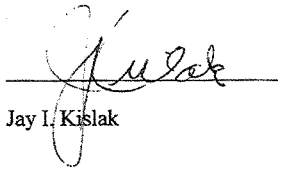
ultimate decision to impose import restrictions. In this regard, the release of the most recent CPAC report related to Cyprus and its discussion about coins could clarify misleading information contained in official State Department documents.

8. I specifically recall the Cypriot request that then current import restrictions on other cultural artifacts be extended to coins was a matter of great public controversy. CPAC considered the question specifically and I recall a special vote being taken on this particular issue.

9. With that in mind, I have reviewed both an official State Department Press Release and a State Department report made pursuant to CPIA Section 303 (g) about the MOU with Cyprus. Copies of these documents have been attached to this declaration as Exhibits 1 and 2. I believe it is absolutely false to suggest in those materials that the State Department's decision to extend import restrictions to ancient coins was consistent with CPAC's recommendations. The full release of CPAC's recommendations with regard to coins could be in the public interest because it should clarify misleading information contained in official State Department documents.

10. I have read this statement and everything in it is true, accurate, and correct to the best of my knowledge. I have had the chance to make any corrections, additions, or deletions that I desire.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief. 28 U.S.C. § 1746.



Dated: April 20 2009

Jay I. Kislak

WRITTEN STATEMENT OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS
FOR
THE COMMITTEE ON FINANCE
"S.1631 the CUSTOMS FACILITATION AND TRADE ENFORCEMENT ACT OF 2009"
ON
OCTOBER 20, 2009

The National Association of Manufacturers (NAM) is pleased to provide the following written statement for the record of the Committee on Finance Hearing on "S. 1631, the Customs Facilitation and Trade Enforcement Act of 2009" held on October 20, 2009. The NAM represents a broad spectrum of U.S. manufacturers, with members in every industrial sector and every state. Its membership includes both large multinational corporations with operations in many foreign countries and small and medium manufacturers that are engaged in international trade on a more limited scale. Our members depend heavily on imported parts, components, and finished products to compete not only in the U.S. marketplace but, also in foreign markets. NAM members have a strong track-record of working with the U.S. government to improve supply chain security and compliance practices.

The NAM is committed to national security. NAM members recognize the importance of preventing the importation of high-risk shipments into the United States, particularly the smuggling of weapons of mass destruction and related materials. Our members are committed to working with Customs and Border Protection (CBP) and other U.S. law enforcement agencies to prevent this from happening and to keep America secure and safe from terrorist threats. NAM members have invested significant resources to secure their supply chains and continue to work collaboratively with the government to make the United States secure.

Striking the right balance between enhancing national security and facilitating trade is important to NAM members. Manufactured goods accounted for 75% of all imports into the United States in 2008. U.S. manufacturers have global supply chains, source inputs from around the world, and import parts and components on a daily basis. Unfortunately over the last several years, both legislation and federal regulations that have increased the burden on manufacturers and on the companies that transport our raw materials and finished products, often failed to incorporate input from industry or consider the economic implications, and moved away from the dual mission of security and trade facilitation.

The NAM strongly believes that economic security is an important piece of our national security. S.1631 is a significant step in recognizing: the role of economic security; the need to implement balanced, vetted, and effective policies to advance the twin goals of Department of Homeland Security (DHS); the importance of public-private partnership and providing benefits for importers who have gone above and beyond to secure their supply chains; and the need to improve commercial enforcement to prevent the circumvention of intellectual property rights (IPR), anti-dumping (AD) and countervailing duty (CVD) orders and to protect the well-being and safety of importers and U.S. citizens.

The Customs Facilitation and Trade Enforcement Act of 2009 seeks to prioritize trade facilitation within DHS; improve interagency and congressional coordination; reward importers with strong compliance records; increase government and industry collaboration; strengthen intellectual property protections; trade enforcement and import safety programs; and expedite the completion of the many still outstanding modernizations needed within the agency. The NAM supports the goals of the legislation. We recognize that this is no small task, and we appreciate the ambitious work of Senators Baucus and Grassley. The NAM believes S.1631 has the potential to result in substantial change to the status quo; however, two significant changes and a number of smaller modifications are needed for the bill to be successful. The NAM, through the Customs and Border Coalition, has provided a detailed list of suggestions to the committee (copy attached).

The key changes needed are highlighted below:

1. **The reorganization of DHS and CBP should include not only the creation of new political-level positions for trade, but also the resources to implement trade programs, and internal review mechanisms to guarantee that the Office of Trade has a seat at the table when new policies (both trade and security-related) are developed.**

   When the U.S. Customs Service was moved from the Department of the Treasury in 2003 to the newly-created Department of Homeland Security many were concerned that the trade mission of the agency would be lost within DHS, whose primary focus was security. Nearly seven years after the move, it is no longer a concern but reality. The impact of new policies on legitimate trade often appear to be afterthoughts, and industry concerns are not adequately considered. Over the last seven years, many have recognized this trend and, in response, CBP has undergone numerous reorganizations in attempts to address the lack of balance between the twin goals of DHS and CBP. Unfortunately, the various internal changes have not resulted in a renewed focus on trade facilitation.

   The NAM believes that for the reorganization proposed in this legislation to accomplish the goals of reprioritizing trade facilitation and lifting its stature within the agency, the following must occur:

   - senior political-level positions must be created to raise trade issues above the staff level.
   - Sufficient resources must be given to the Office of Trade to carry out trade projects and programs aimed at elevating trade facilitation.
   - CBP should create an intra-agency process for consultation with the various offices within CBP on new initiatives that may affect trade facilitation and legitimate trade.

Without the proper resources, the Office of Trade will have to depend on the Office of Field Operations (OFO) to carry out any new trade initiatives or programs. OFO and the new Office of Trade do not share the same mission and OFO could decide not to provide the necessary resources or support to the Office of Trade. This has been the reality under the current structure at CBP.

Another key aspect is increasing internal cooperation and communication across offices within CBP. The trade office is rarely involved in the development of policies that have a security focus, and thus the impacts on trade facilitation are often not considered. Before a new policy can move forward, the Office of Trade should be given an opportunity to evaluate the impact on legitimate trade, even if the primary focus of the policy is security.

As the legislation currently exists, it only accomplishes the first of these objectives by creating several new political-level positions for trade facilitation. The NAM encourages this committee to amend the legislation to include sufficient resources for the new political appointees to carry out their responsibilities and to create a structure that will require intra-agency collaboration and vetting on new policies.

2. **The bill should not repeal §343(a)(3) of the Trade Act of 2002 in its entirety, but rather should narrowly tailor §211(e) to allow Customs and Border Protection (CBP) to use security data to improve targeting for IPR, import safety, and other programs while prohibiting CBP from using the data for customs entry purposes.**

The NAM is concerned that the unintended consequences of repealing §343(a)(3) could have a significant impact on trade facilitation. Therefore we request that §211(e) be narrowly tailored to achieve the intended purpose of improving advanced targeting for IPR, enforcement and import safety violations, and duty or preference programs.

The NAM supports the effort to improve targeting for the above- mentioned purposes. However, as the section currently exists, NAM members are concerned that they will be subject to increased penalties when importer security filing (ISF) data is compared against entry summary data. ISF data and entry summary data are subject to two different legal standards and should not be compared when determining negligence for commercial penalties. Differences between the two documents will often legitimately occur based on when the information is collected by the importer and submitted to CBP. This is not evidence of negligence or wrongdoing on the part of the importer.

As CBP moves towards collecting more advanced data, it is imperative to establish a precedent that advanced data and entry data are not equal, and that each serves a distinct purpose – the first for identifying threats to our security and safety and the second for assessing import duties.

While it is not this committee's intent for CBP to compare ISF data against entry data, it is not unrealistic for industry to worry that, over time, the two documents could be compared against each other, greatly increasing the risk of potentially unwarranted penalties and legal battles with CBP. Therefore, we request that §211(e) be amended to prevent CBP from being able to use the ISF to establish proof of negligence in a §1592 case.

The NAM is also concerned that if security data is used for commercial targeting purposes, it will be subject to the Freedom of Information Act (FOIA). During the creation of the ISF program, industry was repeatedly told by CBP that ISF data would not be subject to FOIA. This is critical, since security data contains many trade secrets would disadvantage manufacturers vis-à-vis their competitors if made available through FOIA actions.

The NAM strongly encourages this committee to amend the legislation to narrowly tailor the use of security data and guarantee that the data will not be subject to FOIA.

Additionally Smaller but Important Modifications

The NAM appreciates the effort made in this legislation to address many of the shortcomings in existing programs and mandates, and looks forward to working with the members to make adjustments. The NAM supports the incorporation of the following changes into the final bill:

1. Customs-Trade Partnership Against Terrorism (C-TPAT): The NAM fully supports the requirement that CBP develop benefits for members of C-TPAT and believes this is important in encouraging importers to continue partnering with the government. We are concerned that without a clear mandate and definition of "benefit" from Congress, CBP will continue business as usual and call non-benefits "benefits." (e.g., CBP currently calls the ability of industry to participate in the C-TPAT Symposium a benefit). To guarantee that the legislation achieves its intended goal, the NAM recommends that the legislation:

    a. include a definition of "benefit";
    b. mandate that the benefits be tangible or measurable; and
    c. commission an *independent* study to evaluate whether the initial promised C-TPAT benefits have been realized.

    The NAM believes these changes will show importers that Congress recognizes the significant costs and resources importers have invested to secure their supply chains and will encourage more importers to participate in the program.

2. Customs Facilitation Partnership Program (CFPP): The NAM believes that the CFPP has the potential to recognize importers who have long-standing records of compliance. However the NAM is hesitant to support the creation of a new voluntary program without more detail on the structure of the program, the requirements to participate, and the anticipated benefits. NAM members have signed up for many programs over the last seven years with the promise of benefits and recognition that they are low-risk, trusted

importers, only to find that the benefits are elusive and that the trustworthy importers are treated in the same way as unknown importers. While the NAM understands that this committee cannot micromanage CBP, it can provide clear guidance and mandates for the program. The NAM encourages this committee to review the foundation of this program and to provide deadlines for implementation, broad criteria for applicants, and a mandate that tangible or measurable benefits accompany entry into the program. This committee should encourage CBP to work with other agencies to create an across-the-board program for pre-admissibility for importers with best-in-class compliance programs.

3. Mutual Recognition Programs: The NAM supports expansion of mutual recognition programs and believes the legislation should encourage CBP to work with other governments to put mutual recognition programs in place wherever possible.

4. Advisory Committee on Commercial Operations of Customs and Border Protection (COAC): The NAM appreciates the efforts of the committee to improve the effectiveness of the COAC through this legislation. It is critical that the COAC not report directly to the agency for which it is providing advice. Currently, the COAC reports to CBP, and as a result CBP is able to control the agenda and dialogue at meetings.

   We offer several suggestions for further changes to the current structure:

   a. Clearly state that the COAC is to report to DHS and CBP should not be permitted to chair the meetings.
   b. Enlarge the size of the COAC to expand industry participation.
   c. Allow for active public participation in open sessions

5. Import Safety: The NAM encourages the committee to bolster §221 by requiring DHS to take a coordinating role to work with other agencies as they develop import safety policies, to use science-based import safety standards, to consult with the COAC and other relevant advisory committees in developing requirements, and to require that all policies be consistent with international obligations.

6. Intellectual Property Rights: S.1631 includes many provisions that will strengthen intellectual property enforcement; however the NAM believes additional provisions should be added. We support adding provisions that:

   a. Provide CBP officers with explicit authority to provide samples, pictures of markings on the packaging or product, or other information to determine the legitimacy of a suspect imported product.
   b. Provide importers with samples of the seized and forfeited goods after the goods have been determined to be counterfeit and are destined for destruction by CBP.
   c. Broaden CBP's administrative authority to seize counterfeit or pirated goods bearing registered, but unrecorded, trademarks or clearly infringing copyrightable works that are not recorded.
   d. Allow industry the opportunity to submit names of companies and/or individuals known to violate IPR to the government.

7. Drawback: Importers have been working with CBP and this committee for a number of years on the revised drawback provision. We appreciate its inclusion in this legislation. However, the NAM fails to understand the rationale for linking implementation of the drawback provision to the completion of the Automated Customs Environment (ACE). We do understand that submitting the documentation for duty drawback will be simplified once ACE is up and running; however given the past history of ACE implementation, the NAM is not confident that ACE will be functional by 2012 and firmly believes the revised duty drawback provision should be effective immediately upon enactment of this legislation.

S.1631 is an important bill and we believe if our recommendations are incorporated, this committee will achieve the goals of the legislation. We have provided the Customs and Border Coalition's recommendations, for which the NAM is the secretariat, as an addendum to this statement. This document provides even more specific suggestions to improve the bill. We thank the committee for allowing us this opportunity to provide a statement for the record and look forward to working with the committee as this bill moves through the legislative process.

Comments on S.1631-The Customs Facilitation and Trade Enforcement Reauthorization Act of 2009

TITLE I

Reorganization of CBP

Section 2(a): Principal Deputy Commissioner should report jointly to the Commissioner of CBP and the Assistant Secretary for Policy at DHS

Section 4(a): Appointment of a Trade Advocate. Add requirement that the appointed individual must have a minimum of five years in non-government services.
-require that the trade advocate report directly to the principal deputy commissioner

Section 5(c): Appointment of a Deputy Assistant Commissioner for trade facilitation and enforcement. Add requirement that the appointed individual must have a minimum of at least 5 years in non government services.

General comments on reorg

- Need to move "trade resources" such as import specialists to the office of trade and out of the office of field operations

- Need to require on that on all policy that the office of trade has a spot at the table. Currently, the office of trade is not involved at all on security programs. The office of trade should have a voice.

Customs Review Board

Section 6(b) Add "and, when appropriate, other relevant agencies."

Personnel

§110—add to §401 (a) that the Director of trade policy within DHS' Office of Policy must have a minimum of 5 years of private sector experience.

TITLE II

§201-C-TPAT

- Suggest in statute for the creation of a definition of "benefit"
    - Benefit=something of material significance to encourage importers to participate in the program in full recognition of the additional costs the importer incurs for participating in the voluntary program.
- §201 (a) insert after additional "tangible or measurable" trade benefits
- §201 (a) after tier 1, tier 2, tier 3 add "and other participants."
- §201 (a) consider additional benefits for CTPAT participants who also participate in ISA and/or FAST
- §201 (a) at the end of the (a) add "which were not available to C-TPAT participants prior to the date of enactment of this legislation."
- Commission a study to evaluate whether the initial promised benefits of C-TPAT have been realized.
- When CBP changes its trade, or regulatory and enforcement criteria, CBP must make sure that C-TPAT benefits are not diminished or materially changed.
- Compliance plus C-TPAT status should be a factor to reducing bond
- TSA should recognize C-TPAT status for the Certified Cargo Screening Program (CCSP)
- Propose new paragraph (d) to Section 201 to read as follows:

"(d) The Commissioner shall continue to develop new ways to enhance the C-TPAT program beyond the period for which annual reports are required, per Section 201(c) above. The purpose of such enhancements shall be to (1) increase the import and export supply chain security of the United States, and (2) provide additional significant benefits to C-TPAT partners."

-

§202 Customs Facilitation Partnership Program (CFPP)

- Expand to include other relevant agencies
- Replicate §201(a-c) substituting CFPP for CTPAT
- Create a series of deadlines for implementing and selecting the first group of participants
- Look at the CBC QTIP proposal
- The program must contain components having account-based strategies to manage and partner with compliant trade participants.
- Need to include more information on purpose and scope of program.

§203: Mutual Recognition Programs

- Encourage CBP to work with other governments to put Mutual Recognition Programs in place wherever possible.

§204 COAC

Additional recommendations:

- Provide authority to allow non-coac participants in the public sessions to ask questions
- Formally authorize COAC to allow the creation of subcommittees and for non-coac members to be able to openly participate
- Remove the party affiliation requirement
- State that CBP shall participate but not chair the COAC meetings

Section 204(b) – New subsection (5):

"An individual may be removed from the committee by a majority vote of its members if the individual fails to attend two or more consecutive committee meetings in a calendar year."

Section 204(b) – New subsection (6)

"The committee membership shall select a Trade Chairperson. The CCOAC Chairperson will be elected by the Committee at the last meeting of any two-year term. It is desired that the Chairperson serve only a two-year term; however, with a majority vote the Chairperson may be re-elected, subject to continuation on the Committee."

Section 204(b) – New subsection (7)

"The committee may vote to create subcommittees to carry out its work. The subcommittees must be chaired by a current member of CCOAC. The Subcommittee membership may consist of current Committee members and appointments from affected portions of the trade."

Section 204(d) – New subsection (5):

"The Secretary of the Department of Homeland Security and the Secretary of the Treasury shall arrange to post minutes of the CCOAC meetings at their respective web sites for public inspection."

§205 ACE

- Require full implementation by 2012 to include all functionalities currently developed
- Require CBP to annually update ACE with new functionalities such as ISF and Lacey Act

§206 ITDS

- CBP needs to take a more prominent coordinating role with the other agencies to facilitate development
- Re-connect ACT and ITDS

§211(e)

Section 211 (e)--Repeal of section 343 (a) (3)
-What specifically is the committee trying to accomplish? Will the ISF data accomplish that goal?

Potential fix if not removed from the bill:
(F) The information collected pursuant to the regulations shall be used exclusively for ensuring aviation, maritime, and surface transportation safety and security, and shall (ADD) " not be used as proof or evidence to establish violations of §1592" ~~determining entry or for any other commercial enforcement purposes.~~

§215-Importer of Record

- What is the committee trying to accomplish with this provision?
- Recommendation: As part of the program's development, there needs to be a viable means for importers to de-activate IOR's in order to prevent future importing activity against these numbers.

§221-Import Safety

- Is there appropriate staffing within DHS/CBP to lead the Import Safety Work Group (ISWG)?
- Should Import Safety and IPR be combined at the ten ports of entry mentioned in the bill?
- DHS should take a coordinating role to work with other agencies as they develop import safety policies.
- What is the status of the Action Plan created by the Bush Administration?
- For both the ISWG and the rapid response plan, language needs to be added to require consultation with CCOAC and other relevant advisory committees.
- Under §221(c) add "(6) where appropriate, CBP should use accepted government and industry developed standards used by the agency of primary jurisdiction for determining admissibility."
- Under §221 add "(d) Where the importer has implemented strong internal controls and has a record of being highly compliant, the importer should receive benefits under §202.
- Under §221 (c) add "(7) adopting science-based import safety standards, and when not available, the ISWG shall develop them in conjunction with industry and the agency of primary jurisdiction."
- Under §221 (c) add "(8) developing policies that are consistent with international obligations
- Under §221 add "(e) Require the ISWG to submit an annual report on import safety activities to determine if the new policies improve product safety and to provide a cost-benefit study."

IPR

- §233—instead of volume, use FOB value and retail value
- §234- No private sector input. No procedure for requesting removal. Nothing about making list available to other agencies.
- §237 add trademark to the section to make it "copyright and trademark."
    - Does not address recordation of non-registered, non-U.S. works.
- §238(a)—add "must" before "provide copyright or trademark owners…"
- §239 (d) Why 30 days? Why not less?
- See IACC's comments for further IPR comments and recommendations
- Provide CBP officers with explicit authority to provide samples, pictures of markings on the packaging or product, or other information to determine the legitimacy of a suspect imported product.
- Provide importers with samples of the seized and forfeited goods after the goods have been determined to be counterfeit and are destined for destruction by CBP.
- Broaden CBP's administrative authority to seize counterfeit or pirated goods bearing registered, but unrecorded, trademarks or clearly infringing copyrightable works that are not recorded.

TITLE III

§302-Drawback

- Remove link between the drawback provision and implementation of Ace; hence the duty drawback provision should be effective immediately upon enactment of this legislation

§307- Pilot Program

- What is the committee trying to achieve with this section. There are already ports that operate 24/7
- Expand to include sea ports

§311-De Minimis

- The de minimis level should be raised to $800, which is the value of goods a traveler can bring into the United States duty free and without customs entry procedures. The value has been at $200 since 1993
- The Secretary of the Treasury should periodically consider adjusting the values established in paragraphs (a) and (b) above to ensure the limits are consistent with the rate of inflation as measured by the Consumer Price Index.
- Change Sec 311(b)(3) to read:

"(b) Entry of Merchandise Valued at $5000 or Less, ---

"(1) In General. –The Secretary of the Treasury shall prescribe rules and regulations for the declaration and entry of merchandise if the aggregate value of the shipment of merchandise is not more than $5000.

"(2) Exception. Delete this subparagraph.

Statement for the Record of the Senate Finance Committee

October 20. 2009 Hearing on

S. 1631, the Customs Facilitation and Trade Enforcement Act of 2009

by the Drawback Committee of the

National Customs Brokers & Forwarders Association of America
1200 18th Street NW, Ste 901
Washington, DC 20036
202-466-0222

The Drawback Committee of the National Customs Brokers and Freight Forwarders Association (NCBFAA) consists of United States Customs brokers specializing in filing duty drawback for small, medium and large U.S. exporters, importers and manufacturers. The Committee represents the drawback interests of NCBFAA's many members, also ranging from small to large U.S. companies. With its unique knowledge of the technical aspects of drawback, the NCBFAA Drawback Committee has been actively involved with Customs & Border Protection in shaping a modern drawback law. The NCBFAA Drawback Committee supports the provisions of the Customs Reauthorization Bill seeking to modernize the drawback law and appreciates the opportunity to comment on the proposed changes to the drawback law in S. 1631. We would appreciate these comments being made part of the Committee's hearing record.

Duty drawback is one of the oldest laws in the United States. It allows U.S. companies to compete in foreign markets by reducing their duty and tax burden where goods are subsequently exported or processed and exported. For over two centuries, drawback has made our businesses more competitive, created jobs, facilitated trade, improved the balance of trade and generally provided significant benefits to the U.S. economy. In fact, drawback is the only WTO-legal export incentive program, with all of our major trading partners providing similar incentives to their exporters.

While the current drawback law has served us well, over time it has become a cumbersome, paper-based system that is not capable in its current form of taking advantage of automation advancements offered by the ACE computer system. This has made the program difficult for Customs & Border Protection to administer. The current law is also unnecessarily complicated and overly reliant in some areas on subjective analysis, making it difficult for many U.S. companies to take advantage of the important benefits provided by program.

The proposed law is the culmination of joint efforts by both Customs and Border Protection and members of the trade, working through the Trade Support Network to modernize drawback and integrate this vital program into ACE. Through years of discussions and review, Customs and trade representatives reached an historic

compromise in developing a modernized drawback law that is simpler for CBP to administer, easier for U.S. companies to understand, and more objective, predictable and accessible for exporters of all sizes. These changes to this important program will make American companies and workers more competitive in the world marketplace.

The proposed drawback law in S. 1361 seeks to implement many of the concepts developed through the Trade Support Network. After reviewing the language proposed, we have met with staff and suggested certain changes to that language that we believe are important to correctly implement the law and better fulfill the historical intent of Congress. These changes address aspects such as how drawback is calculated, transfer of drawback rights, what proof must be maintained by claimants, and drawback of fees and taxes. We believe these changes would ensure that the new law does not result in unintended consequences and the elimination of existing drawback rights that are vital to the competitiveness of U.S. business and labor.

We greatly appreciate the opportunity that you have given NCBFAA's Drawback Committee to provide our comments about this highly technical and complex area of Customs law. We will continue to be available to work with you as the Committee approaches the mark up of this bill and look forward to working with you on any revisions to the bill's language.

SUGGESTED CHANGES TO S. 1631, SECTION 302

A. Calculation of Drawback

The proposed language does not correctly calculate drawback.

First, (d)(1)(A) calculates the quantity based upon "the number of units of merchandise exported with respect to imported merchandise." Where items are one for one (one item imported=one item exported), that would appear to work, although it is not very clear. Where you have merchandise incorporated into other merchandise, you need to use the bill of materials (see (c)(2)) to determine the quantity of imported merchandise that can be claimed for each imported finished good. We suggest that the section be broken into to two cases: those submitted with a bill of materials and those submitted without. Where a bill of materials is not sued, the language "the number of units of merchandise exported" be used as the quantity. Where a bill of materials is used, the quantity should be "the number of units of the imported or substitute merchandise incorporated into the exported units." Without a change, the law does not address drawback where merchandise is incorporated into other merchandise other than one for one.

Second, the calculations in (d)(1)(B) refer to an average of duties, taxes and fees paid. There is no definition of how that average is calculated. Is it an average of the line item, the entire entry, a month of entries, a year, etc.? Previous drafts had a definition of the word "line item" and that definition should be inserted again and the term should be used in this section. In addition, average is a term that can mean a number of things, for example the mean or median. Either a definition should be provided for the word average or the actual formula should be described. We have suggested language below using a description of the components and operations for actual formula.

Third, the lesser of calculations does not work for merchandise incorporated into a finished article. It literally requires the claimant to classify and determine the duty rate of the finished article, take the value of the finished article (likely a much higher value than an imported component) and then compare that to the duties, taxes and fees paid for the included component. It would, for example, have the claimant figuring the value, tariff rate and duty for an exported car, just to compare that to the average duty paid for the radio incorporated into that car. It was never intended to employ this methodology for finished goods where merchandise was being incorporated into the finished item, or to situations involving destruction rather than exportation, where the value at the time of destruction is nominal due to obsolescence or spoilage.

We suggest the following change to (d):

(d) Amount of Drawback.-
(1) In General- The amount of drawback paid pursuant to this section shall be equal to 99 percent of the product of-

> (A) Unless a bill of materials is provided, the number of units of merchandise exported and, the lesser of-

(i) the amount of duties, taxes, and fees paid on the line item divided by the total number of units of the imported merchandise for that line item, or
(ii) the amount of duties, taxes, and fees that would apply to the exported merchandise if the exported merchandise were imported using the value of the exported merchandise divided by the total number of units of exported merchandise.

or,

(B) If a bill of materials is provided for the exported merchandise, the number of units of the imported or substitute merchandise incorporated into the exported units and the amount of duties, taxes, and fees paid on the line item divided by the total number of units of the imported merchandise for that line item..

In addition, the following definition of line item should be put back into the legislation:

LINE ITEM.—

(A) IMPORTED MERCHANDISE.—The term 'line item' means, with respect to imported merchandise, the merchandise identified on a line of the entry summary filed with U.S. Customs and Border Protection by HTS subheading number, net quantity, entered value, and the rate of duties, fees, and taxes applicable to the merchandise.

(B) EXPORTED MERCHANDISE OR ARTICLE.—The term 'line item' means, with respect to merchandise or an article being exported, the merchandise or article identified on a line of the automated export system of the United States Government or[, if unavailable,] on a line of the invoice or other commercial documentation, by HTS subheading number or Schedule B number, quantity, and declared value.

Finally, the section on calculating drawback for destroyed items (see (g)(1)(B)) should read as follows:

"Subject to subparagraph (C), the amount of drawback paid pursuant to subparagraph (A) shall be the amount of duties, taxes, and fees paid on the line item for each unit divided by the number of total units of the imported merchandise with respect to which drawback is claimed."

B. Rules Requiring Transfer of Merchandise

The current bill omits a requirement that the exporter must have received either the finished goods, a substitute for the finished goods, the imported merchandise, or a substitute for the imported merchandise, directly or indirectly from the importer. That is why the law currently has definitions for directly and indirectly. When the transfer section was removed, the terms directly and indirectly were not used are not used in the bill Unless the section is replaced, merchandise does not need to be transferred between parties in the drawback chain. A claimant could claim drawback on imports from an

importer completed unrelated, without any direct or indirect transfer of the merchandise between the parties.

The following language should be added:

> (A) IN GENERAL.—If the exporter and importer are not the same person, the exporter may claim drawback only if the exporter received the imported merchandise, substitute merchandise, imported or substitute merchandise incorporated into an article, or substitute article, directly or indirectly from the importer.
>
> (B) RULES FOR TRANSFER.—Any transfer of drawback rights pursuant to paragraph (1) shall be a private transaction between parties and shall not be governed by regulations promulgated by the Commissioner. The U.S. Customs and Border Protection Agency shall not be required to verify any such transfer.

C. Drawback of Certain Fees

Under the current law, claimants receive drawback of fees such as the HMF. This resulted from a change made by Congress after the Texport case, holding that the language "paid upon entry of importation of the merchandise" did not allow for refunding certain fees. In the 2004 MTB, Congress fixed this and changed the language to read "imposed under federal law." The proposed law goes back to the old language and this should be fixed. Otherwise, this small change in wording will result in a policy change, eliminating certain fees as eligible for drawback under Texport reasoning. (b)(1) should be changed to read "duties, fees, and taxes imposed under Federal Law," on lines 6 and 7 of page 126.

D. Effective Date

The effective date is now tied to ACE implementation. ACE implementation has lagged and is, frankly, uncertain. It will likely take years before the criteria is met and the law is given effect. We suggest that Congress consider a specific implementation date. In so doing CBP and the trade would get the advantage of the efficiency of the substitution change and the benefits of ACE automation for drawback could take place as CBP rolls that out.

E. Proof of Export

Customs insistence on original documentation to prove export is archaic. The trade is concerned that reference to "information similar to the information contained in such record" will be construed to mean certified bills of lading as is currently the case. We suggest that the language in the last two lines of (f)(1) read: "evidence of information similar to the information contained in records kept in the regular course of business." This would allow company business records, copies of records, and electronic records, to be used to prove legitimate exports Similarly, at the end of (f)(2), language such as ", or

copies thereof as kept in the regular course of business" should be added to allow companies to present such business copies rather than having to obtain certified entry documentation from Mexico or Canada.

F. Use of Schedule B

(b)(3)(D) allows the use of the Schedule B for determining whether an item is classifiable within the same 8-digit HTS subheading. One concern is that the Schedule B is often broader than the HTS. In discussions with CBP, we have always understood that a claimant could use a broader Schedule B to prove any HTS that might satisfy that Schedule B number. However, the language in the Bill is not entirely clear on this and we believe it may be appropriate to include a specific reference. We suggest that the section be changed as follows: "The Schedule B number for merchandise, whether or not encompassing several 8-digit HTS subheadings, may be used for the purposes…"

G. Importer Liability

While the importer's liability in (i)(2) is limited, it is limited to the amount the importer has authorized the other person to claim. It is typical for an importer to authorize far more than is on a specific claim. It is also typical for claims to include imports for more than one importer. In order to avoid this language being construed to mean all amounts authorized by the importer (thereby, making an importer liable on a claim for more than its own imports), we suggest it should read "An importer shall be liable for any drawback claim made by a transferee up to the amount of duties, taxes and fees transferred by that importer and designated on the drawback claim.

H. Equivalent AES Information

In (b)(2)(B), the language does not address the situation where there will be no AES filing or "line item" as referred to in that section. This situation is taken into account for proof of export in (f)(1). We suggest that, at the end of (b)(2)(B), the last line read: "in the automated export system or, if unavailable in the automated export system, information similar to the information contained in such line item."

I. Other Merchandise Incorporated Into

Section (b)(4) only refers to imported merchandise and it leaves out substitute merchandise. It should read as follows: "Imported merchandise **or substitute merchandise** described in paragraph (1) that is incorporated into other merchandise shall be eligible for drawback under this section regardless of the number of times the merchandise is incorporated into other merchandise, or such other merchandise **or substitute merchandise** is incorporated into other merchandise if the merchandise is otherwise eligible for drawback under this section.

J. Excise tax

Section (b)(3)(B) is a new section that was not part of the consensus document between the trade and CBP. We believe this section is a policy change which affects a wide variety of drawback claimants. Since the statute is directed toward operational changes and not policy changes, this section should be eliminated.

K. Destruction

Section (g)(1)(A)(i)(II) should be removed. Under the current drawback statute goods can be sold at retail and returned. Drawback can then be claimed either by exporting those goods or by destruction.

STATEMENT FOR THE RECORD

MARY JO MOUIO
on behalf of
THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA (NCBFAA)
1200 18TH STREET, NW, SUITE 901
WASHINGTON, DC 20036
before the
THE SENATE COMMITTEE ON FINANCE
RE: THE CUSTOMS FACILITATION AND TRADE ENFORCEMENT REAUTHORIZATION ACT OF 2009 (S.1631)
OCTOBER 20, 2009

The National Customs Brokers and Forwarders Association of America (NCBFAA) appreciates the opportunity to comment on S.1631 and asks that the following comments be made a part of the Committee's hearing record. We congratulate the Chairman and Ranking Member for the success of the formal hearing on Customs Reauthorization on October 20th -- its success reflects the quality of the deliberation and clear thought that has gone into this legislation. S.1631 answers the urgent need to rebalance the Bureau of Customs and Border Protection (CBP), as well as the Bureau of Immigration and Customs Enforcement (ICE), restoring each agency's traditional focus on facilitation and enforcement. We acknowledge the need to pay strict attention to the nation's homeland security; nonetheless, we think that the time is right for CBP to focus again on commercial operations.

Having said that, there are several areas of the bill where we think improvements can be made. In the interest of brevity, we will focus on these proposals and forego the litany of compliments that S.1631 well deserves.

- **Importer of Record Program.** NCBFAA appreciates having the opportunity to discuss this program firsthand with staff and understand the objective of the provision. Yes, we agree that CBP's present system for identifying importers of record leaves much to be desired and requires overhaul. Still, we caution the committee about solutions that may lead down the same path. We are concerned about the use of social security numbers, about creating a new system with yet another unique identifying number, and potential confusion with other widely used identifying numbers (e.g., Employer Identification Numbers) and numbers gaining acceptance with other government agencies (e.g., DUNS Numbers). In sum, we ask the committee to direct CBP to work closely with interested private sector organizations as it constructs changes to the existing program.

- **Watch List Database.** NCBFAA understands the need for any targeting program to create distinctions among supply chain participants based on risk. Unfortunately, the legislation calls for a *list* without any clarification about how one is added to the list or how one is removed from the list. This is a special concern to carriers and customs

brokers, neither of whom are in a position to know firsthand what is in the containers whose transportation and/or clearance they are responsible for. UPS quite correctly notes that, with a widespread customer-base, high volume of shipments, and enormous numbers of transactions, they would expect to find themselves inevitably added to the list, no matter how careful they are, simply because of their presence in the process, not due to any particular act of wrong-doing on their part. Customs brokers, particularly the largest companies, share these same concerns.

Thus, further thought needs to be given to the compilation of any list. Violations by intermediaries like customs brokers need to be repetitive, display either gross negligence or knowledge, and be proportionate to the size of the company operations. Some process for review, sun setting and remediation should also be considered, at least for those associated parties.

- **Reliquidation.** NCBFAA joins its colleagues in the Trade Support Network and others in the importing community in requesting that Section 501 be revised to eliminate the concept of *notice*, calling for reliquidation within 90 days of liquidation. During consideration of the Miscellaneous Trade and Tariff Act of 2004, this matter was overlooked as Congress sought to change the triggering event starting the time period for administrative review of liquidation, from notice to the date of liquidation itself. We have discussed this with committee staff and stand ready for further discussion.

- **Customs broker penalties.** In Section 303 of the legislation, the bill provides for a monetary penalty or revocation/suspension of a customs brokers license for conspiring to commit an act of terrorism. This provision, while superficially appealing upon first impression, adds nothing to substantive law. Such conspiracies are already felonies that presently call for these sanctions. We agree with the UPS witness speaking at the October 20th hearing that, short of eliminating this redundancy, the committee should clarify that the revocation of a broker's license under this section is only for individual licensed brokers so convicted. Brokers acting in a supervisory capacity of a brokerage employee who is convicted of an act of terrorism should not be affected, nor should this provision apply to a firm's customs broker license, absent culpability.

- **ACE and ITDS.** NCBFAA participated in an industry-wide campaign to convince the Congress to fund Custom's monumental revision of its automated systems, the Automated Commercial Environment(ACE). Likewise, we have served on the board of directors of the International Trade Data System (ITDS) since its conception. We are heavily invested in both.

  Thus far, ACE has yet to process a single entry, while it has developed numerous, less important features that simply divert CBP from the principal task at hand. Now, shrinking resources have caused its implementation to flounder even more. FY10 budget figures provide for a $50M cut. At the same time, the agencies that will depend on ITDS have not been able to construct the capability to enjoy adequately the fruits of

ACE technology. NCBFAA is working within the private sector and, in turn, CBP to get ACE/ITDS back on track and focus on the appropriate priorities.

We applaud the committee for its timely and necessary support for completing ACE.

- **Drawback Modernization.** NCBFAA strongly endorses the committee's work in modernizing the program known as "drawback." The NCBFAA Drawback Committee will supply separate comments about the S.1631 proposals; however, we would be remiss if we did not acknowledge the difficult and challenging work to refine this valuable program. The end result is the product of a long period of dialogue between CBP and the Trade Support Network, composed of many of our members. The committee is to be congratulated for taking an exhaustive look at this very technical program, streamlining the statutory approach, and helping bring this longstanding task to completion.

Chairman Baucus and Ranking Member Grassley, NCBFAA is grateful for the opportunity that you have afforded us to work through complex and difficult issues. As always, we are ready to work with the committee on refinements as you approach mark up of S.1631.

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October 20, 2009

Honorable Max Baucus, Chairman
Honorable Charles Grassley, Ranking Member
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman and Senator Grassley:

In connection with today's committee hearing, I write to express the strong support of Nintendo of America Inc. (NOA), of Redmond, Washington, for adoption of S.1631, the "Customs Facilitation and Trade Enforcement Reauthorization Act of 2009." Chapter 3 of Title II of the bill contains a number of provisions designed to enable the Bureau of Customs and Border Protection (CBP) to better protect rights owners and the general public from the importation of pirate and counterfeit goods. Nintendo supports all the committee's efforts reflected in this chapter, including providing additional resources, to enhance the ability of the CBP to fulfill this key mission.

In particular, Nintendo is very grateful that the legislation deals specifically with the problem of importation of circumvention devices, which are illegal under the Digital Millennium Copyright Act (17U.S.C.1201 *et seq.*). They are manufactured abroad, imported into the U.S. and other countries, and distributed solely for the purpose of circumventing technical means of protection employed by Nintendo to protect its works. Despite their illegality, circumvention devices are an acute and growing problem for the video game industry. These devices facilitate Internet piracy by enabling individuals to play any of the hundreds of games which have been illegally uploaded on to the Internet for no more than the cost of a single circumvention device.

About Nintendo of America
Nintendo of America Inc., based in Redmond, Washington, serves as headquarters for Nintendo's operations in the Western Hemisphere and markets the highly successful line of *Nintendo* video game products. Also located on Nintendo's campus in Redmond is the Nintendo Software Technology Corporation which creates game software for *Nintendo's* video game systems. Nintendo has branch offices in Redwood City, California and New York City.

Nintendo holds the company intellectual property rights in the Western Hemisphere, including copyrights and trademarks. In addition, Nintendo coordinates the worldwide anti-piracy program on behalf of its parent company, Nintendo Co. Ltd. of Kyoto, Japan.

Current *Nintendo* video game hardware platforms -- the *Wii* console and *Nintendo DS handheld systems* -- play Nintendo's proprietary game software as well as games created by Nintendo third party licensees. There are over 100 U.S. companies which independently create, license, market and sell *Nintendo* video game products. The earnings of these companies are also adversely affected by worldwide piracy of *Nintendo* video game products.

Background
CPB is a vital partner in the efforts of Nintendo and other intellectual property rights holders to halt the importation of products which directly infringe recorded copyrights and trademarks, as well as circumvention devices. In recent years, circumvention devices and Internet distribution of pirate games have become the major impediment to Nintendo's ability to protect its copyrighted works; together they cause huge losses. Circumvention devices have been designed and are manufactured and imported to enable the play of counterfeit games on both of our current hardware systems -- the *Wii* console and the *Nintendo DS* handheld gaming systems -- and also to competitors' hardware systems.

Under its general authority to halt the importation of illegal goods, supplemented by internal directives, CBP now seizes circumvention devices at U.S. ports of entry. However, this directive does not appear in statute or in public CBP regulations. Further, contrary to CBP policy with regard to seized pirate and counterfeit goods, information on seizures of circumvention devices is generally not shared with industry partners who would benefit greatly by release of this information and could augment U.S. law enforcement efforts to halt the importation of these illegal goods.

Lack of Disclosure Authority
A major impediment to Nintendo's efforts to protect its copyrighted software and halt the international trade in circumvention devices is the refusal of CBP to release information about such seized devices to affected parties, unless the devices also contain copyrighted material or a trademark, which is rare. CBP believes it has no authority to do so.

In contrast, CBP regulations 19C.F.R.133.42 (copyrights) and 133.21 (trademarks) authorize release to rights holders of extremely valuable information which has proven vital to IP enforcement efforts. The information provided under these two regulatory sections is the basis for items (1) through (8) of Section 239(d) of S.1631.

The information on seized infringing goods provides a valuable indicator of the magnitude of importation of infringing goods and the means utilized, as well as the identity of the manufacturer, exporter and importer. Armed with this information, Nintendo often conducts its own investigations and works with law enforcement authorities in the U.S. to bring criminal charges or may bring a civil action seeking to put an importer out of business. Further, it allows Nintendo to work with law enforcement agencies in exporting countries to try to shut down the criminal organizations which feed the worldwide market for counterfeit games.

Without equivalent information on seized circumvention devices, Nintendo is greatly hampered in its efforts to assist law enforcement agencies in shutting down international supply chains in these illegal goods.

Effect of S.1631
Section 239(a) of S.1631 would amend the Tariff Act of 1930 to authorize CBP to seize circumvention devices. This would rectify the unfortunate lack of any public reference from CBP that these devices cannot legally be imported into the United States. Specific statutory authority would enable Nintendo and other rights holders to specifically point out seizure authority in company "cease and desist" communications and other enforcement mechanisms.

The remainder of Section 239 would create a statutory scheme under which information about seized circumvention devices would be released to parties at interest. Under section 239(b), within 15 days of seizure, CBP would be obligated to publish on its website "information regarding the merchandise seized to permit any person to identify the merchandise" and determine if the merchandise violates section 1201(a)(2) or 1201(b)(1) of the copyright title of the U.S. Code. Once that information is published, an affected party would have 30 days to submit an application asserting it is entitled to the release of the information about the seizure. CBP would then have 30 days to respond. Subsection (d) lists 8 important items of information which would be released.

Previous Efforts to Secure Disclosure

Both Congress and CBP have addressed this issue in the past. In 2004 the House Judiciary Committee examined several potential improvements to IP enforcement, some of which were opposed by CBP as too burdensome. Negotiations led to a commitment to address these issues in regulation and the Committee agreed to drop the proposed statutory changes. Authorizing disclosure of information about the seizure of circumvention devices was one of the commitments CBP made to the Committee. Relevant language from House Report 108-700 is appended to this letter.

CBP in good faith did attempt to follow through on its promises to the Committee. In October 2004, CBP published in the Federal Register a draft regulation which would have provided for disclosure of information on seized circumvention devices, among several positive changes. While CBP finalized its work on this regulation, it was never approved by the Department of Homeland Security.

Suggested Clarification of Section 239

Nintendo requests that the Committee examine one aspect of the proposed language in Section 239 of S.1631. The procedure set forth in subsections (b) through (d) would potentially entail a total of 75 days after the seizure before information would be released to an affected party. In contrast, 19 C.F.R.133.42 and 133.21 involve a much simpler procedure requiring disclosure within 30 days excluding weekends and holidays.

Because the number of affected parties is potentially larger than that whose rights are infringed by importation of pirate and counterfeit goods, the procedure set forth in S.1631 is necessary and the timetables appear reasonable for an initial seizure of a particular type or brand of circumvention device. However, once an initial determination is made that a particular device is illegal and parties have been provided the opportunity to request the information specified in subsection (d), there is no reason to delay release of information about subsequent seizures of identical products to affected parties and to burden CBP with duplicate proceedings as set forth in this section.

Nintendo believes this section should provide for release of information to parties who have demonstrated they are entitled to release of information about specific circumvention devices in a time frame consistent with 19 C.F.R.133.42 and 133.21.

Delay in release of this information sets back enforcement efforts. Importers are alerted to potential enforcement actions when shipped goods are not released by CBP. If they have 75 days to prepare for enforcement, evidence can be destroyed and an entire company dissolved and reconstituted.

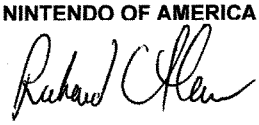
Conclusion
I should point out that the release of information to affected parties on seized circumvention devices is routinely undertaken by several foreign customs services. Through the end of September, customs services in 14 other countries have provided Nintendo details of seizures of over 240,000 circumvention devices this year. U.S. policy stands as an exception to the rule.

Mr. Chairman and Senator Grassley, Nintendo greatly appreciates the introduction of S.1631 and fully supports its adoption. The legislation contains a number of provisions which would strengthen CBP's intellectual property enforcement. We are particularly pleased that the legislation will greatly aid enforcement by Nintendo and other entertainment software companies through the directive in Section 239 that CBP seize illegal circumvention devices and disclose to affected parties information about such seizures.

Nintendo stands ready to assist the Committee in its consideration of this important legislation.

Sincerely,

NINTENDO OF AMERICA INC.



Richard C. Flamm
Senior Vice President and General Counsel

Cc: Honorable Maria Cantwell

Excerpt from House Report 108-700
Committee on the Judiciary

H.R. 4077, as reported, omitted several provisions that had been included in earlier versions due to commitments the Committee received from several Federal departments and agencies....

Upon further consideration, and based on certain commitments made by CBP, the Committee has deleted [certain] ... provisions of this bill....

Finally, the Committee is aware of cooperative efforts between intellectual property owners and CBP to enable CBP to release information on seized devices which violate the anti-circumvention provisions of the Digital Millennium Copyright Act. The information would be comparable to that released under 19 C.F.R. Sec. 133.42(d). While the devices themselves may not contain infringing copyrighted material, they provide the capability for a user to remove technological protection measures from copyrighted works such as entertainment software. Since they allow a user to circumvent technological protection measures, they represent a critical step in enabling a user to make unauthorized copies of software titles which can then be uploaded to the Internet for free downloading across the globe.

CBP has not released such information to copyright owners who may be harmed by such devices because the devices themselves do not contain infringing copyrighted material. The copyright owner thus has no means to learn important information solely within CBP's knowledge, such as the identity of the importer, even though CBP itself has determined that the devices violate the Digital Millennium Copyright Act. The copyright owner is then restricted from pursuing private or criminal enforcement actions in this country or work with foreign authorities to identify and shut down the manufacturing source of the devices.

The Committee believes this gap in disclosure serves only to protect those who import illegal devices. The Committee recommends CBP close this loophole and provide information about illegal circumvention devices to copyright owners.

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October 27, 2009

Senate Committee on Finance
Att'n: Editorial and Document Section
Rm. SD-219
Dirksen Senate office Building
Washington, D.C. 20510

Re: Comments on S. 1631, the Customs Facilitation and Trade Enforcement Act of 2009

Gentlemen:

Our comments below relate to the Intellectual Property Rights [IPR] provisions of S. 1631. Our firm has represented importers and exporters for over 60 years. IPR is the only area in which we represent clients on both sides of the law in the sense that we represent IPR holders who want to procure protection for their rights by recording their trademarks and copyrights with U.S. Customs and Border Protection [CBP], and we also represent parties who have had their merchandise seized and/or forfeited, or who have been assessed penalties by CBP because they are alleged to have violated the IPR laws.

We are extremely concerned that the Congress, and particularly the Finance Committee, focus not only on the problems created by burgeoning imports of counterfeit

counterfeit and infringing goods, but also on the problems created for honest importers who, through no fault of their own, have been accused of infringement (NOT COUNTERFEITING) by U.S. Customs and Border Protection ("CBP") and who have been forced to endure substantial losses in their business because CBP has neither the resources nor the training to properly administer the law. In sum, while we commend CBP for ferreting out, seizing and forfeiting substantial amounts of infringing and counterfeit goods, we also wish to bring to the Committee's attention the fact that honest and innocent importers wrongly accused by CBP of importing infringing goods are unable to obtain timely or satisfactory relief once CBP establishes a detention, seizure or forfeiture. Some of the problems our clients have faced are as follows:

- **Honest Importers are Unable to Obtain Timely Relief:**

Because CBP does not have the resources to issue timely decisions on IPR seizures, our clients have experienced numerous instances in which their goods were seized and held by CBP for extended periods of time. When the merchandise was eventually released (e.g., after Christmas or months or even years later), the value was substantially diminished because the goods had become unsalable or had been refused by the intended purchaser. The problem in these cases is that: There are no directives or mandates to CBP to issue timely decisions in cases in which importers claim they have a

license or permission to import and, more importantly; there are no consequences to CBP if it fails to act in a timely manner.

We suggest that Congress take the following action to insure that importers claiming a right, license or permission to import goods protected by registered patents, trademarks and copyrights are not adversely affected by the manner in which CBP administers the IPR laws:

First, Congress should require CBP to act promptly in all cases in which an importer of seized or detained goods claims a right, license or permission to import them. It is usually not difficult to ascertain whether an importer has the right to import a product. IPR rights owners are required to provide this information as part of the recordation process already. Accordingly, Congress should require CBP to issue a final determination in all such cases within 30 days after an importer contests a detention or seizure by claiming it has the right to import the detained or seized goods. This type of procedure exists when goods are detained due to suspicion of piratical copying. Cf. 19 CFR §133.43. Extensions of the 30 day period should be made only at the discretion of the importer in instances in which CBP requests additional documents or evidence proving the importer has the claimed right to import. An option would be to remove the exception to the procedural safeguards in the Civil Asset Forfeiture Reform Act ["CAFRA"] pertaining to

seizures under the Tariff Act of 1930. Congress should amend 18 U.S.C. §983(i)(2)(A) to read, "the Tariff Act of 1930 or any other provision of law codified in Title 19 *except §§1526(a) and (e);. . .*" . There is no reason why CBP should delay decisions beyond sixty days.

Second, in instances in which CBP fails to act within the 30-day period described above, CBP should be required to release the property under CAFRA and be subject to suit under the Federal Tort Claims Act for deterioration or diminution in value. Currently, these laws do not permit such claims.

Finally, in virtually all instances in which CBP returns goods after a seizure, CBP saddles importers with storage fees and costs which are usually substantial and which are almost always far higher than those which prevail on the open market. CBP's cited reason for assessing such charges is that it "had reasonable cause to detain or seize the goods or the outside storage contractor sets the charges." We disagree. In many instances, prior to the detention or related seizure of merchandise, importers have provided adequate evidence that they have a license or permission to import the goods. Nevertheless, in many instances CBP continues to detain and/or seize goods without good reason.

Further complicating the issue of storage charges is that the government has failed to act in accordance with 19 U.S.C. §1605, which requires that CBP store seized property "in such place as, in the customs officer's opinion, is most convenient and appropriate with due regard to the expense involved. . .". (Emphasis added) Notwithstanding this mandate, the Treasury Department has entered into a sole-source contract with a company to administer the storage of all goods seized under the Treasury Forfeiture Fund. This company charges storage fees well in excess of the going rate for such storage on the open market. The Committee needs to investigate this practice and insure that all storage charges are consistent with those generally prevailing in the market.

- **Customs Seizes Legitimate Goods Having Registered Trademarks Issued by the U.S. Patent and Trademark Office**

Last year CBP seized a shipment of purses and wallets imported by one of our clients which obtained a registered trademark from the U.S. Patent and Trademark Office [PTO]. Personnel in the Chief Counsel's Office at Los Angeles advised us that the seizure was initiated because CBP believed that our client's registered trademark infringed another mark previously issued by the PTO to another party. Because we believed that CBP had no authority to seize legitimate goods bearing a registered

trademark issued by the PTO, we immediately filed a court cost bond and brought the matter before the appropriate U.S. Attorney's Office.

The Assistant U.S. Attorney assigned to the matter agreed with our analysis. However, in the spirit of cooperation, our client agreed to a compromise with CBP under which the client would affix medallions to each purse and wallet containing the client's name, in addition to the trademark design already on the goods.

The fact of the matter is that CBP has absolutely no authority to seize genuine goods bearing a registered trademark issued by the PTO. In deciding whether to issue a registered trademark, the PTO publishes the application for objection by others already granted trademarks. And, even after a trademark is granted a PTO registration, the PTO has a procedure allowing another trademark holder to petition for cancellation. In the instant case, after the purses and wallets were released another trademark owner did petition for cancellation of our client's trademark. During this proceeding we learned that CBP actively counseled the petitioner in this cancellation proceeding and that, in violation of the Trade Secrets Act (18 U.S.C. §1905), furnished the petitioner with our client's confidential commercial information.

The above is the type of "horror story" which should not be repeated. The Committee should see that CBP does not seize legitimate goods which bear a registered

trademark. In addition to harming the trademark holder, in seizing such goods CBP is, in effect, usurping the PTO's function and jurisdiction.

- **Customs Seizes Goods Having Trademarks Similar to Those Registered by Others, But Which Clearly are not Physically Similar to the Goods which a Trademark Registrant has Described in its Application**

Approximately ten years ago CBP seized a shipment of watches imported by our client, Able Time, which bore its mark, "Tommy." Prior to our client importing its watches, Tommy Hilfiger had registered its trademark "Tommy" with the PTO in the class of goods pertaining to fragrances, colognes and the like. Neither the PTO class covering fragrances nor Tommy Hilfiger's registration cover watches. Furthermore, research on the PTO's website reveals that many companies, other than Hilfiger, owned marks incorporating the name "Tommy." At the time of the seizure another company not Hilfiger filed an application to register this mark for watches. Nevertheless, CBP seized the client's shipment.

Even more cryptically, a decision recently issued by the U.S. Court of Appeals for the Ninth Circuit in this matter upheld the CBP's authority to impose a penalty even after the goods were returned to the importer. In our view this decision is clearly contrary to the intent of the Lanham Act which requires that all merchandise be registered in a PTO class of goods and be described with particularity in the trademark registration. The

problem is particularly egregious where the competing or conflicting trademarks use a common word or name like "Tommy." Ten years later, this case continues in the district court.

We believe that CBP's major focus in the IPR arena should be fighting the importation of counterfeit merchandise. CBP should not be involved in making the types of fine distinctions which the Able Time case demonstrates. CBP is making and then causing harm to honest importers who are accused of infringement, rather than counterfeiting. Those who feel aggrieved because they believe another party is infringing its trademark on a technical basis have the right to pursue their own remedies in federal court. In fact, in the instant case, after our client's goods were seized Tommy Hilfiger applied for a registration covering watches, but subsequently abandoned it. Clearly, this is an indication that Hilfiger had no interest whatsoever in using the "Tommy" mark on watches. CBP's resources could be better spent looking for outright counterfeits, rather than spending incredible amounts of time and resources in making IPR determinations which it is ill-equipped to do. Accordingly, we respectfully request that the Committee urge CBP to focus not on claims of infringement which require incredibly difficult legal determinations, but instead, to concentrate on counterfeits, which do not require the types of difficult legal determinations.

The above are only a few of the problems which honest importers are experiencing. There are also problems with fair use, disclaimers and other matters in which CBP is making difficult and, in our opinion, unwarranted decisions about parties who are accused of infringement. The Committee needs to recognize that CBP's resources are limited and that the IPR laws are the most difficult laws enforced by the agency. Without guidance from Congress on which areas the agency should focus its resources, (or a huge increase in inspectors and lawyers) the counterfeiting problem we are experiencing will only get much worse.

Sincerely,

Stein Shostak Shostak Pollack & O'Hara

Elon A. Pollack

cc: Sen. Patrick Leahy, Chairman, Senate Judiciary Committee
Sen. Dianne Feinstein

USA ITA

UNITED STATES ASSOCIATION OF IMPORTERS OF TEXTILES AND APPAREL

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October 28, 2009

Comments on S. 1631, the Customs Facilitation and Trade Enforcement Reauthorization Act of 2009 (Hearing Date October 20, 2009)

These comments are submitted by the United States Association of Importers of Textiles and Apparel ("USA-ITA"). USA-ITA is a voluntary association of some 200 importers and retailers of textile products and wearing apparel as well as related service industries such as international transportation concerns. The importer and retailer members of USA-ITA import textile and apparel products with a first cost in excess of $60 billion.

USA-ITA generally supports the provision of S. 1631. However, there are a few provisions which are a cause of concern.

Section 201 – USA-ITA enthusiastically supports programs designed to reward importers who have demonstrated that they have good compliance records. However, as a general rule, importers of textiles and apparel have been denied these benefits primarily because of quota concerns. Since quotas have been eliminated, there is no longer any justification for denying importers of textiles and apparel equal access to these programs.

USA-ITA asks that the Committee Report make it clear that these programs are to be open to all qualified importers and that the industry sector in which an importer participates should not be a consideration in determining eligibility for such programs.

Section 211(e) – This section would repeal Section 343(a)(3) of the Trade Act of 2002, which prohibits the use of mandatory advance information collected by Customs and Border Protection ("CBP") for commercial enforcement purposes. USA-ITA strongly opposes this provision.

The cooperation of importers was induced in part by the understanding that the advanced filing information, otherwise known as the Importer Security Filing ("ISF") would be used for security purposes only and would not be used for admissibility or enforcement purposes. The only exception should be those situations where the ISF is also the entry. Where the ISF is part of the normal entry process, any misinformation in the ISF would also be misinformation in the entry documents and for that reason could form the basis of an enforcement action. In such a circumstance the existing prohibition would not be an impediment. The prohibition should remain in place.

Section 215 - This section would create an importer of record program, the purpose of which is obscure.

It appears that the program would apply only to those entities that do not have an Employer Identification Number issued by the Internal Revenue Service and must rely upon an importer of record number provided by CBP. Section 215(d) defines the term "number" in respect to an importer of record as the filing identification number described as Section 24.5 of the Customs Regulations. That section defines numbers to include an Employer Identification Number. This suggests that should Section 215 become law, most importers would not face a change in importer number. USA-ITA suggests that this point be made in the Committee Report to avoid any confusion.

Section 311 (e) would amend Section 498 of the Tariff Act of 1930 which deals with entry under regulations. USA-ITA supports increasing the value of merchandise that may be entered under informal procedures but strongly opposes the provision in proposed subsection 498 (b) which would deny that benefit to merchandise classified under Section XI of the Harmonized Tariff Schedule of the United States valued over $250.

Section 143.21(a) of the Customs Regulations does not allow informal entry of textile and apparel when valued at over $250. That provision was deemed necessary because of the existence of a comprehensive quota program. The concern was that allowing use of the informal entry process could facilitate evasion of quota restrictions. Since the quota program has been eliminated, there is no longer any justification for treating textiles and apparel separate from other merchandise. The Committee should drop this provision. It is not necessary.

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USA-ITA appreciates the opportunity to comment on this important legislation and urges that its views be adopted in the final bill.

Laura E. Jones
Executive Director

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