

The Trade Act of 2002: Post 9/11 Security Concerns Prompt New Shipping Policies in the Context of International Commerce

by *Steven W. Block* September 2002

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On August 7, 2002, President Bush signed into law the Trade Act of 2002 (the Act). While it would be a bit hyperbolic to proclaim the Act ushers in a new era of shipping security – new regs have been gushing from transportation agencies in the wake of last year’s terrorist tragedy – the Act does represent the first significant statutory response to post-9/11 transportation security concerns, and tightens the legal knot binding international trade and shipping policy. The media have touted the Act only as giving the president new authority to negotiate and enter into trade agreements, but at least part of its significance lies in its substantial attention to shipping security issues as an integral part of U.S. trade policy.

The Act imposes new requirements on shippers and/or intermediaries (whichever are “most likely to have direct knowledge. . .”) of both import and export cargo. Proper documentation of export cargo is now supposed to be submitted at least 24 hours after delivery to a marine terminal operator, but under no circumstances later than 24 hours before the transporting vessel steams out of port. That documentation must include a shipper’s export declaration transmitted electronically in Customs’ Automated Export System (or an exemption statement), an Internal Transaction Number, and copies of the bill of lading and shipping instructions.

On the import side, the Act hits the Secretary of the Treasury with a long list of chores. These include the drafting of regs facilitating electronic cargo data to be transmitted to Customs. Because of the program’s anticipated complexity, comments will be solicited from all potentially implicated parties.

The Treasury Secretary must also form a Joint Task Force to undertake a number of efforts related to shipping security. These include: (1) the establishment of standards and a process for screening and evaluating cargo prior to its crossing a U.S. border; (2) a system to monitor cargo and ensure its security in transit; (3) a program enabling Uncle Sam to ensure and validate program compliance; and (4) any other steps the Secretary deems necessary to enhance security.

Because 95% of cargo imported and exported across our borders moves by water, the maritime mode will be the subject of most, but not all, attention. The Act requires authorities to modify their implementation of new procedures so as to accommodate each transportation mode’s peculiarities (particularly as regards disparity in technology and commercial practices).

The new law pays lip service, without much more, to the sensitive relationships between competitors in our industry. Players naturally will be nervous about systematically

disclosing certain information that might fall into the competitor's hands, especially in the current economic environment. The Act directs the Secretary to "take into account" these concerns in carrying out his tasks. It also states that regs must be designed "to protect the privacy of business proprietary and any other confidential information," subject to other existing law. How this works in practice, of course, remains to be seen.

Do you notice that Customs' role in post-9/11 transportation security is increasing substantially? The Act appears to be in concert with other proposed legislation in that direction. Port security legislation heightens Customs' responsibilities, in addition to border security measures Customs must put into practice pursuant to recent statutory and regulatory provisions. More surprising (and, for some, alarming), is pending legislation that would transfer to Customs regulatory authority over ocean transportation intermediaries (OTIs), i.e., freight forwarders and non-vessel operating common carriers lumped together by the Ocean Shipping Reform Act of 1998. If passed, this transfer would divest the U.S. Federal Maritime Commission of one of its primary functions. Moreover, it might signal that government administration of OTIs is becoming more of a security and duty-collection issue than an element of shipping regulation.

Per the Act, all of this is supposed to happen within one year, although a provision cuts the Treasury Secretary some slack if technological or other circumstances make that time frame impractical. The Secretary must issue a report to several Congressional Committees within 60 days. This is not a program Congress wants the feds to get around to when convenient.

As we approach the anniversary of last year's catastrophic events, the relationship between international trade and shipping is thrust into the forefront. The Act is a manifestation of Uncle Sam's concern about international trade, a pillar of American economy, and the shipping security necessary to safety in our homeland.

Ref: The Trade Act of 2002, available at <http://thomas.loc.gov>.