

CUSTOMS TRADE PARTNERSHIP AGAINST TERRORISM: A WAY TO ENSURE EFFICIENT TRADE FLOWS WHILE ENHANCING BORDER SECURITY

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One topic that immediately came to mind that covers several issues under discussion at this symposium is the Customs Trade Partnership Against Terrorism (C-TPAT) which is a voluntary program between U.S. Customs and Border Protection (CBP) and the private sector that serves not only the U.S. private sector but the Mexican and Canadian private sector as well. This program is a good example of how the government and private sector can work together to increase trade flow at the border and, at the same time, ensure supply chain security. The program grew out of the attacks of September 11, 2001, which directly impacted CBP. Outside of its headquarters in Washington, CBP's largest operation was in the Port of New York located at 6 World Trade Center, a building that was demolished during the events of September 11. CBP had to find a new location and for many months, its operations were severely hampered due to destroyed records and disruption to their activities. CBP came to the realization that if the borders were going to be secure, CBP could not do this by themselves with their limited resources without a new approach. CBP only can inspect two percent of all the containers that enter the United States. We have learned from September 11 that we must think outside of the traditional box, that things like airplanes or cargo containers can become weapons. Every potential container that enters the U.S. could be a weapon of mass destruction or contain chemical or biological substances. Faced with this daunting task, CBP developed the C-TPAT program.

This was truly a partnership and in the early days. There was actually a document that was signed by the Commissioner of CBP and the company as a partnership agreement. As the program grew, it became more computerized and perhaps a little less personal and we no longer have the signed agreement. Today, the program has 10,500 members and more than 55 percent of the goods entering the United States are from C-TPAT-certified and validated companies. The large majority of C-TPAT members are importers. However, exporters in Mexico and Canada are eligible and have great incentives to join the program, but have not joined as fast as might have been expected. The program, theoretically, is quite simple. It is really a risk assessment program.

U.S. Customs uses a somewhat secretive targeting scoring system to determine which entries to inspect. Inspections delay the movement of cargo and can be costly, particularly for companies that are on just-in-time inventory. They also pose additional problems for refrigerated and perishable goods. Off-loading your container at the border in the 110 degree Fahrenheit heat of Laredo, Texas while CBP inspectors and dogs are going through it for several hours or more is not conducive to speeding up the delays at the border. One of the advantages of C-TPAT membership is that it lowers your targeting score. C-TPAT has various levels of membership targeting score lowers and your likelihood of inspections goes down.

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More importantly, even those companies targeted for inspection under C-TPAT are likely to be chosen for the less intrusive methods of inspection through x-rays. This x-ray equipment is very expensive, but it is faster and definitely less expensive and less time-consuming than having to unload 20 or 30 pallets with a forklift. The C-TPAT members are the ones that get priority going through this x-ray equipment in the larger ports where it is available. This is a distinct advantage for C-TPAT members.

In addition, C-TPAT members get other advantages, one of which is hard to duplicate, which is the commitment of CBP that in time of national emergencies or so-called red alerts, the first cargo that come into the ports belong to C-TPAT members. What this means is that our friends in Canada and Mexico will have a clear priority in moving their cargo into the U.S. over those coming from China, a country that is not eligible for C-TPAT certification, or, in fact, from Europe and other countries that are not C-TPAT-certified. However, we have seen a movement toward reciprocity and Memoranda of Understanding (MOU's) with some other countries that have equivalent programs to the U.S.'s C-TPAT program that is tending to give some advantages to these other exporters in some countries that they have not had in the past.

One particular advantage of C-TPAT that has been a motivating factor to at least some of my clients is another program called Free and Secure Trade (FAST), which allows companies to use the fast lane at the border. We all know that delays at the border can be lengthy. The FAST Program is only open to C-TPAT-certified exporters, importers, and carriers. All three must be in C-TPAT, which makes the program a little bit more difficult to achieve. However, it is also a good motivation for people to join C-TPAT. As an attorney dealing with clients in a downward economic environment, it is hard to convince companies to spend time and money joining a voluntary program that they are not being forced to join by the government. However, economic pressures from customers can be a factor.

For example, a large company that produces and exports auto parts was not a C-TPAT member. However, Chrysler, their largest customer in the U.S., was a member. One of the aspects of C-TPAT that is interesting is that each C-TPAT member is committed to using other C-TPAT members as its suppliers and as transporters in its supply chain in order that it can ensure the integrity of its supply chain. Chrysler told my client that they wanted them to join C-TPAT and, particularly, get into the FAST Program so they could speed up movement of the parts to Chrysler's factories and help implement their just-in-time inventory. This resulted in the company asking how they could join C-TPAT. Despite this factor, only a small percentage of Mexican manufacturers and exporters or truckers that could be members of C-TPAT, have actually joined the program. Out of the 10,425 companies that were C-TPAT members as of December 2012, only 1273 were foreign manufacturers. This includes both Mexico and Canada. We know there are a lot more companies in Canada and Mexico that are exporting to the U.S., so there are a lot of strides that can be made in increasing the participation in this program. Of course, any program, whether voluntary or not, with the U.S. Government proposes burdens. There is a fear, particularly among foreign companies, that they don't want to get involved with a commitment to CBP that might put obligations on them and limit their flexibility.

Any C-TPAT member must meet minimum security standards. This usually involves such things as physical security, fences, cameras, alarms, guards, etc., as well as supply chain security, knowing your customers, tracking your shipments, doing verifications of your own suppliers' security, etc. In the course of 20 or more years of being a customs and trade lawyer, I have had at least three occasions when I have gotten that feared phone call from my client that their truck has been stopped in Laredo or Juarez, Texas and that they found drugs on the truck. Generally, CBP requires that you undergo an investigation and there is a special process when this happens to a C-TPAT company. In almost all of the

cases, I have found that it was never the manufacturer or exporter from Mexico that was involved, but usually the trucker, the driver, or the so-called drayage companies, where the driver and cab change at the border for short hauls between Mexico and Texas. One of the problems is that the truck sometimes goes off of the radar screen for some time, where drugs are placed in the container. Techniques such as lifting off the entire rear doors of the truck without removing the seal have been developed by the drug cartels and in many cases, it is simple intimidation or bribery of the truck driver or often he or she is a participant. Greater use of GPS technology and efforts to track shipments is one way to deter this and is part of what CBP requires under the C-TPAT program.

Another area that CBP requires is cyber security. Obviously, knowing when shipments are going to leave and arrive, and having details about truck and container numbers, etc., makes it easier to interdict and introduce contraband into them. This information is easily obtainable in most computer systems of companies that import and export. Therefore, CBP stresses certain cyber security as part of the C-TPAT protocol. Some companies have objected that this is costly, although in my opinion, most of these are programs that companies would want to participate in regardless of C-TPAT attempts at their own security insurance premiums, etc.

Although C-TPAT is a "voluntary program," once a company joins, they are subject to annual validation visits and revalidation visits to maintain C-TPAT status. Also, they are required to do annual updates of their company security profile and of their partner compliance. This latter requirement has been an issue with some companies that prefer not to have to send letters and make visits to their suppliers and business partners to ensure that they are C-TPAT compliant.

Also, despite its voluntary nature, Congress in the SAFE Port Act gave C-TPAT some formal legal status by setting some standards and appeal provisions before a company can be removed from C-TPAT.

Conclusion

The C-TPAT program is helping resolve the dual problems of border delay and security, but it is underutilized. This is due to inertia on the part of companies to spend time and money on a voluntary program not required by the government, and perhaps some fear element by Mexican and Canadian companies of becoming formally engaged in a partnership with U.S. Customs.

To move forward, CBP needs to do a better job of marketing the program and perhaps eliminating some of the bureaucracy that goes with it, making compliance more user friendly and providing more flexibility on their regulations (e.g., substituting cameras for fences when fencing is not feasible or too costly). The trend toward acceptance and recognition of other countries' programs similar to C-TPAT is increasing the effectiveness of the program in speeding cargo through the sea and airports since C-TPAT is focused more on land traffic between the three NAFTA countries.

More incentives for companies to join would be welcome. One frequent complaint about C-TPAT is that more requirements are added each year, but not necessarily more benefits.