

AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

1050 17th Street, N.W., Suite 810
Washington, DC 20036

Statement of Charlene N. Stocker
Chair, American Association of Exporters and Importers;
Procter and Gamble Distributing LLC

Testimony before the Senate Finance Committee

March 13, 2008

1. Introduction and Overview

Chairman Baucus, Ranking Member Grassley and Members of the Committee, my name is Charlene Stocker and I am Senior International Services Manager for Procter and Gamble Distributing LLC. I am here today representing the American Association of Exporters and Importers (AAEI) as Chair of its Board of Governors. AAEI appreciates the opportunity to offer its comments on budget authorizations for the U.S. Customs and Border Protection (CBP).

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 supply chain security, we are very familiar with the “hands on” and operational impacts of policies and programs. Thus, AAEI is deeply interested in “Customs and Trade Reauthorization” which is the subject of this hearing.

AAEI representatives and its member companies have provided input into and participated in a significant number of U.S. Customs and Border Protection initiatives, including security programs designed to improve the nation’s physical security while not harming and in some cases improving its

economic security. Because AAEI is committed to assisting CBP and DHS achieve its dual mission of security and facilitation, AAEI's testimony aims to assist the Committee in assessing CBP's progress in improving physical security while not harming the economic security of the United States.

During AAEI's involvement in the legislative policy and regulatory processes, we have offered specific recommendations intended to more effectively accomplish homeland security related objectives while reducing economic disruption and unequivocally building the efficient facilitation of trade.

It is a privilege to appear before you today at this hearing. We hope that our comments will help inform your assessment of CBP's performance and progress.

2. **Resources**

Allocation of Manpower and Resources – Both Direct and Through Third Parties

Among vital areas to the trade, the significant enhancement of manpower and resources for multiple federal, and perhaps state and local, agencies through third parties should be carefully considered by the Committee. As noted earlier, this may be the time to review CBP's toward achieving its dual mission of security and facilitating legitimate trade.

We look to you, in those areas of your concern, for potentially significant changes in the way government provides for and otherwise supports import safety, risk management and control and thus imports writ large. We would be happy to discuss CBP's significant under funding and lack of sufficient manpower in the face of expanding responsibilities.

AAEI believes that a fundamental element in the design of such systems must be the economic impact upon small and medium size enterprises. However, the overall impact upon small businesses nationwide; of implementing multiple trade-related approaches to enhanced security, compliance, and now product safety is subject to the unforgiving rule of unintended consequences. "To do no harm" is a difficult mission when, even for a vital purpose, modifying long-established importation and distribution patterns and requirements will be part of the mission.

3. Holistic Approach

Benefits

As it relates to benefits – this is not the first time that we have appeared before your Committee in a continued effort to provide measurable return to industry for the efforts it has made to implement voluntary programs. AAEL wishes to impress upon the Committee that it is imperative to provide economic stimulus through tangible and measurable benefits for industry and company participation in new CBP programs. In the legacy Customs environment a number of important features of the customs process and system were of real benefit to the conduct of trade and thus economic prosperity. Yet, for the future, we are particularly concerned as a result of the record compiled to date with C-TPAT and the anecdotes we are often told about ISA, which is unhappily appearing to be the *modus operandi* of the “10+2” proposal as well.

In the Customs-Trade Partnership Against Terrorism (C-TPAT) program’s impact, one area most often cited as providing benefits to industry (e.g., fewer exams), we frankly have little confidence in assertions of C-TPAT security related expenditure benefits in another principal function beyond the few which they were intend (*i.e.*, security). We have widely consulted within industry as well as reviewing both government and academic studies both government and private sector and have commented on each separately in the spirit which we have so often stated: an essential element in our nation’s homeland security for the 21st century is the continued growth and enhancement of business community contribution through efficiency, efficacy and innovation.

It would be time consuming to examine each of the studies here today. Instead, we would pose essential questions which the Committee may wish to address. Does the study distinguish between the highly desirable and well understood business benefits of significant supply chain enhancement efficiency and efficacy as separate from business benefits derived from those investments made for specific supply chain hardening and security purposes? Does the study incorporate and demonstrate an understanding of the multiplicity of supply chain models in use across the scope of this economy? Has the study been conducted with small-medium enterprises (SME’s) and U.S.-based multinational in mind? Has it incorporated both import and export elements as a focus? Does it demonstrate recognition of the U.S. economic systems reality in “return on investment” (ROI) (with investors, stockholders and regulators) all very much?

The multiple practical and, in many cases minimal government expense or effort, benefits available are not a secret. They have been discussed publicly in Customs Operations Advisory Committee (COAC) meetings and thoroughly aired during meetings of CBP's own Trade Support Network (TSN). Frankly, we are certain that if the Committee were to request a rough compilation for your review it could be provided in sufficient time to assist in development of this legislation. One item that you might particularly wish to explore is why in the "10+2" Notice of Proposed Rulemaking (NPRM) to be discussed later, which is a security driven effort, no recognition or support is granted those companies which have exerted great effort and investment to reach Tier 3 status?

4. AAEI Trade Security Project

For the last several months, AAEI has markedly increased its ongoing drive to provide data and policies focused on shaping a "holistic" approach to trade security. Development and implementation of pragmatic "holistic" approaches to real world problems confronting our industry and the nation is essential.

Currently, there are numerous trade security efforts that impact the supply chain. These programs include supply chain partnerships, data collection, advanced data methods, related security program elements and 100% scanning, among many others.

Though it was not the intention of the multiple parties involved, both in and out of Government, it is now clear that, as these programs have been introduced and evolved over time, CBP and the trade community face a rapidly evolving trade security environment. Today's, and even more so – tomorrow's, environment is one where often disjunctive individual programs, if used in the aggregate, though implemented independently, encompass an overlapping system that places major and seemingly unnecessary and increasingly duplicative burdens on the supply chain. AAEI believes that these often significant new burdens may provide little or no apparent gain in trade security.

Under the guidance of the Customs Committee, AAEI developed its **American Trader's Guide to Post 9/11 and Homeland Security Programs**. Initially released in Fall 2007, the Guide is the compilation of extensive discussions and review with policymakers, industry observers and trade professionals. With this invaluable assistance, it has been very well-received in doing two things. First, it provides trade professionals with one piece of paper showing all the trade security programs that companies have to deal with. Second, it provides policymakers with an overview of the

numerous, and in many cases, overlapping trade security programs that exist. And for good measure, the bottom of the Guide includes a generic global supply chain from point of manufacture and stuffing to delivery and “post-entry” compliance. This supply chain “chart” helps clarify the “basic” daily processes of trade for those interested in greater understanding. Specifically, the chart provides a linear depiction of three tracks for goods imported to the United States: I) the “transportation” flow representing the physical movement of the cargo; II) the “data” flow demonstrating where in the supply chain the foreign manufacturer, carrier, and U.S. importer must submit data to various government agencies; and III) the “regulation and security” check points along the supply chain. All of these tracks proceed simultaneously and demonstrates that the more demands for data and other regulatory requirements placed on the supply chain, the slower and more costly the supply chain will become – both for imports and exports.

Now in its fifth printing, the Guide has been widely distributed. Despite Congressional passage of comprehensive legislation, such as the SAFE Port Act, subsequent legislation (*i.e.*, the Implementing Recommendations of the 9/11 Commission Act of 2007) added or superseded trade security initiatives and requirements without integrating existing regulatory or legislative efforts. More importantly, AAEI expressed its concern that the trade community was being inundated with overlapping programs which burden the supply chain “without significant and concomitant gain in trade security.”

In advocating a “holistic” approach, AAEI seeks a vital balance. Balance between the numerous pressing security requirements demanding industry resources and the need for facilitation to enable U.S. companies to compete by importing and exporting goods efficiently. AAEI believes that such a balance can only be achieved through adopting an account-based management model to regulate companies rather than transactions.

The **American Trader’s Guide to Post 9/11 and Homeland Security Programs** has been updated to reflect the Importer Security Filing and Additional Carrier Requirements published at 73 Fed. Reg. 90 dated January 2, 2008. In particular, the information on “10+2” has been updated in sections **B. Compliance Impact** and **C. Resource Expenditures** which reflects a general consensus on the impact of this rule on small and medium enterprises (SME’s).

The United States is not the only country requiring data for trade security purposes. In fact, it was the United States that urged its trading partners under the auspices of the World Customs Organization (WCO) to adopt robust systems to analyze and share data on international shipments to target high-risk cargo. See, WCO Framework on Standards to Secure and

Facilitate Global Trade adopted in June 2005. As a result of the SAFE Framework, many countries have developed their national trade data program. But most companies do not have separate and distinct supply chains for different regions of the world – they just have a global supply chain in which they build in some flexibility for regional/national variation.

To aid the Committee, AAEL is pleased to also include a new “matrix” as part of AAEL’s Trade Security Project, the **International – The American Trader’s Guide to Advance Data Programs**. This new “matrix” is designed to provide trade professionals and policy makers with an overview of two ongoing areas of serious concern in data programs.

First, the left side of the “matrix” shows how the primary U.S. trade data programs (*i.e.*, the 24-hour rule, and “10+2”) stack up against multilateral programs (*i.e.*, the European Union and the WCO’s SAFE Framework Standards) and other national programs (*i.e.*, Canada, Australia, and New Zealand). (As the Committee is aware, New Zealand is the first country to attain “mutual recognition” with the United States’ C-TPAT program.) With the widespread appreciation of the extensive benefits provided by mutual recognition, in light of development of multiple approaches as described in the chart, the drive for implementing a global program holistically is increasingly recognized.

Second, the right side of the “matrix” provides an overview of the status of the United States’ International Trade Data System (ITDS). See, ITDS Report to Congress at 19, dated November 2007. With extensive business community policy and program involvement, it appears to be, at long last, fulfilling its original promise. Since becoming mandatory in the SAFE Port Act for all federal agencies that require documentation for clearing or licensing the import and export of cargo, getting federal agencies to participate in ITDS has taken on new urgency as the federal “interoperability system” for monitoring product safety. The chart shows many of the Participating Government Agencies (PGA’s) and their access to data in relation to the agencies’ requirements (*i.e.*, whether access and use of the data is deployed, partially deployed, or future functionality).

Together, the information presented in this chart provides trade professionals with the “state of play” of data programs both in the collection of data on the national and international level as well as a snapshot of the United States “single window” ITDS program. For companies engaged in global trade – keeping track of who gets the company’s trade data and how the government uses it – is a core competency that trade compliance professionals need to master to serve their employers’ proprietary interests. AAEL believes that this Committee should closely monitor Treasury and CBP’s

progress in making ITDS fully functional for all federal agencies and maintain its trade facilitation mission.

Keeping in mind both of **The American Trader's Guides**, we are very concerned about CBP and DHS' current efforts to harmonize these various security and data programs with those of other countries and multilateral organizations through "mutual recognition." Frankly, despite our continuous inquiries, we have yet to receive a consistent definition of "mutual definition" from government agencies which is understandable, practical and meaningful to the trade community. We implore the Committee to probe CBP for full explanations of the term "mutual recognition" and other terms that the agency uses to describe its efforts to work with other governments and international organizations on these important programs.

Automated Commercial Environment (ACE)/Trade Support Network (TSN)/International Trade Data System (ITDS)

In looking to regulatory misfires we are also very concerned about the fate of ACE. We encourage you to do all that you can to fulfill the promises of the Customs Modernization Act through the full funding, accelerated construction and timely delivery of ACE.

We have been actively involved in various forums available to trade and appreciate the real-time data access now available and this opportunity to contribute to what we in the trade are, in effect, paying for. But we encourage the Committee to examine the results of the bill you so carefully crafted. Although we could suggest multiple areas of exploration, you might well begin with just three areas: 1) where is account management; 2) what happened to true "automation" (*i.e.*, avoiding redundant data entry and transaction based information); and 3) why did digitalization fail to occur? All three of these questions go to the heart of the Customs Modernization Act – increasing compliance through productivity gains from eliminating repetitive tasks.

However, in addition to asking those questions, we would strongly urge you to monitor further development of ACE and ITDS in that we see two developments of concern. First, along with the need to fully provide ACS and TECS, a growing number of major information technology (IT) driven initiatives seem to be diluting necessary focus to complete ACE and ITDS. Information technology programs, such as the ever growing Secure Freight Initiative, the Secure Border Initiative, US VISIT, and the (WHTI) Western Hemisphere Trade Initiative, require ever more focus for productive implementation. A second concern is that we are led to believe that

forthcoming ACE efforts may not target clear trade needs but instead are likely to be focused on security filings and manifest system work

We urge the Committee to carefully explore the most effective method of guaranteeing full support and resources government wide. In particular the financial and personnel resources required by multiplier agencies in implementation may require vigilance. AAEI supports the Administration's recent action where OMB mandated participation in ITDS from all of the federal agencies that depend on electronic data for international commerce, and accelerated when the ITDS portal will be fully implemented.

Without this Committee's vigilant oversight of the programs, redundancies inefficiencies and under commitment of badly needed resources can persist and our Nation's competitive edge in the global marketplace could diminish. ACE/ITDS will also help in efforts to ensure that the U.S. remains a leader in the increasingly competitive world of global trade. As our trade partners make the move to developing all-electronic trade data systems, it is important that the U.S. does the same.

5. The Need for Balance Between Facilitation and Security

The need for balance between facilitation and security is an important issue discussed throughout our testimony today, as well as a consistent theme in AAEI's previous statements submitted to this Committee, but we would like to highlight a few issues here. AAEI is concerned that federal agencies do not appreciate the trade community's contribution, in resources and time, to make CBP's initiatives more effective. Instead, we frequently hear a mantra of "guns, gates, and guards" when the focus needs to be equally attuned to overall national interest, risk management, and operations facilitation. AAEI is concerned with the lack of resources, both dollars and manpower, devoted to the facilitation and operations aspects of CBP's functions. Here we acknowledge the continuing "brain drain" that is occurring throughout federal agencies as senior government employees retire in record numbers, but the situation that the U.S. trade community confronts goes well beyond that. AAEI believes that additional training funds and private sector coordination funding would be helpful and we strongly encourage the Committee to further explore both.

As discussed above, an important risk management tool is ACE, which promises to provide both the government and the trade with greater efficiencies through productive use of data. We continue to be concerned about the roll-out of ACE, which is now viewed by the government as a security tool rather than a trade facilitation system. An example of the shift in the government's attitude towards ACE is the Federal Advisory Committee

for ACE reports to DHS rather than CBP, which is the agency building the ACE program.

6. Concern Over the Reregulation of Trade

Mod Act Lessons - Low Risk and Account-Based Management is Highly Efficient

Account-Based Management

As this Committee has long recognized, it is highly beneficial to the nation's interests for federal regulation of business trade to be account based. In this, federal programs from Customs to emerging efforts from multiple agencies should recognize those importers participating in a rigorous agenda of sophisticated supply chain security. The benefits to the individual companies, though often substantial do not compare with the savings in infrastructure, process, personnel, interagency collaboration and business profitability.

In 1993, the Congress took what has proven to be an extraordinarily wise step in advancing the nations trade interests. It passed what became known as the Customs Modernization Act or the "Mod Act." Up until that time U.S. trade was mired in the same antiquated transaction-by-transaction based mode of processing imports, which is today being considered by multiple committees for other purposes. In other words, transaction based regulatory processes, which offered little value, treated each individual import as if the importer and its course of trade was brand new and completely unknown to Customs. Such a system would be like subjecting everyone to a full inspection, X-ray, and body search to enter a secure C-TPAT workplace.

In the current trade environment, the trade has found itself working to constantly justify to many officials new to this arena a policy that has proven to be successful (*i.e.*, risk-based account management) which is highly beneficial for all - the agency, the taxpayer, and the trade. The nation and the government has benefited from a thoroughly examined, well-coordinated policy designed in a thoughtful manner whereby Congress sought to remedy the problem by treating importers as accounts, not a series of unrelated "one-off" imports. In other words, Congress understood that Customs could have a relationship with "repeat customers" analogous to the relationship between parties in the private sector, a knowledge-based system founded on a comprehensive understanding of the importers' business practices.

AAEI has consistently urged the Committee to champion the use of account-based management as a key tool in dealing with increased trade and static or modest growth in resources devoted to trade. Therefore, we will not waste the Committee's time on this issue today, but AAEI will continue to support programs that use low risk and account-based management as its foundation.

7. Regulatory Overreach

First Sale

We have both procedural and substantive difficulties with the new CBP interpretation of what is commonly known as "first sale rule" (i.e., sale for exportation to the United States under transaction value in 19 U.S.C. § 1401a). We are unaware of any good reason for CBP to so obviously flaunt well-settled principles decided by two other branches of the federal government - the Congress and the Judiciary. We will leave the multiple international and domestic procedural problems to another discussion with the exception of a crucial question which is directed to this Committee and the Congress.

In the debate over creation of the Department of Homeland Security, with the voice of this Committee clearly heard, the Congress directed that the Department of Treasury would retain "Customs revenue functions." In fact, the Congress further made clear its intention by defining "customs revenue function" to include "[a]ssessing and collecting customs duties . . . classifying and valuing merchandise for purposes of such assessment." See, section 412 of the Homeland Security Act. In its implementation of this Congressional directive, the Treasury Department's order made equally clear that it fully retained "sole authority to approve any regulations concerning . . . valuation . . . and the establishment of recordkeeping requirements relating thereto." See, Treasury Order 100-16, § 1(a)(i) dated May 15, 2003.

While we are expert in the "hands on" application of trade policies and procedures our expertise in judicial matters is largely limited to their practical application. Thus, we have carefully followed what amounts to 20 plus years of very clear settled case law. In fact, we trust that the Committee is very familiar with the case of Target v. the United States, where as recently as January 3, 2008, CBP conceded the applicability of first sale as the proper transaction value.

With respect to the First Sale Rule proposal, we at AAEI and many of our constituents and members have repeatedly asked why CBP feels compelled to attempt to revoke this long-standing and judicially-approved principle.

- CBP has no statutory authority to use the administrative rulemaking process to overrule judicial precedent and cannot use this process to adopt a statutory interpretation of the term "sale for export" contrary to the judicial branch. CBP's only appropriate avenue to accomplish a change to the court's position is through legislation.
- Notwithstanding the sentiment among those within CBP who simply do not agree with the judicial branch's decisions with respect to the first sale rule, it is an abuse of administrative rulemaking power to initiate this proposed revocation to the first sale rule as a means for CBP to attempt to achieve a different result.
- CBP's notice points to a non-binding commentary opinion of the World Customs Organization as reason to propose overruling the judicial branch. *See*, WTO Agreement and Texts of the technical Committee on Customs Valuation Amending Supplement No. 6 dated July 2007. To say that this "non-binding commentary" is the basis for revoking the statutory interpretation of U.S. courts is spurious. U.S. law controls and the court's interpretation of the first sale rule must survive unless changed legislatively.
- CBP also points to the difficulties in administering the first sale rule as additional support for its proposed withdrawal. In response, we would simply note that CBP has been effectively administering the first sale rule for 20 years and has the processes and automated tools in place to continue to confirm or deny first sale claims. Moreover, those companies utilizing first sale have invested enormous time and effort in obtaining the necessary data requirements that CBP needs to manage the program, recognizing that in the absence of adequate back-up, CBP can simply deny first sale treatment. The claim that it may be difficult for CBP to manage compliance with the first sale rule without more analytical data to support such a contention only gives rise to consideration for more resource allocation. Under no circumstance does such a claim give credibility to the CBP's attempt to eviscerate judicial precedent that created the first sale rule.
- At a time when the U.S. economy is reeling from a slow down, revoking the concept of first sale would require the companies who current use the rule to pay the additional duties and associated costs of a re-design of their business models to accommodate the change in

CBP "interpretation." These additional costs would have to be passed on to U.S. consumers.

- Many of the companies which are participating in First Sale have been partners with CBP on important efforts like the C-TPAT security initiative. They have at considerable expense taken the security measures outlined in the C-TPAT program and implemented those measures throughout their supply chains. That commitment to partnership and the costs associated with it are continuing and escalating.
- In return, CBP proposes to revoke one of the few practices that help these companies to maintain their profitability. This would hardly seem to be in keeping with the spirit of the "partnership" CBP has consistently advocated as critical to our collective success. This lack of partnership is exacerbated by the fact that in an environment where CBP has made an effort to consult with the trade on controversial matters, they chose to issue this notice of revocation without first consulting with the trade, formally or informally, to gauge the impact and test the appropriateness of this decision.

Subheading 9801.00.20 Proposal

Since 1991, Customs has without exception found that previously imported goods exported pursuant to a "bailment" agreement can return to the U.S. duty-free under 9801.00.20. This interpretation is consistent with the primary legislative purpose for the provision, which is to prevent "double taxation." For nearly two decades, companies have created warehousing arrangements and otherwise structured their supply chains around Customs' uniform and established practice. In January 2008, without identification of any compelling justification for the sudden change, Customs has proposed to revoke this interpretation and the more than 20 rulings in which it has been expressly followed.

The only legal support cited by Customs is a fourteen (14) year-old court decision (1994) which did not even involve a "bailment" agreement. Ironically, Customs previously cited this same decision in a number of rulings as support for 9801.00.20 treatment, including two of the rulings which it now proposes to revoke.

Both law and sound policy suggest that the rule should be preserved, and certainly not reversed through an administrative process which is consistent with Court decisions and untested by meaningful consultation with the affected trade community. This is underscored by the fact that the U.S.

Court of International Trade, in finding that the government's interpretation of a predecessor provision was too narrow, stated that the provision was designed to prevent "double taxation" and should be interpreted liberally. Yet, Customs now seeks to significantly narrow the scope of the provision, which will lead to the double taxation of certain imported goods.

AAEI submits that both of these CBP proposals evidence administrative overreaching and asks that the Congress do whatever it can, including making specific demands in the appropriations process, to ensure neither proposal is adopted.

8. Internationalization of Trade

As we have discussed throughout this testimony, particularly in relation to The American Trader's Guides, AAEI is concerned about CBP's approach to harmonization and the internationalization of trade. While this is an important and complex topic, we would like to highlight a few issues here.

For most companies operating in today's global environment, participating in partnership programs, such as C-TPAT or ISA, is a requirement rather than voluntary. Since these U.S. partnership programs have become the model for both the European Union (Authorized Economic Operator) and the World Customs Organization ("Framework of Standards to Secure and Facilitate Global Trade"), the continued refinement and progress of U.S. programs has a policy impact on our trading partners, particularly for mutual recognition of these other programs. However, AAEI is concerned that CBP's continued development of initiatives may be too "U.S. centric" without an adequate assessment of the impact on our trading partners who also regulate our affiliated companies. The Committee should also note that the United States is experiencing an increase in exports, both in agricultural and manufactured products. Therefore, it is in our nation's economic interest to ensure that the United States works toward a multilateral approach to these trade issues to avoid burdens on U.S. exports.

AAEI suggests that the Committee encourage CBP to work with multilateral institutions, such as the WCO and WTO, and our trading partners (European Union, Japan, Canada, and Mexico) to enhance trade facilitation by minimizing differences among trade security and compliance programs.

9. Import Product Safety

Setting a Framework for Import Product Safety Difference

AAEI believes that the Committee should recognize that we already have a number of tools to deal with product safety: 1) low risk and account-based management works and can be used to enhance import product safety; 2) trade security and product safety are different and are based on divergent principles including different risk tolerances; 3) interagency cooperation, particularly data exchange through the International Trade Data System (ITDS), is essential; and 4) enhancement of manpower and resources for multiple agencies, both directly and through third parties, should be approached with an eye to significantly enhanced capabilities.

As with trade security, AAEI believes that “no one size fits all” to mitigate product safety risks because different products pose different risks to the public’s health and safety. Therefore, we encourage the Committee require CBP to use risk management principles as the foundation for any regulatory initiative proposed to the trade community relating to product safety.

Trade Security and Product Safety Are Different

AAEI recognizes that although there are important similarities, trade security and product safety are fundamentally different. We have noted and attempted to incorporate those differences in our now four year effort to assist FDA in the development of low risk importer programs which, in our opinion, would have substantially benefited all parties. We remain hopeful that important progress towards this goal can be made through both the regulatory and legislative processes.

It is fair to say that, at its most basic, trade security is primarily concerned with the integrity of the supply chain and ensuring that the “box” (*i.e.*, the cargo container) has not been tampered with during transport so that no weapons of mass destruction or other harmful substances are surreptitiously placed in the box after sealing at the point of stuffing. On the other hand, product safety is focused on the integrity of the commodity in the box.

AAEI strongly encourages the Committee to consider U.S. standards as a vital element in developing a system for product safety. Among the trade community’s greatest concerns is for global businesses to be subject to different and conflicting standards at the state, federal, and international level which will not improve product safety, but simply impede legitimate trade. As an operational matter, we note that any efforts to continue under

the illusion of “one face at the border” will impede the flow of trade if inspectors from multiple federal agencies enforcing different product safety regimes are placed at U.S. ports of entry without a real plan for interagency cooperation.

10. Trade Data

U.S. Business Data Confidentiality

Among the emotionally charged issues which the trade community has confronted in today’s evolving environment are extensive and growing concerns regarding the confidentiality of proprietary business data including IPR, pricing and valuation, manufacturing methods, supply chain and logistics and multiple other aspects of business operations. Such data, as you well know, is property and is extremely valuable. Our concerns are driven both by national impact as well as private sector competitiveness issues – domestic and, in particular, international.

The business and trade communities have recognized that the government’s collection and storage of increasingly “nitty gritty” detailed trade data may become extremely problematic when such data is exchanged with other Federal Agencies when there are insufficient restraints upon improper or unnecessary information transfer. Thus, domestically we would strongly encourage the adoption of variable and flexible security data so that units and personnel government wide would only receive such information as is necessary to fulfill their statutory responsibilities. These concerns multiply in the development of multiple, and what the trade perceives as overlapping efforts involving international bodies and, specifically, foreign governments. Therefore, AAEI implores the Committee to direct CBP to distribute trade data to other federal agencies and foreign entities on a “need to know” basis only.

The trade community grows both more puzzled and more concerned as the seemingly virtually insatiable homeland security driven demands for more business data forcefully defended by both DHS Secretary Chertoff and CBP Commissioner Basham in multiple public forums. Countries from all business sectors and located across the country are beginning to seriously ask ourselves “why more data and where does it end?”

Those most puzzled and troubled by these multiple demands are our small and medium size members, in particular the “mom and pop” niche manufacturers who often source raw materials and unfinished parts from different sources in any given year through multiple suppliers. They do not understand what appears to be a clearly uncoordinated, yet increasing

range, depth and amount of data that is being requested by multiple DHS units and potentially, through CBP, and multiple other agencies.

In exploring this issue, we suggest that the Committee begin to look into the concerns of those companies which are already at work on trying to do what DHS and CBP continue to tell them is "the right thing." First and foremost, are the central questions of: 1) who receives, interprets, distributes and controls our data; 2) what is "our data"- are we truly responsible for knowing and verifying data which our many "business partners", including subcontractors and transporters along the supply chain are compelled to provide; 3) do we have answers to the requirements increasingly generated by new policies and programs coming at business from many different countries in any different formats; 4) is our company data secure in a competitive world or among national governments; 5) do we have a handle on the real world costs both in opportunities not pursued and dollars expended?

We ask that the Committee look for ways to help businesses nationwide deal with these pressing concerns. We would support further examination of what is truly essential rather than "nice to have." We, as the nation's traders of all sizes, should not be forced to live with a policy which has, perhaps uncharitably, been described as – "you give me your data and then I'll decide what I need."

Importer Security Filing "10+2" Proposal

An issue of immediate interest to the trade community which we know that the Committee has heard a great deal recently is the "Importer Security Filing and Additional Data Requirements," commonly referred to as "10+2." In its effort to fulfill the requirements of Section 203 of the SAFE Port Act, CBP published a Notice of Proposed Rulemaking (NPRM) on January 2, 2008. See, 73 Fed. Reg. 90.

As you know, AAEI's involvement in the legislative policy and regulatory processes leading to the issuance of this NPRM has been extensive. We were very active in our appeals here that Congress fully reviews the anticipated impact of contemplated provisions, the clear need for a pilot program as well as a truly comprehensive cost benefit analysis. Subsequently, in the regulatory arena, through our multiple prior filings and frequent communications on the Importer Security Filing (ISF), we have offered specific recommendations intended to more effectively accomplish homeland security related objectives while reducing economic disruption and unequivocally building the efficient facilitation of trade. In this, we have strongly suggested, unfortunately without success, that the impact upon the

nation's small and medium sized business – the vast majority of the 800,000 U.S. importers - be fully understood and calculated in the dimensions of this effort. Frankly, as a result of our unique familiarity with this issue, we sincerely question whether the NPRM fulfills Congress' intent as set forth in the authorizing statutes.

In our efforts to fully assess the impact of the NPRM and to provide further substantive recommendations, we and multiple other industry groups requested an extension of comment period which was granted for only an additional 15 days. We have attempted to distill our extensive comments to just seven points, as listed below.

- First is the likely accomplishment of Physical and Economic Security Goals. We believe that proposed program is not likely to achieve the physical and economic security intended because it calls for the collection of millions of lines of data from low risk importers/shipments. In so doing, the proposed program fails to incorporate appropriate risk management concepts, is expensive to the trade and counterproductive for CBP in their efforts to find high risk shipments.
- The second is the imposition of new Bond requirements. These requirements were a complete surprise to all elements of the trade in particular those sectors most directly impacted. CBP inappropriately imposes liabilities on the importer, prior to entry, for actions that are taken beyond the importer's control and for data of which the importer has no certain knowledge.
- The "prototype test" which is proposed by CBP is a very different animal than the kind of pilot which AAIE suggested was absolutely necessary to avoid unnecessary disruption. In short, this test proposed by CBP is inadequate for the job. It fails to incorporate multiple constructive suggestions offered by the trade community. One of multiple concerns is that it merely verifies where the data is in commercial documents and what data can be consistently gathered by the trade. To truly gauge economic and trade impact, CBP should, at minimum, run a true prototype test of the actual filing rather than the different beast altogether currently utilized. This is particularly important in the timing of getting the relevant data - and the targeting processes in order to avoid massive disruption and displacement of trade.
- We fail to understand why an ISF Confirmation Number is not provided. The failure of CBP to provide a number that can be used to

identify the ISF for post filing corrections and to provide visibility to the importer once the ISF has been filed (while requiring updates if data changes) will create significant unnecessary difficulties (e.g. uncorrected clerical errors). These difficulties and other unavoidable human error will only serve to distract CBP from more relevant information.

- In implementing Section 203 it was clear to the trade that extensive Technical Details would be required from CBP. The lack of technical details included in the NPRM makes assessing the impact of the proposal difficult for the trade. Clearly, more information is needed in order for the trade to fully understand the technical requirements of fulfilling this rule.
- A sufficient Phase in period is needed for effective implementation and minimum disruption to the economy. Given that the proposal is a fundamental departure from requirements and procedures that have governed the import process for many years, CBP's decision to not provide a meaningful "phase-in" period is ill-advised and counterproductive. While CBP has indicated that it is willing to allow for an enforcement "phase-in," CBP should provide a transition period that takes into account the unique challenges that this new program presents. Frankly, phase in for enforcement, while appreciated, does not begin to repair the damage anticipated from rapid deployment.
- A realistic assessment of cost impact is required. There is consensus within the trade community, across sectors and scale of enterprise, that the ISF requirements will create significant supply chain delays and substantially increase the costs of importing into the U.S. attacks. The economic analysis performed for CBP by Industrial Economics, Incorporated is so fundamentally flawed that a new study should be commissioned in order to measure the true costs, and feasibility of this regulatory proposal. In addition we would, separately, encourage the Congress to seriously examine whether this proposed rule, in its current construct, will reduce the risks of terrorist attack.

CBP & DHS Communication with U.S. Trade Community Regarding Data Anomalies

AAEI supports ongoing dialogue and partnership with CBP and DHS to achieve a productive balance between trade security and trade facilitation. However, many AAEI members are concerned that in some areas, such as data anomalies, we do not have a dialogue with the agency. The U.S. trade community provides CBP with large amounts of trade data, either required

through the advance cargo manifest regulations or on a voluntary basis through C-TPAT. Although C-TPAT membership reduces the number of examinations, it does not eliminate them. As a result, when a C-TPAT member's shipment is subject to an examination, the company does not know whether it is the result of a random sample or whether an anomaly in the company's trade data was captured in the Automated Targeting System (ATS) because CBP generally does not communicate with companies if it is the latter. Data anomalies can take on a variety of forms, such as substitute shipments from a different supplier, using a different mode of transportation to ship a particular product more quickly, etc.

To be clear, AAEL supports CBP's screening of all high-risk cargo through ATS. However, CBP's limited resources for examinations should be devoted to those companies which truly pose a high risk to the Nation. We propose that CBP develop a protocol to communicate with U.S. companies that are C-TPAT members with strong records of compliance in order to discern between those shipments that actually pose a high risk versus those which exhibit a data anomaly, so that the company can provide CBP with a satisfactory explanation concerning the anomaly instead of CBP devoting resources to an examination. AAEL is confident that such a protocol would increase dialogue between CBP and the U.S. trade community, as well as foster awareness that U.S. trade data is truly being used appropriately to ensure the security of the Nation.

11. Industry Outreach and Consultation

Revision of the Drawback Statute

As the Committee is well aware, AAEL's members have worked as part of an exemplary TSN effort in partnership with CBP to draft new statutory language that would simplify the process of applying for drawback, which in turn could expand U.S. businesses use of drawback. AAEL cannot overstate the importance and urgency of enacting a revision of the drawback statute.

For the past four years, AAEL's members have worked in partnership with CBP to draft new statutory language that would simplify the process of applying for drawback, which in turn could expand U.S. businesses use of drawback. CBP has three goals that are paramount to its drawback simplification efforts: 1) it must be easy to administer; 2) the revisions must protect the revenue of the United States; and 3) the new drawback system must support complete automation.

The product that both AAEL and CBP support meets these requirements, and includes the following provisions:

- 1) Substitution drawback would be based on the Harmonized Tariff Schedule of the United States (HTSUS) to eight digits.
- 2) The drawback claimant could be any party in the chain from import to export as long as the required permissions were obtained from the responsible parties.
- 3) The timeframe for drawback would be simplified from to five years from the date of import to date of filing the claim.
- 4) Drawback would be paid based upon the average duty per quantity for the designated line item of an import entry.
- 5) Proof of export for drawback would be based on an automated export system.
- 6) Drawback on items that are destroyed instead of exported would be limited to direct identification only.
- 7) NAFTA drawback would remain the same since it is part of the NAFTA treaty.

The trade is now working with CBP on the programming requirements that need to be done in the ACE system so that this module can be deployed to implement the new drawback provisions and make the system more efficient and effective in providing duty refunds when goods are exported from the United States.

If enacted, we know it will benefit U.S. exports, as well as U.S. competitiveness in the global marketplace. We are fully prepared to assist this Committee's legislative efforts to pass the revised drawback statute.

12. Paying for Trade

Paying for Trade Security and Trade Facilitation – A Study of Customs Fees

We would suggest to the Committee that fair and equitable collection of revenues for that which has been and will be done is an area of great concern to us and, as you have long demonstrated, to this Committee. We believe that a lot of proposals have been generated in regard to two primary questions and some visibility would be helpful. These questions focus on the collection and distribution of customs user fees and methods of incentivizing important private sector security and related process expenditures.

We, like you, are very aware of the multiple proposals for utilization of some form of additional customs fees which are currently promoted to support a great variety of proposed programs. We do not reject the possibility that a well-conceived and designed plan, developed with a thorough understanding of commercial and diplomatic realities in our global economy, could provide a valuable new source of revenue to accomplish important national trade and security policy goals. In fact, as we have testified previously, we would and do support and encourage you to launch a high priority study of this matter. Such a study should include multiple aspects of collection and utilization, while specifically including the issues generated by the collection and use of Merchandise Processing Fees imposed under the Consolidated Omnibus Resolution Act of 1985.

In formulating such a study, we encourage you to help future Congress' better understand and avoid the multiple problems generated by earlier efforts to levy such fees upon the U.S. trade community. Prominent among these have been both the nature of the assessment (tax on value) and constitutional limitations (tax on exports). However, from our preliminary review, it appears that each of the methods commonly discussed does appear to require extensive review so as to avoid unanticipated economic and trade repercussions.

We would also encourage exploring ways to ensure that the proposed solution, *i.e.* method of revenue collection, is directly related to the problems or opportunities which required such a solution. Frankly, determining the relationship, for example, between current Merchandise Processing Fees and monies allocated for CBP services is currently very difficult. However one thing is safe to say, these fees have clearly generated substantial surpluses utilized in general revenue expenditures. Allocation of the revenue actually collected to general revenue expenditures simply rolls along without relation to the use of such funds for the CBP's commercial operations. We suggest that current evidence seems to demonstrate that such general revenue allocation has not and perhaps cannot provide equitable return either between sectors of the trade community nor to U.S. trade interests overall.

We are concerned that the revenues which are not reinvested back into trade administration will result in costs being passed into the U.S. importers and exporters, and ultimately, these costs will be passed onto the U.S. consumer as a hidden tax. We would welcome the opportunity to assist the Committee's efforts and among other items, would encourage careful review of tying user fee collections directly to customs and related operations expenditures.

13. Harmonization of U.S. Agencies Involved in Trade

Harmonized Tariff Schedule

As the Committee is well aware the adoption of the Harmonized Tariff Code, administered by the World Customs Organization has proven enormously beneficial. We would like to take a look at the 2007 revisions in the hope of smoother implementation of expected 2012 revisions.

In our efforts to fully detail and explain the impact upon the business community, AAEL conducted an extensive survey which we the made public in AAEL's International Trade ALERT in 2007.

One of the most important points to note is that an overwhelming portion of our membership incurred, in "apples to apples," substantial additional costs to comply with the new 2007 HTS conversion. In addition to the resource expenditure outlined above, the percentage of respondents reporting anomalies in the 2007 HTS conversion was quite high. In fact, over 40% of our respondent members reported that they identified anomalies in the conversion. Considering that 27.6% of our respondents had over 100 HTS number changes and an additional 14.4% of respondent members had in excess of 5,000 HTS number changes, the anomaly discovery rate of 40.2% is troublesome in its requirement of otherwise unnecessary expenditures. This was particularly true when they noted their experience that errors and oversights present in the "final" HTSUS publication are very difficult to have corrected, and corrections (when they do occur) lead to multiple updates of a finalized tariff requiring companies dependent on the 2007 HTS conversion to set aside resources in order to maintain compliance with the tariff.

Additionally, the Committee should be aware of a secondary impact of the revisions to HTS. As a result of the proliferation of Free Trade Agreements recently negotiated by the United States, the delay and errors in the revised HTS made it difficult for many U.S. companies to qualify products for preferential treatment under FTAs when using the "tariff shift" rule of origin (*i.e.*, when a good undergoes a change in one of the FTA countries so that the tariff classification of the imported product is different from that of the exported product as prescribed in the HTSUS). Without a timely and accurate HTSUS, many companies could not determine whether goods qualified for preferential treatment to issue a certificate of origin or enter the goods duty-free under the FTA.

We ask this Committee to explore building a reliable domestic "roadmap" to move forward with making the 2012 HTS updates a smoother and relatively seamless process. Here you may choose to look into the main points of

issue for 2007 as a guide for future updates. These were: 1) inordinate delays in delivery and antiquated format of the published schedule, publication; 2) schedule inaccuracies leading to difficulty in implementation including absence of a 10-digit correlation table available in a timely manner; 3) the lack of opportunity to fix errors and oversights prior to the final publication of the tariff; and 4) inadequate essential coordination among government agencies leading to failure to account for the tariff's impact on FTAs as well as "messy" and confusing deadlines leading to the need for this Committee to enact a hurried fix, for which we are extremely grateful!

One aspect of the Committee's approach in this Congress has provided a number of beneficial elements. Specifically, we appreciate the opportunities you may have to legislatively advance beneficial coordination among agencies authorized to administer the HTS. There are multiple examples inclusive of the clear benefit that could be achieved in carefully examining the economic impact of the apparent proliferation of rules of origin and other requirements among the FTAs. Though perhaps seemingly minor during discussion of major principles – the impact on business processes and procedures is significant. However, in recognition of the opportunity to consider each agreement to be considered in the future, we would like to take a serious look at one respective concern.

We are particularly concerned that timing and process of domestic implementation of FTAs can be carefully administered. In this, we thank the leadership of the U.S. Trade Representative for their efforts in the 2007 implementation, but urge them to pursue legislative remedies, if they determine necessary, to avoid the same needs just four years from now.

14. Conclusion

In conclusion, we wish to thank the Senate Finance Committee for its invitation to testify today about CBP's progress toward meeting its mission of security, facilitation, product safety and operational issues. We greatly appreciate the Committee's continued efforts to ensure that trade facilitation is not lost in the mandate to achieve trade security. We believe that the Committee's oversight of CBP's programs and initiatives is critical to maintain U.S. competitiveness in the global economy. We sincerely hope that our testimony will prove useful as the Committee reauthorizes CBP while balancing all the competing demands on the agency's resources. AAEL looks forward to working with this Committee to demonstrate our commitment to partner with CBP in pursuit of these missions.