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CUSTOMS REAUTHORIZATION: STRENGTHENING U.S. ECONOMIC INTERESTS AND SECURITY

HEARING

BEFORE THE

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UNITED STATES SENATE

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CUSTOMS REAUTHORIZATION: STRENGTHENING U.S. ECONOMIC INTERESTS AND SECURITY

THURSDAY, MARCH 13, 2008

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

The hearing was convened, pursuant to notice, at 9:19 a.m., in room SD–215, Dirksen Senate Office Building, Hon. Max Baucus (chairman of the committee) presiding.

Present: Senators Stabenow and Grassley.

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

The CHAIRMAN. The hearing will come to order.

In December 1815, President James Madison began his address to Congress by saying, "I have the satisfaction of being able to communicate the successful termination of the war which has been commenced against the United States by the Regency of Algiers." That was the Barbary Pirates.

President Madison also expressed to Congress his hope that America's infant manufacturing industry "will become, at the early day, not only safe against competitions from abroad, but a source of domestic wealth and external commerce."

In his message, Madison sought to advance two goals: one, to raise revenues to support our Nation's security, and two, to protect America's infant industry. To achieve both goals, he proposed changes in tariffs. The Senate referred President Madison's proposal to a newly-formed committee called the Committee on Finance, and President Madison's proposal became one of the committee's first legislative actions: the Tariff Act of 1816.

Since that time, the Finance Committee has overseen the agency that has had responsibility for collecting revenues from Customs duties. In 1816, the functions of the U.S. Customs Service were small. At that time, America's imports were a mere $116 million a year, and duties collected on these imports totaled about $35 million.

Today, America's imports are $2 trillion a year and the annual duties collected on these goods bring in almost $30 billion. Today, in addition to protecting our economic interests, our Customs agencies also secure our borders. These responsibilities are shared between two agencies, Customs and Border Protection and Immigration and Customs Enforcement.

Consider the jobs that Customs agents will do in the next 24 hours. In that short period, our Customs officials will process 1.13 million passengers and pedestrians into or out of our country; they will handle more than 70,000 truck, rail, and sea containers—that is just 24 hours—and they will approve for entry nearly 83,000 shipments of goods.

During that 24 hours they will arrest 70 people at our ports of entry; they will seize 2,250 pounds of narcotics and more than $650,000 worth of counterfeit goods; they will confiscate more than 4,000 meat or plant materials; and they will identify and destroy 164 agricultural pests.

But as much as the scope of the job has changed, one thing has remained the same since 1815. The job of Customs affects both security and commerce. The Customs Service is an invaluable part of our Nation's defense, and it is also fundamentally rooted in international commerce. Since 9/11, it has become increasingly difficult for our Customs agencies to maintain the critical balance between those two goals.

The Senate Finance Committee has nearly 200 years of accumulated expertise in working with Customs to balance these vital missions.

And so we are here today to carry on our long tradition of overseeing Customs. We are here today to continue our work to ensure the free and secure flow of goods into and out of our country.

Today's hearing is the first step toward reauthorizing our Customs agencies and determining how we can better protect America's consumers by safeguarding our borders.

In the months that come, this committee will craft new legislation to put more resources at our Nation's borders. We will seek to ensure that imports of food and consumer goods are safe and healthy. We will buttress our ability to identify pirated and counterfeit goods and keep them off our store shelves, and we will make sure that our Customs apparatus fully collects revenues due to the United States.

Today's witnesses have traveled from across the country, including Billings, MT, to provide the perspective of the trade community. This committee plans to hold another hearing next month to hear from the government agencies tasked with securing our borders.

And so I look forward to continuing this committee's nearly 200 years of work to balance our Nation's security and economy. I look forward to our maintaining our success in the war against America's enemies. And I look forward to working to keep American businesses, in Madison's words, "a source of domestic wealth and external commerce."

I would like to begin at the outset by welcoming our witnesses. Thank you all very, very much. I am pleased to begin our hearing today with Samuel Banks, executive vice president at Sandler and Travis Trade Advisory Services, and former Deputy Commissioner of the U.S. Customs Service. Following Mr. Banks is Charlene Stocker, who is chairwoman of the American Association of Exporters and Importers and senior international service manager for Procter and Gamble. Our third witness is Greg Brown, counsel at Ford Global Technologies. Finally, it is my personal honor to wel-

come from Billings, MT Ms. Toni Tease, a registered patent attorney from Billings, MT.

We all look forward to your testimony. Your prepared remarks will automatically be submitted in the record, and you have 5 minutes to give your oral testimony.

I want to apologize at the outset, though. There is going to be a memorial service in the Senate shortly, and we will have to do some back and forth. I will recess the committee hearing for a while and Senator Stabenow will also chair the hearing. It will be a little bit of an inconvenience here, but it is during the service and so forth. Thank you all very much.

We will begin with you, Mr. Banks.

STATEMENT OF SAMUEL H. BANKS, EXECUTIVE VICE PRESIDENT, SANDLER AND TRAVIS TRADE ADVISORY SERVICES, WASHINGTON, DC

Mr. BANKS. Good morning, Mr. Chairman, Senator. I appreciate the opportunity to appear before you today. As you said, I spent a career in U.S. Customs, and that is half of my perspective. The other part is, since 2000, I have been working with the international business community that move goods across our borders.

I would like to address three issues today that I believe this committee could, and should, address in directing the activities of CBP, of Customs, and the funding of Customs and Border Protection.

The first issue. CBP is highly reliant on the cooperation of the international trade community to participate in border security and compliance programs. To encourage industry's participation, CBP has promised to provide the trade community with tangible benefits in return for industry's support for these efforts. Quite frankly, the industry does not believe that these benefits have been realized.

The second point that I would like to make is that the administration and the Department of Homeland Security, quite frankly, have not adequately supported or funded CBP in the development of two very important automation programs. First is the Automated Commercial Environment, ACE, and second, the International Trade Data System, ITDS. I will talk more about these, but these are critical to the Nation's security, economic well-being, and public safety.

The third issue, if I have time, is it really would help if CBP were encouraged to be more creative and aggressive in adopting modern business practices. These are ideas that could save money, enhance productivity, and improve performance for CBP and the business community, so I would like to briefly elaborate on each of these.

On the first topic, the trade feels that CBP needs to engage in a focused, candid, and open dialogue with industry on concrete, measurable benefits for the companies that are investing huge sums of money in CBP's security and compliance programs. Industry, quite frankly, does not feel CBP has dedicated the necessary time or energy to this issue.

In their defense, CBP is incredibly overwhelmed. They have a staggering number of highly complex, multi-million-dollar initiatives under way in both security and trade. Actually, despite all

this, to CBP's credit, they usually work fairly well in partnership with industry to develop these programs. However, as challenging as these projects are for CBP, each of these initiatives also has significant ramifications for industry.

The cumulative effect of simultaneously developing this myriad of initiatives is placing a serious strain on the resources and the goodwill of the business community. If CBP is spending millions of dollars on these things, the industry is spending multi-million dollars either to join the programs or to comply with them.

Now, generally industry has been supportive of CBP goals, as the companies want to contribute to the security of the U.S. too. However, increasingly you hear of industry leaders pushing back on CBP and asking for these benefits so that they can take these benefits to their board room and convince their leadership to continue this cooperative effort with CBP.

Just a few examples that CBP could offer in terms of benefits without compromising their mission. One, CBP releases low-risk ocean cargo 5 days before arrival. Why can they not release it immediately upon vessel departure from foreign ports and give importers more visibility into their supply chain? Why does CBP require reams of paper documents from highly compliant companies when they could receive the information electronically? If IRS can allow for tax filings electronically, you would think CBP could as well.

Companies that join security programs like Customs-Trade Partnership Against Terrorism (C-TPAT) are supposed to receive expedited processing, so why are their shipments not put at the head of the line when CBP does require an exam? And if CBP decides they want to do a random exam or a compliance exam, why can these trusted importers not actually have the flexibility to request that those exams take place at an interior port? So to push this along, perhaps this committee could require a report from CBP on what progress is being made in terms of working with industry to explore, define, and agree on those benefits.

The second issue I would like to mention has to do with the two automation systems that I talked about. The first is the Automated Commercial Environment, called ACE. ACE is an automated initiative which is basically replacing 30-year-old CBP computer systems that in their day radically changed the way import business was done. ACE holds the potential—a greater potential—to revolutionize and streamline trade and to achieve significant savings for CBP and industry. But equally important and less recognized is the fact that ACE also plays a critical role in border security, import safety, and trade enforcement.

What ACE really is, is this huge pipeline that captures and collects massive amounts of information on international shipments and then distributes that information to CBP and other government agencies. This ACE data pipeline is monstrous. I mean, it has information on the 32,000 ocean containers that arrive in the U.S. daily. It contains all of the information on that $2 trillion worth of imports that enters the country. It is this data that feeds CBP's targeting systems to identify high-risk shipments for terrorism, for contraband, unsafe products, intellectual property rights, and the list goes on.

CBP knows that ACE is important for security and import safety, but quite frankly it does not appear that officials at the Department of Homeland Security share this understanding. They have referred to ACE as merely a trade system, and therefore of secondary priority. We even understand that DHS attempted to divert ACE funding to other programs.

While industry sincerely appreciates the work of this committee to ensure that ACE continues to receive the funding and that it is properly managed, you also need to know that ACE continues to grow in scope and complexity. Part of this growth is trying to support security programs as opposed to trade programs. Trade has no objection to having ACE help out the security programs, but it is essential that they stay on schedule and deliver as promised.

So we recommend that the committee seriously consider increasing the authorized funding for ACE and advocate that these monies are appropriated. The committee also needs to examine the progress of the International Trade Data System, ITDS. It is just a companion program base. It supports the sharing of import/export data within government agencies.

If ACE is this huge pipeline on data about international shipments, ITDS represents this network of feeder pipes that distribute that data to some 43 other Federal agencies. These are agencies that oversee and enforce programs on border security, import safety, public health, IPR, et cetera.

The importance of ITDS to the Nation's safety was actually highlighted in the recent President's Interagency Working Group Report on Import Safety. Based on that report, OMB even instructed all the department and agency heads to develop action plans to join ITDS. All this rhetoric is heartening, but the reality is, the administration has not added one more penny to either ITDS or ACE to actually do this. So, again, I guess it is our hope that you support continued funding of ITDS and, in fact, consider increasing it. A mere $16 million for import safety is probably a small price to pay.

Lastly, I would like to talk about this committee encouraging CBP to be more creative and innovative in the trade area as much as they are in the security area. They can really improve their productivity and effectiveness by adopting some modern business practices.

One quick example. The idea of customer accounts exists throughout the business world. You see it with frequent flyer programs, gold accounts, and the like. Well, a decade ago CBP embraced an account approach for major U.S. importers. Start looking at the company-wide efforts to manage compliance as opposed to CBP trying to go out and check on a shipment-by-shipment basis. But, quite frankly, implementation of this has been slow.

To date, CBP has, in the last decade, only appointed 32 national account managers, and that cannot even begin to cover the top 1,000 importers. Adopting account management would not only benefit industry, but it would benefit CBP to maintain compliance and oversight over all these imports. In fact, CBP probably should go out and encourage some of the other agencies, like FDA and Agriculture, to join in this shared account effort to address some of the import safety issues.

So those are the three areas, I guess, that I would seek for this committee to take focus on and kind of push CBP in the right direction.

Thank you very much.

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

Senator STABENOW. Well, thank you, Mr. Banks. Let me just indicate, as I am sure you were told, multiple things are happening this morning. We appreciate you being able to be flexible in terms of changing the time of the hearing. This is a very, very important subject. I represent the border State of Michigan, the great State of Michigan. Mr. Brown, welcome. We are glad to have you.

And certainly all the members are extremely interested in this and the information that you are giving us will, certainly through our staff, be made available to everyone. We are, in fact, voting today on the budget resolution which looks at the entire budget for next year. I can assure you that we are very focused on increasing resources in the kinds of areas that you are talking about, so we appreciate your comments.

Ms. Stocker?

STATEMENT OF CHARLENE N. STOCKER, CHAIRWOMAN, AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS, PROCTER AND GAMBLE, CINCINNATI, OH

Ms. STOCKER. Thank you, Senator Stabenow and members of the committee and staff. I am Charlene Stocker, senior international services manager with Procter and Gamble, but I represent, today, the American Association of Exporters and Importers as chair of its board of governors. Thank you for the invitation.

Our written testimony which was submitted for the record discusses the importance of the committee to reassess CBP's progress towards balancing trade security and trade facilitation, the need for a holistic approach, and dedicated resources to achieve the balance of these goals.

I would like to share with you our thoughts on five specific topics: AAEI's two American Trader's Guides—the "Post 9/11 and Homeland Security Programs" and the "Advanced Data Programs," which I see have been passed out at all the chairs; the importer's security filing known as 10+2; the first sale rule; trade data; and resources. I will be pretty quick.

You can see these charts that we have here. In order for us to discuss what a holistic approach would entail, we needed the trade to put all of the security and data programs on one particular sheet. First, let us take a look at the post 9/11 and the Homeland Security programs. We focused on the proliferation of independent and uncoordinated security programs governing trade security.

Down the left side of the first page of the chart, we have all the security programs developed by the various Federal agencies: international, multilateral, private sector programs, emerging and potential programs, like 10+2, and finally, the compliance programs with a security impact, like Focused Assessment and AES.

Moving to the right, that section describes the provisions of these programs so that they can be compared apples to apples. The next section on page 2 of the chart is a consensus overview of the impact of compliance. The last section on the right of the chart is our work

to gather the trade community's assessment of the resource expenditures resulting from the trade security programs.

Then we come to "The American Trader's Guide to the Supply Chain" (a 2-page chart). Going from left to right, you can see the guide to the supply chain. It shows the intertwining of three essential tracks for the goods in the international supply chain. First, you can see the transportation flow, which represents the physical movement of the cargo; second, the data flow; and third, the regulation and security part, which shows the checkpoints along the supply chain.

Now, if we look at the chart entitled "International Advanced Data Programs," the first page of the matrix shows how the primary U.S. trade data programs, like the 24-hour rule and 10+2, compare with the European Union and the WCO, as well as other national programs.

The second page of the matrix provides an overview of the status of the United States International Trade Data System. The chart shows many of the participating government agencies and their access to this ITDS data. Pairing both the multilateral and the national data sets with ITDS shows the committee a bird's-eye view of the complex overlapping of the data systems: we are the experts and we can hardly figure it out.

During our 10+2 discussion I would like to mainly be concerned that the 10+2 proposal will have a very negative impact on the trade. We are not sure that CBP has adequately analyzed the cost of the proposed rule on the vast majority of the 800,000 U.S. importers, and we sincerely question whether the proposed rule on 10+2 fulfills Congress's intent set forth in the authorizing statutes.

Most recently, our concern has been focused on the first sale rule, which is simple: one, why the change, and two, why now? First sale is a well-settled law and change would disrupt international transaction. This, at a time when the U.S. economy is slowing, revokes first sale and would require companies to pay additional duties and costs to redesign their entire business models.

With regard to trade data, we are concerned that the confidentiality of U.S. business data remains a critical issue for the trade community. CBP sharing the data should be on a flexible and variable schedule, and only on a need-to-know basis.

Finally, on resources, AAEI remains concerned about resources dedicated to CBP's trade facilitation mission. Our concern is more fundamental than the number of employees assigned to Customs and compliance as opposed to security functions. Rather, our concern extends to the brain drain at CBP and the training of new employees with fundamental understanding of Customs compliance, facilitation, and security based on reasonable care, internal controls, and risk management.

We thank you for the opportunity to testify before the committee today, and we will offer answers to any questions you may give us.

Senator STABENOW. Thank you very much, Ms. Stocker. If the intent was to show complexity, you have certainly achieved the goal. It would take me a while to figure this out. We will have folks working on this now for some time. [Laughter.]

Ms. STOCKER. I am sure we will.

Senator STABENOW. But thank you. Thank you very much. This is very helpful.

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

Senator STABENOW. Mr. Brown, welcome. It is good to see you.

STATEMENT OF GREG P. BROWN, COUNSEL, FORD GLOBAL TECHNOLOGIES, DEARBORN, MI

Mr. BROWN. Thank you. Senator Stabenow and members of the Finance Committee, on behalf of Ford Motor Company I want to thank you for the opportunity to testify today regarding the crucial role U.S. Customs and Border Protection has in protecting America's citizens and its economy.

Because Ford itself is a global technology company, we are keenly aware of the important role trade and worldwide movement of products, technology, and ideas can play if administered properly. Customs is a vital partner in our protection efforts. However, the threat that faces our industry, our country, and our economy goes well beyond just the process of protection, it goes to what we are inadequately protecting today: America's intellectual property and, thereby, its citizens, its jobs, and its economic future.

U.S. industry invests hundreds of billions of dollars in research, design, testing, production, and marketing of products. This money is wasted if overseas operators are allowed to turn intellectual property into intellectual piracy.

The Motor Equipment Manufacturers Association estimates that counterfeit goods account for $12 billion annually in the global automotive sector, and this illicit trade eliminates as many as 200,000 legitimate automotive jobs.

Ford takes this issue seriously. We have established a global network of investigators, and we work with industry groups such as the U.S. Chamber of Commerce, with government, and law enforcement agencies around the world, beginning here at home with the U.S. PTO and U.S. Customs and Border Protection, to pinpoint counterfeiters and put them out of business.

Design piracy is one area of current focus for Ford. Today's technology makes it easy for design pirates anywhere in the world to rapidly photocopy an existing part. In response, Ford seeks, and obtains, design patents from the U.S. PTO for ornamental and distinctive exterior parts of our vehicles.

Recently, after lengthy and expensive proceedings in the International Trade Commission, we obtained an exclusion order prohibiting importation of seven copied parts of our popular F–150 pickup truck. While welcome, this victory demonstrates the difficulties in effectively combatting design piracy. First, successful enforcement in design patent cases is difficult. Their less than 35 percent enforcement rate encourages copycatters and discourages original manufacturers from rightfully seeking to protect themselves.

Second, a major loophole exists in stopping design piracy with design patents. Using the fastest process available to us, there is at least a 30-month window between product introduction and effective enforcement. Prior to the issuance of an exclusion order, Customs cannot seize duplicate parts despite our patents, and once on shore, an ITC ruling provides no remedy against parts already

imported. Exploiting this loophole, design pirates fill their U.S. warehouses with imported copy parts sufficient to meet demand for years to come.

Ideally, a simpler and more efficient mechanism for stopping design piracy would exist. A simple registration scheme for designs would prevent exact copying of ornamental and distinctive exterior parts. One way or another, we should greatly reduce the 2½-year loophole in the current system.

Finally, Ford also believes that Customs should be encouraged to be more effective and efficient with its existing programs and initiatives, like the Customs-Trade Partnership Against Terrorism. We believe that Customs should better leverage programs like C-TPAT to segregate and secure low-risk importers, freeing Customs to focus resources on higher-risk importers and counterfeiters. Ford is also concerned at the recently announced import security filing rule commonly known as 10+2 that threatens to dilute Customs' focus and effectiveness on its priority missions, while not enhancing security.

Ford is grateful for this opportunity to share our views on how to eliminate this unfair competition. There is a real and present threat to the U.S. consumer, industry, and economy. Customs is the first line of defense against this unfair competition, the importing of intellectual piracy, and the exporting of U.S. jobs. We must work collectively and cooperatively to harness every applicable resource to stop this threat to consumers and to level the playing field for American workers and industry. Thank you.

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

Senator STABENOW. Thank you very much.

At this point I am going to have to recess for just a few moments. I will recess the committee. I apologize, Ms. Tease. Either myself or Senator Grassley will be coming back to chair. I will be returning as well. But we have multiple things. Until we have figured out how to say "beam me up, Scotty" to be able to be in more than one place at once, I apologize. We will recess the committee for a few moments. Thank you.

[Whereupon, at 9:47 a.m., the hearing was recessed, reconvening at 9:56 a.m.]

Senator GRASSLEY. Would you continue with your testimony, Ms. Tease?

STATEMENT OF ANTOINETTE M. TEASE, P.L.L.C., REGISTERED PATENT ATTORNEY, INTELLECTUAL PROPERTY AND TECHNOLOGY LAW, BILLINGS, MT

Ms. TEASE. Good morning, Senator Grassley. I would like to thank you for the invitation to appear before you today to talk about intellectual property rights enforcement from the perspective of a solo patent and trademark attorney from Billings, MT.

I would like to begin with a few words about Montana. Montana is a highly entrepreneurial State. We are ranked number one for entrepreneurial activity, and we experienced the third-largest increase in exports among all 50 States in 2006. Montana's State university system is recognized nationally for its entrepreneurship program. What this means is that both global trade and the protection of intellectual property rights are very important to Montana's

economy. With that said, I believe that my comments will be representative of small businesses throughout the United States.

I have been asked specifically to address how Customs might do better in enabling small businesses like my clients' to record their intellectual property rights with Customs and enforce those rights. With respect to recordation, I have made some specific recommendations in my written testimony.

The first recommendation is that the Customs recordation process be integrated with the trademark and copyright registration processes. The Trademark Office has an electronic registration system that is transparent and easy to use. Customs has implemented an electronic recordation system, but many more of my clients would record their marks with Customs if they could do so simultaneously with applying for registration of the mark at the U.S. PTO.

Second, I have proposed that the trademark renewal processes at the U.S. PTO and Customs be integrated so that a trademark owner can renew its trademark registration and Customs recordation at the same time.

Third—and this is the most significant issue relative to recordation from my perspective—I have proposed that parties seeking to record a trademark or copyright with Customs be allowed to opt out of providing information that they believe is confidential or constitutes a trade secret.

Let me give you a real-world example. I was on the phone yesterday with a client from Bozeman that would like to record one of its trademarks with Customs, but the Customs application form requires us to disclose the names of all persons and business entities authorized to use or apply the mark. This would require my client to disclose its entire customer list. Regardless of whether Customs treats this information as confidential, clients are reluctant to provide this information to any third party, including the government.

For those of my clients that have chosen not to record their trademarks or copyrights with Customs, the main reason is not because the amount of information required is burdensome, nor is it due to the cost of recordation, but it is because they are reluctant to provide confidential and trade secret information.

I have proposed that rights holders be allowed to opt out of providing this information to Customs in exchange for their agreement to bring to the attention of Customs any shipments containing violative imports of which they are aware.

Fourth, I believe there should be an automated process for reporting suspected violations to Customs. For example, if we know that a particular company may be importing counterfeit goods, we ought to be able to submit that information to Customs electronically and receive an immediate acknowledgement that that information has been received.

Ideally, information would be provided to the trademark or copyright holder periodically by e-mail about the status of the investigation. Generally speaking, Customs is perceived as a closed agency, one that is difficult to communicate with. The more we can do to provide transparency on the IPR side, the more companies will participate in the recordation process and choose to enforce their rights through Customs. This concludes my comments about the Customs recordation process.

I would like to briefly address three other topics that relate directly to the issue of IPR enforcement. The first issue is that of achieving better coordination of U.S. IPR enforcement efforts. As you know, the National Intellectual Property Law Enforcement Coordinating Council has been widely viewed as ineffective. Both the Senate and the House have proposed legislation that would eliminate NIPLECC and establish an IP enforcement network or an IP enforcement representative in its place.

Regardless of which avenue is taken, I believe that greater emphasis needs to be placed on coordinating the IPR enforcement efforts of various governmental agencies. Intellectual property rights have taken on such a degree of importance in our present economy, that enhanced governmental action to preserve and enforce these rights is essential.

I do not believe that any discussion of intellectual property rights enforcement would be complete without mentioning patent law reform. The reason I say this is because we can place all our emphasis on enforcement, but, if the laws we are enforcing do not make sense or are no longer reflective of our current economic and political environment, then our enforcement efforts are misplaced.

If we wish our foreign trade partners to recognize the value of a stable patent system and the benefits that can be realized from fostering a climate of innovation, then we need to lead by example, and that entails maintaining a constant vigilance over our patent, trademark, and copyright systems to ensure that they are achieving the fundamental goals of fostering innovation without stifling competition.

Lastly, it is one thing to enforce intellectual property rights at our borders. It is another to work with foreign governments to effectuate the cultural and economic changes that are required to stop piracy at its source. To be truly effective in this endeavor, our vision must include working with foreign legislative bodies and IP offices, on both the public and a private level, to share knowledge and instill a recognition that the protection of intellectual property rights is mutually beneficial. In this regard, the United States should take a vigorous and engaged role in encouraging other nations to develop reciprocal methods of intellectual property rights enforcement. Thank you.

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

Senator GRASSLEY. Thank you all very much. I am sorry I missed the testimony of the previous three. For the benefit of my constituents, I had a meeting with an Inspector General who was not doing their job right, and I had to complete that so my staff could continue their work. So that is why I am late.

I am going to ask Ms. Stocker three questions that are generally related to the general issue of staffing at Customs. Do you have any concerns that current staffing levels at Customs and Border Protection and ICE are not sufficient to meet the growing needs of the trade community? Two, have members of your association experienced any difficulty due to inadequate staffing? Three, how would you recommend the committee address the issues?

Ms. STOCKER. All right. Number one, on sufficiency, I think there may be a need to increase the amount of personnel at the border because of the idea of one face at the border. It can work, with

training. We need each of the individuals at the border to be able to do multiple projects and be trained to do multiple projects. In addition to that, we need to make sure that they can know compliance, reasonable care, and risk management.

To address, secondly, the differences in what is needed with regard to the pendulum swinging, they are doing too much of security. We need them to swing back and look more at compliance, because, as they take a look at compliance and arrange for our good customers who are C-TPAT compliant, et cetera, they can then have more time to do other risk-management pieces.

Three, how would we like you to address it? Obviously with additional funding from the committee. If I have any other comments, we will give those to you later.

Senator GRASSLEY. All right.

Also for you, we know that you criticized the recent proposal by Customs and Border Protection to eliminate the so-called first sale rule. If implemented, what impact would this proposal have on your members? Are you aware of any problems your members have encountered with corroborating first sale transactions? And, lastly, could implementation of this proposal provoke any backlash from the business community in terms of participating in public/private initiatives that are administered by Customs?

Ms. STOCKER. Well, the question is really, why would we want to change it, and why do we want to change it now? It is well-established law at this time. We have had really no change in the way we operate. To include that in a new regulation would really slow business down and cause us to have additional expenditures.

We would have to redesign our business models to make sure that we could account for the significant change in the sale and the difference between taking a look at a WCO non-binding opinion, and having CBP change the law would, at this point, slow down the American economy and make us change some things that would cost us a lot more money.

Senator GRASSLEY. Would it keep the business community from participating in those public/private initiatives?

Ms. STOCKER. It probably would not, because we need to be in the "green lane" to keep moving. However, it would cost us some more money, and we are looking for some additional benefits, because we thought that C-TPAT and working with CBP should be a partnership, and looking at the change of the first sale rule sort of violates the partnership agreement.

Senator GRASSLEY. Mr. Banks, in your testimony you mentioned that the "green lane" concept is not working as an incentive for companies to participate in Customs' programs. You also cite numerous costs that companies incur to implement and participate in these programs. How can Customs and Border Protection deliver on the "green lane" concept? What types of benefits do you think would be attractive to the trade community that serve as incentives?

Mr. BANKS. Senator, quite frankly, I think CBP could use a push to actually sit down with industry and have an open, candid dialogue on what benefits would really help industry in terms of managing their supply chains as a result of these companies participating in CBP's security programs and the partnership programs.

I think CBP has really dropped the term of "green lane," but I think there is a whole series of tangible benefits that would really encourage the participation of industry in these security programs.

I just went through a few simple ones, such as, CBP today releases low-risk ocean shipments 5 days before arrival. Why could they not release it immediately upon arrival to help importers get greater visibility into their supply chain? There is a whole series of even just small things that they could do that would incentivize industry to continue their support on all of these programs.

Senator GRASSLEY. I have to follow up based on what you said in the first sentence, that they ought to sit down and talk. Now, I would not know whether they sit down and talk to you regularly or not at all, but obviously they do not, at least that you know about. Is there an institutional bias against their doing that? Do you have any reason to think they do not? Does the law not permit them to do that?

Mr. BANKS. Actually, CBP has done a great job in terms of making sure they engage with industry and talk about the design and development of some of these programs.

Senator GRASSLEY. I thought you said they did not.

Mr. BANKS. But the problem is, they talk about the design and the development of the programs. What they do not sit down and do is, they just have not spent the energy or the effort to talk about what benefits could industry receive as a result of it. It is kind of like, let us talk about the technicalities of how the security programs all work, but, as soon as industry raises the issue of, well, what benefits could we possibly get in order to provide incentives to our companies, then CBP kind of is not quite as engaging on that benefit side.

Senator GRASSLEY. Also for you, Customs and Border Protection recently issued a request for quotation for a program known as the Global Trade Exchange. Do you have any concerns with respect to the proposed program? Can you identify any benefits with respect to the proposed program? What types of challenges would importers face if such a program were made mandatory?

Mr. BANKS. I think most of industry objects to this Global Trade Exchange. They are concerned about, nobody knows exactly what it is. Second, industry is very concerned about their proprietary trade data being shared with a privately owned and operated company.

My personal view is, if this program were to be developed as kind of a prototype, a test bed, on a voluntary basis for participants, I do not know that it would not be a good thing, to find out, can you get more data, can you help with security, and can you actually provide these benefits to industry as a result of it? But if you ask most of industry, they are going to do thumbs down on that concept.

Senator GRASSLEY. I have one more question, then I think I will submit questions for answer in writing.

[The questions appear in the appendix.]

Senator GRASSLEY. Mr. Brown, you mentioned in your testimony that Ford was one of the original seven charter members of the Customs-Trade Partnership Against Terrorism program. What benefits does Ford derive from its participation? What recommenda-

tions would you suggest for improving the program? Do you have any reaction to what Mr. Banks had to say about the green lane-type incentives?

Mr. BROWN. Yes. The C-TPAT program has been a benefit for Ford and members of our industry by enabling the identification of secure and known importers. Ideally, that system could be leveraged to help free resources within CBP to actually push for unknown and counterfeit importers, hopefully improving the level of scrutiny to those kinds of importers. So that is kind of where I would focus. No, I do not have anything to add to Mr. Banks's comment regarding green lane.

Senator GRASSLEY. Senator Stabenow?

Senator STABENOW. Yes. Thank you.

Senator GRASSLEY. In the middle of your questioning, Senator Baucus asked if we would follow the Senate procedure and have a 2-minute moment of silence.

Senator STABENOW. Yes, please. Is that at 10:15?

Senator GRASSLEY. Yes. I think we should do it at 10:15.

Senator STABENOW. All right. Thank you.

Thank you again for all of your testimony. I would like to direct this to Mr. Brown, from Ford. Obviously what happens in manufacturing is very important to us in Michigan. Certainly we have the largest northern border crossing in Detroit to Windsor, so we come face to face every day with the dual responsibility of Customs and Border Protection between focusing on security and safety, at the same time having over a billion dollars worth of commerce that is crossing our bridge and tunnel every day. So, it is a terrific challenge for us in doing that.

I wonder if you might speak, though—you talked about a number I have used a lot, a $12-billion automotive sector counterfeit industry, costing us over 200,000 jobs. I have heard 250,000 jobs. I wonder if you might speak more to how this design piracy or this counterfeiting that is not being stopped at the border has affected Ford's bottom line.

Mr. BROWN. Well, design piracy, specifically on just those limited parts related to the exterior ornamental designs of the vehicle, as I mentioned in my testimony, the impact to Ford alone is estimated to be $400 million in lost sales.

Senator STABENOW. Four hundred million?

Mr. BROWN. Four hundred million dollars of imported parts. Obviously Ford's position in the market, if you extrapolate that out to the overall market, that number is just a representation of approximately 5 percent of the parts of a car. So when you start talking about counterfeiting, you are really talking about many, many more parts than just those related to the exterior design. So it is a very significant problem with a very significant impact on the bottom line for Ford.

Senator STABENOW. Have Customs officers at ports ever contacted Ford about suspicious products?

Mr. BROWN. Yes. We get contacted regarding a number of products that bear Ford's brands, predominantly, and we are now working with Customs to help them effectively identify any parts that are in violation of our exclusion order that we have made regarding our exterior designs on the F–150.

Senator STABENOW. As an international company, you see other countries operate. I am wondering how U.S. Customs performs compared to other industrialized countries such as those in the EU. How would you compare those?

Mr. BROWN. We work closely with customs agencies around the world. Where we have been able to work and give clear instruction, we have had some success. I think everywhere around the world we could actually work better together to try to increase the enforcement of our IP with respect to the parts of vehicles. We tend to find very good enforcement with respect to Ford branded parts that do not necessarily relate to the vehicle itself—hats, tee shirts, and toy cars. But we really need to continue to press forward on trying to reach better performance on actual counterfeit parts, and that would be a great opportunity for us to discuss with Customs and Border Protection to see how we can improve that.

Senator STABENOW. Thank you.

Senator GRASSLEY. Could I interrupt right now?

Senator STABENOW. Yes, please.

Senator GRASSLEY. Then you can continue your questioning.

Senator STABENOW. Thank you.

Senator GRASSLEY. For the benefit of everybody, what we are doing now, because it is 10:15, on the Senate floor there will be a moment of silence to honor the service and sacrifice of our troops and their families for their service in Iraq, Afghanistan, and around the world in the war on terror, at this point we would halt the proceedings for a moment of silence.

[Whereupon, a moment of silence was observed.]

Senator GRASSLEY. Continue, Senator Stabenow.

Senator STABENOW. Thank you.

Senator GRASSLEY. I have been informed that Senator Baucus will be back to ask questions, because he participated in the larger ceremony, and that is the reason for his absence. He will be here, and he would like to ask questions, I am informed. Proceed.

Senator STABENOW. Thank you.

Mr. Banks, I am wondering if you believe, with your experience with Customs and dealing with countries like China—we have heard so many things, multiple issues that relate to trade enforcement with China, and certainly recently we have passed a strong Consumer Product Safety Commission bill just last week in the Senate to try to address a piece of it, and we are trying to address issues around enforcement.

But I am wondering if you believe that countries like China right now take us seriously when we talk about intellectual property rights and product safety, and yet at the same time we do not have the staff, we do not have the enforcement, we are not stopping the counterfeit products, the fake products as they enter the country. Do you think they take us seriously?

Mr. BANKS. I guess I am not convinced that a number of countries really take us seriously when it comes to intellectual property rights. They allow free reign to basically benefit their own companies or their own manufacturers. I think it is different for the import safety issue. I think they really are paying attention to this because they know there is the real threat we are going to stop those products from coming in.

Now, can they actually exercise those controls within their countries where there are vast numbers of manufacturers? I am not convinced of that. I think if the U.S. Government, cooperating with other countries that are concerned about import safety, if we do not kind of hold people's feet to the fire on that, we are going to continue to have problems.

Senator STABENOW. So really, it makes sense. If they cannot sell products to us because the toothpaste poisons people, the pet food poisons animals, the toys, and so on, that is one thing. But stealing our ideas and counterfeit products at this point does nothing but add to their bottom line.

Mr. BANKS. It is economic incentive. Yes.

Senator STABENOW. Yes. So we really have to show them that we are serious about that. I think it was interesting at another hearing we had not long ago, former Commerce Secretary Mickey Kantor spoke about the fact that, with 230 trade agreements currently on the books, we have the smallest trade enforcement agency of any of the industrialized world, which was pretty significant when you think of it that way.

Recently, over the President's Day recess, I had a round table with manufacturers, and Under Secretary Padilla was gracious enough to come in and meet with a number of business people. One of the things that we heard is frustration that the companies have to identify the problem, identify the source, bring the problem to Customs' attention, and only then could they—maybe—get some kind of action.

And so I wonder if you might speak more about Customs being proactive rather than reactive and all the cost that involves for businesses right now in the way this is set up.

Mr. BANKS. Well, quite frankly, Senator, I think Customs is proactive in this area. They really do try to focus in on some of this. But for the most part, I do not think industry knows about a lot of those efforts because CBP is a law enforcement agency. They do not share this information. I mean, they will share information on individual seizures, but I really do think they are trying to work this. Could they work it harder? You betcha. No question about that.

Now, about industry supplying intelligence information or lookout information, I think industry tries to do that. I guess—and we have heard it from some of the representatives today—CBP takes that information in but they really do not inform industry as to what happens with that information. They really are not overly communicative. Again, they are a law enforcement agency. Some of that is understandable. But it would help if there were a closer partnership, if there were better systems in place to be able to ensure that there were coordinated intellectual property rights enforcement capabilities.

Senator STABENOW. So you are feeling at this point that this is a communications issue as much as it a——

Mr. BANKS. I think it is a communications issue. I also think Mr. Brown and Ms. Tease talked about some improvements, some process improvements. How can you get this information to the agency? How can you simplify the process for industry to be able to supply

that information? I think there were some great suggestions in that testimony in order to be able to accomplish that.

Senator STABENOW. All right. A question from manufacturers to all of you. Many major U.S. companies are already participants in the U.S. C-TPAT program. These companies receive almost no benefits under the 10+2 rule, despite their officially recognized status as a trusted trade partner. Failure to treat these participants differently wastes limited targeting and inspection resources that could be more effectively devoted to unknown or suspect parties. Do any of you know why the program does not link the C-TPAT risk management program together? Anyone want to respond to that? Mr. Brown?

Mr. BROWN. I do not know.

Senator STABENOW. You do not know. All right.

Mr. BROWN. I mean, you said it well, Senator. We do not know why they are not leveraging C-TPAT.

Senator STABENOW. Yes, Ms. Stocker?

Ms. STOCKER. One of the things that we could try to do is, in many instances if a C-TPAT company talks to their account manager, because of the number of inspections or whatever that are happening, on a discussed process, they will then see that a C-TPAT company can get less inspections or less stoppage or less review when it is noted.

So as things happen and the ports are instructed, then you can probably, if you want to say after the fact, get a better handle on having them focus on other non-C-TPAT businesses. But until you really have an issue that can be discussed with the account manager and work with the ports, sometimes who is and who is not C-TPAT does not happen in their risk models and you do get a number of inspections before that can happen.

Senator STABENOW. Well, right now, initially this is for sea-going cargo, but it is my understanding it will shift to land borders at a later date. If that happens, there is great concern in Michigan about devastating our economy, which of course is linked to our Canadian neighbors, literally, on a daily basis of people and cargo, and so on. I am wondering, do you know if Customs made any consideration of the impact of applying 10+2 to land border crossings as it relates to U.S. manufacturers?

Ms. STOCKER. I am sure they are looking at it, but we need them to look at it much more quickly and have discussions, and open discussions with the trade on what we can do proactively to continue to try to come up with some plans to better move our cargo on the land borders. But, no, they have not come up with anything specific at this time.

Senator STABENOW. Let me just ask another question, Ms. Stocker, as it relates back to product safety. In light of Customs' failure to secure the borders against counterfeit parts and dangerous goods at this point, I mean, we have serious challenges. How have importers increased their own monitoring of foreign products that they bring into the country?

Ms. STOCKER. Many companies have a quality control program. They are probably doing a lot more testing with contract manufacturers and other providers that are outside of the Nation. Specifi-

cally by program, I cannot answer that question. We can get back to you and do some research for you on that.

Senator STABENOW. It would be very helpful to know what companies are doing. I do not know, Mr. Brown, from Ford's perspective, if you could elaborate more on what Ford is doing, or other auto companies.

Mr. BROWN. Sure. Absolutely. We deploy resources on a global basis. Finding counterfeit parts in North America, for instance, in the U.S., is very important to us. But what we found, through our years of trying to combat counterfeiting and piracy, is that it is a lot more effective to go to the source and try to find where those products are coming from and to try to get the message out there that we are the wrong company to tread on.

So that is why we have a global enforcement team that is dedicated to policing our marks and our intellectual property. Frankly, that is where greater collaboration with Customs would be really very helpful, because as of now this is largely a privately funded effort. We would like to think that, with greater resources and assistance from Customs, we could be a lot more effective.

Senator STABENOW. Great. Thank you.

Well, Mr. Chairman, you are here right on time. I was done with my questions. I will turn it back over to our distinguished chairman.

The CHAIRMAN. Thank you, Senator, very much for taking the time. I very much appreciate you chairing the hearing.

And I apologize to the witnesses for this inconvenience. You are unfortunately here also during vote-a-rama day on the budget resolution, which is just nuts, is what it is.

I would like to ask a question of the witnesses about small ports and resources for personnel at smaller ports. I am getting concerned statements from some of our personnel, especially in our State of Montana, who really want to do a good job, but do not know that they have all the resources that they really need to do the job. These are smaller ports.

What can we put in the Customs reauthorization bill to address that concern? I will let anybody who wants to, answer that question, just so indicate. Mr. Banks?

Mr. BANKS. I think there are two issues there, Mr. Chairman. One is, you have tremendous turnover of personnel within Customs. They need to have kind of an incentive to be able to recruit some of the best and the brightest who are out there. One of the things that was on the administration proposal was to provide something called law enforcement status, or CICSI retirement status. It is an incentive to basically draw quality people into the organization. But I hear the President's budget omitted it. It would be great if that could be put into one of your bills to make sure that we can find the best people to come into Customs to support it.

The CHAIRMAN. Now, does that help small ports, or all Customs?

Mr. BANKS. It is going to help all ports. But the thing is, you need some of your very best people in the small ports because they have to do everything. That is the hardest part about it. You can have specialists in the bigger ports, but in the smaller ports, you

really need to get some of the very best because the breadth of the mission is astounding.

That brings, actually, the second suggestion. Much more needs to be done in terms of training. With all this personnel turnover, with all these new missions being added as part of DHS coming together, like immigration and the agricultural issues, training needs to be intensive.

The CHAIRMAN. Any thoughts though on what we can put in a bill that would help enhance that probability?

Mr. BANKS. I think this law enforcement status, CICSI coverage, is something that could be absolutely put into the bill. On training, do you specifically demand a report on what they are doing in terms of enhancing that training, especially for the small ports? Do you authorize them to have some kind of a remote video training program in order to be able to achieve that? Those are possible ideas.

The CHAIRMAN. Ms. Stocker, do you have a thought?

Ms. STOCKER. My only thought is to authorize them to have enough money to complete their systems and their training mission, because in today's environment, if you have a good computer system and a good way to train people to use it, you can do more with less. So, making sure that their funding is appropriated.

The CHAIRMAN. All right.

Mr. Brown, the same? All right.

Ms. Tease, you were raising your hand.

Ms. TEASE. Yes. I am sorry. I would add that I think substantive training in intellectual property law would be helpful. I get calls from potential clients every day who do not know the difference between a patent, a trademark, and a copyright. They want to trademark their inventions and copyright their logos. I think for our Customs officials to appreciate the differences between patents, trademarks, and copyrights, would be important.

In the trademark arena, according to the Customs regulations, they need to be able to distinguish between counterfeit goods and confusingly similar goods, so they are going to need a basic appreciation of trademark law in order to do that, and the same on the copyright side where the legal standard for infringement is substantial similarity. So I would add that the bill might address substantive training in intellectual property law.

The CHAIRMAN. Could you all again give us a flavor of or indicate the importance of the correct balance in official duties between basically commercial, say, and enforcement? That is, the problem we are going to have in our country if we do not get that balance right, that is, we do not spend enough time on the commercial side, which gets to resources, training, and so forth? Again, what are the implications? What are the consequences of not getting that balance right? Mr. Banks?

Mr. BANKS. Mr. Chairman, I think the consequences are huge. Take a look at import safety. Take a look at all these unsafe products that have made it into the country. Who is focused on that? Well, that is a trade issue to a great extent. It is equally important for the Nation's security of its public health. This trying to achieve balance between kind of the border security side and the trade side has been historic. It used to be drug enforcement versus trade. It

is a real tough balancing act. If they let one terrorist in, this is a huge, huge issue.

But today, take a look at how many times—it seems like on a daily basis you see this counterfeiter-contaminated heparin drug coming in from China. That is part of the reason CBP needs to spend more focus, more time, more attention on the trade side as they do on the enforcement or security side.

The CHAIRMAN. Who else wants to just address the consequences of not getting this right? Maybe quantify it.

Ms. STOCKER. Well, I do not think I can actually quantify it, but making sure we have good training in risk management is important. If good customers are moving goods that are very low risk, then repetitive low-risk shipments should be viewed as that and that will free up the time to take a look at the non-regular type shipments where you are probably going to have an issue. I think, as the pendulum swings, it is the risk management piece that I think sometimes is left out of the training.

The CHAIRMAN. Why is that left out? Why is risk management left out?

Ms. STOCKER. Probably because it is the hardest of them all. As we talked about the brain drain, it is over time. As you have experienced, you can figure out, what is the best way to look at this particular scenario. But I would think statisticians and other people involved in the programs should be able to figure out a way to help train young folks on risk, because, yes we have compliance, and yes we have reasonable care, and yes we have security, but it is the true balance, and where is your risk so you can target that risk in the right place.

The CHAIRMAN. Ms. Tease?

Ms. TEASE. I am happy to give you a real-world example and a quantification, Senator. I believe that, if the balance tips too far in favor of security versus IPR enforcement, there will be clients in Montana that will lose market share and dollars. My example may not sound significant like companies like Ford and Procter and Gamble, but I just completed a patent enforcement effort on behalf of a Bozeman manufacturing company.

Over the past year and a half, we have gone after six companies that were infringing our patent. We have settled with all six, and I would say the dollars in the door to this manufacturing company were about $150,000. That is a significant number to that Bozeman manufacturing company, and will pay my bills for the next 5 to 10 years. They have literally put it in the legal fund for enforcing their other patents. So, that is an example for you.

The CHAIRMAN. Now, what happened in that case? You say there was an infringement?

Ms. TEASE. Yes.

The CHAIRMAN. Could you maybe just give us a sense of the infringement?

Ms. TEASE. I will try. I have to be careful not to get into attorney/client privilege here.

The CHAIRMAN. Sure.

Ms. TEASE. But the infringers were all manufacturing these goods overseas and they were imported into the United States. Mr. Brown talked earlier about the importance of maintaining private

enforcement efforts and not relying solely on Customs to prevent these goods from getting into the U.S. So we contacted these companies, starting with cease and desist letters, and then drafted complaints and negotiated settlements.

I will add that what I am hearing from my clients is there is virtually no intellectual property screening occurring in the Seattle port, and that is where most of my clients' goods are coming through, so the onus falls on us to enforce our patent rights, again, as Mr. Brown said, once they have crossed our borders.

The CHAIRMAN. Help me a little bit. I have never worked in the Seattle port. So what happens mechanically, administratively? That is, what should a Customs official do to do the proper screening?

Ms. TEASE. I think how it is supposed to work, Senator, assuming that resources were infinite, is that containers would be physically inspected and checked against the information that Customs has on recorded marks, and not only the recorded marks, but the parties that are authorized to use or apply those marks.

That is why they ask those questions on the application form, so if they open up a container and it has one of my client's marks on it and we have recorded that mark, they can check the list of authorized parties and determine whether or not that is a counterfeit good. That, in theory, is how it is supposed to work.

I think as a practical matter, very little or no intellectual property screening is occurring, at least at the Seattle port, I suspect because of a lack of resources. I can tell you also that the same client I mentioned uses Expediters International, a Customs brokerage house that handles the 10+2 type issues, the Customs documentation, and they do not have anyone physically present at the ports either. So, it is just Customs that is there. They are the only ones receiving these containers and responsible for inspecting them.

The CHAIRMAN. I actually was at that port about a year ago and various people showed me what they do. A couple of things struck me. One is, properly, the focus on security. A lot of these containers were X-rayed, and lots of different technology applied. But it struck me that it is still pretty rudimentary. It just seemed to me there should be a better way of doing this.

For the United States of America not to have even better technology, more sophisticated, seemingly fail-safe ways to address products coming in—I am talking, only the security side struck me. But, second, on the commercial side, I did not sense that much was going on at all, frankly. That was quite concerning to me. I did not ask how would one properly screen for infringement, but I did not see them doing anything that seemed to me to be performing that duty.

What about going further out? Not only just trying to screen at the border, but other ways to protect intellectual property infringement from even getting across the ocean to the United States? What are your thoughts on that, Ms. Tease?

Ms. TEASE. Yes, Senator. I appreciate your asking that question because I think there are a lot of good things in the PRO IP Act, the bill H.R. 4297. The reason I like that Act is, it calls not only for an IP enforcement representative who would report directly to

the President and to Congress—I think intellectual property enforcement needs to be taken seriously at that level—but it would call for 10 IP attachés, diplomatic attachés to participate in diplomatic missions and/or be stationed at our embassies abroad, and 5 IP law enforcement coordinators responsible for various regions around the globe. This all gets to your issue of effectuating the cultural and economic changes required in other countries to stop piracy at its source. It would also call for a Department of Justice IP Enforcement Division. Right now, the IP work is really just occurring in the Criminal Division.

I would like to say something about these CHIP positions, Computer Hacking and Intellectual Property, the USA positions. Currently, in theory, there is one in every DOJ district within the United States. However, these positions need to be funded, as opposed to heaping additional duties on existing AUSAs, which I can tell you is what has occurred in Montana.

The CHAIRMAN. I would like to ask you also about CBP's proposal to revise the first sale rule. Without consulting the Congress, or not consulting this committee, frankly, I have serious concerns about the proposal to change the first sale rule. CBP did not consult with this committee or the industry, it is my understanding.

But what are your thoughts on the CBP's proposed first sale rule, and what kind of effect will it have on your business operations? Ms. Stocker?

Ms. STOCKER. Well, the effect on the business is that it is going to cause us to redesign our models on international trade. But we were wondering why they are trying to do this, and why they are trying to do it now when it has been well-settled, and it has been discussed in a number of cases. So it does not really make a lot of sense to do it now when our economy is not growing at this time and we really need to continue what we are doing and do it a little bit better. So we are asking the same question: why? Why now?

The CHAIRMAN. Why do you think they are? Why are they proposing this change? Why, do you suppose?

Ms. STOCKER. Well, the only thing it is really going to do, probably, is increase duties. If they are looking for money—because everybody is—that might be one of the reasons why they are doing it. But we can ask and get back to you on some additional questions. We can ask a number of our companies to find out, what their opinions would be.

The CHAIRMAN. I do not mean to overstate this next point or be kind of corny about it, but the fact of the matter is, all of us in public service work for people. I am just a hired hand for the State of Montana. Customs officials are basically hired hands. They are the employees for the people of our country. Clearly, the right attitude would be, when you are an employee, you want to do a good job for your employers, which means you want to service your employers.

So companies importing products into the United States, I presume, would like to have their employees do a really good, bang-up job and so forth, and the employees themselves want to do a really good, bang-up job and do its best for United States importers, for example.

My question, though, really is, do you find that attitude when you work with Customs? That is, boy, as a Customs official I want to do what is right here and really help. If it is not quite what you would like it to be, to what degree is it lack of resources, to what degree is it lack of training, to what degree is it just attitude, and so forth? Ms. Stocker?

Ms. STOCKER. I truly believe that everyone in the chain is trying to do the best job possible, and I think the issues really are, what are the current trends and where has the pendulum swung. So right now CBP is very, very adamant and working a lot more toward trade security versus trade facilitation. Yes, in many instances we do have a lot of very good dialogue. They take our input and we see some of the changes.

But I think as the pendulum swings back and forth at different times, at this point we are really a lot more into the security end versus in the trade facilitation end, and we would like to see that pendulum swing back. There has always been a relatively good open dialogue with regard to discussion, but sometimes the outcome is not necessarily good middle-of-the-road outcome where everyone can benefit.

The CHAIRMAN. I appreciate that. But again, and I know I am repeating myself, but how do we swing the pendulum back? What can this committee do to help get that pendulum swung back? Without sacrificing security, what do we do to get that pendulum back so we are doing a bang-up job on the commercial side?

Ms. STOCKER. Well, one of the things that I think we can do with regard to the systems is making sure that systems are better so we have more people who can work within the process and on the process to get it to be better in total, and second, taking a look at all of the different things that everybody is doing, all of the different trade programs that are out there. We need to simplify.

"Not invented here" is not a good process. Taking what is already there to make it better would work as opposed to new, new, new all the time. Let us take some well-established procedures and processes, get them working, and get them streamlined so we can all be on the same set of rules and procedures and not constantly adding new, new, and more and more.

The CHAIRMAN. But what can this committee do with respect to our oversight functions? On one extreme, we could have hearings every day and have it all lined up, different components, different parts of this problem. But we cannot do that, clearly. So what can this committee do as efficiently as possible to get the pendulum back on the commercial side?

You mentioned, Mr. Banks—I forget what the classification is so people can get paid better and that kind of a thing. But what else can we force? We could ask for reports. My view is, often you have to ask. It is good to have plans, benchmarks, quantify progress, see how you are doing—dates, deadlines, and that kind of thing. So, if we were to ask the agency to come back and give us a report, what would be some of the components in that report, assuming we have established benchmarks and deadlines to quantify progress and so forth? Mr. Banks?

Mr. BANKS. Mr. Chairman, one of the things I would suggest, I mentioned there are two computer systems. Charlene talked about

computer systems. There is something called the Automated Commercial Environment. It is basically a pipeline for trade data that comes in. There is something called ITDS, the International Trade Data System, which allows the sharing of that information across all sorts of government agencies to do a better enforcement job.

Quite frankly, both of them are under-funded. Both of them are not happening fast enough. If you really want to impact trade by developing—if you can accelerate the process of those two systems, you almost force CBP into spending more time on trade issues and trade facilitation. Authorization is key for those systems.

The other one is, you are absolutely correct, demand reports or require reports on what actual progress is being made in order to be able to share this information with both industry and with other agencies. Establish milestones that need to be met and hold their feet to the fire. I think that, just in that sense alone, would be a huge step forward.

The CHAIRMAN. Well, I appreciate that. You can help us in drafting the report language, too.

Ms. Stocker, any thoughts on what we should have the agency do when we ask them to report back to us?

Ms. STOCKER. I think Sam's point on ITDS is key. If you look at our second chart where we talk about the number of agencies that have not yet implemented, green means fully implemented on ITDS, that those agencies get all of the data. The rest of them are either in progress or very slow behind that. Once we submit data, having all of the agencies pull from that same pot of data will help everybody. So pushing the different agencies and maybe requiring them to get on ITDS, will really truly help us.

The CHAIRMAN. All right.

Ms. STOCKER. It will use the money properly.

The CHAIRMAN. Good.

Mr. Brown, your thoughts. What do we ask them to tell us in the report?

Mr. BROWN. Well, actually, I really have nothing to add to what they have said. I think they have hit the big issues right on the head.

The CHAIRMAN. All right.

Ms. Tease?

Ms. TEASE. Yes, Senator. I think Sam touched on this earlier. I think the problem really is a cultural one within Customs, from what I am hearing. They think of themselves as a law enforcement agency and not so much as a public service agency, like the U.S. Patent and Trademark Office, which has done some good things in that respect, and there is still room for improvement in others.

I think what we can do in the bill is make some very specific recommendations as to how Customs communicates with the public, with practitioners like myself and interested parties, and that would include making recordation easier—and we have elaborated on some of these recommendations in our written testimony—providing a mechanism for electronic reporting of violations, fixing the website. The Informed Compliance Publication on IPR enforcement needs to be re-posted. It has been taken down for 2 years now. Get a Help Desk like the Patent and Trademark Office has.

The CHAIRMAN. Well, I am going to have to wrap up. This has been very helpful to me, and obviously this is just a first step. I am very interested in getting this direction to Customs to have them come back and report to us. I am very interested in having you all help design the request. This is kind of exciting. We will make things happen here. We will address the culture issue, modest resources, as you have suggested. I am just very interested in kind of getting that pendulum back to where it should be, and thank you very, very much for taking the time.

The hearing is adjourned.

[Whereupon, at 10:49 a.m., the hearing was concluded.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

STATEMENT OF
Samuel H. Banks

Chairman Baucus, Senator Grassley, and other Distinguished Senators, thank you for the opportunity to appear before you regarding the United States Customs and Border Protection (CBP).

The perspective I will provide today is based on having been a career officer in the U.S. Customs Service and ultimately serving as the Deputy Commissioner until February of 2000. Since then, I have worked with numerous multinational businesses engaged in cross-border trade and am currently serving on the Commercial Operations Advisory Committee (COAC) which is the official industry advisory board to DHS and CBP. I request to have my full statement entered into the record, and I will summarize my comments.

I would like to address three issues:

1. Trade benefits for participating in CBP Initiatives
2. Support for Automated Commercial Environment (ACE) and International Trade Data System (ITDS)
3. CBP adoption of modern business practices

Trade Benefits for participating in CBP Initiatives

CBP is responsible for a myriad of challenging missions critical to our nation's future. CBP must secure our homeland against terrorism, reduce illegal immigration, prevent unsafe products and contraband from entering our nation, and enforce U.S. trade laws—all the while facilitating the flow of legitimate trade and travel which are essential for our country's prosperity and global competitiveness.

The Government frequently is accused of inaction, but this cannot be said of CBP. The number and magnitude of current CBP programs and initiatives is staggering. The acronyms for these programs cover the alphabet—ACE, ISF, SFI, GTX, SBI, ITDS, CSI, ISA, C-TPAT, WHTI, and so forth— suffice it to say, each acronym represents a major program.

CBP certainly has its hands full managing all these programs as each one represents significant change and complex challenges. However, you also need to understand that each of these programs also affects the trade and travel industries. The collective and cumulative effect of all these programs being implemented simultaneously places a serious strain and financial burden on the international business community.

The good news is that CBP is working diligently on developing these initiatives to fulfill its missions and, for most of the programs, CBP is partnering constructively with industry to ensure that the initiatives succeed. In return for industry's willing participation, CBP has promised benefits to the trade. The bad news is that many of these programs are very costly, offer few direct benefits to industry, and require companies to make significant investments in changing their operations and information systems at a time when global competitive pressures are at an all time high. Quite frankly, the position of many people in industry is the promised benefits that could assuage these costs have not been realized.

The trade community generally has been supportive of most CBP initiatives as these companies want to contribute to the security of the U.S. and the international supply chain. At the same time, these companies need to be able to compete efficiently and prosper in the global marketplace; otherwise the good impacts on security the agency seeks will not accrue if our industries suffer economically. What industry is asking of CBP is to provide some measureable, tangible benefits to the trade. The industry leaders working with CBP need some concrete evidence they can take to their boardrooms to support continued participation and investment in CBP initiatives.

CBP has sponsored studies to prove the trade does benefit from programs such as C-TPAT, but these studies have only partially allayed industry skepticism. Several industry representatives have made specific recommendations to CBP describing benefits that would be valuable to the trade and do not appear to compromise or contravene CBP's policies or mission, but little has happened.

A few quick examples of potential benefits are:

1. CBP could assist importers in their logistics planning by sending notifications of the "conditional release" of a shipment immediately when the vessel sails from the last foreign port instead of the current CBP policy to notify the trade five days prior to arrival in the U.S.
2. Companies participating in C-TPAT are promised expedited processing but there is no mechanism to go to the "head of the line" when exams are required by CBP.
3. CBP too often requires highly compliant companies to submit voluminous paper entry documents after the cargo is released—if the IRS can accept electronic tax filings, why can't CBP accept the information electronically?
4. CBP requires all importers to have similar bond coverage, why can't the amounts be reduced for companies who are highly compliant?
5. If CBP determines a random exam or compliance exam is required on a shipment from a highly compliant company, couldn't the exam be conducted at an interior port of the company's choosing?

It is in CBP's interest to promote and retain industry's cooperation by embarking on a focused, candid, and open dialogue to explore, define, and mutually agree upon satisfactory benefits for the trade. The trade community would appreciate any actions that this Committee can do to encourage such an outcome.

Support for ACE and ITDS

The one program which historically has provided the most significant benefits to industry is CBP's automation of its commercial systems. Over the past three decades, CBP's commercial information systems, such as the Automated Commercial System (ACS) and now the Automated Commercial Environment (ACE), have resulted in huge cost savings for international businesses by eliminating paper, expediting shipments, and achieving exceptional efficiencies. CBP also achieved comparable efficiencies.

ACE has even greater potential to deliver significant improvements in trade facilitation, efficient processing, and improved enforcement. One of the early features of ACE enables industry to pay duties on a monthly basis versus a daily payment process. This has saved some companies millions of dollars. The ACE Portal delivers instant access to information for companies to improve their business practices and compliance programs. The ACE Portal has also enabled government agencies to improve their oversight of international trade. The implementation of the ACE electronic manifest for truck cargo at CBP land border ports resulted in significant reductions in the processing time for cargo crossing the northern and southern borders, while allowing for advanced security targeting of that cargo.

CBP understands the importance of ACE and is working diligently to deliver it. ACE is not only critical for CBP's trade mission, it is also critical for CBP's border security mission. ACE is, in essence, a "huge pipeline" for industry to submit their global supply chain and shipment information to CBP and other government agencies. To comprehend the size of this "information pipeline," you only need to realize that it will contain comprehensive data on the nearly 32,000 ocean containers that arrive at U.S. ports every day and the information on over $2 trillion of U.S. imports annually. It is this data that feeds CBP's targeting systems to identify high-risk shipments for terrorism, contraband, unsafe products, etc.

Many in industry are not convinced that officials at the Department of Homeland Security share this understanding of how important ACE is to security, trade, and the safety of imported products. DHS officials have referred to ACE as strictly a "trade" program, not recognizing its critical role in cargo security, and it usually seems that DHS treats ACE with benign neglect. There were even concerns in this past year that DHS was trying to divert authorized ACE funding to other DHS programs.

I think you would find unanimity within the business community that ACE should receive continued funding to maintain the momentum and progress. The Senate Finance Committee has demonstrated its commitment to ACE in the past and it is hoped that your resolve will continue.

If anything, the recent crisis over the safety of imported products and foods has highlighted the importance of ACE and its companion program, the International Trade Data System (ITDS) to our nation. ITDS and ACE can integrate all relevant U.S.

Government agencies into a single information system on imports and exports into a "single window" for government and industry.

If ACE is the huge pipeline to receive data on imports, ITDS represents a collection of "feeder pipes" that distribute the appropriate data to the 43 federal agencies that participate in ITDS and which are responsible to oversee and enforce programs on import safety, intellectual property rights, trade agreements, and the myriad of other national priorities.

The President's Interagency Working Group on Import Safety issued their report in November 2007 and it is replete with references to ACE and ITDS as vital to the Government's success in preventing unsafe products from reaching American consumers. In addition, on September 10, 2007, the Office of Management and Budget instructed all the Heads of all Departments and Agencies to develop action plans to participate in ITDS.

This rhetoric is heartening; however, the reality is that the Administration has not added one more penny in 2008 for ACE, ITDS, or for any of the agencies to directly participate in ITDS.

As this Committee considers legislation to deal with import and food safety issues or to enforce trade programs, industry hopes you will think of the potential for ACE and ITDS to achieve those goals and the funding for those programs.

CBP adoption of modern business practices

CBP deserves credit for adopting a number of modern business practices over recent years, but they could achieve much more. Two examples of successful innovations are:

- ACS, ACE, and ITDS are real-life examples of "e-gov" initiatives that support vast numbers of users in both industry and government.
- CBP was an early adopter of sophisticated risk management systems similar to credit card companies' fraud prevention programs.

However, one area in which CBP could and should make more progress in replicating successful business practices is in the trade arena. The concept of "customer accounts" exist throughout the business world, in fact, many companies offer everything from "frequent flyer" status to "gold accounts."

CBP also embraced an "account" approach in dealing with major U.S. importers instead of the historic transaction-by-transaction process for each shipment. Their vision was to ensure a large importer like General Motors or Wal-Mart was compliant across the entire company instead of CBP trying to check or inspect on a shipment-by-shipment basis. To date, CBP has selected some 32 National Account Managers for major importers and most of these importers are pleased to have a primary contact within CBP.

But the reality is that importers who are National Accounts still have to deal with local port offices in addition to their CBP Account Manager. The reality is that 32 CBP Account Managers cannot possibly manage the top 1,000 importers. The reality is that not only would industry benefit from greater uniformity and consistency of treatment from CBP, but CBP also would benefit with improved compliance.

CBP should not only be more aggressive in internally adopting the practice of account management, CBP should be talking with other federal agencies to collaborate on shared account focus and should start this expansion by addressing the Import Safety issues discussed earlier. Looking at individual shipments will not identify every threat to food, toys, and other products entering the country's ports, and will not address the root problems. Working with major importers through an account management process, on the other hand, will engage their resources and focus their attention on the foreign suppliers where these problems originate.

Thank you, Mr. Chairman and members of the Committee, this concludes my oral statement.

QUESTIONS FOR THE RECORD
Hearing on "Customs Reauthorization: Strengthening U.S. Economic Interests and Security"
March 13, 2008

Responses From Samuel H. Banks, Sandler & Travis Advisory Services

Questions From Senator Grassley

Q. Do you have any concerns that current staffing levels at Customs and Border Protection and Immigration and Customs Enforcement are not sufficient to meet the growing needs of the trade community?

A. Yes, the current level and composition of staffing at CBP and ICE are not sufficient to meet the growing needs of the trade community.

CBP needs additional positions dedicated in the commercial area to deliver upon a long-promised but unrealized goal of providing National Account Managers for large importers and brokers to achieved improved regulatory compliance and improved customer service. National Account Managers should be assigned to the top 100 importers which represent 34% of the value of imports and then to the top 3000 importers which represent over 75% of import value. However, since the inception of the account management program, CBP has only appointed 32 National Account Managers which cannot begin to cover the needs of the business community. National Account Managers usually are promoted from the ranks of the most qualified CBP import specialists and hiring of these officers has lagged in recent years. Additional import specialists are needed in the ports to improve compliance and enforcement examinations which are essential for intellectual property rights enforcement and import safety inspections.

ICE needs additional agents to be dedicated specifically to intellectual property rights enforcement, investigations, and prosecutions.

Q. Customs and Border Protection recently proposed to eliminate the "first sale" rule. If implemented, what impact would this have on your clients? Could implementation of this proposal provoke any backlash from the business community, in terms of participating in public-private initiatives administered by Customs and Border Protection?

A. The elimination of the "first sale" rule will have an adverse impact on our clients who import into the U.S. Many companies have structured their business practices and established contractual arrangements based upon the long-standing precedent that "first sale" is the appropriate value for declaration to CBP.

CBP issued their reinterpretation of the "first sale" provision without notification or consultation with industry which is highly disruptive to U.S. importers. Many of our importer clients also

believe the reinterpretation is legally flawed, not in concert with prior court decisions, and is unwarranted.

Q. Last week marked the fifth anniversary of the establishment of the Department of Homeland Security. How well do you think the delegation of customs authority by the Treasury Department to the Department of Homeland Security is currently working? Do you have any recommendations for improving the current system?

A. The delegation of customs authority by the Treasury to DHS is not working as envisioned. Quite frankly, the solution is not so much to restructure this inter-Departmental delegation but to ensure that DHS takes seriously its responsibilities in the commercial arena. Other than general rhetoric on "trade facilitation" as important, DHS has not demonstrated the leadership or emphasis to ensuring border security programs are designed mindful of the criticality of sustaining international trade. DHS has not sufficiently recognized the strategic importance of government-business partnerships and the need to address benefits to industry in return for the trade's willing participation in security programs. DHS has not embraced a sufficient leadership position to promote inter-agency programs to ensure the safety of imported consumer products, foods, and pharmaceuticals. DHS largely has dismissed CBP's Automated Commercial Environment (ACE) as strictly a trade system whereas ACE is fundamental to collecting the global supply chain data that supports border security, import safety, in addition to trade facilitation and enforcement.

March 13, 2008 Testimony before Senate Finance Committee
Greg P. Brown
Counsel
Ford Global Technologies

Chairman Baucus, Senator Grassley, and members of the Finance Committee, on behalf of Ford Motor Company I want to thank you for the opportunity to testify today regarding the crucial role U.S. Customs and Border Protection has in protecting America's citizens and its economy.

I am an Intellectual Property Attorney for Ford Global Technologies, a wholly owned subsidiary of Ford Motor Company responsible for managing all of the intellectual property rights for Ford and it's subsidiaries around the world. Because Ford itself is a global technology company, we are keenly aware of the important role trade and the worldwide movement of products, technology, and ideas can play – if administered properly.

Customs is a vital partner in this administration and we have worked long and successfully with them to do so. However, the threat our industry, our country, and our economy face goes well beyond just the process of protection. It goes to what we are inadequately protecting today: America's intellectual property and thereby, its citizens, its jobs, and its economic future.

Global counterfeiting and piracy is already a serious problem and growing. It is illegal, it is often dangerous to consumers, and it is always expensive to those whose products are effectively "stolen." Yet today's counterfeit criminals enjoy greater returns with less risk.

U.S. industry invests 100's of billions of dollars in research, design, testing, production, and marketing of products. This is money wasted if overseas operators are allowed to turn intellectual property into intellectual piracy.

Estimates of intellectual piracy's global costs range from $150 billion to $750 billion annually. The IACC (International Anti-Counterfeiting Coalition) estimates approximately 5-7% of world trade is counterfeit goods. MEMA (Motor Equipment Manufacturer's Association) estimates that counterfeit goods account for $12 billion annually in the global automotive sector and this illicit trade reduces as many as 200,000 automotive jobs.

The American consumer expects automobile manufacturers will do everything they can to ensure their safety through rigorous engineering, testing, and certifying their

products. But the benefits of these efforts can be compromised when the brakes, steering or some other system in the vehicle fails due to a counterfeit part.

Counterfeiters are eager to develop replacement parts that look similar – if not identical – to the original equipment, authorized part. Today's technologies allow copied parts to visually deceive consumers even though they do not meet original design, engineering, or safety standards.

For example, we have submitted counterfeit parts for product testing by the respective supplier of the original authentic part. In a recent evaluation of a suspension component, the test engineer's summary states:

"The counterfeit parts were found to have similar dimensions as the originals and numerous trademark identifications (i.e. part number, logo, assembly, etc). However, the materials, machining, and sealing systems are of low quality and are not recommended for use on any vehicle."

Ford Motor Company takes the issue seriously. We deploy resources globally to protect our consumers. Our strategic efforts focus on several fundamental areas:

- IP enforcement – trademarks, copyrights and patents;
- Training – including our own employees, Customs/law enforcement, etc.
- Monitoring internet activities;
- Controlling security – packaging and the distribution/supplier chain; and
- Ongoing communications with customers, industry groups, and governmental bodies around the world.

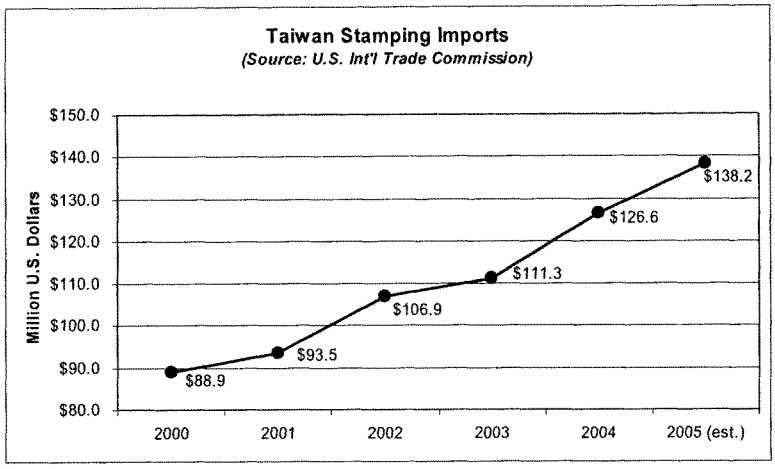
We have established a global network of investigators and we work with industry groups such as the U.S. Chamber of Commerce, Coalition Against Counterfeiting and Piracy (CACP), IACC, and MEMA, to name just a few of our partners in this effort.

In addition, Ford along with our industry partners, works with government and law enforcement agencies around the world, beginning with the United States Customs and Border Protection and the United States Patent and Trademark Office (USPTO) here at home, to pinpoint counterfeiters and put them out of business.

We have learned some important lessons in the area of intellectual property enforcement.

Intellectual property is the very foundation of a competitive business. It helps define a company's brand integrity, its products, and its critical technologies. Effectively leveraging intellectual property not only encourages research & development spending, it is the fuel for the R&D engine, and it is something every shareholder demands in today's economy.

It is up to each company and in the interest of every nation to ensure their intellectual property is protected and respected around the world. Today's technology combined with the internet and the speed of commerce has changed the playing field. An example of a growing problem for us is illustrated by the following chart.



This chart demonstrates incredible growth from just one country in copying sheet metal parts. Today's technology makes it possible for a company anywhere in the world to rapidly "photocopy" an existing part.

These copy-parts are then sold as cheap alternatives to original parts. Consumers, especially subsequent consumers, have no way of seeing these parts are fakes.

In addition to the consumer and brand implications, as in counterfeiting generally, these are highly profitable sales for those in the counterfeiting business. There are enormous cost savings when there is no product development or marketing cost.

Ford alone estimates lost sales of $400 million per year due to these copy parts. If that is 15% of the market, lost industry sales must exceed $2 billion.

Ford decided to do some thing in response to this growing problem. Ford sought and obtained design patents from the USPTO for ornamental and distinctive exterior parts of our vehicles. Next, after lengthy and expensive proceedings in the International Trade Commission (ITC), we obtained an exclusion order. This order prohibits the importation of copies of seven parts of our popular F150 pickup truck. For Ford, this victory demonstrates the importance of applying specific intellectual property (design patents) to solve a specific problem (automotive design piracy).

While welcome, this victory also clearly demonstrates problems preventing us from effectively combating design piracy.

First, 3 of the 10 patents were held invalid due to one of the many technicalities a design patent owner must face during enforcement proceedings. These design patent technicalities result in successful enforcement in fewer than 35% of design patent cases tried. Unfortunately, this success rate encourages copy-catters, while discouraging original manufacturers rightfully seeking to protect themselves.

Second, a major loophole exists in the timing involved in stopping design piracy with design patents. Using the fastest process available to us, there is at least a 30 month window between product introduction and enforcement. Using this window, design pirates fill their U.S. warehouses with imported copy parts sufficient to meet demand for years to come. Prior to the issuance of an exclusion order, Customs cannot seize duplicate parts, despite our patents. Once these parts are inside our borders, even when we beat the unfavorable odds, an ITC ruling provides no remedy against parts already on shore.

For our victory to have real meaning, there needs to be swift and effective enforcement of the exclusion order. Therefore, we partner with Customs to enforce this victory by supporting Customs in their efforts to stop these shipments from entering the United States. Customs' efforts are a critical element in ensuring that U.S. consumers and our customers are supplied with only parts that meet Ford's exacting safety and quality standards. With additional funding and resources, Customs could do much more.

Ideally, a simpler and more efficient mechanism for stopping design piracy would exist. A simple registration scheme for designs would prevent exact copying of our ornamental and distinctive exterior parts. That design should go to Customs shortly after a new product launches. Customs would then enforce the registration, much the same as they enforce our design patents under an exclusion order today. Such an approach would be consistent with the underlying U.S. intellectual property policy goals and mirror the intellectual property rights protection provided in Brazil, France, Germany, Japan, and many other countries.

At the least we should greatly reduce the two-and-a-half year loophole in the current system before we can obtain an exclusion order. Such a delay is effectively a denial of rights and should be eliminated.

Finally, Ford also believes that Customs should be encouraged to be more effective and efficient with its existing programs and initiatives such as Customs-Trade Partnership Against Terrorism (C-TPAT). Ford is proud to have been one of the original 7 charter members of C-TPAT and we recently completed our first revalidation. These security measures can be applied beyond interdicting terrorists and terrorist weapons. A secure supply chain also helps secure the United States against counterfeit goods. We believe that Customs should better leverage its resources to all aspects of its mission, by using programs like C-TPAT to segregate known secure and responsible shippers and

importers, thus freeing Customs to focus on higher risk and less known shippers and importers. Leveraging proven programs such as C-TPAT would not only increase security, but improve Customs' performance in other areas, such as combating counterfeiting.

I should mention that Ford is also concerned that other Customs initiatives, particularly the recently announced Importer Security Filing rule (commonly known as "10+2"), which threaten to dilute Customs' focus and effectiveness on its priority missions. Customs should be challenged to make Congress and American citizens confident and comfortable that all of its efforts and initiatives have a reasonable chance of actually achieving the stated goals of increased border and supply chain security or other mission priorities such as anti-counterfeiting.

In conclusion, while we do not know the full magnitude of these problems, we do know the problem exists and is getting worse. The vehicle manufacturing business is an intensely competitive business. This competition is beneficial and consumers are getting the safest, highest quality vehicles ever produced. However these benefits are undercut, and will eventually be destroyed, by unfair competition from counterfeiters and design pirates.

Ford Motor Company is grateful for this opportunity to share our views on how to make our industry more competitive. There is a real and present threat to the U.S. consumer, industry, and economy. We must prevent this if we are to remain secure in our products and competitive as a country. Customs is the first line of defense against this unfair competition – the importing of intellectual piracy and the exporting of U.S. jobs and know-how. We must work collectively and cooperatively to harness every applicable resource to stop the threat to consumers and level the playing field for workers and industry.

Thank you.

Response to a Question for Greg P. Brown, Ford Global Technologies
Senate Finance Committee hearing of March 13, 2008 on
"Customs Reauthorization: Strengthening U.S. Economic Interests and Security"

Question from Senator Grassley

In your testimony you mention that in this day and age of technology it is easy to create counterfeit auto parts that are visually identical to parts produced by Ford. This raises a safety concern for U.S. consumers. Do you have any recommendations on how to improve coordination and cooperation between Customs and Border Protection and the business community to help safeguard American consumers? How about with respect to collaboration between Customs and Border Protection and foreign governments?

Answer

Customs has a dual mission: Secure the national borders, while facilitating legitimate trade. Stopping counterfeit goods actually combines border security, of which both physical and economic security should be considered co-equal components, and facilitation of legitimate trade.

By rating the risk of import shipments, based on what Customs knows about both the suppliers and importers, Customs can secure the borders by targeting high-risk shipments, while facilitating trade by allowing low-risk shipments to enter with minimal scrutiny. This process allows for a rational and effective deployment of limited resources.

Customs must employ effective risk assessment tools if it is to achieve either mission or both. Customs has already launched a few security initiatives that are risk-assessment based (C-TPAT and CSI), but they have not developed them enough to realize their full potential and usefulness. Instead, Customs has turned its attention to initiatives that do not distinguish import shipments according to the degree of risk to either security or trade compliance they pose ("10+2"). Customs should be encouraged, if not directed, to turn its attention back to risk assessment based methods that will be far more effective in targeting high risk shipments and enabling Customs to intercept them before they do damage, physical or economic, to the United States.

C-TPAT (Customs-Trade Partnership Against Terrorism) is one program that Ford believes offers great potential for Customs to effectively risk-assess import shipments, stop the bad ones from coming in (security), while allowing the good ones (trade

facilitation). In C-TPAT, importers provide information to Customs about their supply chains and the measures the importer has implemented to secure them. Currently, Customs validates C-TPAT applicants by auditing the information provided through on-site visits to the importer's domestic facilities and a sample of the importer's foreign suppliers. Customs can and should do more with C-TPAT.

Because C-TPAT is essentially a database containing security related information for both foreign suppliers and US importers, C-TPAT is a platform that can be immediately used to rank both suppliers and importers according to the degree of risk they pose to both security and trade compliance. Basically, the more that Customs knows about suppliers and importers, the lower the risk that a shipment poses.

In order to incorporate anti-counterfeiting into a C-TPAT risk-assessment process, we would propose a "Tier IV" (currently, C-TPAT has three tiers, with Tier III being importers which Customs has validated as having supply chain security measures that exceed basic requirements and are considered "best practices").

In Tier IV, importers would provide Customs with a list of "authorized" suppliers (suppliers with which the Importer does business) and "authorized" importers (the Importer itself and any other suppliers that may import goods in order to fulfill their commitments to the Importer). These lists of "authorized" suppliers would include:

- the importer's Tier I suppliers and service providers, and, if known,
- whether or not these suppliers are participating in C-TPAT.

These lists could also include additional information, such as:

- the type of packaging to be expected for the shipments,
- the identity of the supply chain service providers involved (freight forwarders, consolidators, brokers, etc.) and
- the ship-to locations, regardless of importer.

Tier IV shipments would have the lowest risk ratings and, therefore, given the least amount of scrutiny by Customs. Finer risk ratings within this group could be established, based on additional information provided. The amount of information provided by the C-TPAT participant to Customs would have a direct impact on the risk ratings; the more information that a C-TPAT importer can provide to Customs, the lower the risk rating for the affected shipments.

For anti-counterfeiting purposes, authorized suppliers and authorized importers would be presumed to be lowest risk of engaging in counterfeit trade. With counterfeit shipments, it is assumed that we don't know a lot about who the counterfeit suppliers or importers are. Thus, if Customs were to risk-assess import shipments based on the amount of information that is known to Customs, then by a deductive process, counterfeit shipments would have higher risk ratings and, therefore, greater scrutiny by Customs.

Tier IV risk ratings would dramatically reduce the number of import shipments that Customs has to worry about. A relatively few large importers account for the majority of import shipments. Most of these large importers have a high percentage of repetitive shipments from the same suppliers with the same goods. Assuming a good number of these importers went into Tier IV status, the number of shipments that Customs would have to scrutinize would drop dramatically, clearly giving Customs a much better chance of intercepting the ones that pose an actual threat.

Formulating risk ratings would allow risk targeting to be programmed. Customs should be encouraged to devote resources to risk-assessment tools that can be effectively automated.

What is known to Customs should be the baseline for risk ratings. Thus, importers would have an incentive to provide Customs with as much information as they have in order to get legitimate shipments with the lowest risk rating possible. At the same time, if, for example, Customs knows that a foreign supplier is C-TPAT certified, Customs should apply that information and related risk rating to an importer that may not know that. The same would hold true for importers. (Customs does not do this in the current C-TPAT process.)

Importers could also start working with their suppliers to standardize the information that is provided on the documents that accompany import shipments. For example, the description of goods (apart from the tariff classification) could use industry standard definitions. Brand identity could be included in this documentation. This could be a very effective, supplemental tool to further risk rate import shipments. Use of standardized documentation information would enable Customs to identify non-standard, and, therefore, more likely to be higher risk shipments.

AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

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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. AAEI 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 befits 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, AAEI is pleased to also include a new "matrix" as part of AAEI'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. AAEI 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]assessing 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 in 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 AAEI 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, AAEI 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. AAEI 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 Statue

As the Committee is well aware, AAEI'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. AAEI cannot overstate the importance and urgency of enacting a revision of the drawback statute.

For the past four years, AAEI'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 AAEI 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, AAEI conducted an extensive survey which we the made public in AAEI'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. AAEI looks forward to working with this Committee to demonstrate our commitment to partner with CBP in pursuit of these missions.

THE AMERICAN TRADER'S GUIDE TO POST 9/11 AND HOMELAND SECURITY PROGRAMS

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UNITED STATES SECURITY PROGRAMS (POST 9/11)	A. PROGRAM DESCRIPTION													
	Responsible Government Entity	Trade Participants: U.S. Exporters	Trade Participants: Other	Prerequisites/Dependencies	Mandatory	Mode(s) of Transport (All=Future Expansion)	Distinct Security Plan Required for Program	Specific Security Equipment Requirements	Advanced Information Required (For program or per shipment)	Screen Shipment Data (Targeting)	Background Checks Required	Physical Cargo Exams (Required for Program)	Cargo Scanning at Origin	Agency Specific Minimum Security Requirements
I. DEPARTMENT OF HOMELAND SECURITY														
Advanced Trade Data Initiative (ATDI-PILOT)	DHS/CBP	Exporters	Importers			All			✔	✔	✔			✔
C-TPAT	DHS/CBP	TBD	Importers/ Carriers/Brokers/ Ports			All	✔	✔	✔	✔	✔			✔
Maritime Transportation Security Act (MTSA)	DHS/Coast Guard		Ports/ Carriers		✔	Ocean	✔							
Electronic Manifests (EMAS)	DHS/CBP/DOT		Carriers/Importers	ACE/DOT-EFM	✔	Truck (All)		✔	✔	✔				✔
Free and Secure Trade (FAST)	DHS/CBP/CBSA		Carriers	C-TPAT/ACE ID		Truck (All)	✔	✔	✔	✔	✔			✔
Container Security Initiative (CSI)	DHS/CBP/DOE	TBD	Carriers/Importers	DOE/ISPC/MTSA	✔	Ocean		✔		✔		✔	✔	✔
Known Shipper Program	DHS/TSA/FAA	Exporters	Air Carriers	FAS	✔	Air	✔	✔			✔			✔
Secure Freight Initiative	DHS/CBP/DOE	Exporters	Ports/Carriers/Importers	CSI/Pot/DOE	✔	Ocean (All)	✔ (Ports)	✔		✔		✔	✔	✔
100% Scanning	DHS/CBP	TBD	Importers/Shippers Carriers/Ports	CSI/SFI	✔	Ocean (All)	✔ (Ports)	✔		✔			✔	✔
II. OTHER GOVERNMENT AGENCIES														
Cross Border Truck Safety Inspection Program (Pilot)	DOT/SCT (Mex)		Importers/Truck Carriers			Truck	✔	✔	✔		✔			✔
Heightened HazMat Regulations	DOT/TSA/FAA	Exporters	Carriers		✔	All	✔	✔	✔		✔			✔
Bioterrorism Acts Filing	FDA/CBP		Importers/Brokers		✔	All			✔	✔		✔	✔	
Radiological and Isotopes Programs (Radiation)	DOE/CBP		Importers			All		✔		✔				
III. INTERNATIONAL/MULTILATERAL														
Safe Framework of Standards to Secure and Facilitate Gobal Trade	WCO (National)	Exporters	All	C-TPAT/AEO		All	✔	✔	✔	✔	✔		✔	✔
International Ship & Port Facility Security Code International (IPSC)	International	Exporters	Ocean Carriers/Ports		✔	Ocean	✔	✔						✔
Authorized Economic Operator	EU/Japan, et al.	Exporters	All	C-TPAT		All	✔	✔	✔	✔	✔			✔
IV. PRIVATE SECTOR														
Radio Frequency Identification Device (RFID)		Exporters	Importers/Carriers			Ocean/Truck (All)		✔		✔				
Third Party Validation (C-TPAT)	CBP		Agent			All	✔	✔	✔	✔	✔			✔
International Standards Organization (ISO)/PAS 28001		Exporters	All			All		✔	✔	✔	✔			✔
V. EMERGING AND POTENTIAL														
Container Standards and Procedures	DHS	TBD	Importers/Carriers		✔	Ocean (All)		✔						✔
Indirect Air Carrier Standard Security Program (IACSSP)	**NOT PUBLICLY DISCLOSED**													
Data Security Filing (10+2) - (Proposed in Regulation)	DHS/CBP	TBD	Importers/Shippers/ Brokers/Ocean Carriers		✔	All		✔	✔	✔				✔
Transportation Worker Identification Credential (TWIC) (Proposed in Regulation)	DHS/Coast Guard/ TSA/DOT	Exporters	Truck/Importers/Ports		✔	Ocean/Truck		✔			✔			✔
Global Trade Data Exchange (GTX)	DHS/CBP/DOC	Exporters	All	AEO/ACE/10 + 2	✔	All				✔	✔			✔
VI. COMPLIANCE WITH SECURITY IMPACT														
Focused Assessment (Control Procedures and Environment)	DHS/CBP	Exporters	Importers			All								
Container Security Device Program (CSD)	DHS/CBP	Exporters	Importers		✔	All					✔			✔
Automated Export System (AES)	CENSUS/CBP/DHS	Exporters			✔	All			✔	✔		✔	✔	
Automated Targeting System (Expanded Security Targeting System)	DHS/CBP	Exporters	Importers			All				✔		✔	✔	
Entry/ES (ABI)	DHS/CBP		Importers		✔	All			✔	✔		✔	✔	

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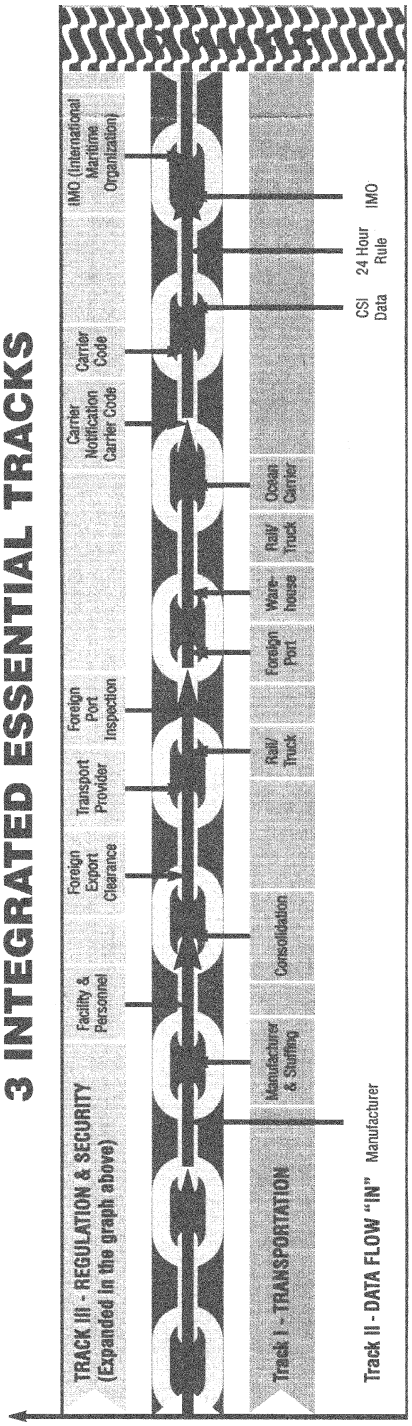
B. COMPLIANCE IMPACT*										C. RESOURCE EXPENDITURES*										
Delay-Supply Chain (<24 hours)	If Delay, < 10% of shipments?	Delay- Supply Chain (.24-48 hours)	Extended Delay- Supply Chain (48 hours-7 days)	Major Delay- Supply Chain (> 7 days)	Production System Disruption (<1 hour)	Production System Disruption (>1 hour)	Increased inventory	Mode Discrimination	Previously Uncollected Data Required	Redeployment of Internal Resources	Addition of External Resources	Added Manpower Hours (<2%)	Added Manpower Hours (> 2%)	Cost Increase (< 1%)	Cost Increase (> 1%)	Significant Financial Investment (One Time) (< 2% manufacturing costs?)	Significant Financial Investment (One Time) (> 2% manufacturing costs?)	Significant Financial Investment (Multi-year)	Time (< 2% of transport time?)	Time (> 2% of transport time?)
*This chart is a work in progress. Categories B and C reflect general consensus and are SME oriented. Thus, they underrepresent larger and multinational companies.																				
							✔		✔	✔	✔	✔			✔	✔			✔	
✔	✔	✔								✔	✔	✔		✔		✔		✔		
✔					✔						✔	✔					✔			
											✔	✔		✔		✔		✔		
✔		✔					✔		✔	✔		✔		✔		✔	✔	✔	✔	
✔		✔		✔		✔	✔	✔			✔	✔			✔	✔				✔
✔	✔						✔	✔		✔	✔	✔		✔		✔			✔	
PILOT										PILOT										
PENDING ACTION										PENDING ACTION										
PILOT										PILOT										
✔					✔	✔			✔		✔	✔			✔	✔				✔
				✔					✔	✔	✔		✔		✔		✔	✔	✔	
✔											✔	✔				✔				
PENDING ACTION										PENDING ACTION										
PILOT										PILOT										
										✔	✔				✔	✔	✔	✔		
✔	✔	✔								✔	✔	✔		✔		✔	✔			
PENDING ACTION										PENDING ACTION										
PENDING ACTION										PENDING ACTION										
UNKNOWN										UNKNOWN										
	✔	✔					✔	✔	✔	✔	✔	✔			✔		✔	✔	✔	
PENDING ACTION										PENDING ACTION										
PENDING ACTION										PENDING ACTION										
							✔			✔	✔	✔		✔		✔			✔	
PENDING ACTION										PENDING ACTION										
✔	✔									✔	✔			TBD			✔			
										✔										


THE AMERICAN TRADER'S GUIDE TO THE SUPPLY CHAIN—
3 INTEGRATED ESSENTIAL TRACKS
TRACK III - REGULATION & SECURITY
(Expanded in the graph above)
Facility & Personnel
Foreign Export Clearance
Transport Provider
Foreign Port Inspection
Carrier Notification Carrier Code
Carrier Code
IMO (International Maritime Organization)
Track I - TRANSPORTATION
Manufacturer & Stuffing
Consolidation
Rail/ Truck
Foreign Port
Ware-house
Rail/ Truck
Ocean Carrier
CSI Data
24 Hour Rule
IMO
Track II - DATA FLOW "IN"
Manufacturer

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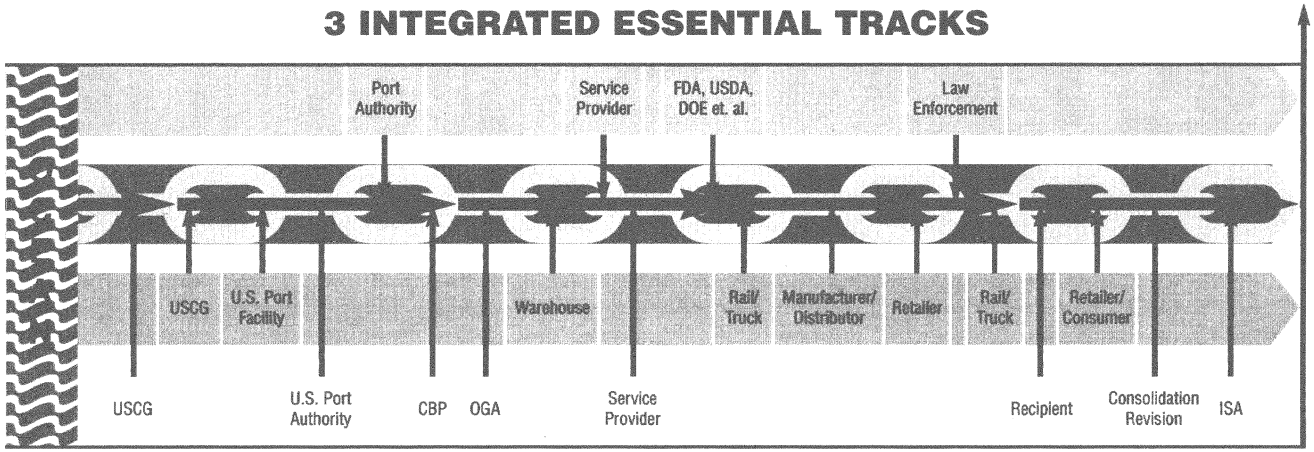

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INTERNATIONAL – THE AMERICAN TRADER'S GUIDE TO ADVANCED DATA PROGRAMS

NOTE: These charts represent the current "state of play" on the development of the data requirements for global trade. The chart on the **left side** lists the data elements required by various countries which will become harmonized with the International Trade Data Set. The chart on the **right side** depicts the status of the U.S. International Trade Data System being developed by U.S. Customs and Border Protection with 27 Participating Government Agencies of the federal government. These charts were developed by AAEI's leaders and trade professionals utilizing their best assessment based on the most recent available information.

International - Multilateral and National Data Sets (Mutual Recognition)

	Data Element Comparision	Program Description						
		European Union Regulatory Package	World Customs Organization Safe Framework Standards	U.S. System		Canada	Australia	New Zealand
				24 Hour Rule	"10 + 2"			
	Category I							
EXPORT ELEMENTS	Agent		✔	✔				
	Border Crossing Means of Transportation Identification and Nationality	✔	✔	✔				
	Consignor	✔	✔		✔		✔	✔
	Consolidator Name/Address				✔		✔	✔
	Container Stuffing Location				✔			
	Customs Office of Exit	✔	✔	✔		✔		
	Country of Origin				✔	✔	✔	
	Exporter		✔				✔	
	Manufactor Name/Address				✔			
	Place of Loading	✔	✔	✔	✔	✔	✔	✔
	Seller Name/Address				✔		✔	
	Category II							
SHIPPING ELEMENTS	Cargo Description- Brief		✔	✔		✔	✔	
	Carrier Identification/Name	✔	✔	✔	✔	✔	✔	✔
	Conveyance Reference Number	✔	✔	✔	✔	✔	✔	
	Dangerous Goods U.N. Number	✔	✔	✔	✔	✔		✔
	Declaration Date	✔			✔		✔	
	Description of Goods	✔	✔	✔	✔	✔	✔	✔
	Equipment Identification Number/Size Type	✔	✔	✔	✔	✔		✔
	Goods Item Number	✔						✔
	Marks-Shipping Mark	✔				✔	✔	
	Number of Items (Total Planned)	✔				✔	✔	
	Packages- Type/Number	✔	✔	✔			✔	✔
	Seal Number	✔	✔	✔			✔	
	Tariff Code Number	✔	✔	✔	✔	✔	✔	
	Trasport Charges Method of Payment	✔	✔				✔	
	Transportation Document Number	✔					✔	
	Weight-Total Gross	✔	✔	✔		✔	✔	✔
	Category III							
IMPORT ELEMENTS	Buyer Name/Address				✔			
	Consignee	✔	✔	✔	✔	✔	✔	✔
	Consignment Reference Number	✔	✔				✔	✔
	Country(ies) of Routing	✔	✔			✔		
	Delivery Destination	✔	✔			✔	✔	✔
	Importer		✔		✔		✔	
	Invoice- Total Amount		✔				✔	
	Location of Goods For Examination	✔					✔	
	Notifying Party	✔	✔			✔	✔	✔
	Place of Unloading	✔				✔	✔	✔
	Port of Arrival - 1st	✔	✔	✔		✔	✔	✔
	Port of Arrival Date and Time - 1st	✔	✔	✔		✔	✔	✔
	Signature	✔						
	Summary Declaration - Individual Filing	✔						

ACKNOWLEDGMENTS: Multilateral and U.S. Government data originally portrayed in matrix distributed by the World Customs Organization at its October 2007 Private Sector Consultative Group meeting. AAEI wishes to thank the Embassies of Australia, Canada and New Zealand for providing great assistance in populating the data elements required in their respective national trade data programs.

INTERNATIONAL – THE AMERICAN TRADER'S GUIDE TO ADVANCED DATA PROGRAMS

NOTE: These charts represent the current "state of play" on the development of the data requirements for global trade. The chart on the **left side** lists the data elements required by various countries which will become harmonized with the International Trade Data Set. The chart on the **right side** depicts the status of the U.S. International Trade Data System being developed by U.S. Customs and Border Protection with 27 Participating Government Agencies of the federal government. These charts were developed by AAEI's leaders and trade professionals utilizing their best assessment based on the most recent available information.

U.S. ONLY - ITDS Agency Requirements

	AGENCY / FUNCTION	AMS	APHIS	ATF	BLS	BTS	Census	CPSC	EPA	FAA	FCC	FDA	FMC	FMCSA	FSIS	FTZB	FWS	IA	IRS	ITC	MARAD	NHTSA	NMFS	NRC	OPIC	OPM	TTM	USACE	Deploy Date
ACCOUNTS	View Reports (e.g. Jones Act Violation, 24-Hour Rule Violation, Unmanifested Cargo)	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	F	Q2'07
	View Account-Related Data (e.g. Importer, Carrier, Facility, Facility Operator	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	Q2'07
	Create/Maintain FTZ Accounts															D													Q2'07
	Create/Maintain Licenses, Permits, Certificates (LPCs) by ACE Account	P	P	P									P		P								P			P		P	Q2'07
	View Account-Based Blanket LPCs by ACE Account	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	Q2'07
	View Transactional LPCs	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	Q2'09
	Log Payment in Account-Based Subsidiary Ledger		P																P				P				P	P	Q1'09
	View Financial Reports	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	Q2'07
	Extract Reference Data to File	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	Q2'07
ENTRY	Process Import Declaration							F			F					F		F										Q1'09
	Manage Census Override Functionality						F																						Q1'09
	Maintain HTS (Harmonized Tariff Schedule						F													F								Q2'09
	Process e214 (Application for FTZ Admission)		F				F									F			F					F		F		Q2'09
	View Entry Summary Data & Transaction History	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	Q1'09
	View Entry Corrections	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	Q2'09
	View Transaction History	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	Q1'09
MANIFEST	Search & View In-Land Transit Transactions	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	Q2'09
	Search & View BOL, Containers, Conveyances & Consists	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	Q2'08
	Make/Receive Recommended Action Among PGAs & View Action List	F	F	F				F	F		F	F	F		F		F		F				F	F		F	F		Q2'08
	Establish Note for Action to CBP	F	F	F				F	F		F	F	F		F		F		F				F	F		F	F		Q2'08
	Enter Requests to Transfer Cargo		F	F					F			F			F		F							F		F		F	Q2'08
	Place/Remove Holds		F						F			F			F		F							F		F		F	Q2'08
	Enter & View Findings	F	F	F				F	F		F	F	F		F		F		F				F	F		F	F	F	Q2'08
	Update Released Quantities of Seized Cargo	F	F	F					F			F			F		F							F		F		F	Q2'08
	Screen eManifest Truck Data for Safety Regulations Compliance													F															Q2'09
	View Air, Rail & Sea Manifest	F	F	F	F	F	F	F	F			F	F		F	F	F	F	F	F	F	F	F	F	F	F	F	F	Q2'09
	Monitor Authorized Movements	F	F		F	F			F		F	F	F		F	F	F	F	F				F	F	F	F	F		Q2'09
	Deny/Take Action on Admissibility (Cargo Release)	F	F	F				F	F			F			F		F	F					F	F	F	F	F		Q2'10
	View Entrance/Departure Requests of Foreign Vessels/Cargo		F				F	F					F						F		F		F				F	F	Q2'08
	View ATS Screening Results	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	Q2'08
	View Reports (e.g. Jones Act Violation, 24-Hour Rule Violation, Unmanifested Cargo)	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	Q2'09
ALL	Schedule and View Reports, Add Data Elements to Standard Reports	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	P	Q2'07
	Download Data E tracts for Local Analysis Using Own Tools	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	F	Q1'09

New Agencies / Requirements: BC, BIS, CDC, EAS, GIPSA, OES, OIE, PMA, TSA, USTR

ADDITIONAL DATA: SUNSP - Uniform Product Code (UPC)

ITDS CHART KEY: D Deployed | P Partially Deployed | F Future Functionality | Does Not Apply

ACKNOWLEDGEMENTS: This chart was originally published by the ITDS Board in its Report to Congress on the International Trade Data System (ITDS) dated November 2007 and has been slightly graphically modified for the Guide. The chart appears on page 19 of the Report and a list of Participating Government Agencies (PGAs) may be downloaded from the ITDS website (http://www.itds.gov/xp/itds/itdsbd4-organizationpages) and is also posted on AAEI's home page (www.aaei.org). Note that not all 41 PGAs are reflected in the chart because they have recently joined ITDS.

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Written Responses to Questions for the Record from Senator Grassley

United States Senate
Committee on Finance

Hearing on
"Customs Reauthorization: Strengthening U.S.
Economic Interests and Security"
March 13, 2008

A. Introduction

On behalf of the American Association of Exporters and Importers (AAEI), I am pleased to provide the Senate Finance Committee with our written responses to Questions for the Record, which were forwarded to us at the request of Senator Baucus, regarding AAEI's testimony before the Committee at its hearing on "Customs Reauthorization: Strengthening U.S. Economic Interests and Security" that was held on March 13, 2008.

B. AAEI responses

1. *How can Customs and Border Protection deliver on a "greenlane" concept to offset the numerous costs that companies incur by participating in supply chain programs? What types of benefits would be attractive to the trade community to serve as incentives?*

AAEI strongly supports the "greenlane" concept as a way to provide trade facilitation benefits to companies that provide U.S. Customs and Border Protection (CBP) with additional information about their supply chain through voluntary partnership programs, such as the Customs-Trade Partnership Against Terrorism (C-TPAT) and the Importer Self-Assessment (ISA) program. For most companies competing in today's global environment, time is money. Therefore, CBP needs to fulfill a basic bargain with the trade – the more information that a company provides in advance of shipments, the less likely the shipment would be stopped for the examination. An example of how this should work is that if CBP Headquarters designated a company as a "partner," the local port director would be, at a minimum, informed as to the substantially reduced need for determining that the shipment should be examined or otherwise detained. This is especially the case for "routine" shipments – high volume products that ship on a regular

basis (*e.g.*, weekly, monthly, etc.) from the same manufacturer, same port of export, same carrier, and the same port of entry.

AAEI strongly recommends that the Committee explore this idea of "greenlane" with CBP as a benefit to the trade in exchange for partnership program participation and it would reduce the inefficient use of scarce CBP resources.

2. *Customs and Border Protection recently issued a Request for Quotation for a program known as the Global Trade Exchange. Do your members have concerns with respect to the proposed program? Can they identify any benefits with respect to the proposed program? What types of challenges would your members face if such a program were made mandatory?*

We are happy to report that it is our understanding that CBP has suspended the RFQ for the Global Trade Exchange (GTX). Nonetheless, although not specifically discussed in our testimony, AAEI remains deeply concerned about the GTX. To be candid, we are not sure what the GTX program would entail, other than the concept that companies would send their trade data to an independent entity (*i.e.*, GTX) and then the government would request the company's data from GTX. In fact, AAEI sent a letter to Secretary Chertoff on September 5, 2007, inquiring into the specific nature of GTX and how it would be administered. (A copy of AAEI's letter to Secretary Chertoff is posted on our website at http://www.aaei.org/aaei/files/ccLibraryFiles/Filename/000000002432/Ltr%20to%20Secretary%20Chertoff%209%205%2007%20GTX.pdf.) To date, we have not received any reply from Secretary Chertoff, any Department of Homeland Security (DHS) official, or CBP official addressing AAEI's questions and concerns about GTX.

Since we have received no additional information from DHS or CBP about GTX, we are unable to provide the Committee with any information concerning benefits from GTX. If GTX were to become mandatory for U.S. companies, either importing or exporting goods, would incur additional costs and another layer of bureaucracy.

Therefore, we strongly urge the Committee to make specific inquiries of the DHS' or CBP's intentions for GTX – or any related or similar programs' framework and management principles, operating principles (and controls), data transmission protocols, access and confidentiality, just to list a few issues raised by AAEI in its letter. We are just as interested as the Committee in receiving answers to these questions before GTX proceeds as a government-sponsored program.

3. *What benefits do your members derive from their participation in the Customs-Trade Partnership Against Terrorism program. What recommendations do your members suggest for improving the program?*

AAEI would roughly characterize the primary benefits of members' participation in C-TPAT as an overarching one of "being in the club" (*i.e.*, demonstrating to CBP the company's commitment to supply chain security) and a "de facto" requirement for doing business with C-TPAT companies. (By "de facto," we mean that with over 15,000 companies in the C-TPAT program, companies avoid doing business with non-C-TPAT member companies as a business decision, even though C-TPAT only requires that companies convey the C-TPAT policies to its trading partners.) Once the company is validated as a C-TPAT partner company (*e.g.*, there are approximately 8,143 C-TPAT certified companies), it has access to CBP's C-TPAT Portal which enables the company to verify the C-TPAT status of other companies who are its suppliers, service providers, and customers. The tertiary benefit that our members perceive to be of value as a C-TPAT member is CBP's stated desire to work with C-TPAT member companies as "partners" (*i.e.*, if there are weaknesses in the company's supply chain, CBP will work with the company to implement best practices to remedy the problem). However, please note that this secondary benefit is not shared across the supply chain as several small carriers have been suspended from the program when a security breach has occurred (*e.g.*, the company reported to CBP that it found contraband in its cargo).

AAEI believes that CBP should explore more C-TPAT benefits that support trade facilitation – that is the ease, speed and cost-effectiveness of importing goods into the United States. Additionally, as we noted in our written testimony, we believe that CBP (and DHS) should provide opportunities for information sharing with C-TPAT members – particularly about the company's own trade data and any anomalies detected through CBP's targeting system.

Not only have C-TPAT members shown their commitment to supply chain security by volunteering for the program (with all its associated costs), but they also have a financial incentive to protect their brands and company good-will. AAEI also recognizes that C-TPAT member companies do experience some non-trade security related savings (*e.g.*, reduced loss and damage claims, a reduced delay in shipments, etc.). Therefore, CBP should harness companies' self-interest for supply chain security. If CBP truly desires a partnership with C-TPAT members, the dialog must be a two-way conversation when it comes to supply chain security.

4. *In your testimony, you highlighted important distinctions between security and product safety inspection systems. You also referred to the need to strike a balance between security interests and facilitating legitimate trade. How does your organization's account-based management proposal reflect the distinctions you have identified in approaching security and product safety inspection objectives?*

As discussed in our written testimony, based on our experience with risk management, AAEI recognizes that the assessment of risk for trade security and product safety are different – because they are measured by different

standards. Although we do not advocate specific standards, the distinction between these areas is that trade security is concerned about the integrity of the shipping container (*e.g.*, has the container been breached or contains something extraneous) whereas product safety is concerned about the integrity of the product itself (*e.g.*, is it adulterated, spoiled, counterfeited, etc.).

Thus, CBP can collect trade data to assess the security of a shipping container, but that same data will tell the U.S. Consumer Product Safety Commissioner absolutely nothing about whether the product has lead paint posing a health threat to consumers. In other words, chasing data about the shipments does not enable the government to make intelligent assessments about risk for product safety. The strength of account-based management is to regulate companies as a whole entity (*e.g.*, as an "account"), rather than a series of transactions.

Therefore, if companies are treated as an "account" (*i.e.*, as a complete entity importing goods into the U.S. instead of a series of unrelated shipments), the government is better able to do a "risk profile" of each account assessing the risk for trade security (*e.g.*, country of sourcing, type of product, C-TPAT membership, etc.) and product safety (*e.g.*, country of sourcing, type of product, risks associated with that product, etc.). By conducting a risk profile of each account, the government can then design partnership programs to receive more information about the products being shipped while the company takes affirmative steps to reduce those risks, and the government can concentrate scarce resources on high risk accounts (*e.g.*, non-participants in partnership programs) and high risk cargo (*e.g.*, products that pose a significant risk to the health and safety of American consumers).

An example of a benefit of account management is how it can assist CBP administer the "First Sale" rule, which we continue to believe is highly beneficial and well-established. Account managers could confer with companies on all the duty savings programs and strategies (*e.g.*, trade preference programs, free trade agreements, reconciliation, etc.) that is uses, including "First Sale" – in particular, which manufacturers, products, and shipments. As a result, CBP would have a comprehensive idea of which companies are using "First Sale" without having a ruling from CBP Headquarters.

Moreover, by working with companies as accounts, the government would be able to leverage "best practices" to reduce risks over a larger number of shipments as opposed to a "shipment by shipment" approach. (AAEI remains concerned that CBP's reversal of lawful duties savings strategies, such as "First Sale," will have a negative impact on companies' willingness to join future partnership programs sponsored by CBP because they will be paying more money in duties and have less incentive to spend additional money on voluntary programs with benefits that may be illusory.) Congress

can assist this priority by specifically funding more on the vital "account manager" positions in this Customs Reauthorization bill and strongly encourage CBP to make such positions attractive (both in compensation and prestige) to CBP employees reflecting the skill set and knowledge required for this position to be effective.

5. *Last week marked the fifth anniversary of the establishment of the Department of Homeland Security. How well do you think the delegation of customs authority by the Treasury Department to the Department of Homeland Security is currently working? Do you have any recommendations for improving the current system?*

AAEI believes that DHS plays a critical leading role in protecting the United States through its use of risk management principles to guard against catastrophic threats by "pushing out the border." While AAEI remains supportive of the DHS' mission, and CBP's role within DHS, we remain deeply concerned about the relationship between the Department of Treasury and DHS. In our written testimony, we raised a number of issues (*i.e.*, "First Sale", 9801.00.20 proposal, and data confidentiality) where the trade community has felt that traditional customs compliance and commercial issues have been relegated behind higher DHS priorities – new sources of revenue, security, and getting cooperation from foreign governments – to the detriment of the commercial interests of U.S. companies. Moreover, we believe that CBP reporting to both DHS and the Department of Treasury provides CBP will balance in its dual mission of protection the nation's borders and its revenue, and CBP (as well as Treasury) provides DHS with important international links to foreign governments and multi-lateral organizations (e.g., World Customs Organization, World Trade Organization, etc.).

We believe that more Department of Treasury officials should be assigned (and funded by the Congress) to provide the necessary oversight of CBP in carrying out its "customs revenue functions." For example, we suggest that Congress explore placing oversight of "account managers" or other functions within the Office of International Trade with the Department of Treasury as the bulk of their responsibilities will relate to "customs revenue functions." Additionally, we believe that there should be more Treasury Department outreach to the trade on a regular basis beyond representation at the quarterly Commercial Operations Advisory Committee (COAC) meetings and Trade Support Network meetings relating to the development of the International Trade Data System (ITDS). AAEI appreciates its opportunities to provide this Committee with its thoughts and comments, and we suggest that the Committee have a continued dialog with COAC to provide additional perspectives on these important issues.

Also, with utmost respect, we would encourage this Committee to maintain its traditional oversight with respect to "customs revenue function" to constantly assess whether we are striking the right balance between our nation's security and our economy.

C. Conclusion

Once again, we want to thank the Senate Finance Committee for extending an invitation to AAEI to testify before the Committee at its recent hearing. We greatly appreciated the opportunity to share with the Committee our observations, comments, and suggestions about striking a balance between trade security, trade facilitation and product safety. AAEI is fully prepared to provide any additional assistance that the Committee may request of us while it endeavors to reauthorize CBP.

Antoinette M. Tease, P.L.L.C.

TESTIMONY OF ANTOINETTE M. TEASE
U.S. SENATE COMMITTEE ON FINANCE
Hearing on Customs Reauthorization: U.S. Security and Economic Interests Through Trade Enforcement
March 13, 2008

I. INTRODUCTION

Thank you, Chairman Baucus, Ranking Member Grassley, and members of the Committee, for the opportunity to testify on the topic of intellectual property rights (IPR) enforcement. I am a patent, trademark and copyright attorney and a solo practitioner in Billings, Montana. I represent individuals, start-up companies, small businesses, universities and investors. Almost all of my clients meet the definition of a small business concern under the Small Business Act or are independent inventors or nonprofit organizations. My clients are located primarily in Montana and Wyoming, but I also represent clients in several other states and foreign countries.

From my office in Billings, Montana, I practice international patent, trademark and copyright law. My clients have protected their inventions and trademarks all over the world. In deciding whether to seek patent or trademark protection in a foreign country, the issue of whether and to what extent that country enforces intellectual property rights is a major factor. My clients also face enforcement issues. I have been involved in patent and trademark enforcement actions on behalf of Montana clients in Canada, Australia, New Zealand, Germany, Italy, Norway, Sweden, Korea, Japan and China. Thus, the protection of IP rights across borders is an important issue to Montanans.

Montana's unique character as a frontier state is reflected in its entrepreneurial spirit. Montana was ranked #1 on the Kauffman Index of Entrepreneurial Activity by

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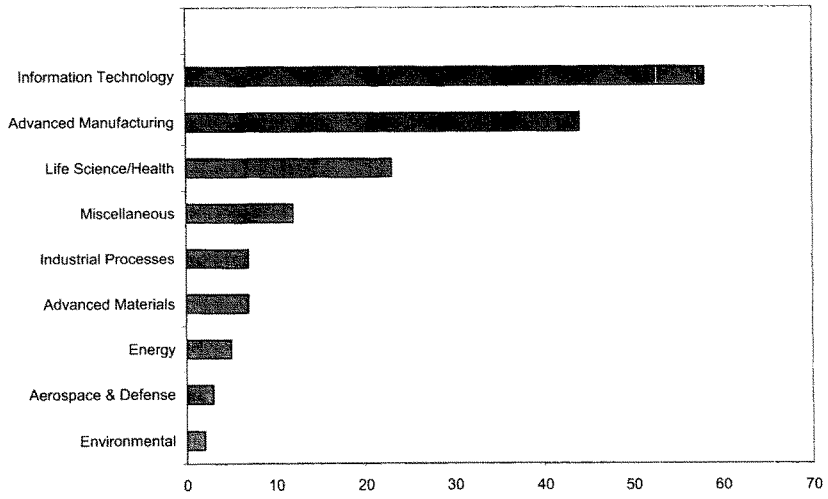
State (2006) with 600 entrepreneurs per 100,000 people. Bozeman has a thriving high-tech and software community, and inventors come to me from all parts of the state—from the Hutterite colonies in the north to the oil rigs in the east. The inventions I see range from hunting and fishing gear to agricultural equipment to software and biotech. Manufacturing still plays a role in Montana's economy; I am proud to say that I represent the only fishing wader manufacturer in the United States and the only pet toy manufacturer in the United States (both located in Bozeman, Montana). All other manufacturers in those two industries have moved their manufacturing operations overseas.

Intellectual property protection is an important part of Montana companies' ability to compete in the global economy. Between 10 and 20 patents issue to Montana inventors every month. In 2006, 162 patents issued to Montana inventors.[1] Approximately 36% of those patents were in the information technology field, 27% in manufacturing, and 14% in life sciences/health.

2006 PATENTS IN MONTANA



[1] As of the date of this testimony, the 2007 statistics are not yet available.

Technology transfer from the universities to Montana-based businesses supports the entrepreneurial climate that Montana has fostered and continues to foster. Data through 2005 indicates that out of 197 patents issued to the Montana University system, 55% of those patents were licensed to Montana companies. It is anticipated that licenses of Montana University system patents will generate over $4MM for the period 2006-2010.

Technology Transfer Activites, Montana University System

Patents Issued	197	240
Total Active Licenses	150	180
Active Licenses, MT Companies	83	110
Percent of Licenses with MT Companies	55%	59%
License/Patent Revenues	$527,484	$1,900,000
Reimbursed Patent Costs from Licenses	$731,595	$2,000,000

Source: Montana University System Institutional Reports

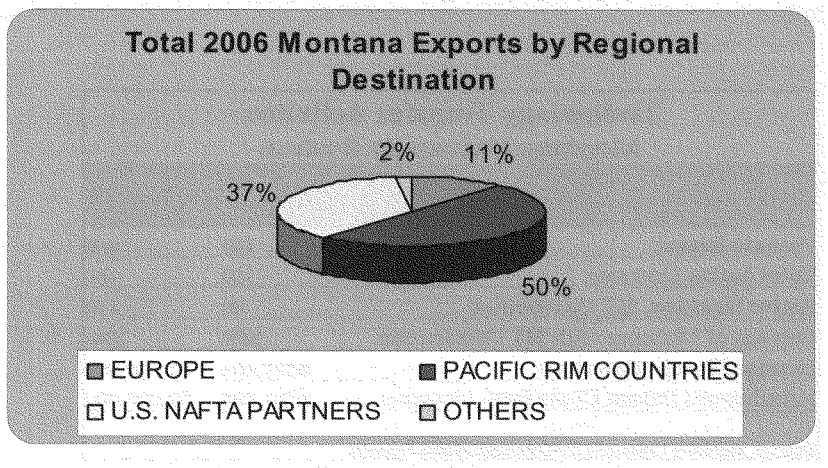
In addition to investing in intellectual property protection, Montana businesses are heavily engaged in exporting their products to other parts of the world. As of 2005, export-supported jobs linked to manufacturing accounted for an estimated 1.3 percent of Montana's total private-sector employment, and over one-twelfth (8.8 percent) of all manufacturing workers in Montana depended on exports for their jobs.[2] A total of 600 companies exported goods from Montana locations in 2005. Of those companies, 515 (86 percent) were small and medium-sized enterprises (SMEs) with fewer than 500 employees.[3]

In 2006, Montana's export shipments of merchandise totaled $887 million, and Montana's exports increased by 130 percent over 2002 levels—the third largest percentage increase among the 50 states. Montana exported to 109 foreign destinations

[2] Source: State Export-Related Employment Project, International Trade Administration and Bureau of the Census. Information compiled by and reproduced with the permission of the Office of Trade and Industry Information, International Trade Administration, U.S. Department of Commerce.

[3] Source: International Trade Administration and Bureau of the Census, Foreign Trade Division: Exporter Database. Information compiled by and reproduced with the permission of the Office of Trade and Industry Information, International Trade Administration, U.S. Department of Commerce.

in 2006. The state's largest market in 2006 was Canada, which received goods exports of $434 million (49% of Montana's total exports that year), followed by Japan ($85 million) and Germany ($55 million). Other top markets included Mexico and Taiwan. The chart below illustrates the break-down of 2006 Montana exports by region.[4]



Montana's leading manufactured export category in 2006 was chemical manufactures, which alone accounted for $210 million, or 24 percent, of Montana's total export shipments. Other top manufactured exports included machinery manufactures ($190 million), primary metal manufactures ($65 million), and transportation equipment ($63 million).[5]

In light of the importance of both global trade and the protection of intellectual property rights to Montana companies, I would like to focus the remainder of my testimony on four areas in which I believe intellectual property rights enforcement can be strengthened. These four areas are: the recordation of trademark and copyright rights with U.S. Customs and Border Protection ("CBP") and the reporting of violative imports; the coordination of U.S. intellectual property rights enforcement efforts; the enactment of meaningful patent law reform; and collaboration with foreign governments with respect to intellectual property law reform and enforcement.

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[4] Chart prepared by the Montana Department of Commerce and reproduced with permission.
[5] Source: Original of Movement State Export Series, Bureau of the Census, Foreign Trade Division. Information compiled by and reproduced with the permission of the Office of Trade and Industry Information, International Trade Administration, U.S. Department of Commerce.

II. FACILITATE THE RECORDATION OF TRADEMARK AND COPYRIGHT RIGHTS WITH U.S. CUSTOMS AND THE REPORTING OF VIOLATIVE IMPORTS

A. Integrate the CBP Recordation Process With the Trademark and Copyright Registration Process.

Owners of trademarks and copyrights may record their marks with CBP, thereby facilitating the ability of CBP to prevent and detect illegal imports. First, I would like to applaud CBP for implementing an electronic recordation system. This has greatly simplified the application process and made it more user-friendly. However, the CBP recordation process could be streamlined even further by integrating it with the registration process at the U.S. Patent and Trademark Office ("USPTO") and the U.S. Copyright Office. For example, during the process of applying for a trademark or copyright registration, the applicant should have the option of electing to record the mark with CBP for an extra fee.[6] If and when the trademark or copyright registration issues, this information should be transmitted to CBP and the trademark or copyrighted work automatically recorded with CBP.[7]

Many of my clients would choose to record their marks and/or copyrighted works with CBP if it did not entail a separate recordation process (it is not so much the fee as the fact that a separate recordation process is entailed that deters many of my clients from registering their marks or works with CBP). As a practical matter, although CBP is technically authorized to enforce non-recorded trademark and copyright rights, their enforcement efforts are focused on those rights that have been recorded with the CBP.[8]

B. Integrate the Renewal Periods for CBP Recordations with Trademark Registration Renewal Periods.

Under current CBP regulations, a CBP trademark recordation "shall remain in force concurrently with the 20-year current registration period[9] or last renewal thereof in the [USPTO]."[10] A CBP copyright recordation "shall remain in effect for 20 years unless

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[6] Currently, the U.S. Patent and Trademark Office sends out a one-page flyer with all Certificates of Registration informing the registrant of the availability of recordation with CBP, but there is no automated process tying registration of a trademark with the USPTO to recordation of the mark with CBP.

[7] This same recommendation has been made by the U.S. Chamber of Commerce in their Draft Finance/Ways & Means Legislation (dated Oct. 22, 2007), Section 205(b).

[8] *See, e.g.*, "Trademark and Tradename Protection," Customs Directive No. 2310-008A (April 7, 2000), Section 4.1 ("Unrecorded trademarks which have been registered with the USPTO on the Principal Register, while not a priority, may be enforced, if and when possible, and in such a manner as in the sound administration of the Customs laws shall not be compromised.").

[9] The reference to the "20-year current registration period" is based on old law. Registrations granted prior to November 16, 1989 had a 20-year term, and renewals granted prior to November 16, 2989 also had a 20-year term. Registrations and renewals granted on or after November 16, 1989 have a 10-year term.

[10] 19 C.F.R. 133.4(b).

the copyright ownership of the recordant expires before that time." At the USPTO, trademark registrations must be renewed between the ninth and tenth years after registration, and every ten years thereafter. Copyright registrations with the U.S. Copyright Office need not be renewed.[11]

If CBP recordation is integrated with the USPTO registration process for trademarks, then CBP trademark recordations should be automatically renewed—upon payment of a CBP renewal fee—at the same time that the trademark registration is renewed with the USPTO. Because copyright renewals are no longer required for most works, requiring CBP recordations to be renewed every 20 years is reasonable. In the absence of a CBP-enforced renewal period for copyrighted works, copyright recordations would remain in the CBP records indefinitely, and CBP would not know when those copyright terms expire (because the expiration date depends upon when the author dies or, for works made for hire, when those works are created or published). As a practical matter, the copyright holder may not know, at the time of recordation with CBP, the date on which the copyright will expire (either because the author is still living or because the work made for hire has not yet been published); therefore, this information may not be available at the time of CBP recordation.

C. *Allow CBP Recordation Applicants to Opt Out of Providing Confidential or Trade Secret Information.*

The current application form for CBP recordation of a trademark requires the applicant to disclose (i) the names of all parties authorized to apply the trademark and the nature of the relationship to the owner (*e.g.*, licensee, subsidiary, manufacturer, etc.), (ii) the names of any persons or business entities, foreign or domestic, who use the trademark and a description as to those uses(s). Similarly, the application form for CBP recordation of a copyright requires the applicant to disclose the names of all parties authorized to use or reproduce the copyrighted work and the nature of the relationship to the owner (*e.g.*, licensee, subsidiary, manufacturer, etc.).

For many clients, the type of information required on the CBP trademark and copyright application forms may be considered proprietary and confidential and/or a trade secret. Even if CBP purports to keep this information confidential,[12] some clients will still be deterred from recording their marks and/or copyrighted works with CBP because they are uncomfortable disclosing this information to a governmental entity.

CBP should allow recordation applicants to opt out of providing information that they consider confidential and proprietary and/or a trade secret. Without this

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[11] Works created on or after January 1, 1978, are not subject to renewal registration.

[12] There is nothing in the applicable regulations that addresses the confidentiality of information provided to CBP in connection with the recordation process. *See* 19 CFR 133.1 *et seq.*(trademarks) and 19 CFR 133.31 *et seq.* (copyrights).

information, CBP may not be able to determine whether a shipment contains violative imports; therefore, in exchange for exercising the right not to provide information on authorized dealers, distributors, etc., the recordant should be required to call to the attention of CBP any shipments containing violative imports of which the recordant is aware (with particulars provided by the recordant in writing) so that CBP can intervene.[13]

D. Provide an Automated Process for Reporting Violative Imports.

According to CBP, the Customs IPR enforcement regime "offers rights holders a two-tiered enforcement option...." The first tier is the recordation process, and the second tier is the "application process."[14] The "application process" refers to the process by which rights holders provide CBP with information relative to the importation of violative imports so that Customs can prevent such importation.[15] The main page for CBP IPR[16] contains information on IPR recordation, IPR searches, and IPR enforcement. For IPR enforcement, links are provided to certain directives (on Trademark and Tradename Protection, Exclusion Orders, and the Personal Use Exemption for Trademarks), but none of these directives addresses *how to report* a violative import to CBP. In fact, under the "Enforcement" heading, the CBR IPR main page says:

> The first step in obtaining IPR protection by CBP is to 'record' validly registered trademarks and copyrights with CBP. Detailed information and electronic forms is [sic] available at the links above.

Detailed information *is* provided about *recording* a trademark or copyright with CBP, but very little information is provided about *how to report a violation* to CBP. In addition to providing such information on the CBP website, it would also be helpful to provide an automated process for reporting violations to CBP.

The CBP website includes a page entitled "How to get IPR Border Enforcement Assistance,"[17] which tells visitors to email or call the IPR Branch for "legal or policy-related questions about CBP's IPR enforcement." This page also includes contact information for the Los Angeles Targeting Analysis Group ("TAG") IPR Help Desk and suggests that TAG be contacted for "general IPR information or assistance." It is not at all clear from this page how a rights holder would go about reporting a violation to CBP.

In order for CBP and rights holders to work together effectively, the process of reporting violations to CBP should be easy, and the website should include a clear

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[13] As a practical matter, most CBP seizures are the result of the recordant calling such shipments to the attention of CBP.
[14] "Trademark and Tradename Protection," *supra* n. 8, Section 2.
[15] *Id.*
[16] http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ipr/.
[17] http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ipr/ipr_enforcement/ipr_enforcement_assistance.xml.

explanation of that process. Preferably, a link would be included on the IPR main page to a form whereby rights holders can report violations and receive an immediate email acknowledgment (as with trademark applications and Trademark Trial and Appeal Board proceedings). Subsequent information from CBP regarding the status of the investigation could also be provided to the rights holder by email.[18]

E. Update the Customs Enforcement of Intellectual Property Rights Informed Compliance Publication.

The CBP issues Informed Compliance Publications on various topics of interest, ranging from the NAFTA country of origin rules to the foreign assembly of U.S. components. These Informed Compliance Publications are posted on the CBP website.[19] Only one of these publications, however, deals with intellectual property rights. It is entitled "Customs Enforcement of Intellectual Property Rights" and dated March 8, 2006. This publication, however, is not currently posted. Instead, the page for this publication[20] contains the following notice:

> Due to several recent changes made to CBP's IPR border enforcement program and procedures, CBP has determined to remove the informed publication covering IPR from this site until further notice. It is our intention to significantly revise the publication, which was last revised in August 2001, and repost it on this website again in the *Spring of 2006*. In the meantime, updated and correct information covering many of the same topics can still be found at the IPR pages located at www.cbp.gov. We regret any inconvenience this may cause.

(Emphasis added.) This publication needs to be updated and re-posted in order to facilitate access to and understanding concerning the CBP IPR enforcement program.

III. ACHIEVE BETTER COORDINATION OF U.S. IPR ENFORCEMENT EFFORTS

The National Intellectual Property Law Enforcement Coordinating Council ("NIPLECC") was created by Congress in 1999 to coordinate U.S. activities to protect and enforce IPR domestically and abroad. The NIPLECC is headed by the U.S. Coordinator for International Intellectual Property Enforcement, who reports to the

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[18] The type of information that is currently disclosed to trademark rights holders is set forth in Section 5.1 and 5.2 of the "Trademark and Tradename Protection" Customs Directive (*see supra*, n. 7). The issue of disclosure of information to copyright and trademark owners is also addressed in the U.S. Chamber of Commerce's Draft Finance/Ways & Means Legislation, *supra* n. 8, Section 204.

[19] http://www.cbp.gov/xp/cgov/toolbox/legal/informed_compliance_pubs/.

[20] http://www.cbp.gov/xp/cgov/toolbox/legal/informed_compliance_pubs/customs_enforce.xml.

Commerce Secretary. NIPLECC was provided $900,000 in dedicated funding for the fiscal year 2007.[21]

Despite the best of intentions, NIPLECC has been widely viewed as ineffective. According to the U.S. Government Accountability Office ("GAO"), the NIPLECC "has struggled to define its purpose, retains an image of inactivity within the private sector, and continues to have leadership problems...."[22] In the first session of the 110th Congress, legislation was introduced in both the Senate (S. 522 (Bayh)) and the House (H.R. 3578 (Sherman)) that would eliminate the NIPLECC and instead establish an Intellectual Property Enforcement Network ("IPEN"). Under this bill, entitled the "Intellectual Property Rights Enforcement Act," the head of IPEN would come from the Office of Management and Budget ("OMB").

Also introduced in the first session of the 110th Congress, H.R. 4279 (Conyers), the "Prioritizing Resources and Organization for Intellectual Property Act of 2007," would create an Office of the U.S. Intellectual Property Enforcement Representative ("IPER"), which would take the lead in coordinating U.S. government agency IPR enforcement activities and assist the U.S. Trade Representative ("USTR") in conducting trade negotiations relating to IPR enforcement. This bill would also eliminate the NIPLECC.

The draft legislation proposed by the U.S. Chamber of Commerce proposes appointment of a Director of Intellectual Property Rights Enforcement within the Department of Homeland Security. This individual would be charged with coordinating the enforcement activities of the CBP and Immigration and Customs Enforcement ("ICE").[23]

Regardless of which avenue is taken, I believe that greater emphasis needs to be placed on coordinating the IPR enforcement efforts of various governmental agencies. Intellectual property rights have taken on such a degree of importance in our present economy that enhanced governmental action to preserve and enforce these rights is essential.

IV. ENACT MEANINGFUL PATENT LAW REFORM IN THE U.S.

No discussion of IPR enforcement would be complete without mentioning the need for patent law reform here at home. I realize that patent law reform is not the topic of today's hearing; however, I firmly believe that if we are to take a leadership position in the world with respect to intellectual property rights, we need to hold ourselves to the

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[21] "Intellectual Property Rights and International Trade," CRS Report for Congress (Dec. 20, 2007) at 43.
[22] "Intellectual Property Risk and Enforcement Challenges," GAO Testimony Before the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property (Oct. 18, 2007).
[23] U.S. Chamber of Commerce's Draft Finance/Ways & Means Legislation, *supra* n. 8, Section 101.

highest standards and deal with the difficult issues involved in the current debate over patent law reform. In that regard, I have attached as Exhibit A to my testimony a letter that I recently submitted to Senator Jon Tester concerning S. 1145, the "Patent Reform Act of 2007."

For the reasons stated in my letter to Senator Tester, I believe that S. 1145 would do more harm than good. This does not obviate, however, the need to implement balanced and well-reasoned patent law reform. If we wish our foreign trade partners to recognize the value of a stable patent system and the benefits that can be realized from fostering a climate of innovation, then we need to lead by example—and that entails maintaining a constant vigilance over our patent system to ensure that it is achieving the fundamental goal of fostering innovation without stifling competition.[24]

V. SEIZE OPPORTUNITIES TO COLLABORATE WITH FOREIGN GOVERNMENTS REGARDING IPR

Finally, in order to be effective, our IPR enforcement efforts must not stop at our borders but must encompass working with foreign governments to emphasize the importance of intellectual property laws and the enforcement of property rights created by those laws. It is one thing to stop counterfeit goods from entering our country, but it is another to effectuate the cultural and economic changes that are required to stop piracy at its source. Some of those efforts can be undertaken by the federal government, but some of those efforts can also be undertaken by private organizations such as the American Bar Association ("ABA") and the U.S. Chamber of Commerce.

By way of example, H.R. 4279 (mentioned above) would establish ten "intellectual property attachés" in the Department of Commerce. These individuals would serve in U.S. embassies or other diplomatic missions with the purpose of encouraging cooperation with foreign governments in enforcement of IPR laws and facilitating training and technical assistance programs targeted toward improving foreign enforcement of IPR laws.[25] This is one example of how the government could work directly with foreign governments to improve their IPR systems.

In a related vein, representatives of the USPTO and the USTR recently met with representatives of the Intellectual Property Office of the Philippines to share information pertaining to IPR in relation to strengthening bilateral cooperation on trade and investment. These and similar efforts to work directly with the intellectual property offices of foreign countries are a necessary part of any IPR enforcement initiative.

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[24] As some have noted, patent law reform in the U.S. may have implications as far as our Free Trade Agreements (FTAs) are concerned. See "Intellectual Property and the Free Trade Agreements: Innovation Policy Issues," CRS Report for Congress (Jan. 17, 2007), at 8-20.

[25] "Intellectual Property Rights and International Trade," *supra* n. 21, at 47-48.

Similar efforts have been and continue to be undertaken by private organizations like the ABA and the U.S. Chamber of Commerce. I had the privilege of serving on an American Bar Association Task Force made up of individuals from the ABA-IPL Section, the Section of International Law, and the Section of Science & Technology Law that prepared and presented comments to the State Intellectual Property Office ("SIPO") of China in connection with that country's recent efforts at patent law reform. The U.S. Chamber of Commerce, in conjunction with the American Chamber of Commerce-China and the American Chamber of Commerce-Shanghai, also submitted comments to SIPO in connection with the proposed amendments to the Chinese patent laws.

In sum, CBP IPR enforcement must go hand-in-hand with a strategy to work with our international trading partners—both on a public and on a private level—to share knowledge and instill a recognition that the protection of intellectual property rights is mutually beneficial. Not all foreign countries will embrace our values, but hopefully they will recognize the importance of intellectual property rights to a healthy economy. In this regard, the United States should take a vigorous and engaged role in encouraging other nations to develop reciprocal methods of IPR enforcement.

EXHIBIT A

Antoinette M. Tease, P.L.L.C.

February 19, 2008

The Honorable Jon Tester
United States Senate
Granite Tower
222 N. 32nd St., Suite 102
Billings, MT 59101

RE: Patent Law Reform – S. 1145

Dear Senator Tester:

Thank you for the opportunity to visit with you about S. 1145 and how it might impact Montana businesses, inventors and investors. I represent a lot of farmers and ranchers in addition to business people and entrepreneurs, and I believe that S. 1145 would hurt small inventors by reducing the value of their patents and making them more difficult to enforce.

As you know, I am a registered patent attorney practicing in Billings, Montana. Approximately two-thirds of my clientele is located in Montana and Wyoming. The remaining one-third is scattered throughout the rest of the United States and half a dozen foreign countries. In terms of my Montana clients, about one-third of them are start-up businesses, one-third are individual inventors, and one-third are established companies. In addition to representing patent owners, I also represent Montana-based investors seeking to invest in, or acquire, companies based in and outside of Montana.

To give you an idea as to the volume of patent activity in Montana, I have filed and prosecuted hundreds of patent applications. On average, I have filed four patent applications a month for the past several years. Based on information I provide to the *Billings Business* magazine on a monthly basis, I can say that between ten and 20 patents are issued to Montana inventors each month.

There are many reasons why Montana businesses (and individual inventors) pursue patent protection for their inventions. These reasons include preventing competitors from selling a particular product or service (*i.e.*, gaining a competitive advantage); assuring the company a certain freedom to operate (by preventing others from patenting certain inventions); treating the issued patent or patent application as a corporate asset (in terms of company valuations); and attracting investor funding. Individual inventors may be interested in licensing their patent rights and collecting

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royalties or in building a business around the patented product or service (and bringing jobs to Montana).

I have the privilege of serving on the American Bar Association Section of Intellectual Property Law (ABA-IPL) Council, which is the governing body of the Section. In that respect, and also by virtue of the fact that I have served on the ABA-IPL Section Patent Law Reform Task Force, I am familiar with the issues presented in S. 1145.

I have brought with me today copies of the ABA-IPL Section *White Paper* on patent law reform, as well as a September 20, 2007 letter from Pamela Banner Krupka, Chair of the ABA-IPL Section, to Senators Leahy and Specter, expressing the Section's opposition to S. 1145. I am not here today to reiterate the arguments made in the white paper or the ABA-IPL letter. Rather, I am here today to express my own views on certain provisions of S. 1145 in light of their impact on Montana companies.

1. Applicant Search Requirements.

S. 1145 would require that patent applicants conduct a patent search prior to filing a patent application *and* that they submit an analysis of the search results in connection with the application. Under current law, patent applicants are not under any obligation to conduct a search, although my clients do. The problem with S. 1145 is not that it would require applicants to conduct patent searches, but that it would require applicants to analyze and explain the search results to the examiner. This requirement would significantly increase the cost of filing a patent application (by potentially thousands of dollars, depending on the scope of the search results) and would cause many individual inventors and start-ups to decide not to file at all.

In addition, searches are necessarily imperfect (primarily because they involve judgment on the part of the individual conducting the search but also because the patent office—not infrequently—misclassifies patent applications), and it would be unfair to hold the applicant responsible for omissions in the search results and/or analysis. The applicant is already under a duty to bring to the attention of the patent office all prior art of which the applicant is aware, and that requirement strikes an appropriate balance between requiring candor and placing an inordinate burden on the applicant.

2. Inequitable Conduct.

Inequitable conduct is a defense raised in patent infringement litigation. According to the ABA-IPL Section, "the standard for what might constitute inequitable conduct is vague and indefinite in its application." The ABA-IPL Section has advocated for reform of the law relating to inequitable conduct so that a patent would be held unenforceable only when fraud resulted in issuance of an invalid patent claim. Although

S. 1145 would impose on applicants the search requirements discussed above, it does not include any meaningful reform of the law surrounding inequitable conduct.

If the goal is to encourage open and candid communication between the applicant and the examiner, then the penalty for intentionally misleading the patent office should be not only clear but also commensurate with the scope of the misrepresentation. Adoption of a "but for" standard (*e.g.*, a valid and infringed claim would be unenforceable only if the examiner relied on the misrepresentation in allowing the claim) would provide a disincentive for applicants who might otherwise be inclined to commit fraud on the patent office without imposing an unduly harsh penalty—unenforceability of the entire patent—that might not be commensurate with the applicant's misrepresentation or omission. It would also provide some clarity to the law, which might encourage some practitioners and their clients to be more forthcoming with the patent office when dealing with prior art.

3. Post-Grant Opposition.

S. 1145 would repeal the *inter partes* reexamination procedures, which have not been widely used but which provide a mechanism for challenging a patent in an administrative forum and which allow the challenger to take an active role in the reexamination proceeding (as opposed to *ex parte* reexamination proceeding, where the challenger's role is limited). Under current law, reexamination proceedings (whether *inter partes* or *ex parte*) can be based only on certain type of prior art (namely, patents and publications).

Under S. 1145, within 12 months after issuance of a patent, a third party could request that the patent office conduct a post-grant review to challenge the validity of the patent (this is called the "first window"). S. 1145 would also provide a "second window" of review, which could occur any time during the life of the patent, if the petitioner files the petition within 12 months after receiving an explicit or implicit notice of infringement and can demonstrate significant economic harm based on the challenged claim. Both windows would open patents up to scrutiny based on all kinds of prior art (*e.g.*, prior use, prior sale or offer for sale, etc.)—not just the limited prior art at issue in a reexamination proceeding.

The open-ended "second window" is problematic because it may have a chilling effect on patent holders in terms of enforcement of their patents. For instance, a patent holder may decide not to send a cease and desist letter for fear that it might trigger a "second window" petition for review. The "second window" would also impose a more lenient standard for invalidation of a patent ("preponderance of the evidence" rather than the "clear and convincing evidence" standard that applies in court challenges), thus eroding the certainty associated with patent ownership.

With the "second window," there is little incentive for an interested party with a potential basis for invalidating a patent to bring a challenge during the first window. Certainty is good for business, and to that extent I believe that a first window in which all types prior art can be brought to the attention of the examiner, together with a more limited mechanism for review thereafter (preferably in the form of enhanced *inter partes* reexamination procedures), makes sense.

4. Venue.

With certain limited exceptions, S. 1145 would require that an action for patent infringement be brought in the judicial district (Montana only has one judicial district) in which the infringer is incorporated or has a principal place of business or in a judicial district where the infringer committed a substantial portion of the infringing acts *and* has a regular and established physical facility that constitutes a substantial portion of the infringer's operations. Under current law, a patent holder can file suit in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or any judicial district in which the defendant is doing business. Although current law does require a nexus between the case (or the defendant) and the judicial district in which suit is brought, the venue provisions of S. 1145 would severely restrict a patent holder's choices in terms of where to file suit. In my opinion, the more restrictive venue provisions of S. 1145 would have a disproportionate impact on Montana patent holders because most infringers will be located out of state, and the costs of pursuing an out-of-state infringement action may be double or even triple what it would cost to bring suit in Montana. These venue provisions may make it impractical for Montana patent holders to enforce their patents in court for cost reasons.

5. Interlocutory Appeals.

Since the U.S. Supreme Court handed down its decision in *Markman v. Westview Instruments, Inc.*[1] in 1996, U.S. District Courts handling patent cases have handled so-called "*Markman*" hearings in which the terms used in patent claims are construed (interpreted) by the trial court. To date, the U.S. Courts of Appeals for the Federal Circuit has taken the position that appeals from *Markman* hearings are not an appropriate subject for an interlocutory appeal (an interlocutory appeal is an appeal taken up while the underlying case is still pending and prior to a final judgment). As a practical matter, if the trial court construes a claim a certain way and then grants summary judgment for one party or the other based on that claim construction, the matter could be taken up on appeal because summary judgment is a final judgment. If, however, the claim construction does not result in summary judgment being granted, typically an appeal would not be allowable at that time.

[1] 517 U.S. 370, 38 U.S.P.Q.2d 1461 (1996).

S. 1145 would allow a party to appeal a trial judge's claim construction ruling to the Federal Circuit for immediate resolution (this is called an "interlocutory appeal"). According to the Honorable Paul R. Michel[2], Chief Judge for the Federal Circuit, between 70 and 80 percent of the cases heard by the Federal Circuit are from summary judgments. Allowing litigants to appeal claim constructions rulings will delay resolution of patent cases at the trial level and significantly increase the workload of an already overburdened Federal Circuit. To the extent that certainty is good for business, I do not believe that prolonging resolution of patent cases[3] and increasing costs will be advantageous to patent holders or accused infringers.

6. Damages.

The damages provisions of S. 1145 are highly controversial because they would require a trial judge to make a factual determination as to the portion of the total economic value of the invention that is attributable to the patent holder's specific contribution over prior art—and then award damages based on that determination. This is not only a very difficult determination to make, but one that will (in the words of Judge Michel) essentially require a "second trial" after infringement has been found. Requiring such an apportionment of damages would not only further delay the resolution of patent cases, but it will also diminish the value of patents generally.

* * *

I recognize that patent law reform is needed, and I understand that many of the issues surrounding patent law reform are difficult to resolve. But I believe that on balance, S. 1145 would do more harm than good. I appreciate your consideration of these issues and would be happy to answer any questions you may have. Thank you.

Sincerely,

Antoinette M. Tease

cc: The Honorable Max Baucus

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[2] Association for Corporate Patent Counsel, Address by Hon. Paul R. Michel, Chief Judge, U.S. Court of Appeals for the Federal Circuit (Jan. 28, 2008) at 11.

[3] Judge Michel estimates that on average, the pendency time of appeals to the Federal Circuit is 11.5 months. *Id.* at 1.

Antoinette M. Tease, P.L.L.C.

TESTIMONY OF ANTOINETTE M. TEASE
U.S. SENATE COMMITTEE ON FINANCE
Hearing on Customs Reauthorization: U.S. Security and Economic Interests Through Trade Enforcement

March 13, 2008

Questions for Antoinette M. Tease, Registered Patent Attorney

From Senator Grassley

Q: In your testimony you refer to the need to collaborate with foreign governments if we want to enhance the protection of intellectual property rights. However, you did not mention the Anti-Counterfeiting Trade Agreement that that U.S. is negotiating with the European Union, Japan, and other like-minded countries. Do you view this effort as a good use of U.S. trade negotiators' time?

A: Yes, I do. I believe the question is referring to the treaty that is tentatively slated to be called "Comprehensive Treaty for Prevention of Counterfeit Products and Pirated Goods" and for which the first meeting of the parties involved was held in December 2007. As I understand it, the goal is to have the 150 members of the World Trade Organization eventually participate in this effort. The main points of the treaty include:

- a halt in exportation of counterfeit products and pirated goods;
- the seizure/destruction of counterfeit products by customs officials as well as information pooling among the authorities;
- establishment of criminal penalties for the importation of counterfeit product labels;

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- the elimination of Internet Service Providers (ISPs) providing information over the Internet concerning counterfeit product marketing;
- the disclosure of detailed information of persons marketing counterfeit products by ISPs; and
- technology/know-how transfers to developing countries for discovering counterfeit products.[1]

Q: You did not comment on the Administration's Strategy Targeting Organized Piracy, also known as the "STOP" initiative. What is your view of the STOP program? If Congress were to legislate new layers of bureaucracy over existing systems, does it risk undermining current achievements in facilitating interagency cooperation to protect intellectual property rights?

A: I don't think so. I think what is needed is greater integration and a higher level of accountability. My impression, based on my own first-hand experience as well as the research I have conducted, is that there is not a great deal of interagency cooperation occurring right now. As far as STOP is concerned, I think it is a laudable effort, and it has been well received, but it is perceived as lacking permanence because it is a presidential initiative and not the result of legislative action. I agree with the GAO's assessment (referring to the October 18, 2007 GAO report entitled "Intellectual Property: Risk and Enforcement Challenges") that STOP does not provide a fully integrated national strategy for intellectual property rights enforcement. I believe it is a step in the right direction but does not go far enough.

Q: You testified about the need for private rights holders to work with Customs and Border Protection to enforce intellectual property rights. For example, you mentioned the possibility of self-help activities like automated reporting. How else might private rights holders and other interested parties strengthen public-private partnerships to protect intellectual property rights?

A: I think there are a lot of ways in which private parties can work together with CBP to improve their processes, both in terms of recordation and in terms of enforcement. My written testimony addressed some of the ways in which CBP and rights holders can work together. But as Senator Baucus recognized in his questioning at the hearing, the issue really goes beyond specific procedural recommendations and is an issue of agency culture. Perhaps a task force comprised of private parties with experience in working with CBP could be appointed to work with CBP to help the agency address some of these cultural issues and become more service-oriented. The task force could also work with CBP to implement some of the specific recommendations that were made at the hearing and in the written testimony and to come up with additional recommendations.

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[1] This list is taken from an article by Samson Helfgott, my good friend and colleague in the American Bar Association Section of Intellectual Property Law. Sam's article appears in the Winter 2008 issue of the *IPL Newsletter*.

Q: Have you had any interactions with Immigration and Customs Enforcement regarding the investigation of possible violations of intellectual property rights? Do you have any recommendations for improving the working relationship between Customs and Border Protection and Immigration and Customs Enforcement to improve the initiation and conduct of such investigations?

A: I have not.

Q: You testified that Customs and Border Protection should allow recordation applicants to opt-out of providing information that they consider confidential, proprietary, or a trade secret. Do you know what views the agency may have regarding this issue?

A: I do not. About a year and a half ago, I tried numerous times to get through to someone at CBP knowledgeable about the issue of confidentiality of CBP submissions, but I was never able to connect with someone who could answer my questions. (I would get voice mail, no one would call me back, I would eventually get through to someone only for them to tell me that they didn't know the answers to my questions, etc.) This is one of the reasons that I recommended at the hearing that CBP put into place a Help Desk similar to the USPTO's Inventor's Assistance Center or PCT Help Desk.