



---

December 3, 2004

Office of Field Operations  
U.S. Customs and Border Protection  
1300 Pennsylvania Avenue, N.W.  
Washington, D.C. 20229

Dear Sir:

The National Industrial Transportation League (“League”) appreciates the opportunity to provide its comments on the second draft of the revised security standards applicable to importers who participate in the Customs-Trade Partnership Against Terrorism (“C-TPAT”) program.

The League represents more than 600 companies engaged in the transportation of goods in domestic and international commerce. For many years, NITL’s membership was open only to shippers and receivers of goods. However, the League recently broadened its membership to include carriers and other entities involved in the transportation of goods. The majority of League members, however, continue to be traditional shippers and receivers. The League’s shipper members use all of the modes of carriage to ship commodities of all kinds across the nation and around the world.

After September 11, 2001, the League has represented its members on a wide range of security issues before various government authorities, including the Congress, the Customs and Border Protection (“CBP”), the Department of Homeland Security (“DHS”), the Transportation Security Administration (“TSA”) and the Department of Transportation (“DOT”). In addition, many of the League’s members participate in C-TPAT and the League has been a supporter of that program and other initiatives that aim to enhance the security of our nation. In general, the League supports the development of programs and standards that would effectively improve the security of the freight transportation system, while also ensuring to the greatest extent possible the free flow of commerce.

### **Proposed Revisions to Importer Standards**

The League has carefully reviewed the second draft of the revised C-TPAT security standards for importers. It has also conferred with a select group of its members who are substantial U.S. importers of a variety of commodities across different supply chains and who are themselves participants in the C-TPAT program. The League appreciates the efforts of CBP to modify the proposed C-TPAT standards in order to address certain criticisms and concerns raised by the industry with respect to the first draft of the revised standards.

However, the League believes that the approach and standards included in the second draft, in many respects, are still unrealistic, unworkable and vague. A number of questions continue to exist regarding the implementation and enforcement of the proposed standards. Moreover, because the proposed standards are more akin to mandatory obligations and are intended to hold the importer more accountable for the security of its supply chain, significant liability concerns are created by the proposal. Accordingly, for the reasons explained herein, the League urges CBP to delay the implementation of the proposed standards for importers and to continue to work with the industry to adopt standards that are clear and achievable. CBP should also

clarify both the benefits and consequences that would result for importers that adhere to or fail to adhere to the new standards.

### **1. Risk Assessments.**

CBP no longer refers to the proposal as “minimum standards” to be applied by importers. Instead, the revised draft requires importers to apply the standards based on a risk analysis of its supply chain performed by the importer. However, CBP has not clearly defined the criteria or standards that should be considered in the risk analysis. Rather, it is left to the discretion of the importer to define the risk that will determine the appropriate security measures to be put in place. The agency has wrongly assumed that most importers have the expertise and the relevant knowledge of security threats to create a “documented and verifiable process for determining risk.”

CBP should establish the criteria to be considered by importers in performing a risk assessment, based upon its review of thousands of security plans submitted under C-TPAT, and based on security threats and vulnerabilities of which it has knowledge. Otherwise, it is likely that importers will assess risk in vastly different ways which, in turn, will lead to the implementation of inconsistent and potentially conflicting security measures. Furthermore, without further guidance from CBP as to the relevant factors for determining risk, inefficiencies and unnecessary costs would be incurred by those importers who wrongly assume that a particular location, business partner, or commodity presents a security risk when CBP believes otherwise. The League believes that CBP has a responsibility to develop clear security standards and to inform industry as to how the standards are to be implemented and enforced. The current draft is ambiguous in this regard and allows for inconsistent interpretations by importers.

### **2. Mandatory v. Voluntary Requirements**

C-TPAT was initially established as a voluntary program that enabled importers to implement security “best practices” based on their individual business practices that are approved by CBP. CBP has indicated in the proposal that the application of the revised standards based on risk continues to allow “for flexibility and the customization of security plans based on the member’s business model.” However, the specific security standards set forth in both the initial draft and in the revised draft are written in a mandatory fashion. Thus, there is a disconnect between the written standards with which importers “must” comply and the proposed flexible manner in which the standards will be enforced by CBP. This creates confusion over the extent to which importers must adhere to the new standards.

There is a fundamental question as to whether C-TPAT, which was created as a voluntary program that held importers accountable only for their own voluntary commitments, is the proper mechanism to be used to establish requirements that are more mandatory in nature. If CBP ultimately proceeds to strengthen the C-TPAT standards, the League believes that the standards should not be written as mandatory requirements. Rather, CBP should continue to require importers to adhere to security “best practices.” Alternatively, CBP could require importers to exercise due diligence or reasonable care when undertaking to implement the new standards. Accordingly, the proposed standards should be revised to eliminate the mandatory verbiage and should be changed to standards that reflect “best practices” or to standards that require importers to apply them using due diligence or reasonable care.

Moreover, there are significant concerns on the part of importers that by agreeing to adhere to the new standards they will become potentially liable to third parties, in the event of a future incident that causes personal injuries or property damage. It is the change to the more mandatory language that creates this potential liability. The fact that CBP may not intend to strictly enforce the C-TPAT standards does not reduce the liability that importers, arguably, may have to third parties, based on the importer’s “agreement” to implement the standards. In such a case, the liability exposure conceivably could be catastrophic for a company.

### **3. Business Partner Requirements.**

Notwithstanding the proposed revisions to the Business Partner standards, they remain unworkable and unrealistic. In general, these standards hold the importer accountable to ensure that its foreign business partners,

who are not C-TPAT participants, implement and adhere to security procedures and practices consistent with the C-TPAT standards (“the importer must work with these business partners to ensure that pertinent security measures are in place and adhered to by their direct/contracted business partners.”). The fact that importers lack control over the facilities and operations of their foreign contract manufacturers, suppliers and vendors makes this objective impractical, if not impossible, to meet.

Moreover, this standard raises the following questions: Is it the responsibility of the importer to determine what are pertinent security measures for its foreign vendors?; What are the consequences if one or more business partners refuses or fails to adhere to such standards?; Is an importer required to discontinue business with that particular vendor?; Would shipments coming from such entity be subject to inspections and delays? CBP needs to provide the industry with answers to these questions.

Under the revised draft, importers are responsible to develop a security questionnaire for its foreign business partners and to obtain responses to the same that will elicit the security practices and procedures that the foreign companies have in place. This standard is likely to create an incredible paperwork burden for importers, especially for large importers who may have hundreds of different foreign suppliers. It could also result in substantial inefficiencies and duplicative efforts since a single foreign vendor could be asked to respond to numerous questionnaires and to adhere to inconsistent security practices. In addition, CBP has failed to consider whether importers maintain the proper expertise to develop an appropriate security questionnaire. Sample security questionnaires or, at a minimum, greater guidance as to areas and level of detail to be included in the questionnaires should be provided by CBP.

The importer must review and evaluate the responses to the security questionnaires and “implement an appropriate plan of action, based on risk, that will assist the business partner in improving their security.” Importers also must conduct periodic reviews of business partners’ facilities, based on risk, to ensure that their business partners follow security standards that are consistent with C-TPAT. In crafting these standards, CBP has wrongly assumed that most importers maintain sufficient leverage over their foreign manufacturers, suppliers, and vendors which will ensure that such entities will agree to respond to the questionnaires and to implement corrective security measures imposed by the U.S. importer. Requiring importers to impose security procedures on their foreign suppliers is likely to be viewed as intrusive by many foreign companies who operate in a less transparent commercial environment.

Importers are being asked to perform a comprehensive risk assessment of their supply chain but it should not be assumed that importers have or can readily obtain relevant and complete security information from their business partners. Neither do importers have access to information regarding terrorist threats that would allow them to properly perform such an assessment. Furthermore, many importers are not qualified or trained and do not have sufficient resources to properly evaluate their business partners’ processes and procedures. Thus, it is questionable whether meaningful security benefits will result from the revised security standards.

Finally, if an importer fails to adhere to the business partner standards, the implications of such failure are unclear: Would the importer be forbidden from using that supplier?; Would shipments from that supplier be subject to inspections and/or delays?; Would the importer forfeit its C-TPAT status? CBP should provide the answers to these questions which would assist the trade community in understanding the workings of the program and would assist importers in evaluating the costs and benefits of the program.

#### **4. Container Security.**

To enhance container security, importers must require that procedures exist at the time of container stuffing for the inspection of the physical structure of the container and for affixing a high security mechanical seal to a loaded container. Procedures also must exist for verifying seals throughout the supply chain; reporting compromised seals to CBP; and for preventing access to or manipulation of containers held in storage. The same difficulties mentioned above regarding lack of control over the operations of foreign entities, including vendors and terminals, and the lack of sufficient leverage to impose certain requirements on such entities also apply to the container security standards. In some cases, the stuffing of the container will be handled by third parties, such as consolidators. Moreover, as a loaded container enters the stream of commerce, the importer has even less control or visibility as to its handling. It simply is not reasonable to impose mandatory requirements

on importers for activities that occur overseas at the point of container stuffing, sealing, or storage, since the importer will not be able to effectively enforce such requirements.

## 5. Other Security Requirements

For many of the other proposed security standards dealing with access controls, personnel security, procedural security, security training and physical security, it is presumed, although not clearly stated, that the application of such standards are the importer's responsibility. Whether the importer would be successful in requiring foreign vendors to adhere to such requirements, is highly questionable and, in some cases, such as for background checks, may not be legally permissible. In addition, in today's commercial environment requiring U.S. importers to perform security checks on their overseas business partners could have adverse commercial impacts on those U.S. companies as compared with their overseas competitors who are not-seeking to impose such checks on the same foreign vendors. CBP must be mindful of these commercial concerns as it seeks to adopt new security requirements for importers.

\*\*\*\*\*

Although improvements were made to the second draft, there are still significant problems that need to be addressed by CBP. The League believes that if the agency were to adopt the proposed standards, the substantial uncertainties and burdens associated with the proposal could discourage new companies from signing up for C-TPAT. It would also lead many existing participants to re-evaluate whether to continue with the C-TPAT program based on the costs and liability risks associated with the proposal as compared to the benefits derived from C-TPAT. Accordingly, the League believes that CBP should not adopt the current draft standards. Rather, it should continue to work with the industry to develop realistic and workable security standards that are likely to lead to effective security improvements. The League respectfully requests that CBP consider revising the proposed standards based on its comments herein and those of other importers and their representatives.

The League appreciates the opportunity to make its views known to CBP on this important matter and stands ready to work with the agency to further refine the proposed standards. Should you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter J. Gatti". The signature is fluid and cursive, with a large initial "P" and "G".

Peter J. Gatti  
Executive Vice President