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Tel 352 692 5493
Fax 352 692 5494

Dennis L. Bryant
Bryant's Maritime Consulting
4845 SW 91st Way
Gainesville, FL 32608-8135

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100% scanning – dying a slow death

Dennis L. Bryant

Congress cannot legislate technology, but it keeps trying.

A case in point is the requirement for scanning in a foreign port of all containerized cargo bound for the United States (the so-called 100% scanning requirement). It was supposed to come into effect on 1 July 2012. That date has been pushed back to at least 1 July 2014, if ever. The major reason for the delay is that no equipment capable of scanning maritime shipping containers in a practicable manner has been invented. The law, though, remains in place. We have reached this curious situation through a series of legislative steps.

The Maritime Transportation Security Act of 2002 included a provision directing the Secretary of the Department in which the Coast Guard is operating to establish a program to evaluate and certify secure systems of international transportation. The program was required to include establishing standards and procedures for screening and evaluating cargo prior to loading in a foreign port for shipment to the United States, as well as any other measures the Secretary considers necessary to ensure the security and integrity of international intermodal transport movements. In this instance, Congress did its job. It identified that a complex task needed to be done and assigned responsibility for accomplishment of that task to a high-ranking Administration official. Things were good.

Congress increased the specificity of its tasking in this regard when it adopted the Security and Accountability for Every Port Act of 2006 (otherwise known as the SAFE Port Act). This time the Secretary was directed to ensure that 100% of the cargo containers originating outside the United States and unloaded at a United States seaport undergo a screening to identify high-risk containers and that 100% of the containers identified as high-risk are scanned or searched before leaving a US seaport facility. There are two key provisions of this tasking. First, it required 100% screening, not 100% scanning. Second, scanning or searching of a high-risk container was only required at some point prior to the container's departure from the US seaport. In other words, the scanning or searching could be done in the foreign port, on the vessel en route (unlikely), or in the US port.

A related provision in the SAFE Port Act also directed the Secretary to deploy an integrated scanning system to scan, using nonintrusive imaging equipment and radiation

E-mail dennis.l.bryant@gmail.com
Internet http://brymar-consulting.com/

detection equipment, all containers entering the United States before such containers arrive in the US. The scanning system was to be deployed as soon as possible, but not before the Secretary determined that the system: (1) had a successful pilot program in three foreign seaports; (2) had a sufficiently low false alarm rate; (3) was capable of being deployed and operated at ports overseas; (4) was capable of integrating with existing systems; (5) did not significantly impact trade capacity and flow of cargo at foreign or US ports; and (6) provided an automated notification of questionable or high-risk cargo as a trigger for further inspection. The Secretary was directed to submit a report to the appropriate Congressional committees every six months on the status of the full-scale deployment, as well as the cost of deploying the scanning system at each foreign port.

At a 7 February 2012 Congressional hearing, US Customs and Border Protection (CBP) reported that implementation costs of the scanning regime would be approximately $16.8 billion. The Administration has not requested, and the Congress has not appropriated anywhere near the level of funding required to implement the scanning regime. In fact, Congress has refused to appropriate acquisition funds because all testing to date shows that none of the available scanning technologies are effective at detecting potential nuclear weapons or so-called dirty bombs.

Despite the technological and fiscal challenges, Congress included in the statute entitled the "Implementing Recommendations of the 9/11 Commission Act of 2007" a provision prohibiting the entry into the United States of any container that has not been scanned by nonintrusive imaging equipment and radiation detection equipment at a foreign port prior to loading on a vessel. The prohibition included an application date of 1 July 2012. Inclusion of this particular provision in this particular legislation was ironic since the 9/11 Commission not only did not make such a recommendation, it specifically recommended implementation of a risk-based protocol as part of a program to appropriately screen potentially dangerous cargo. While adopting this misguided requirement, Congress did provide an escape clause.

Putting the monkey on the back of the Secretary of Homeland Security, the escape clause allows for a two-year extension (with the possibility of additional two-year extensions) if the Secretary certifies to Congress that at least two of six conditions exist. The six conditions are (A) the required scanners are not available for purchase and installation; (B) the scanners do not have a sufficiently low false alarm rate; (C) the scanners cannot be purchased, deployed, or operated at ports overseas including, if applicable, because a port does not have the physical characteristics to install such a system; (D) the scanning systems cannot be integrated, as necessary, with existing systems; (E) use of the scanners will significantly impact trade capacity and the flow of cargo; and (F) the scanners do not adequately provide an automated notification of questionable or high-risk cargo as a trigger for further inspection by appropriately trained personnel. Congressional oversight hearings and reports from the Government Accountability Office (GAO) indicate that all six conditions have been met.

On 2 May 2012, DHS Secretary Janet Napolitano officially certified to Congress that (1) use of systems that are available to scan containers will have a significant and negative impact on

trade capacity and the flow of cargo and (2) systems to scan containers cannot be purchased, deployed, or operated at ports overseas because ports do not have the physical characteristics to install such a system. In accordance with the certification, the deadline for implementation of the 100% scanning regime has been deferred until 1 July 2014. The Secretary could well have certified that none of the six conditions have been met.

There is no reason to expect that at least five of the six statutory conditions will have been met by 1 July 2014. Thus, a subsequent two-year extension is highly probable. Absent a technological breakthrough, availability of a practicable scanner is unlikely. In addition, it is highly unlikely that Congress will appropriate the monies required to implement such a 100% scanning regime. Regardless, for the foreseeable future we will continue to go through this charade of the Secretary making a biennial certification to Congress that it did indeed adopt legislation mandating use of a non-existent technology. Congress should confine itself to what it does best – whatever that is.