



## TFTEA – CBP Organizational Structure

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Among its many provisions, the Trade Facilitation and Trade Enforcement Act (“TFTEA” or the “Act”), H.R. 644, formally establishes U.S. Customs and Border Protection (“CBP”) as a department within Homeland Security (“DHS”). Section 802(a) contains the key provisions. That section amends Section 411 of the Homeland Security Act and the U.S. Code to reflect the new department information. TFTEA marks the first authorization of CBP since passage of the Homeland Security Act in 2002, finally doing away with that awkward U.S. Bureau of Customs and Border Protection name that no one used, except in legal paper; and is, of course, the very same agency title that leads so many Administration officials and others to call it Customs and Border Patrol! By virtue of Section 802(b), CBP continues to carry out the functions, missions, duties and authorities vested in the agency from earlier times. Further, all rules, regulations and policies previously put in place by CBP remain in force.

In reviewing Section 802(a), it is clear the current structure and hierarchy of CBP has been formalized, with a few notable modifications. In this Alert, we summarize the CBP structure approved in the Act. However, one ever vexing issue is the number of reports called for from CBP in this Act and so many other laws. As a result, the Commissioner will be quite busy compiling reports and carrying out assessments, covering topics such as CBP’s Business Transformation Initiative, port of entry infrastructure needs assessments, and personal searches conducted by CBP personnel. The Act also requires the DHS Secretary to certify in writing prior to entering into or renewing an agreement with a foreign government for a trusted traveler program that the proposed or renewal partner foreign government routinely submits lost and stolen passport information of its citizens to INTERPOL and shares this information with the United States.

CBP is still headed by a Commissioner, with the revised “Commissioner of U.S. Customs and Border Protection” (Commissioner) title. He (or she) continues to be assisted by a Deputy Commissioner. The Senate Committee on Finance continues to confirm all nominees to the position and maintains sole jurisdiction over confirmation of the Commissioner.

Starting with a humble beginning, including collection of duties, excise taxes, fees and penalties on imported merchandise due to the desperate need for revenues after the U.S. declared its independence in 1776, the duties of the Commissioner have not surprisingly expanded over time. Now, CBP is one of the world’s largest law enforcement organizations, employing over 60,000 individuals. The current duties of the Commissioner are formally stated in the Act and, for the most part, represent the role the trade community knows. However, those duties are now expanded even further:

The Commissioner shall —

1. coordinate and integrate the security, trade facilitation, and trade enforcement functions of CBP;
2. ensure the interdiction of persons and goods illegally entering or exiting the United States;
3. facilitate and expedite the flow of legitimate travelers and trade;
4. direct and administer the commercial operations of CBP, and the enforcement of the customs and trade laws of the United States;
5. detect, respond to, and interdict terrorists, drug smugglers and traffickers, human smugglers and traffickers, and other persons who may undermine the security of the United States, in cases in which such persons are entering, or have recently entered, the United States;
6. safeguard the borders of the United States to protect against the entry of dangerous goods;
7. ensure the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland;



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8. in coordination with U.S. Immigration and Customs Enforcement (“ICE”) and United States Citizenship and Immigration Services, enforce and administer all immigration laws, ... , including—
  - a. the inspection, processing, and admission of persons who seek to enter or depart the United States; and
  - b. the detection, interdiction, removal, departure from the United States, short-term detention, and transfer of persons unlawfully entering, or who have recently unlawfully entered, the United States;
9. develop and implement screening and targeting capabilities, including the screening, reviewing, identifying, and prioritizing of passengers and cargo across all international modes of transportation, both inbound and outbound;
10. in coordination with the (DHS) Secretary, deploy technology to collect the data necessary ... to administer [a] biometric entry and exit data system;
11. enforce and administer the laws relating to agricultural import and entry inspection ...;
12. in coordination with the Under Secretary for Management of the Department, ensure that CBP complies with Federal law, the Federal Acquisition Regulation, and the Department’s acquisition management;
13. ensure that the policies and regulations of CBP are consistent with the obligations of the United States pursuant to international agreements;
14. enforce and administer—
  - a. the Container Security Initiative program ...; and
  - b. the Customs–Trade Partnership Against Terrorism program ... ;
15. conduct polygraph examinations...;
16. establish the standard operating procedures ...;
17. carry out the training required ...; and
18. carry out other duties and powers prescribed by law or delegated by the Secretary.

The current Commissioner (Gil Kerlikowske) may continue to serve until a new Commissioner is appointed, which will likely to happen only once a new administration is in place, if then. The Deputy Commissioner (Kevin McAleenan), and individuals serving as Assistant Commissioners (such as Todd Owen and Brenda Smith) and other officers and officials may continue to serve as the Executive Assistant Commissioners, Deputy Commissioner, Assistant Commissioners, and other officers and officials, as appropriate, unless the Commissioner decides to replace any of them.

Certain operational offices within CBP were formalized by Section 802(a) of the Act:

#### U.S. Border Patrol

The Chief of U.S. Border Patrol (“Border Patrol”) will now be at the level of Executive Assistant Commissioner (“EAC”), and each EAC continues to report to the Commissioner. The duties of the office are to:

- A. serve as the law enforcement office of CBP with primary responsibility for interdicting persons attempting to illegally enter or exit the United States or goods being illegally imported into or exported from the United States at a place other than a designated port of entry;
- B. deter and prevent the illegal entry of terrorists, terrorist weapons, persons, and contraband; and
- C. carry out other duties and powers prescribed by the Commissioner.

#### Air and Marine Operations

The person heading up this office will now be at the level of EAC. Air and Marine Operations duties are to:





- A. serve as the law enforcement office within CBP with primary responsibility to detect, interdict, and prevent acts of terrorism and the unlawful movement of people, illicit drugs, and other contraband across the borders of the United States in the air and maritime environment;
- B. conduct joint aviation and marine operations with ICE;
- C. conduct aviation and marine operations with international, Federal, State, and local law enforcement agencies, as appropriate;
- D. administer the Air and Marine Operations Center; and
- E. carry out other duties and powers prescribed by the Commissioner.

#### *AIR AND MARINE OPERATIONS CENTER.*

The Air and Marine Operations Center continues under the Border Patrol EAC. The Air and Marine Operations Center duties are to:

- i. manage the air and maritime domain awareness of the Department, as directed by the Secretary;
- ii. monitor and coordinate the airspace for unmanned aerial systems operations of Air and Marine Operations in CBP;
- iii. detect, identify, and coordinate a response to threats to national security in the air domain, in coordination with other appropriate agencies, as determined by the Executive Assistant Commissioner;
- iv. provide aviation and marine support to other Federal, State, tribal, and local agencies; and
- v. carry out other duties and powers prescribed by the Executive Assistant Commissioner.

#### Office of Field Operations

The Office of Field Operations (“OFO”) is the largest component within CBP. As international traders know, OFO is responsible for managing CBP operations at regional or field offices, ports of entry, and pre-clearance stations overseas. The Assistant Commissioner will now be an EAC, still reporting to the Commissioner. OFO coordinates CBP’s enforcement activities at U.S. air, land, and sea ports of entry, in order to:

- A. deter and prevent terrorists and terrorist weapons from entering the United States at such ports of entry;
- B. conduct inspections at such ports of entry to safeguard the United States from terrorism and illegal entry of persons;
- C. prevent illicit drugs, agricultural pests, and contraband from entering the United States;
- D. (D) in coordination with the Commissioner, facilitate and expedite the flow of legitimate travelers and trade;
- E. administer the National Targeting Center;
- F. coordinate with the Executive Assistant Commissioner for the Office of Trade (“OT”) with respect to the trade facilitation and trade enforcement activities of CBP; and
- G. carry out other duties and powers prescribed by the Commissioner.

#### *NATIONAL TARGETING CENTER.*

An Executive Director will head up the National Targeting Center, reporting to the OFO EAC. The Center’s duties are to:

- i. serve as the primary forum for targeting operations within CBP to collect and analyze traveler and cargo information in advance of arrival in the United States to identify and address security risks and strengthen trade enforcement;
- ii. identify, review, and target travelers and cargo for examination;



- iii. coordinate the examination of entry and exit of travelers and cargo;
- iv. develop and conduct commercial risk assessment targeting with respect to cargo destined for the United States;
- v. coordinate with the Transportation Security Administration, as appropriate;
- vi. issue Trade Alerts; and
- vii. carry out other duties and powers prescribed by the Executive Assistant Commissioner.

With the implementation of the Automated Commercial Environment (“ACE”) single window for trade transactions, we anticipate the National Targeting Center will have much more information, much earlier in the transaction, so as to be able to analyze goods for examination selection purposes. In other words, the Center’s role becomes that much more critical, as does the importance of correct and complete data being reported and transmitted from the outset for importers and exporters.

#### *ANNUAL REPORT ON STAFFING.*

Within 30 days of enactment and annually thereafter, the OFO EAC must submit a report to the Committee on Homeland Security and the Committee on Ways and Means of the House of Representatives and the Committee on Homeland Security and Governmental Affairs and the Committee on Finance of the Senate a report on the staffing model for OFO, including how many supervisors, front-line CBP officers, and support personnel are assigned to each Field Office and port of entry.

In demanding this report, Congress has made clear it wants to keep tabs on the number of staff this office employs in its management, administration and field operations. What is not clear is whether Congress yet understands the importance to the trade community and the country of CBP staff other than front-line inspectors.

#### Office of Trade

Within 30 days of the TFTEA enactment, the assets, functions, personnel, and liabilities of the Office of International Trade will be transferred to the Office of Trade (“OT”) and the Office of International Trade will be abolished. [CBP had long ago indicated its displeasure with two offices with the letters IT in them, the other being its Information Technology section.] Neither CBP nor Homeland Security funds may be used to transfer assets elsewhere without prior Congressional approval. However, the Commissioner is authorized to transfer any other CBP assets, functions, or personnel to OT which will be headed up by an EAC.

The duties of the OT are to:

1. direct the development and implementation, pursuant to the customs and trade laws of the United States, of policies and regulations administered by CBP;
2. advise the Commissioner with respect to the impact on trade facilitation and trade enforcement of any policy or regulation otherwise proposed or administered by CBP;
3. coordinate with the OFO Executive Assistant Commissioner with respect to the trade facilitation and trade enforcement activities of CBP;
4. direct the development and implementation of matters relating to the priority trade issues identified by the Commissioner in the joint strategic plan for trade facilitation and trade enforcement;
5. otherwise advise the Commissioner with respect to the development and implementation of the joint strategic plan;
6. direct the trade enforcement activities of CBP;
7. oversee the trade modernization activities of CBP, including the development and implementation of the ACE and support for the establishment of the International Trade Data System;





8. direct the administration of customs revenue functions as otherwise provided by law or delegated by the Commissioner; and
9. prepare an annual report to be submitted to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives not later than June 1, 2016, and March 1 of each calendar year thereafter that includes—
  - a. a summary of the changes to customs policies and regulations adopted by CBP during the preceding calendar year; and
  - b. a description of the public vetting and interagency consultation that occurred with respect to each such change.

OT consolidates the CBP trade policy, program development, and compliance measurement functions into one office.

#### Office of Intelligence

This Office is under the leadership of an Assistant Commissioner, who reports to the Commissioner. The Office has the following duties:

- A. develop, provide, coordinate, and implement intelligence capabilities into a cohesive intelligence enterprise to support the execution of the duties and responsibilities of CBP;
- B. manage the counterintelligence operations of CBP;
- C. establish, in coordination with the Chief Intelligence Officer of DHS, as appropriate, intelligence-sharing relationships with Federal, State, local, and tribal agencies and intelligence agencies;
- D. conduct risk-based covert testing of CBP operations, including for nuclear and radiological risks; and
- E. carry out other duties and powers prescribed by the Commissioner.

This Office currently carries out these duties by collecting and analyzing advance traveler and cargo information, using enhanced law enforcement technical collection capabilities, sharing intelligence with other law enforcement agencies, federal, state, tribal and local.

#### Office of International Affairs

The Assistant Commissioner who heads up this Office reports to the Commissioner. The duties of the Office are to:

- A. coordinate and support CBP's foreign initiatives, policies, programs, and activities;
- B. coordinate and support CBP's personnel stationed abroad;
- C. maintain partnerships and information-sharing agreements and arrangements with foreign governments, international organizations, and United States agencies in support of CBP's duties and responsibilities;
- D. provide necessary capacity building, training, and assistance to foreign customs and border control agencies to strengthen border, global supply chain, and travel security, as appropriate;
- E. coordinate mission support services to sustain CBP's global activities;
- F. coordinate with customs authorities of foreign countries with respect to trade facilitation and trade enforcement;
- G. coordinate CBP's engagement in international negotiations;
- H. advise the Commissioner with respect to matters arising in the World Customs Organization and other international organizations as such matters relate to the policies and procedures of CBP;
- I. advise the Commissioner regarding international agreements to which the United States is a party as such agreements relate to the policies and regulations of CBP; and
- J. carry out other duties and powers prescribed by the Commissioner.







The OIA focuses on international cooperation, including strengthening multi- and bilateral relationships to implement international agreements and joint efforts in order to facilitate and secure legitimate trade.

#### Office of Professional Responsibility

This office is headed up by an Assistant Commissioner and investigates internal misconduct, manages integrity-related programs and policies, and also conducts research and analysis into the misconduct of any CBP employees.

#### *STANDARD OPERATING PROCEDURES.*

The Commissioner is expected to establish standard operating procedures for:

- searching, reviewing, retaining and sharing information contained in communication and electronic or digital devices by CBP at U.S. Ports of Entry;
- use of force employed by officers and agents, including the use of deadly force;
- processing and investigating complaints against CBP employees for violations of professional conduct, which procedures must be uniform, standardized and publicly available; (Note: There are several links on the CBP website describing the procedure for filing complaints.)
- notification of status to complainants;
- mechanism for reporting use of deadly force by an officer or agent, including evaluating whether correct procedures were followed.

The EAC for Air and Marine Operations, together with the Office for Civil Rights and Civil Liberties and the Office of Privacy of the Department, are responsible for standard operating procedures (“SOPs”) to provide command, control, communication, surveillance, and reconnaissance assistance through the use of unmanned aerial systems. These procedures must include:

- i. a process for other federal, state, and local law enforcement agencies to submit mission requests;
- ii. a formal procedure to determine whether to approve or deny such a mission request;
- iii. a formal procedure to determine how such mission requests are prioritized and coordinated; and
- iv. a process regarding the protection and privacy of data and images collected by CBP through the use of unmanned aerial systems.

The SOPs must require:

- A. in the case of a search of information conducted on an electronic device by CBP personnel, the Commissioner to notify the individual subject to such search of the purpose and authority for such search, and how such individual may obtain information on reporting concerns about such search; and
- B. in the case of information collected by CBP through a search of an electronic device, if such information is transmitted to another Federal agency for subject matter assistance, translation, or decryption, the Commissioner is to notify the individual subject to such a search of that transmission.

The Commissioner may withhold notifications of complaint status or the purpose or authority for a search, as well as how to obtain information about the status, if the Commissioner determines the information would impair national security, law enforcement, or other operational interests.



These SOPs must be updated every three years. The DHS Inspector General is responsible for developing and annually administering an audit mechanism to review whether searches of electronic devices at ports of entry conform to these SOPs. Other details regarding the number of searches; whether information was retained, copied, or shared; the number of devices detained; whether information was transmitted to another Federal agency, whether prosecution or conviction resulted, and similar information, must be collected and reported. Similarly, as to the use of deadly force, the Commissioner must notify the relevant Congressional committees and provide a copy of the evaluation of the incident promptly. Reviews as to whether the use of unmanned aerial systems conform to the relevant SOPs are also required. These reports must include detailed descriptions about the images collected through unmanned aerial systems, as well as how they are collected and stored.

### Training

Training for all CBP officers and agents is mandated. A specific amount of continuing education will be formulated by the Commissioner, sufficient to maintain employee understanding of federal legal rulings, court decisions, and departmental policies, procedures, and guidelines. This educational component is especially important given the lack of significant enforcement cases by either CBP or ICE due to the retirement of knowledgeable staff. This training is also critical given CBP's reorganization into Centers for Excellence and Expertise and the apparent lack of understanding by most CBP personnel about value and other complicated issues.

### Wait Times Transparency

Wait times for travelers entering the U.S. at the 20 highest volume international airports are available to the public through the CBP website. The information is determined according to federal flight data. Wait times are determined by calculating the time elapsed between an individual's entry into the CBP inspection area and that individual's clearance by a CBP officer.

Reports are to be submitted to the relevant Congressional committees, to include wait times and ranking of each airport by wait time. The Commissioner must also provide adequate staffing at the CBP information center, so travelers may submit comments or speak with representatives about their entry experience in a timely manner.

Given how this provision is worded, it is not clear the current wait time controversy will be resolved. CBP and the trade still seem to measure the starting point differently. The Act seems to call for the wait time to start when the individual enters the CBP compound. However, the real wait time starts when the person gets in line to clear.

### Other Authorities

The DHS Secretary has authority to establish additional offices or Assistant Commissioner positions (or other similar officers or officials) as deemed necessary to carry out the missions, duties, functions, and authorities of CBP, but must notify the relevant Congressional committees prior to exercising that authority. The current expectation is no new positions will be added in the short-term and everyone currently in office will remain in place.

The next edition of our International Trade Client Alert will highlight the impact of TFTEA on exporters.