



## DEADLINE FOR 100% SCREENING OF AIR CARGO APPROACHES

**Legal Corner** By David Street, TOYSA Legal Counsel

Three years ago this August, Congress passed the Implementing Recommendations of the 9/11 Commission Act of 2007. That Act contained a requirement that 100% of air cargo on passenger aircraft must be screened no later than three years from the date of the Act. That three year period will expire this coming August. According to the Transportation Security Administration (“TSA”), which is responsible for meeting this requirement, “around 1 to 3 million pounds of cargo will be grounded daily from August 1<sup>st</sup> owing to a lack of preparation by some shippers and forwarders to meet the new requirement.” Is your company ready for the institution of this new screening regime? Or are you at risk of having your air cargo grounded when the new requirement takes effect?

The statute has defined “screening” as follows:

“Screening” means a physical examination or non-intrusive method of assessing whether cargo poses a threat to transportation security. Methods of screening include x-ray systems, explosives detective systems, explosive trace detection, explosives detection K-9 teams certified by the Transportation Security Administration, or a physical search together with manifest verification.

Congress has provided that the TSA may approve additional methods of screening but has explicitly prohibited simply reviewing information about the cargo or verifying the identity of the shipper. In other words, what Congress is requiring is that the actual cargo that will be transported on passenger aircraft be inspected in some manner on a piece by piece basis. The TSA has approved a number of specific x-ray devices, explosive detection systems, and explosive trace detection devices for use in this cargo screening program. The latest version of this list was published by TSA on March 23, 2010 and is available on the TSA website.

When the legislation was passed mandating this requirement, TSA quickly realized that it would be impossible to meet the 100% screening goal by relying on air carriers alone. Air carriers already screen passenger checked baggage and do not have available sufficient space or physical resources to screen air cargo on a 100% basis without negatively impacting the transportation system through delays, cargo logjams

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and increased transit times. The TSA solution to this problem has been to distribute the opportunity - - and responsibility - - for screening cargo throughout the air cargo industry.

The concept TSA has developed is called the Certified Cargo Screening Program ("CCSP"). The CCSP is a voluntary program that is open to all segments of the air cargo industry; shippers, indirect air carriers, freight forwarders and third parties. Under the CCSP, facilities can choose to seek approval as certified cargo screening facilities ("CCSF"). To qualify, applicants will have to file an application with TSA, demonstrate that they screen the cargo pursuant to one of the acceptable screening methods and maintain a strict chain of custody for cargo they screen and forward to the air carrier. The theory is that by distributing the responsibility for cargo screening throughout the supply chain, the 100% screening requirement can be met with minimal economic disruption. Shippers, in particular, will be able to choose whether they want to screen their own cargo as a CCSF in which case they will be able to transfer their cargo directly to the air carrier without having the containers reopened, thus minimizing the potential for damage. Alternatively, shippers can choose to have their cargo screened by their indirect air carriers or freight forwarders or even work out cooperative arrangements with their air carriers to simply have the cargo screened there.

To a certain extent, it appears the TSA concept is working. According to TSA, the industry has met an interim screening requirement of at least 50% of air cargo transported on passenger aircraft with few problems. Moreover, there appear to be a significant number of CCSF's being approved. As of March 19, 2010 597 facilities in 32 states representing 208 cities have been approved. Of these, 401 belong to indirect air carriers, 150 belong to shippers and 46 belong to so-called independent cargo screening facilities, which are third-party operations.

Nevertheless, there are a number of significant problems surrounding the certified cargo screening program that may lead to significant delays and refusals to permit cargo to load when the 100% screening requirement deadline comes this August. A primary problem is simply one of knowledge. That is, it appears that many participants in the air cargo industry, particularly those on the shipper side, are not fully aware of what the 100% cargo screening requirement means. As a result, these shippers, primarily small and medium-sized companies, have not taken the necessary steps to ensure their cargo will be screened when the August deadline arrives. Such shippers need to take one of two courses. Either they must become certified cargo screening facilities on their own or they must locate such a CCSF operated by a third party and make arrangements to route their shipments through that facility prior to loading onto passenger aircraft. Hopefully, your company has already accomplished this task. If not, you should begin planning to do so right away. According to TSA, it takes a significant amount of time to become certified as a cargo screening facility. Shippers should plan on a minimum of 45 days for this process but understand that many applications will take longer.

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A second issue is the fact that there are limited cargo screening technologies currently available and approved by TSA and those technologies that have been approved are expensive. As a result, only large shippers, forwarding companies and air carriers have the resources to invest in these technologies. Moreover, the TSA-certified screening methods available to forwarders and airlines restrict the size of cargo that can be screened and there is no TSA-certified technology capable of screening large airfreight skids and pallets. Thus, there may well be bottlenecks if too many shippers rely on third parties to screen their shipments.

As a result, most shippers should give serious consideration to doing their own screening and becoming a CCSF. This, in fact, may be the most cost effective option. One of the approved screening methods is to physically inspect the cargo and verify it against the manifest or other packing document before it is completely packaged or shrink wrapped and put on a skid. This method of screening does not require expensive technology and ensures that, if the shipper also meets the TSA required chain of custody requirements, the cargo will not be unpackaged for inspection further down the supply chain. A shipper wishing to become a CCSF must file an application with TSA and adopt the required security procedures, which include requirements in the following areas:

1. Identification of the physical screening area and implementation of access controls to this area;
2. Training employees in the manner required by TSA;
3. Submitting Security Threat Assessments (“STAs”) for employees and authorized representatives directly dealing with the screened cargo;
4. Using an appropriate screening method approved by TSA;
5. Adopting chain of custody requirements to ensure that cargo, once screened, is not subject to further tampering.

The application to become a CCSF is available on the TSA website.

Another significant issue involves inbound cargo from overseas origins. Such cargo clearly falls within the 100% screening mandate. Because U.S. jurisdiction, however, does not extend to the foreign origin facilities where cargo is packed and loaded onboard passenger aircraft, TSA has had a difficult time determining how to meet this requirement for this type of cargo. TSA does have the legal authority to require that inbound cargo be 100% screened before it reaches the United States. Enforcing this requirement at the current stage of supply chain security developments throughout the world, would inevitably lead to a significant disruption of commerce into the United States. Many foreign airports and carrier facilities have physical limitations that would prevent U.S. and foreign air carriers from screening 100% of inbound cargo using

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currently available technologies. One TSA representative has described this problem in testimony to Congress as follows:

. . . , a unilateral mandate of 100% screening would cause significant delays at origin airports because, as is the case in the United States, carriers are not equipped to perform this level of screening. Where all-cargo flights exist as an alternative, shippers would be forced to divert business away from passenger airlines, which rely on cargo as a major generator of revenue and profit. Such a reduction in volume would most likely be reflected in higher passenger ticket prices.

As you can imagine, in the currently weakened state of the world economy, strictly enforcing the 100% screening requirement for inbound international cargo shipments would generate significant political problems from unhappy businesses and individual consumers. Moreover, the sheer scope of the inbound cargo problem is daunting. In 2006, more than 2.4 million unique shippers and manufacturers shipped cargo to the United States on passenger aircraft. These flights originated in 98 different countries. Obviously, some of these countries and individual shippers pose more security problems than others. As TSA develops its strategy for 100% screening of inbound cargo on passenger aircraft, it will have to balance all of these factors.

Currently, TSA does not expect to meet the 100% cargo screening requirement for inbound air shipments. It is working with individual foreign countries and international organizations to address these issues and hopes to come up with a plan in the relatively near future. According to news reports, Congress does not intend to exempt inbound international air cargo from the 100% screening requirement, but has informally indicated that it understands the problem with this cargo and does not intend to prohibit such cargo from entering the country at this time without being screened. Congress currently intends to work with TSA to identify a solution to the problem and ensure itself that cargo from high-risk areas is being screened. For those of you who are importing air cargo on passenger air carriers, this is an issue to which you should continue to pay careful attention as regulatory or congressional action in the future could have a significant impact on your operations.

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