ONE IF BY LAND, TWO IF BY SEA, BUT NOT IF BY AIR: IMPLICATIONS OF A LEGAL DIFFERENCE IN MANIFEST DISCLOSURE

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I.INTRODUCTION 120
II.AIR TRADE 123
III.STATUTORY HISTORY 125
A. The Tariff Act of 1930 125
B. United States Code - Title 19: Customs Duties 126
C. Ancillary Laws and Directives 127
1. Anticounterfeiting Consumer Protection Act 127
2. Miscellaneous Trade and Technical Corrections Act of 1996 130
IV.REQUEST FOR INFORMATION 131
A. Agency Request 131
B. Freedom of Information Act Request 131
C. The CPB's Denial 135
V.ANALYSIS 136
A. Air Automated Manifest System 136
B. Miscellaneous Technical Corrections Act 137
C. FOIA 139
D. Supply Chain 140
VI.CONCLUSION 142

ABSTRACT

In a society of international trade and increasingly modern technology, trade data providers have answered the demand for information regarding whom businesses should trade with and why. One-fourth of all imports into the United States come by air, but trade

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data providers are denied information about air cargo from the U.S. Customs and Border Protection ("CBP") agency, although they are given the same information regarding vessel cargo under the Freedom of Information Act ("FOIA"). Without these essential air cargo manifests, companies cannot glean data regarding the supply chain of their products, thus resulting in uneducated trade. The CBP must begin disclosing air cargo manifests, or else companies will continue to trade less effectively, the purpose behind FOIA will be undermined, and the statutes intended to compel disclosure will be rendered meaningless. Scholars have written on the topic of trade information disclosure, but they have not explored the important difference between vessel and air cargo manifests

This Article inquires into the viability of the CBP's argument for nondisclosure of air cargo manifests. The Article provides a background of air trade history and the procedures that exist to request air cargo manifests. By presenting the legislative history of relevant statutes and examining the Freedom of Information Act, this Article analyzes the possible reasons why there has been no public access to this essential information. Lastly, this Article examines the consequences of the CBP's continual nondisclosure and the legal, economic, and societal implications of that continued nondisclosure.

I. INTRODUCTION

Since the dawn of time, man has left his mark as he crossed the globe. In pursuit of trade and access to goods, humans have traveled by land, then by sea, and now by air. Without trade, man would be lacking his most significant meeting place – the market. At the market, the masses could congregate and barter for unique riches brought in by the few daring others who traveled leaps and bounds to the far corners of the earth. Presently, with technology at our fingertips, we not only have the ability to know what the market holds, but we can trade online without ever having to leave our homes. "High bandwidth global communication technologies have radically changed the nature and timeliness of information, and who has access to it."[1]

[1] Steve New & Dana Brown, *Four Challenges of Supply Chain Transparency*, EUR. BUS. REV. (July 18, 2011), *available at* http://www.europeanbusinessreview.com/?p=4082.

While watching the movie *Cocktail*,[2] one may wonder, who really invented the "flugelbinder" or the mini-drink umbrella? As a society, we have all probably invented a ton of "stuff" but never knew how to get it mass-produced. Where do things like the "flugelbinder" get produced? Where does this "stuff" come from? What does it mean to be "Made in China"? What, if anything, do we know about the goods brought into the market? Knowing the details of the market is an invaluable asset in today's business world. Companies want to do business with partners in other countries, but how does a company determine its best potential trading partners? With these questions in mind, one would turn to the internet. To this end, a handful of companies known as trade data providers recognized the dire need for this knowledge and built a revolutionary and objective source of information to address the fundamental challenges of global trade.[3] These trade data providers created a system that determines which overseas companies are trustworthy and monitors those suppliers on an ongoing basis.[4]

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[2] COCKTAIL (Touchstone 1988). "What the @uck is a Flugelbinder" *available at* http://www.youtube.com/watch?v=uhnTuzp7lFk.

> [Flanagan] You know there's a guy who makes these.
> [Jordan] One guy? He must be exhausted.
> [Flanagan] Yes, he is. But still, he gets up in the morning and he kisses his wife and he goes to his drink umbrella factory where he rips off ten billion of these a year. This guy's a millionaire.
> [Jordan] *(picking up an ashtray)* How about the guy who makes these?
> [Flanagan] How about that guy? Not to mention the guy who makes these.
> [Jordan] And those little wrappers are made by another guy.
> [Flanagan] What about these plastic things at the end of these laces.
> [Jordan] Hmmm. It's probably got one of those weird names too like - aahh, "flugelbinder."
> [Flanagan] Flugelbinder, right. We're sittin' here, and we're surrounded by millionaires. You rack your brains day and night to try to come up with a money-making scheme, and some guy corners the flugelbinder market.

Id.

[3] *See generally* PIERS Global Intelligence Solutions, http://www.piers.hk/eng/index.aspx; Zepol Corp., http://www.zepol.com/TradeIQ.aspx; Manifest Journals, http://www.manifestjournals.com; Panjiva, www.panjiva.com; Import Genius, www.importgenius.com; Alibaba, www.alibaba.com.

[4] *See* About Panjiva: Intelligence Platform – Panjiva, Panjiva, http://panjiva.com/about-panjiva/intelligence-platform (last visited Oct. 22, 2012) ("[W]ith a wealth of web data carefully combined with objective data. . .Panjiva can provide information on 6 million companies that do business across borders.")(taken from website as it existed on Oct. 22, 2012).

Shipments pass through United States' ports of entry and the CBP is tasked with collecting shipment information.[5] By transforming the data from the CBP into straightforward, actionable metrics of supplier strength, the trade data providers help companies assess potential new suppliers and track their existing suppliers.[6] Thousands of companies rely on this information as a daily business tool.[7] The problem is that all the information provided is based solely on vessel manifests, ignoring the 25 percent of all imports by air,[8] thus creating a large hole of knowledge in the supplier market.[9] With no rationale for the denial of air manifests, changing the practices can help on several fronts.

This Article examines why vessel manifest data is readily available to the public and questions why air cargo manifest data is not. It explores why the practices should be changed and what has hindered their disclosure. Part II of this Article discusses air trade history and its impact on the import and export of goods. Part III then explains the history and interpretation of relevant statutes and how statutory misapplication has been used to support the denial of disclosure. Next, Part IV discusses the procedures used to seek information related to air cargo manifests. Part V analyzes the implications of the current agency's interpretations, enforcement of current law, and the resulting

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[5] *Id*.

[6] *See id*. ("Supplier search tools help companies significantly reduce the time and expense of finding new suppliers. The interface sifts through a database of over 100,000 rated suppliers in 185 countries to hone in on the select few that meet the business needs. For example, in a matter of seconds, a business can refine its search to identify all suppliers of merino wool sweaters in India that have served premium customers. Supplier monitoring tools help companies keep tabs on their existing suppliers to identify moments of risk and areas of opportunity in their supply chain.") (taken from website as it existed on Oct. 22, 2012).

[7] Jason Busch & Lisa Reisman, *ARE YOU AN IMPORTANT GENIUS OR SHOULD YOU GO STRAIGHT TO THE SOURCE?*, SPEND MATTERS BLOG, *AVAILABLE AT* HTTP://WWW.SPENDMATTERS.COM/INDEX.CFM/2008/5/29/ARE-YOU-AN-IMPORTGENIUS-OR-SHOULD-YOU-GO-STRAIGHT-TO-THE-SOURCE (MAY 29, 2008, 10:52 AM) (SEARCH COMMENTS FOR "KEVIN PALMSTEIN," POSTED ON OCT. 29, 2008, 7:54 AM) ("TRANSPORTATION SERVICE PROVIDERS FIND NEW CUSTOMERS AND EDUCATE THEMSELVES ON THEIR CUSTOMER'S SUPPLY CHAINS. SOURCING DEPARTMENTS RESEARCH SUPPLIERS AND MONITOR EXCLUSIVE DISTRIBUTION AGREEMENTS. BRAND OWNERS PROACTIVELY PROTECT THEIR TRADEMARKS AND COPYRIGHTS BY LOOKING AT THE COUNTERFEITERS' BILLS OF LANDING. FINALLY, ECONOMISTS AND BUSINESS ANALYSTS DERIVE VALUABLE FORECASTS AND MARKET ASSESSMENTS.").

[8] *Import Trade Trends*, U.S. CUSTOMS AND BORDER PROTECTION, at 9 (2010), http://www.cbp.gov/linkhandler/cgov/trade/trade_programs/trade_trends/itt.ctt/itt.pdf [hereinafter *CBP Report*].

[9] *See generally* ImportGenius, www.importgenius.com.

implications on businesses and effects on the supply chain. Lastly, Part VI of this Article concludes with concern for the current agency position and discusses possible reasons for and the consequences of the CBP's unfounded denial of disclosure for air cargo manifests.

II. AIR TRADE

Historically, the easiest and most common method of transporting goods was by water.[10] However, by the beginning of the twentieth century, the transport of goods by air began to play an equally important and rapidly expanding role in the course and conduct of world trade. Early aviation promoters were always looking for new and practical uses for the airplane. One idea was to use aircraft as carriers of cargo.[11] "During the 1920s, the volume of freight shipped by air grew significantly."[12] During this period, there were a few attempts to organize air cargo airlines, but "the first *commercial* airlines that were *all-cargo* did not emerge until after World War II."[13] Air cargo "remained a sideline operation to mail and passenger traffic until March 14, 1941, when the four largest airlines at the time, United Airlines, American Airlines, Trans World Airlines and Eastern Airlines, formed Air Cargo."[14] "By the end of the war, many of the airlines began their own independent air cargo services."[15] In 1949, the Civil Aeronautics Board ("CAB") gave four airlines permission to operate as all-cargo airlines.[16] Despite widespread hopes for a vibrant industry, the air freight industry did not grow as expected, and it was only in the 1980s that a

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[10] *See generally History of Trade*, HISTORY WORLD, http://www.historyworld.net/wrldhis/PlainTextHistories.asp?grupid=1925&HistoryID=ab72&gtrack=pthc (last visited Dec. 22, 2011).

[11] Asif Siddiqi, *A History of Commercial Air Freight*, U.S. CENTENNIAL OF FLIGHT COMMISSION, http://www.centennialofflight.gov/essay/Commercial_Aviation/AirFreight/Tran10.htm (last visited Dec. 22, 2011) (The first shipment by air occurred in 1910 when a department store shipped a bolt of silk by air from Dayton to Columbus, Ohio. This shipment had beaten the railroad by two cities.).

[12] *Id.*

[13] *Century of Flight, Airlines and Airliners*, [hereinafter "*Century of Flight*"]http://www.century-of-flight.net/new%20site/commercial/history%20of%20air%20freight.htm (last visited Dec. 22, 2011)(emphasis in original).

[14] History of Commercial Air Freight, supra note 1.

[15] Century of Flight, supra note 13.

[16] *History of Commercial Air Freight, supra* note 11 (The four awarded operation rights were Slick, Flying Tiger, U.S. Airlines and Airnews.)

new airline, Federal Express ("FedEx"), revolutionized the face of the air cargo business.[17] In 1989, FedEx became the world's largest full service all-cargo airline.[18]

Overall, "the air cargo system is a complex, multi-faceted network [that handles] a vast amount of freight, express packages, and mail carried aboard passenger and all cargo-aircraft."[19] The system is comprised of manufacturers, shippers, freight forwarders, airport sorting, and cargo handling facilities.[20] The air cargo market is composed of goods shipped by air and the enterprises that undertake to ship them.[21] The term "air cargo" is not well defined in a regulatory sense, and is often used interchangeably with air freight. In this article, "air cargo" refers to goods shipped by aircraft from one destination to another through the air transport system.[22] Due to the high demand for fast and efficient shipments of goods, the air cargo industry has grown over the past twenty-five years:[23] "In 2002, air cargo comprised about 0.3% by weight of all freight movement in the United States. While this percentage may seem small, it is much greater than the 0.07% percent of freight that traveled by air in 1965."[24] In 2010, 28 percent of all shipments into the United States arrived by air, exceeding the 25 percent that arrived by sea.[25]

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[17] *Id.* (Fred Smith, founder of FedEx, "believed that combining passenger air traffic with freight air traffic, as established airlines were doing, was not the most efficient way of doing business. He believed that the route patterns for the two were totally different" and "that one of the most important selling points was his idea of next-day guaranteed service of delivery.").

[18] *Id.*

[19] Bart Elias, *CRS Report for Congress: Air Cargo Security*, CONGRESSIONAL RESEARCH SERVICE, 1 (2007), http://www.fas.org/sgp/crs/homesec/RL32022.pdf.

[20] *Id.*

[21] *See generally* Boeing World Air Cargo Forecast Team, *Boeing World Air Cargo Forecast* 2010/2011, BOEING (2010), *available at* http://www.boeing.com/commercial/cargo/.

[22] Air Cargo Logistics Strategy Paper - Board of Investments, 1, *available at* http://www.boi.gov.ph/pdf/publication/roadmap/Air%20Cargo%20Logistics%20Strategy%20Paper.pdf.

[23] Elias, *supra* note 19, at 4.

[24] *Id.*

[25] *CBP Report*, *supra* note 8, at 9, Figure 6.

The cargo industry operates from approximately 450 airports,[26] is composed of more than 280 air carriers, and transports roughly 50,000 tons of cargo per day.[27] The total volume of imported and exported goods moving through U.S. ports is expected to double over the next twenty years.[28]

III. STATUTORY HISTORY

A. The Tariff Act of 1930

The Smoot-Hawley Tariff Act ("Tariff Act" or "the Act") was a product of President Herbert Hoover's campaign promises made during the 1928 presidential election –specifically, his pledge to help farmers by raising tariffs on farm product imports.[29] The Tariff Act was enormously controversial at the time of its passage and is still considered one of "the most notorious pieces of legislation in the history of the United States," especially considering that the Act is often credited with deepening the Great Depression.[30] The Act was intended to provide revenue, regulate commerce with foreign countries, and encourage American industries to protect American labor from foreign competition, especially in light of the Great Depression.[31] The Act "raised U.S. tariffs on over 20,000 imported goods to record levels."[32]

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[26] *Airport* Insecurity: *TSA's* Failure to Cost Effectively Procure, Deploy and Warehouse its Screening Technologies (Nov. 20, 2012), available at http://oversight.house.gov/wp-content/uploads/2012/05/5-9-2012-Joint-TSA-Staff-Report-FINAL.pdf.

[27] *Aviation Security: Securing Cargo: Biot Report #374*, SUBURBAN EMERGENCY MANAGEMENT PROJECT, (June 22, 2006) (on file with author).

[28] Maritime Transportation Act of 2002, Pub.L. No. 107-295, § 101(2) (2002) *available at* http://www.gpo.gov/fdsys/pkg/PLAW-107publ295/pdf/PLAW-107publ295.pdf.

[29] Anthony O'Brien, *Smoot-Hawley Tariff*, ECONOMIC HISTORY ASSOCIATION, *AVAILABLE AT* HTTP://EH.NET/ENCYCLOPEDIA/ARTICLE/OBRIEN.HAWLEY-SMOOT.TARIFF (LAST VISITED JANUARY 28, 2012) (THE ACT WAS SPONSORED BY U.S. SEN. REED SMOOT AND REP. WILLIS C. HAWLEY, AND SIGNED INTO LAW ON JUNE 17, 1930.) SMOOT-HAWLEY TARIFF ACT, HTTP://WWW.BRITANNICA.COM/EBCHECKED/TOPIC/550096/SMOOT-HAWLEY-TARIFF-ACT.

[30] O'BRIEN, *supra* note 29 ("Although the 1920s were generally a period of prosperity in the United States. this was not true of agriculture; average farm incomes actually declined between 1920 and 1929.); *see also* Patrick Chovanec, *A Primer on U.S. Trade Policy*, AN AMERICAN PERSPECTIVE FROM CHINA BLOG (Sept. 15, 2009), *available at* http://chovanec.wordpress.com/2009/09/15/a-primer-on-u-s-trade-policy/ (last visited Jan. 29, 2012).

[31] *Id.*

[32] David Howarth and Megan Becker, *The Great Depression, available at* http://www.personal.psu.edu/dbh5017/art002/a7/Causes.html.

B. United States Code - Title 19: Customs Duties

Today, what remains of the Tariff Act is considered "the foundation of American trade policy"[33] and can be found in Title 19, Sections 1202-1683 of the United States Code. Section 1431 states in pertinent part:

> (c) Public disclosure of certain manifest information.
>
> (1) Except as provided in subparagraph (2), the following information, when contained in a vessel vessel [sic] or aircraft manifest, shall be available for public disclosure:
>
> (A) The name and address of each importer or consignee and the name and address of the shipper to such importer or consignee, unless the importer or consignee has made a biennial certification, in accordance with procedures adopted by the Secretary of the Treasury, claiming confidential treatment of such information.
>
> (B) The general character of the cargo.
>
> (C) The number of packages and gross weight.
>
> (D) The name of the vessel, aircraft, or carrier.
>
> (E) The seaport or airport of loading.
>
> (F) The seaport or airport of discharge.
>
> (G) The country of origin of the shipment.
>
> (H) The trademarks appearing on the goods or packages.
>
> (2) The information listed in paragraph (1) shall not be available for public disclosure if—
>
> (A) the Secretary of the Treasury makes an affirmative finding on a shipment-by-shipment basis that disclosure is likely to pose a threat of personal injury or property damage; or
>
> (B) the information is exempt under the provisions of section 552(b)(1) of title 5 [of the United States Code].[34]

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[33] Jim Powell, Policy Analysis: Why Trade Retaliation Closes Markets and Impoverished People, Cato Policy Analysis No. 143 (Nov. 1990), *available at* http://www.cato.org/pubs/pas/pa-143.html("[M]ost subsequent major trade laws including the Reciprocal Trade Agreements Act (1934) and much of the Trade Expansion Act (1962), the Trade Act (1974), the Trade Agreements Act (1979), the Tariff and Trade Act (1984) and the Omnibus Trade and Competitiveness Act (1988) have been amendments of the" Tariff Act of 1930.).

[34] 19 U.S.C. § 1431 (2006):

(a) In general.

a. Every vessel required to make entry under section 1434 [19 USC § 1434] of this Title or obtain clearance. . .)shall have a manifest that complies with the requirements prescribed under subsection (d) of this Section.

C. Ancillary Laws and Directives

1. Anticounterfeiting Consumer Protection Act

In 1995, the Clinton Administration proposed the Anticounterfeiting Consumer Protection Act ("ACPA"), which Congress passed into law in July 1996.[35] At the time, regulations were deemed inadequate in helping American businesses fight against the ever-increasing market of counterfeited, copyrighted, and trademarked goods.[36] Counterfeiting is not limited in scope to just one product, as trafficking occurs for a multitude of products ranging from auto parts to pharmaceuticals and food products, making it a highly sophisticated crime.[37] The ACPA is designed to ward off counterfeiters by utilizing four principal tools.[38] The first tool increases criminal penalties for violators, while the second allows law enforcement to seize counterfeit

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(b) Production of manifest.

a. Any manifest required by the Customs Service shall be signed, produced, delivered or electronically transmitted by the master or person in charge of the vessel, aircraft or vehicle, or by any other authorized agent of the owner or operator of the vessel, aircraft of vehicle in accordance with the requirements prescribed under subsection (d) of this Section. A manifest may be supplemented by bill of lading data supplied by the issuer of such bill. If any irregularity of omission or commission occurs in any way in respect to any manifest or bill of lading data, the owner or operator of the vessel, aircraft or vehicle, or any party responsible for such irregularity, shall be liable for any fine or penalty prescribed by law with respect to such irregularity. The Customs Service may take appropriate action against any of the parties.

(Section 1431 (c) was not included in the original Tariff Act of 1930 as enacted in 1930. It was not added until the Trade and Tariff Act of 1984 and read "(c)(1) Except as provided in subparagraph (2), the following information, when contained in such manifest, shall be available for public disclosure . . . ."

Tariff Act of 1930, § 431(c)(1), 98 Stat. 2974, 52, (1984)).

[35] Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, 110 Stat. 1386 (1996).

[36] S. REP. NO. 144-177, at 1 (1995).

[37] *Id*. at 2.

[38] *Id*.

goods. The third makes it more difficult to have the seized goods reenter the commerce stream and also makes it easier to find counterfeit goods while in transit. Lastly, the fourth tool calls for stronger civil penalties for those businesses harmed by counterfeiters.[39] In enacting the ACPA, Congress finally took action on the findings contained in a 1995 Senate Report which stated, "[c]ounterfeiting of trademarked and copyrighted merchandise costs legitimate American businesses billions of dollars and results in a multimillion dollar loss in sales and tax revenues."[40]

Section 11, Public Disclosure of Aircraft Manifests of the ACPA, amends section 431(c)(1) of the Tariff Act of 1930 to permit public disclosure of aircraft manifests under the same terms currently allowed for sea shipments.[41] According to the legislative intent behind the Act, the justification for the amendment grew out of the need to disclose the same information for shipments by air that U.S. Customs routinely discloses relating to the nature of shipments imported by sea.[42] "This information [, referred to as vessel manifests,] has proven to be extremely valuable to U.S. trademark holders who are trying to trace or interdict the entry of counterfeit goods."[43]

Congress further reasoned that "[s]ince most low-weight, high value counterfeits are shipped by air, trademark holders need access to air shipment data as well as sea shipment data if they are to be able to better assist enforcement officials in identifying counterfeiters and stopping the flow of fraudulent goods transported in this manner."[44] Numerous written statements submitted as part of the Senate Judiciary

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[39] *Id*.

[40] *Id*. (Congress in 1984 recognized the harm in counterfeiting and enacted The Trademark Counterfeiting Act, in which the Senate Report stated, "counterfeiting defrauds purchasers, who pay for brand-name quality and take home only a fake. It cheats manufacturers of sales that their reputation has earned them, and tarnishes that reputation when the manufacturers are blamed for the flaws of goods they did not produce.").

[41] Tariff Act of 1930 § 431(c)(1), 19 U.S.C. § 1431(c)(1), *amended by* Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, § 11, 110 Stat. 1386. ("Section 431(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1431(c)(1)) is amended – (1) in the matter preceding subparagraph (A), by inserting 'vessel or aircraft' before 'manifest'; (2) by amending subparagraph (D) to read as follows: '(D) The name of the vessel, aircraft, or carrier'; (3) by amending subparagraph (E) to read as follows: '(E) The seaport or airport of loading.'; and (4) by amending subparagraph (F) to read as follows: '(F) The seaport or airport of discharge.'").

[42] S. REP. NO. 144-177, *supra* note 37, at 11 (1995).

[43] *Id.*

[44] *Id.*

Committee hearing on the ACPA supported this position.[45] Letters submitted to the Committee Chairman, Senator Orin Hatch, supported disclosure of air cargo manifest data and inclusion of the word "aircraft" into the United States Code.[46] In a letter submitted by Eastman Kodak, David Biehn, then-vice president and general manager, stated:

> Currently, U.S. law does not adequately provide law enforcement officials with the tools to confront this problem [(counterfeiting)] effectively, nor does it provide us with the ability to obtain information necessary to assist them. This legislation will address this situation. We are particularly pleased with the expanded Customs reporting requirements. This disclosure of air manifest data and trademark information will be of invaluable assistance in identifying counterfeit merchandise and the location of counterfeiters.[47]

Congress went on to say that this amendment "eliminates the unwarranted and out-of-date distinction between information required about goods shipped by sea as compared to goods shipped by air."[48]

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[45] *See* A Bill to Control and Prevent Commercial Counterfeiting and for Other Purposes: Hearing on S. 1136 *Before the S. Comm. on the Judiciary*, 104th Cong. 104-830 (1995) (Additional submission to the record).

[46] *See, e.g.*, *id*. at 27 (prepared statement of John Bliss, President of the Int'l Anticounterfeiting Coal. (IACC) to Chairman Orin Hatch) (S. 1136 permits public disclosure of aircraft manifests under the same terms as sea shipments, thus eliminating an unwarranted distinction related to information shipping by sea and by air, and reflecting the reality that many, particularly smaller, consumer counterfeit goods and labels are routinely imported by air rather than by sea.); (*Id.* at 69 (letter submission of E. Edward Kavanaugh, President of the Cosmetic, Toiletry and Fragrance Ass'n to Chairman Orin Hatch) S.1136 contains an important provision that will help Customs fight counterfeiting. This provision, Section 12, requires importers to disclose information on entry documentation such as may be necessary to determine whether the imported merchandise bears and infringing trademark. This is an important step to help Customs identify infringing goods and enhance border enforcement of intellectual property rights.); (; *Id.* at 71 (letter submission of Vincent L. Volpi, President of Prof'l Loss Prevention Consultants to Chairman Orin Hatch).

[47] *Id.* at 64-65 (letter submission of David P. Biehn, V.P. & Gen. Manager, Consumer Imaging Div. and Richard G. Pignataro, V.P. & Gen. Manager, Prof'l and Printing Imaging Div. of Eastman Kodak Co. to Chairman Orin Hatch) The private sector is more than willing to do its part in the assault on American intellectual property rights. Allowing the private sector to work more closely with law enforcement, in general, for the common good, prohibiting the re-export of counterfeit goods amending disclosure requirements and increasing civil penalties will add new weight to federal anticounterfeiting law and provide the industry with the tools it needs to respond to the modern scourge of piracy.).

[48] S. REP. NO. 104-177, at 11 (1996).

2. Miscellaneous Trade and Technical Corrections Act of 1996

During the 104th Congress, on June 7, 1996, Senator William V. Roth, Chairman of the Committee of Finance, requested public comment on a package of thirty-two trade bills comprising various technical corrections.[49] Section 3 of the Miscellaneous Technical Corrections Act ("TCA"), passed into law by Congress in October 1996, set forth the rules governing the provision of manifests required by the CBP. It purported to amend section 431(c)(1) of the Tariff Act of 1930,[50] and states in pertinent part: "[t]o clarify that the reference in the original section is to vessel manifests and not to other types of manifests."[51] Furthermore, the Committee on Ways and Means sought comments on a variety of technical corrections "by deleting 'such' and inserting 'a vessel' in order to clarify the reference is to vessel manifest and does not include any other types of manifests."[52] Additionally, in response to the request for comments, the Air Transport Association of America ("ATA") supported the technical correction and stated, "[i]t is highly important, in the interest of cargo security and confidentiality of business data, that air cargo manifests remain immune to publication of any form."[53]

[49] S. REP. NO. 104-393, at 1 (1996).

[50] Miscellaneous Trade and Technical Corrections Act of 1996, Pub. L. No. 104-295, sec. 3(a)(3), § 431(c)(1). (This Act purported to amend section (c)(1) by substituting "a vessel manifest" for "such manifest;" however, because of a prior amendment, this amendment could not be executed. Original language prior to the ACPA amendment 1431(c)(1) provided that except as provided in subparagraph (2), the following information, when contained in such manifest, shall be available for public disclosure. After the ACPA amendment, 1431(c)(1) Except as provided in subparagraph (2), the following information, when contained in such vessel or aircraft manifest, shall be available for public disclosure.).

[51] S. REP. NO. 104-393, at 3 (1996).

[52] Staff of Subcomm. on Trade of the Comm. on Ways and Means, 104th Cong., Written Comments on Technical Corrections to Recent Trade Legislation 2 (Comm. Print 1995), *available at* http://www.gpo.gov/fdsys/pkg/CPRT. . ./pdf/CPRT-104WPRT91825.pdf.

[53] *Id*. at 9.

IV. REQUEST FOR INFORMATION

A. Agency Request

To obtain manifest data that is publicly available pursuant to 19 U.S.C. § 1431(c),[54] requests and subscriptions for Automated Manifest System ("AMS") data must be sent in writing to the CBP.[55] Once the request is received and processed by the CBP's Revenue Division, the raw manifest data will be compiled on data sets and transferred to compact discs by the CBP and mailed to the requester.[56] Should a request for information be denied, a requester has a right to appeal the CBP's decision.[57]

B. Freedom of Information Act Request

Requests are agency specific.[58] If the agency's response regarding disclosure is unsatisfactory, a requester may file an administrative appeal.[59] If the CBP does not provide disclosure, FOIA provides the requester an avenue for relief by allowing for court review.[60] In order to

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[54] 19 C.F.R. § 103.31(e) (2006). An electronic copy of vessel manifest information to shippers can be obtained if publicly available pursuant to 19 U.S.C. § 1431 and the procedures are set forth in 19 CFR § 103.31(e). Information that has been made publicly available is precluded from the FOIA. Trade Symposium Question Card Answers, U.S. CUSTOMS AND BORDER PROTECTION, *available at* http://www.cbp/gov, (search "q card answers 2009," follow "Trade Symposium Question Card Answers" hyperlink to "question 18").

[55] Anticounterfeiting Consumer Protection Act, Pub. L. No. 104-153, § 11, 110 Stat. 1386 (1996). The Customs Service was renamed The Bureau of Customs and Border Protection after it was transferred from the Treasury Department to the Department of Homeland Security in 2003. U.S. CUSTOMS AND BORDER PROTECTION, BULL. NO. 44-14, NAME CHANGES OF TWO DHS COMPONENTS 1 (Mar. 31, 2010), *available at* http://www.cbp.gov/xp/cgov/trade/legal/bulletins_decisions/bulletins_2010/vol44_03312010_no14/ *(follow "General Notices" hyperlink)*. For ease of reference, it will be referred to herein as "the CBP.".

[56] 19 C.F.R. § 103.31(e) (2006).

[57] *FOIA Appeals & Litigation*, FOIADVOCATES, http://www.foiadvocates.com/appeals_litigation.html (last visited Dec.. 6, 2012).

[58] *Id.*

[59] *Id.* Appeals can be effective to successfully challenge excessive processing delays, fee waiver denials, and the improper full or partial withholdings of responsive documents.

[60] Ray v. Turner, 587 F.2d 1187, 1190 (D.D.C. 1978); *see also* STEPHEN DYCUS ET AL., NAT'L. SEC. LAW 1, 998 (3d ed. 2007) ("At this time one contests the fees that were charged. Appeal on the basis of failure to describe adequately the documents being requested, or that no records were located, failure to conduct an adequate search for the requested documents.").

increase disclosure of government information, FOIA was passed into law by Congress in 1966.[61] Prior to its enactment, the burden was on the individual citizen to prove his right to inspect government records.[62] FOIA eliminated this burden, based on "the presumption that the government and the information of government belong to the people."[63] By shifting the burden from the individual's "need to know" to the government created a "right to know" standard, FOIA requires the government justify non-disclosure.[64] In addition, the legislation prior to FOIA had no clear guidelines or remedies for those individuals who were denied access to government information.[65] Thus, FOIA created clarity where none had previously existed by establishing guidelines of what is available for public disclosure and remedies for denial of disclosure. FOIA's hard and fast rule is that federal agencies are to provide the fullest possible disclosure to the public, disclosing all records that do not fall within one of nine explicit exemptions specified by Congress.[66] According to the statute, "[i]t is the agency opposing disclosure of the information under FOIA that bears the burden of establishing that an exemption applies."[67]

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[61] *Ray*, 587 F.2d at 1190.

[62] *Dycus*, supra n. 60 at 989.

[63] See *id*.

[64] *Id*. at 989-990

[65] *Id*. at 989.

[66] GC Micro Corp. v. Defense Logistic Agency, 33 F.3d 1109, 1113 (9th Cir. 1994) ("An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption")(citing Lewis v. IRS, 823 F.2d 375, 378 (9th Cir. 1987)). *See generally* the following list of exemptions:

> Exemption (b)(1)- National Security Information
> Exemption (b)(2)- Internal Personnel Rules and Practices
> "High" (b)(2)- Substantial internal matters, disclosure would risk circumvention of a legal requirement" Low" (b)(2)- Internal matters that are essentially trivial in nature
> Exemption (b)(3)- Information exempt under other laws
> Exemption (b)(4)- Confidential Business Information
> Exemption (b)(5)- Inter or intra agency communication that is subject to deliberative process, litigation, and other privileges
> Exemption (b)(6)- Personal Privacy
> Exemption (b)(7)- Law Enforcement Records that implicate one of 6 enumerated concerns
> Exemption (b)(8)- Financial Institutions
> Exemption (b)(9)- Geological Information

5 U.S.C. 552(b) (2006).

[67] 5 U.S.C. § 552(a)-(b) (2006); *see also* Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 57 (D.C. Cir. 2003).

FOIA lawsuits generally arise after a person requests information contained in the records of a government agency that the agency then refuses to release.[68] In the context of this Article, this involves the situation where a person has requested aircraft manifest data and the CBP has denied its release. When a FOIA request is received, the CBP must first determine if any FOIA exemption applies to the requested information.[69] In this instance, the relevant exemption is located in 5 U.S.C. § (a)(4)(b). Exemption four protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[70] This exemption is intended to protect the interests of both the government and the submitters of information.[71] Records are held to be commercial so long as the submitter has a "commercial interest" in them, but not if they "reveal basic commercial operations."[72] Some examples of items regarded as revealing commercial or financial information include business sales statistics, research data, technical designs, customer and supplier lists, profit and loss data, overhead and operating costs, and information on financial condition.[73] Records requests are deemed to be "from a person" as long as a partnership, corporation, association, or public or private organization other than an agency completed the submission.[74]

After examining the commercial or financial nature of the information, the next step is to determine whether the information requested is privileged or confidential. In the seminal case on Exemption four, *National Parks and Conservation Ass'n v. Morton*,[75] the District of Columbia Circuit Court of Appeals established a two-part test for determining when financial or commercial information in the government's possession is to be treated as confidential. The court stated that "[i]f disclosure of the information is likely. . .either. . .(1) to impair the Government's ability to obtain necessary information in the

[68] FOIA Update Vol. I, No. 2 1980 Policy discussion, DEP'T OF JUSTICE, (1980), *available at www.justice.gov/oip/foia_updates/Vol_I_2/page4.htm.*

[69] *Id.*

[70] 5 U.S.C. § 552(b)(4) (2000).

[71] *Freedom of Information Act Guide: Exemption 4*, DEP'T OF JUSTICE (May 2004), *available at* www.justice.gov/oip/exemption4.htm.

[72] *Id.* (quoting Pub. Citizens Health Research Grp. v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983)).

[73] *Id.*; (citing Landfair v. U.S. Dep't of the Army, 645 F. Supp. 325, 327 (D.D.C 1986)).

[74] 5 U.S.C. § 551(2) (2006).

[75] Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained," then it is treated as confidential.[76] The court stated that, in general, "the various [FOIA] exemptions. . .serve two interests – that of the Government in efficient operation and that of persons supplying certain kinds of information in maintaining its secrecy."[77] Further, "unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials, and the ability of the Government to make intelligent well informed decisions will be impaired."[78] *Critical Mass Energy Project v. Nuclear Regulatory Comm'n* affirmed the test in *National Parks*, but confined it to "information that persons are required to provide the Government."[79] An air cargo manifest is compelled by the government for all cargo on board.[80] By the same token, vessel manifests are compelled by the government.[81] The District of Columbia Circuit Court of Appeals held that information that is "voluntarily" submitted to the government would be treated as confidential under Exemption four as long as it is "of a kind that the provider would not customarily make available to the public."[82] This creates a system that "(1) encourage[es] cooperation by those who are not obliged to provide information to the government and (2) protect[s] the rights of those who must."[83]

Exemption four "protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication."[84] Since the claimants in *National Parks* were required to provide the financial information in question to the government pursuant to statute, there was "presumably no danger that public disclosure [would] impair the ability of the Government to obtain this information in the future."[85] However, the exemption may still be invoked for "the benefit of the person who

[76] Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 873 (D.C. Cir. 1987) (alterations in original) (quoting *Nat'l Parks*, 498 F.2d at 770).

[77] *Critical Mass*, 975 F.2d at 873 (alterations in original) (citing *Nat'l Parks*, 498 F.2d. at 766).

[78] *Id.* (quoting *Nat'l Parks*, 498 F.2d at 767).

[79] *Id.* at 872.

[80] 19 C.F.R. § 122.48(a) (2006).

[81] 19 U.S.C. § 1431(a) (2006).

[82] *Critical Mass*, 975 F.2d at 879.

[83] *Id.* at 873.

[84] *See id.* (quoting *Nat'l Parks*, 498 F.2d at 768).

[85] *Nat'l Parks* at 770.

has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position"[86] and "actual competition and a likelihood of substantial competitive injury."[87] If a court finds a competitive harm, then the information is "confidential" within the meaning of Exemption four and exempt from disclosure.[88] The CBP holds that the requested information is compelled by the government and creates a competitive harm, according to the comment of the ATA, and is therefore exempt from disclosure and does not need to release based on FOIA.

C. The CPB's Denial

Generally, the CBP will deny disclosure if the claim falls pursuant to an exception. For example, a trade data provider[89] on appeal wished to receive aircraft manifest data. In response, the CBP sent a withholding determination that denied disclosure:

> "[P]ursuant to Pub. L.104-295, it has been CBP's position the air cargo manifest data should not be publicly available . . . Acting consistently with Public Law 104-295 your request for the air manifest data is denied pursuant to FOIA Exemption (b)(4) . . . You may institute judicial review . . ."[90]

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[86] *Id.*

[87] Gilda Indus., Inc. v. U. S. Customs and Border Prot. Bureau, 457 F. Supp. 2d 6, 9 (D.C. Cir. 2006) ("A 'competitive injury' is one flowing from the affirmative use of proprietary information by competitors") (quoting *FDA*, 704 F.2d at 1291 n.30).

[88] *See Nat'l Parks*, 498 F.2d at 771.

[89] The trade data provider for this example wishes to remain anonymous.

[90] Letter from CBP to a trade data provider (Aug. 18, 2009).

> [Y]ou are aware, air cargo manifest data is not publicly available as is vessel manifest data. The Automated Manifest System (AMS) does not maintain air cargo manifest data thus sending a request or subscribing to the AMS will not provide you with information that you seek.
>
> In your appeal letter, you make the legal argument that, due to the passage for the ACPA, CBP "is required to provide aircraft manifest data to the press and public under the same conditions that [are] already to sea manifest data." Your legal argument, however is missing a key piece of legislation. Subsequent to the passage of the ACPA, Congress passed . . . Public Law 104-295 TCA . . . Congress clarified the reference in §1431 (c) (1) is to vessel manifests and does not include other types of manifests . . . .

Id. Additionally, when asked whether their information was based solely on vessel manifests, Import Genius replied, "Unfortunately the shipments that come in by air are protected by law and we will not have this data." *See generally* ImportGenius, *available at* www.importgenius.com.

As of this Article's publication, no company has sought judicial review of this issue.

V. ANALYSIS

Why is CBP refusing to disclose aircraft manifest data and what are the effects of this position on the commercial supply chain? Subsection A will discuss the Air Automated Manifest System and how it used in air cargo manifest reporting. Subsection B will explain how the Miscellaneous Technical Corrections Act section regarding air cargo manifests has been misapplied and explores the relevant implications. Next, subsection C discusses the possible outcomes if disclosure of the data was compelled through the courts pursuant to FOIA. Lastly, subsection D discusses the importance of transparency in the supply chain.

A. Air Automated Manifest System

Why does CBP claim that it "does not maintain air cargo manifest data" when Automated Manifest System ("AMS") is already in place and referenced by CBP in publications?[91] By definition, the AMS "is a multi-modular cargo inventory control and release notification system for sea, air, and rail carriers."[92] Pursuant to Section 343(a) of the Trade Act of 2002, all modes of transportation both into and out of the United States must provide for the advanced electronic presentation of cargo information.[93] Section 122.48(a) was added to the CBP regulations to implement statutory provisions relating to inbound air commerce.[94] This requires the incoming air carrier to always provide information through Air AMS when the incoming aircraft enters the United States with

[91] *See Air AMS Communication and Data Processing Services*, U.S. DEPARTMENT OF HOMELAND SECURITY, *available at* http://www.cbp.gov/linkhandler/cgov/trade/automated/automated_systems/ams/air_ams_data.ctt/air_ams_data.doc (last visited Dec. 7, 2012).

[92] *See* Binex, *AMS Systems*, http://binexline.com/ams-systems.php (last visited Dec. 7, 2012) ("AMS speeds the flow of cargo and entry processing and provides participants with electronic authorization to move cargo prior to arrival.").

[93] General Notices, 19 CFR Part 122: Required Advance Electronic Presentation of Cargo Information: Revised Compliance Dates for Air Cargo Information, BUREAU OF CUSTOMS AND BORDER PROTECTION, 1, available at http://www.cbp.gov/linkhandler/cgov/trade/legal/bulletins_decisions/bulletins_archives/bulletins_2004/vol38_03242004_no13/38genno13.ctt/38genno13.pdf.

[94] *Id.*

commercial cargo aboard.[95] The CBP must electronically receive information concerning the incoming cargo in advance of its arrival into the United States.[96] The CBP collects such information through the Air AMS.[97] The compliance dates for full participation in the advance reporting system were set for December 2004.[98]

Considering it is now January 2013, is it possible that eight years have passed and the CBP still has not had the time to implement the same data procedures they maintain with vessel manifests? When the CBP states that they do not maintain air cargo manifest data, are they really insinuating that they lack the manpower to maintain their system in a manner where they could readily provide air cargo information to requesters on demand? Or is the government just being apathetic? Since the public has not sought judicial review pursuant to FOIA, why should the CBP take further steps when the status quo seems to be sufficient?

B. Miscellaneous Technical Corrections Act

The CBP is of the opinion that 19 U.S.C. § 1431(c)(1) only compels the public disclosure of vessel manifest data, and that there is no Congressional intent to include disclosure of the aircraft manifest data. The CBP claims it is justified in this stance because of the amendment made by the TCA. Unfortunately, the CBP's notion is inconsistent with the law, and it is in fact legally required by law to disclose such information.[99]

The key issue is that the oft-cited amendment was never actually incorporated into law.[100] This amendment attempted to amend section 1431(c)(1) as it existed prior to the ACPA amendment,[101] but without

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[95] *Air Automated Manifest System: Frequently Asked Questions*, VILDEN ASSOCIATES, INC. (Jul. 25, 2005), *available at http://www.vilden.com/airfaq/air_faq_cargo.htm* (search for "question 36").

[96] Bureau of Customs and Border Protection, *supra* note 93, at 1.

[97] Air Automated Manifest System, *supra* note 95.

[98] Bureau of Customs and Border Protection, *supra* note 93, at 1.

[99] *See generally supra* section IV.

[100] Miscellaneous Trade and Technical Corrections Act of 1996, Pub. L. No. 104-295, § 3(a)(3), § 431(c)(1). The Act as of October 11, 1996 purported to amend subsec. (c)(1) by substituting "a vessel manifest" for "such manifest;" however, because of a prior amendment, this amendment could not be executed. *See id.*

[101] *Id.* Before the 1996 ACPA amendment, 19 U.S.C. § 1431(c)(1) read as follows: "the following information, when contained in such manifest, shall be available for public disclosure." Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 3000 (prior to 1996 amendment). After the ACPA amendment, § 431(c)(1) was changed by "inserting 'vessel or

actually taking note of the ACPA amendment. That is why the section reads: "when contained in such vessel vessel [sic] or aircraft manifest, shall be available for public disclosure."[102] The amendment never eliminated or discussed the elimination of the word "aircraft," as in the ACPA amendment, but instead duplicated the word "vessel."

In opposition to the disclosure of air cargo manifests, the Air Transport Association of America (ATA) submitted in testimony to Congress that it is "highly important in the interests of cargo security and confidentiality of business data . . . that air cargo manifests remain immune from publication in any form."[103] However, the position of the ATA should not be reason enough for the resulting non-disclosure under the ACPA. The Senate Judiciary Committee clearly explained that the purpose of section eleven was to modernize existing law so that aircraft and vessel manifests were treated the same.[104] There is a lack of logic to the actions taken by Congress, considering it passed the ACPA, which had more congressional testimony and consideration than the TCA, only to amend it less than six months later and hastily adopt an improperly executed correction.[105]

To put the manifest documents in perspective, Air Cargo Manifests are currently compelled by the government.[106] The air cargo manifest includes data such as consignee name and address, nature of the goods, number of pieces, the air waybill, and/or air waybill number.[107] Much like Inward Vessel Manifests, ("IVM"), the names and addresses of the shipper and the consignee may be kept confidential by the CBP at the request of the shipper or carrier.[108]

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aircraft' before 'manifest.'" Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, 110 Stat. 1386. After the TCA attempt at amending 19 U.S.C. § 1431(c)(1), the statute read as follows: "the following information when contained in such vessel [vessel] manifest, shall be available for public disclosure." Miscellaneous Trade and Technical Corrections Act of 1996, Pub. L. No. 104-295, 110 Stat. 3515.

[102] 19 U.S.C. § 1431(c)(1) (2006).

[103] WRITTEN COMMENTS ON TECHNICAL CORRECTIONS TO RECENT TRADE LEGISLATION, H.R. DOC. NO. WMCP: 104-4, at 9 (1995), *available at* http://www.gpo.gov/fdsys/pkg/CPRT-104WPRT91825/pdf/CPRT-104WPRT91825.pdf (last visited Dec. 7, 2012).

[104] *See supra* note 35

[105] S. REP. NO. 104-177 (1996).

[106] 19. C.F.R. § 122.48 (2006).

[107] Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022, 1024-25 (D.C. Cir. 1999) (citing 19 C.F.R. § 103.31(e)(3) (2006)).

[108] 19 C.F.R. § 103.31(d)(1) (2006) (The public is allowed to collect *manifest* data at every port of entry. Reporters collect and publish names of importers from vessel *manifest*

With regard to vessel manifests, a foreign exporter that wishes to ship goods to the United States generally arranges with an ocean carrier to carry the goods into the country[109] Using information provided by the exporter/shipper, the carrier prepares a bill of landing for each specified lot of goods and completes a Cargo Declaration, or IVM.[110] The IVM lists all the bills of landing on the vessel and it provides information about each shipment, including a general description of the goods.[111] CBP requires the carrier to present the IVM on entry to an American port, and CBP then releases this information to the general public.[112] Once the goods are in a U.S. port, CBP requires the individual importer to complete an Import Declaration.[113] Since the documents are completed by the individual importer (and not with second-hand information supplied by the shipper to the carrier as they are for IVMs), the Import Declaration is far more specific and yet remains subject to disclosure under FOIA claim.[114] Notably, the data providers are not seeking unprecedented specifics with regard to air cargo manifests, but instead are only seeking the same information the same information they already freely receive with respect to vessels.[115] Because of CBP's misapplication of the law, trade data providers and the public alike are being denied disclosure of information they should have a right to obtain.

C. FOIA

If trade data companies were to seek judicial review, the CBP's ongoing denial of disclosure would likely be found illegal. Under current case law, if a party were to challenge the CBP nondisclosure pursuant to a FOIA exception, the CBP will bear the burden to show that it applied the exemption properly and would be required to prove a "substantial harm to the competitive position from whom the

data unless an importer/shipper requests confidentiality (emphasis added)).

[109] Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d at 1023.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *CBP Form 1302: Inward Cargo Declaration*, U.S. DEPARTMENT OF HOMELAND SECURITY (June 2009) (search for "Form 1302"); *CBP Form 7509: Air Cargo Manifest*, U.S. DEPARTMENT OF HOMELAND SECURITY (June 2009) (search for "Form 7509").

information is obtained."[116] This would be difficult to prove, as companies are able to opt out of disclosing information under current interpretations of exemption four.[117] However, the procedural requirements of FOIA state that "any reasonably segregable portion of a record"[118] must be released after appropriate application of the FOIA's nine exemptions.

As long as the air cargo carriers are able to opt out of disclosing information, it is hard to see how the companies would be able to claim a substantial harm to their competitive position. Based on this, it is likely that a court would require the CBP to release the documents, albeit with names redacted to protect individual identities. Considering there has been no issue in disclosing analogous information from vessel manifests, it would be difficult for a court to rule in favor of the CBP's non-disclosure. As it stands, the effects of CBP's non-disclosure has rendered FOIA meaningless, but one lawsuit challenging the CBP could change this current reality rather quickly.

D. Supply Chain

Aside from legal issues, the CBP's ongoing denial of disclosure is making it difficult for relevant parties to determine where goods in the market originate and where they end up. Organizations have realized they must know more about what happens in their business as it relates to a global marketplace. To this end, there is now a growing movement to understand the total environmental impact of products and services. In order to do that, businesses "need to understand [a] product's impact up and down the supply chain."[119] Further, in order to maintain a brand

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[116] *Nat'l Parks*, 498. F.2d at 766-70 ("In order to bring a matter (other than a trade secret) within this exemption, it must be show that the information is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential); Getman v. N.L.R.B., 450 F.2d 670, 673 (D.C. Cir. 1971) (*quoting* Consumers of United States, Inc. v. Veterans Admin., 301 F. Supp. 796, 802 (S.D.N.Y. 1996)).

[117] 5 U.S.C. 552(b)(4) (2006); *Nat'l Parks*, 498 F.2d at 767-70 (stating that the legislative history of this exemption is intended to protect these companies); *Department of Justice Guide to the Freedom of Information Act*, DEPARTMENT OF JUSTICE, *available at* http://www.justice.gov/oip/foia_guide09/exemption4.pdf.

[118] Freedom of Information Act, 5 U.S.C. § 552, *amended by* Pub.L. 104-231, 110 Stat. 3048 (1996).

[119] Terrance G. Clark, *Energy and Sustainability Perspectives: Why is Supply Chain Transparency Important?* (CA TECHNOLOGIES) (Jul. 31, 2009), *available at* http://community.ca.com/blogs/greenit/archive/2009/07/31/why-is-supply-chain-transparency-important.aspx.

that is sustainable, "[c]ompanies must have operational integrity and their communications have to strike the right balance between visibility and transparency."[120] Another benefit is that information is helpful to consumers who are already susceptible to the purchase of counterfeit goods.[121] To this end, counterfeiting "is a huge problem because, after all, an ethically made shirt looks and feels identical to the sweatshop alternative."[122]

Further, based on a slew of product recalls, consumers, governments and companies are beginning "to worry about quality, safety, ethics, and environmental impact and [are] demand[ing] details about the systems and sources that deliver goods."[123] Issues such as recalls become impossible to manage when there is a lack of effective information.[124] For example, natural disasters necessitate companies to have more transparency.[125] In 2011, a massive earthquake hit Japan, but the figurative aftershocks were not limited to Japan. The disruption to the global supply chains was significant.[126] Hewlett Packard predicted a $700 million loss in sales and Honda's production of Civics was disrupted.[127] Companies need better information about the supply chain so they can better prepare themselves for unforeseen circumstances such as natural disaster. This information would allow companies to have greater preparedness and procurement flexibility in order to manage in

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[120] Nathan Schock, *Communicating Sustainability With Transparency*, TRIPLEPUNDIT, http://www.triplepundit.com/2010/11/communicating-sustainability-transparency/ (last visited Apr. 6, 2012).

An example of such a company is Patagonia, in which they have implemented the Footprint Chronicles where the show the supply chain and lifecycle of the products they sell. *Id.* ("Driven by growing calls for transparency, firms such as Wal-Mart, Tesco, and Kroger are beginning to use new technologies to provide providence data to the market place.") Steve New, *The Transparent Supply Chain*, HARV. BUS. REV. (Oct. 2010), *available at* http://hbr.org/2010/10/the-transparent-supply-chain/ar/1.

[121] *See* New, *supra* note 120.

[122] *Id.*

[123] *Id.*

[124] New & Brown, *supra* note 1.

[125] *Openness vs. Transparency*, GLOBAL REPORTING INITIATIVE: SUPPLY CHAIN TRANSPARENCY, (Oct. 22, 2007), http://supplychaintransparency.wordpress.com/2007/10/. Transparency is defined as "there is enough information available with the company on the sustainability aspects of a product including where and how all the components have been sourced. *Id.*

[126] New & Brown, *supra* note 1.

[127] *Id.* Pace, a UK box manufacturer, and Nokia incurred substantial drops in profits. *Id.*

adverse circumstances.[128]

While the disclosure of additional information can paradoxically lead to "missteps. . . which [would] directly affect consumers' trust,"[129] the policy reasons for nondisclosure of manifest information are outweighed by the aforementioned benefits. With the added information that air cargo manifests can provide to the market, it will allow for a more efficient system for all affected parties.

VI. CONCLUSION

Requests for Air Cargo Manifest Data are consistently denied by the Customs and Border Protection. These facially baseless denials are cause for concern regarding the agency's intention behind the refusal to provide the information.

The world has changed in many ways since legislative amendments regarding vessel manifests were enacted. The internet alone has changed the face of shipping and the transport of goods, as it now enables personal sellers and online companies to deliver goods to individuals all over the world. In the 1980s, before the birth of e-commerce, FedEx was recognized as having revolutionized shipping. It is time for the CBP to change with the times and assimilate into the world in which we now live. The policy arguments against releasing air freight information fall short, and no clear reason or fair concern has been raised in opposition.

Requiring the same information vessels provide regarding their cargo be provided for air shipments, including the same option to exclude confidential or unique identifying information, is not an unreasonable request. There are many potential reasons, however, why this request has not been honored to date. These include lack of resources at CBP, political pressure on CBP, lobbying clout from the airline industry, and concerns about terrorism.

While a specific rationale may be difficult to pinpoint, the legal

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[128] David Sinchi-Levi, *Webinar Summary: Mitigating business risks: Managing known-unknowns and unknown-unknowns*, SCM WORLD, *available at* http://www.scmworld.com/events/event_details.asp?id=194335 ("companies can prevent $310bn losses resulting from natural disasters.").

[129] *Deloitte Highlights Systemic Risk in Supply Chains*, GLOBAL REPORTING INITIATIVE: SUPPLY TRANSPARENCY, (October 4, 2007) *available at* http://supplychaintransparency.wordpress.com/2007/10/04/deloitte-highlights-systemic-risk-in-supply-chains/. "Information is not only a tool for me, but for other who can hold me accountable." New & Brown, *supra* note 1.

implications from CBP's refusal to disclose air cargo manifest data are apparent. The CBP's actions render FOIA meaningless, leave consumers and businesses with incomplete, non-transparent supplier information, and misapply the substantive federal law by continuing to enforce an incorrect amendment in contradiction of its legislative intent. The CBP's unfounded denials of air cargo manifest data may be numerous and compounded, but the societal impact is immeasurable. The nondisclosure of air cargo manifest data is a wrong that is in need of a drastic overhaul.