

COMMENTS ON PROPOSED MEMORANDUM OF UNDERSTANDING

January 17, 2008

MOU PROVISIONS	COMMENTS
1.0 INTRODUCTION	
1.1 Partners in Protection (“PIP”) is a voluntary program established by the CBSA to encourage industry, in all business modes, to assist the CBSA in its efforts to enhance border security, combat organized crime and terrorism, detect and prevent contraband smuggling, and increase awareness of customs and immigration compliance issues to secure the flow of legitimate goods and travellers across the border.	<p>What does “mode” refer to? Is this a reference to the different categories or types of applicants, eg. importers, brokers, carriers, etc? The C-TPAT Agreement contemplates that within different categories of participants (importers, for example), companies may have different business “models”, which will affect their risk analysis, etc.?</p> <p>This is a supply chain security program. Why is there reference to immigration compliance and travellers? Suggest substituting “customs and immigration compliance issues to secure the flow of legitimate goods and travelers across the border” with “customs compliance issues in order to better secure the supply chain while facilitating the flow of legitimate goods across the border.”</p>
1.2 The CBSA recognizes the complexity of international supply chains and endorses the application and implementation of security measures and systems, using a risk-based approach, to secure the supply chains while facilitating the flow of legitimate goods and travellers across the border.	<p>Suggest substituting this section with the following:</p> <p><i>The CBSA recognizes the complexity of international supply chains and endorses the use of a risk-based approach to applying and implementing security measures and systems.</i></p>
1.3 PIP allows for flexibility and customization of security measures, with certain established minimum security criteria, based on the Participant’s business mode.	<p>What does CBSA mean by “the PIP Program allows for flexibility and customization of security measures, with certain established minimum criteria...”? Is there flexibility in the application of the minimum criteria? If there is no flexibility in the application of the minimum security criteria, where is the flexibility?</p> <p>See comment above regarding use of the term “mode.”</p> <p>There should also be flexibility in application of the security measures based on such factors as the size of the company, the number of employees, the nature of the company’s business, the location of the company’s business, the activities carried out at a particular location, etc.</p>

<p>1.4 Although the PIP program is separate from other CBSA low-risk trader programs, in particular, Customs Self-Assessment (“CSA”) and Free & Secure Trade (“FAST”) to expedite international shipments, the three (3) programs are related and work together.</p>	<p>What is the purpose of this section? We suggest that it be deleted as it is too ambiguous and will likely create uncertainty and confusion.</p>
	<p>There are a number terms used throughout this document, including PIP Security Criteria, minimum security criteria, security profile, that should be defined at the beginning of the MOU in a separate Definitions section.</p>
<p>2.0 PURPOSE & NATURE</p>	
<p>2.1 The purpose of this Memorandum of Understanding (“MOU”) is to set out the roles and responsibilities of the CBSA and the Participant to enhance the physical security and integrity of the production, transportation, importation and/or exportation processes of the Participant and to authorize its participation in the PIP program.</p>	
<p>2.2 The roles and responsibilities of the Participant set out in this MOU are voluntary and do not, in any manner whatsoever, affect any of the legal obligations of the Participant under any Act of Parliament.</p>	<p>With regard to the legal obligations of the Participant, some of the benefits that CBSA will offer to Participants under the PIP program will affect the application of some legal obligations.. It is suggested that a phrase be added such as: “except as specified herein or as provided under the program.”</p> <p>This raises the question as to how CBSA will provide certain benefits without provisions in the Customs Act or other applicable legislation.</p>
<p>2.3 This MOU represents administrative understandings between the CBSA and the Participant that are not intended to be legally binding or enforceable before the Courts.</p>	<p>See comments to section 5.1.</p>
<p>2.4 Nothing in this MOU is intended to create a relationship of agency, partnership, employer-employee or joint enterprise between the CBSA and the Participant.</p>	
<p>2.5 The Participant agrees with the roles and responsibilities set out in this MOU.</p>	
<p>3. ROLES & RESPONSIBILITIES</p>	

<p>The CBSA will:</p> <p>3.1 Accord the Participant preferred consideration when making risk-based determinations for the purposes of cargo examinations;</p>	<p>We recognize that CBSA cannot identify all of the benefits that it will offer to PIP participants in the MOU. However, we suggest that more benefits be listed than are currently identified before the MOU is finalized, including, for example, front of the line inspections, priority in crossing the border in the event of an emergency situation, etc. We also suggest that there should be a general statement that CBSA will provide incentives and benefits to PIP participants and will work with industry to identify, develop and implement new incentives and benefits on an ongoing basis. Unless companies see significant tangible benefits, they are unlikely to participate in the program.</p> <p>What does “preferred consideration” mean? How will this be measured? Will different participants receive different consideration? If so, how will this be determined?</p>
<p>3.2 Review any information submitted by the Participant in accordance with this MOU and, where necessary, provide feedback;</p>	<p>There should always be a response when information is submitted to CBSA. A timeframe should be established for responding and where appropriate, providing feedback. We recommend thirty (30) days.</p> <p>Where feedback is provided, will the Participant be expected to respond?</p>
<p>3.3 Ensure that any information received from the Participant in accordance with the PIP program will be treated as confidential and will not, subject to the disclosure provisions of the <i>Customs Act</i> (Canada), be disclosed to any person;</p>	<p>For obvious reasons, there is serious concern about the confidentiality of information provided by applicants to the PIP program. There does not appear to be a legal basis for stating that information submitted for purposes of the PIP program is “collected under the <i>Customs Act</i> (Canada), and is ‘customs information’ as that term is defined therein” as stated in subsection 1.14 of the Security Criteria as the PIP program is not provided for under the <i>Customs Act</i>. This means that the disclosure provisions of the <i>Customs Act</i> would not apply.</p>
<p>3.4 Provide the Participant with awareness (information) sessions on indicators of suspicious cross-border activities and/or security violations. The CBSA will also provide the Participant with general information on security and smuggling issues. This will facilitate the exchange of information between both parties;</p>	
<p>3.5 Provide the Participant with up to date CBSA contact</p>	<p>It is recommended that instead of simply providing contact numbers that</p>

<p>numbers to report any suspicious matter or to seek its counsel with regard to a possible contravention of any Act of Parliament;</p>	<p>specific individuals be identified.</p> <p>As indicated in the comments to the Security Criteria, consistency in terminology and clarity is needed in terms of what types of activities participants are expected to report. We recommend restricting this requirement to illegal or suspected illegal activities.</p> <p>What protection will the Participant have if it reports an illegal or suspected illegal activity? There need to be some assurances (similar to a voluntary disclosure situation) that if a Participant comes forward, the Participant will not be penalized.</p>
<p>3.6 Identify a contact person for any issue flowing from this MOU; and</p>	<p>Just the MOU or any matter relating to the PIP program?</p> <p>It is suggested that more than one person be assigned and that they be supply chain security specialists.</p>
<p>3.7 Maintain an up-to-date list of authorized PIP participants on the CBSA web-site.</p>	<p>For security reasons, we do not recommend publishing the names of authorized PIP participants on the CBSA website or anywhere else other than a secure Web portal accessible only to PIP members.</p>
<p>The Participant will:</p> <p>3.8 Ensure that its security measures and systems continue to meet or exceed the minimum security criteria for its business mode established by the CBSA and set out in the PIP Security Criteria;</p>	<p>Are the minimum security criteria and the PIP Security Criteria one and the same? We suggest that these be attached as a schedule to the MOU.</p>
<p>3.9 Within the time frames set out in the PIP Security Criteria, review its security measures and systems at all of its facilities and provide updated security profiles to the CBSA;</p>	<p>There are no time frames in the PIP Security Criteria for reviewing security measures and systems.</p> <p>The facilities that will be subject to security measures and systems will have to be defined. It is recommended that in general only those locations that are the point of first delivery for goods after importation and main offices should be subject to the PIP Security Criteria. Retail locations would not be covered, for example, unless imported goods were delivered directly to these locations following importation rather than</p>

	going through distribution centres. There may be some exceptions. Some security measures may have to be company wide, such as those relating to data and documentation protection.
3.10	<p>Within the time frames established by the CBSA in any security assessment report, take all reasonable measures to correct any problematic security issue identified by the CBSA;</p> <p>Insert after “reasonable measures” and before “to,” “within the Participant’s control.”</p>
3.11	<p>Inform the CBSA of any inability to correct an identified problematic security issue and/or any non-conformity with the minimum security criteria;</p>
3.12	<p>Promote its relationship with the CBSA under the PIP program to its employees and encourage them to cooperate fully with the CBSA to carry out the purposes of this MOU;</p> <p>We do not consider it appropriate for employees to have a direct relationship with CBSA. We suggest that this subsection be reworded as follows:</p> <p><i>Promote its participation in the PIP program to its employees and encourage them to cooperate fully with the Participant to carry out the purposes of this MOU.</i></p>
3.13	<p>Authorize the CBSA to include its name on the CBSA website of authorized PIP participants;</p> <p>See comments to section 3.7 above.</p>
3.14	<p>Identify its contact person for any issue flowing from this MOU;</p> <p>Just the MOU or any matter relating to the PIP program?</p>
3.15	<p>Condition its business dealings to those entities who agree to take steps to ensure their security measures and systems meet or exceed the minimum security criteria established by the CBSA and set out in the PIP Security Criteria;</p> <p>Use of the term “condition” makes this section unclear. Is this section intended to mean that PIP participants must restrict their business dealings only to those entities that agree to ensure that their security measures are consistent with PIP?</p> <p>To what extent does CBSA expect importers to ensure that their business partners develop security processes and procedures consistent with PIP? Which business partners? All vendors, carriers, warehouses, freight brokers, forwarders? Some importers have thousands of suppliers of goods and services. Most importers will not be in a position to impose</p>

	<p>requirements on their suppliers to implement security processes and procedures as a condition of their contracts. A risk based approach needs to be adopted not only with respect to conducting reviews of business partners but also with respect to which business partners (eg. key or strategic partners) should be required to implement security processes and procedures.</p> <p>If importers cannot ensure that business partners develop security processes and procedures, the PIP participant can mitigate the risk and by following tighter security procedures when dealing with that supplier, such as subjecting merchandise received from that business partner to greater inspections.</p>
<p>3.16 Within the time frames set out in the PIP Security Criteria, advise the CBSA in writing of any substantive company changes, including its security profile and/or its business, contact and subsidiary company information;</p>	<p>As indicated in our comments to the Security Criteria, it is necessary to clarify what “substantive” company changes need to be notified to CBSA.</p>
<p>3.17 Establish procedures to encourage employees to advise the CBSA of any suspicious circumstances involving potential customs or immigration offences;</p>	<p>It is not appropriate to encourage all employees to contact CBSA. Employees should notify the appropriate person or persons within the company who should then contact CBSA. Recommend deleting “to encourage employees” with “within the company” “or within the Participant.”</p> <p>As indicated in the comments to the Security Criteria, consistency in terminology and clarity is needed in terms of what types of activities participants are expected to report. We recommend restricting this requirement to illegal or suspected illegal activities.</p>
<p>3.18 When drugs or other contraband are found by an employee, without handling same, and without delay, report the situation to either the CBSA or other law enforcement agency;</p>	<p>Drugs and contraband could be discovered by someone other than an “employee.”</p> <p>See comments to 3.17 regarding consistency in terminology and clarity with respect to the types of activities that a participant is expected to report.</p>
<p>3.19 In cases where an employee contacts the CBSA to report</p>	<p>Substitute “an employee” with “the Participant.”</p>

	suspicious circumstances, and upon the request of the CBSA, to the extent allowed by law, provide the CBSA with access to supplementary cargo or any other relevant information;	
3.20	Upon request, provide the CBSA with access to any security monitoring systems that are utilized for premises security; and	Insert “reasonable” after “upon” and before “request.”
3.21	Where practicable, and upon the request of the CBSA, make the CBSA familiar with relevant internal information and security systems and processes, and assist the CBSA in appropriate training in search methods for those premises, conveyances and business operations the company controls.	Insert “reasonable” before “request.” What does “assist the CBSA in appropriate training in search methods for those premises” mean?
4. OTHER OPERATIONAL RESPONSIBILITIES		
4.1	For all purposes under this MOU, the CBSA and the Participant will work in consultation and will respect the role and statutory mandate of the CBSA and the efficient operational requirements of the Participant to engage in its chosen business activities.	
4.2	The CBSA will not ask the Participant to act as a law enforcement body.	
4.3	The CBSA may, at any time, undertake a periodic assessment of the Participant.	
4.4	The failure of the Participant to comply with any role or responsibility set out in this MOU may, depending on the circumstances, result in the suspension or termination of this MOU by the CBSA.	See comments to section 5.1.
4.5	Any non-compliance with, or contravention of, any Act of Parliament by the Participant or its employees may, depending on the circumstances, result in the suspension or	See comments to section 5.1.

<p>termination of this MOU by the CBSA.</p>	
<p>5.0 DISPUTE RESOLUTION</p>	
<p>5.1 Any dispute flowing from this MOU will be resolved by consultation among the contact persons identified by the CBSA and the Participant. The final level of dispute resolution is between the persons occupying the positions of signatory to this MOU.</p>	<p>Especially because of the business partner requirements under the PIP program and similar supply chain security programs in other countries, including C-TPAT, termination or suspension of the PIP program could seriously damage a company's business. It is not acceptable for the final level of dispute resolution to be through consultation between the parties. It is critical that expedited administrative and judicial appeal processes be established before the new PIP program is implemented and the availability of these appeal processes must be addressed in the MOU. The appeal processes should also be designed in consultation with industry.</p> <p>The Participant's participation in the PIP program should not be terminated or suspended until all avenues of appeal have been exhausted and there is a final decision in favour of the CBSA.</p>
<p>6.0 EFFECTIVE DATE & TERMINATION</p>	
<p>6.1 This MOU will come into effect on the date that it is last signed and will remain in effect until it is suspended or terminated by the CBSA or the Participant upon written notice, or at any time, upon mutual consent, of the persons occupying the positions of signatory to this MOU.</p>	<p>See comments to section 5.1 regarding suspension and termination.</p>
<p>6.2 If this MOU is suspended or terminated, the Participant is no longer an authorized participant in the PIP program and its name will be removed from the list of authorized PIP participants maintained by the CBSA on its web-site.</p>	<p>See comments to section 3.7 regarding publication of names of PIP participants on CBSA website.</p>
<p>6.3 If this MOU is suspended or terminated by the CBSA for any reason set out in paragraph 4.4 or 4.5, the Participant may seek its reinstatement, upon written request to the CBSA.</p>	<p>As stated above in the comments to section 5.1, the Participant's participation in the PIP program should not be terminated or suspended until all avenues of appeal have been exhausted and there is a final decision in favour of the CBSA.</p>

