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## customs update: how will the 9/11 report affect traders?

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### **practice areas**

international trade

regulatory

Still on the bestseller list after its initial publication in July, the 9/11 Commission Report makes for interesting reading even now. Its greatest strength and its biggest weakness is that it is focused exclusively on the events of 9/11. As such, the report really only provides a snapshot, and a myopic one at that, for international traders of things to come. It is replete with references to air travel because, of course, this is the context in which that terrible day is framed. The Commission's hearings did raise issues about cargo and all modes of transportation, but little is said about that in the report itself.

Of interest to international traders are the countries and regions identified by the Commission as being on the front lines of terrorism:

- Western Pakistan and the Pakistan-Afghanistan border
- Southern or western Afghanistan
- The Arabian Peninsula, especially Saudi Arabia and Yemen and the nearby Horn of Africa, including Somalia and extending southwest into Kenya
- Southeast Asia, from Thailand to the southern Philippines to Indonesia
- West Africa, including Nigeria and Mali
- European cities with expatriate Muslim communities, especially cities in central and eastern Europe where security forces and border controls are less effective.

In looking at this list, one is struck that what most of these regions have in common is they are remote and not particularly developed, either economically or, by Western standards, socially. Of course, cargo does arrive in the U.S. from Southeast Asia and Europe, especially the Philippines, which is known in the trading community as a high security risk area. The same has not necessarily been true for other locations in Southeast Asia, such as Thailand and Indonesia.



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Similarly, Americans do not generally think in terms of security risks when dealing with European sellers and ports. Taking the Commission's recommendations to heart will require us all to rethink our business alliances and how we deal with our business partners.

Despite mentioning the Middle East as a hotbed for terrorism, the Commission nonetheless recommends a Middle East Free Trade Area by 2013.

Just as international traders have consistently said that securing the supply chain requires international agreements and accommodations, so, too, the Commission recommends the U.S. engage other countries to develop a "comprehensive coalition strategy against Islamist terrorism...[t]he most important policies should be discussed and coordinated in a flexible contact group of leading coalition governments," with the proposal that this is a proper forum in which to "develop joint strategies to target terrorist travel." Of course, international traders would add, "and to target terrorist activities as they relate to cargo, as well as to formulate and implement cargo, conveyance and trade infrastructure security measures."

The report goes on to recommend targeting terrorist money and travel, but also that "every stage of our border and immigration system should have as a part of its operations the detection of terrorist indicators on travel documents." Here traders would add, "and commercial documents (which for these purposes includes carrier and bank documents, too)."

Echoing what many traders feel, the Commission also reported, "[t]he current efforts do not yet reflect a forward-looking strategic plan systematically analyzing assets, risks, costs, and benefits. Lacking such a plan, we are not convinced that our transportation security resources are being allocated to the greatest risks in a cost-effective way.

"Major vulnerabilities still exist in cargo and general aviation security. These, together with inadequate screening and access controls, continue to present aviation security challenges.

"While commercial aviation remains a possible target, terrorists may turn their attention to other modes. Opportunities to do harm are as great, or greater, in maritime or surface transportation. Initiatives to secure shipping containers have just begun. Surface transportation systems such as railroads and mass transit remain hard to protect because they are so accessible and extensive."

The report goes on to recommend exactly what international traders have been urging from the beginning - that elected representatives must make the hard choices to allocate limited resources through priorities which are risk-based and should partner the public and private sectors together. The report also acknowledges that every state and city have some "minimum infrastructure for emergency response. But the federal homeland security assistance should not remain a program for general revenue sharing." The Commission recommends "a panel of security experts be convened to develop written benchmarks for evaluating community needs..." and that Congress be obliged to allocate funding in accord and local communities be required to abide by those benchmarks.



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Further, the government, according to the Commission, needs to invest in technology designed to screen cargo transported by plane, ship, truck or rail and improve methods of identifying and tracking high-risk containers, operators and facilities. Customs has led this effort, most recently with its recommendations regarding container seals.

Reiterating what has been said from the outset by Customs and Border Protection, the report goes on to recommend a layered security system and tasks the Transportation Security Administration (which by law oversees cargo security) with identifying for Congress the "array of potential terrorist attacks, the layers of security in place, and the reliability provided by each layer." TSA would then also need to identify and develop plans to improve weak individual layers as well as the "effectiveness of the layered system it deploys." The report charges TSA with needing to "intensify its efforts to identify, track and appropriately screen potential dangerous cargo in both the aviation and maritime sector." Traders would take that statement to include all modes of transportation.

Much has been made in the general press about the Commission's recommendation for a national intelligence director, and the establishment of a National Counterterrorism Center for joint operational planning and intelligence, with staffing from many agencies. Perhaps alarming to international traders is the Commission's point that the Customs and immigration databases should be considered sources of intelligence information. While certainly everyone wants to contribute to the security of the country, it is becoming increasingly clear that when a shipment is held for any reason by Customs, it is more and more difficult to find out why. This early on, we are seeing individuals ignore Customs' detention policy, even in circumstances where there are no security concerns. What safeguards will be put in place to distinguish between real national security concerns and simple trading questions?

Commenting about the Department of Homeland Security, the report concludes that the agency "should identify those elements of our transportation, energy, communications, financial, and other institutions that need to be protected, develop plans to protect that infrastructure, and exercise the mechanisms to enhance preparedness. This means going well beyond the preexisting jobs of the agencies that have been brought together inside the department.

"Recommendation: The Department of Homeland Security and its oversight committees should regularly assess the types of threats the country faces to determine (a) the adequacy of the government's plans -- and the progress against those plans -- to protect America's critical infrastructure and (b) the readiness of the government to respond to the threats that the United States might face. "

In testimony before the Commission, Randall Yim quoted Comptroller David M. Walker's points in setting an agenda for the General Accounting Office. From Walker's perspective, the key questions are:

1. How may we sustain our homeland security efforts in light of fiscal, human capital and other constraints upon resources at all levels of government and in the private sector?
2. How will we balance priorities to improve homeland security with other important national priorities, such as education security, health care security, environmental security and economic security?



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3. How will we integrate homeland security measures into underlying public and private business processes and government agency missions to balance priorities and sustain efforts?
4. How will we hold governments, not-for-profits, and private sectors accountable, both for the prudent investment of money, and for maintaining and enhancing the capabilities for which they are responsible?

Acknowledging the need for government to work closely with the private sector to be successful in these efforts, Walker posed other questions.

1. What are the likely threat scenarios homeland security must address?
2. Who is in charge and who should be in charge under various scenarios where specific responsibilities are vital?
3. What should be done and who needs to do it?
4. Who pays for it, including how much does it cost and how is it paid for?
5. How do we assure accountability both in use of funds and meeting agreed upon responsibilities under the various scenarios.

Walker and Yim focused on guiding principles and standards. Whether you agree with their approach or not, these questions are equally valid for the public and the private sector. With the goal of moving forward a public dialog on these issues, the 9/11 Commission has begun its Public Discourse Project aimed at public education and a national conversation about the most serious issue of our times. What has your company done to be prepared? What do you think the federal government should do that has not already been done?