

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—114th Cong., 2d Sess.

S. 461

To provide for alternative financing arrangements for the provision of certain services and the construction and maintenance of infrastructure at land border ports of entry, and for other purposes.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by Mr. JOHNSON (for himself and Mr.
CARPER)

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Cross-Border Trade
5 Enhancement Act of 2016”.

6 **SEC. 2. REPEAL AND TRANSITION PROVISION.**

7 (a) REPEAL.—Subject to subsections (b) and (c), sec-
8 tion 560 of the Department of Homeland Security Appro-
9 priations Act, 2013 (division D of Public Law 113–6; 127
10 Stat. 378) and section 559 of the Department of Home-

1 land Security Appropriations Act, 2014 (division F of
2 Public Law 113–76; 6 U.S.C. 211 note) are repealed.

3 (b) AGREEMENTS IN EFFECT.—Notwithstanding
4 subsection (a), nothing in this Act may be construed as
5 affecting in any manner an agreement entered into pursu-
6 ant to section 560 of the Department of Homeland Secu-
7 rity Appropriations Act, 2013 (division D of Public Law
8 113–6; 127 Stat. 378) or section 559 of the Department
9 of Homeland Security Appropriations Act, 2014 (division
10 F of Public Law 113–76; 6 U.S.C. 211 note) that is in
11 effect on the day before the date of the enactment of this
12 Act, and any such agreement shall continue to have full
13 force and effect on and after such date.

14 (c) PROPOSED AGREEMENTS.—Notwithstanding sub-
15 section (a), nothing in this Act may be construed as affect-
16 ing in any manner a proposal accepted for consideration
17 and further development by U.S. Customs and Border
18 Protection or the General Services Administration pursu-
19 ant to section 559 of the Department of Homeland Secu-
20 rity Appropriations Act, 2014 (division F of Public Law
21 113–76; 6 U.S.C. 211 note) that was accepted prior to
22 the date of the enactment of this Act.

23 **SEC. 3. DEFINITIONS.**

24 In this Act:

1 (1) ADMINISTRATION.—The term “Administra-
2 tion” mean the General Services Administration.

3 (2) ADMINISTRATOR.—The term “Adminis-
4 trator” mean the Administrator of the Administra-
5 tion.

6 (3) COMMISSIONER.—The term “Commis-
7 sioner” means the Commissioner of U.S. Customs
8 and Border Protection.

9 (4) DONATION AGREEMENT.—The term “dona-
10 tion agreement” means an agreement made under
11 section 5(a).

12 (5) FEE AGREEMENT.—The term “fee agree-
13 ment” means an agreement made by the Commis-
14 sioner under section 4(a)(1).

15 (6) PERSON.—The term “person” means—

16 (A) an individual;

17 (B) a corporation, partnership, trust, es-
18 tate, association, or any other private or public
19 entity;

20 (C) a Federal, State, or local government;

21 (D) any subdivision, agency, or instrumen-
22 tality of a Federal, State, or local government;

23 or

24 (E) any other governmental entity.

1 (7) RELEVANT COMMITTEES OF CONGRESS.—

2 The term “relevant committees of Congress”
3 means—

4 (A) the Committee on Appropriations, the
5 Committee on Environment and Public Works,
6 the Committee on Finance, the Committee on
7 Homeland Security and Governmental Affairs,
8 and the Committee on the Judiciary of the Sen-
9 ate; and

10 (B) the Committee on Appropriations, the
11 Committee on Homeland Security, the Com-
12 mittee on the Judiciary, and the Committee on
13 Transportation and Infrastructure of the House
14 of Representatives.

15 **SEC. 4. AUTHORITY TO ENTER INTO FEE AGREEMENTS FOR**
16 **THE PROVISION OF CERTAIN SERVICES OF**
17 **U.S. CUSTOMS AND BORDER PROTECTION.**

18 (a) FEE AGREEMENTS.—

19 (1) AUTHORITY FOR FEE AGREEMENTS.—Not-
20 withstanding section 13031(e) of the Consolidated
21 Omnibus Budget Reconciliation Act of 1985 (19
22 U.S.C. 58c(e)) and section 451 of the Tariff Act of
23 1930 (19 U.S.C. 1451), the Commissioner may,
24 upon the request of any person, enter into an agree-
25 ment with that person under which—

1 (A) U.S. Customs and Border Protection
2 will provide the services described in paragraph
3 (4) at a port of entry or any other facility
4 where U.S. Customs and Border Protection
5 provides or will provide services;

6 (B) such person will remit a fee imposed
7 under subsection (b) to U.S. Customs and Bor-
8 der Protection in an amount equal to the full
9 costs incurred or that will be incurred in pro-
10 viding such services; and

11 (C) any additional facilities at which U.S.
12 Customs and Border Protection services are
13 performed or deemed necessary for the provi-
14 sion of services under an agreement entered
15 into under this section shall be provided, main-
16 tained, and equipped by such person, without
17 additional cost to the Federal Government, in
18 accordance with U.S. Customs and Border Pro-
19 tection specifications.

20 (2) CRITERIA.—The Commissioner shall estab-
21 lish criteria for entering into a partnership under
22 paragraph (1) that include the following:

23 (A) Selection and evaluation of potential
24 partners.

1 (B) Identification and documentation of
2 roles and responsibilities between U.S. Customs
3 and Border Protection, the Administration, and
4 private and government partners.

5 (C) Identification, allocation, and manage-
6 ment of explicit and implicit risks of partnering
7 between U.S. Customs and Border Protection,
8 the Administration, and private and govern-
9 ment partners.

10 (D) Decision-making and dispute resolu-
11 tion processes in partnering arrangements.

12 (E) Criteria and processes for U.S. Cus-
13 toms and Border Protection to terminate agree-
14 ments if private or government partners are not
15 meeting the terms of such a partnership, in-
16 cluding the security standards established by
17 U.S. Customs and Border Protection.

18 (3) PUBLICATION.—The Commissioner shall
19 make publicly available the criteria established under
20 paragraph (2), and shall notify the relevant commit-
21 tees of Congress not less than 15 days prior to the
22 publication of the criteria and any subsequent
23 changes to such criteria.

24 (4) SERVICES DESCRIBED.—Services described
25 in this paragraph are any services related to, or in

1 support of, customs, agricultural processing, border
2 security, or inspection-related immigration matters
3 provided by an employee or contractor of U.S. Cus-
4 toms and Border Protection at ports of entry or any
5 other facility where U.S. Customs and Border Pro-
6 tection provides or will provide services.

7 (5) MODIFICATION OF PRIOR AGREEMENTS.—
8 The Commissioner, at the request of a person who
9 has previously entered into an agreement with U.S.
10 Customs and Border Protection for the reimburse-
11 ment of fees in effect on the date of enactment of
12 this Act, may modify such agreement to implement
13 any provisions of this Act.

14 (6) LIMITATION.—The Commissioner may not
15 enter into a reimbursable fee agreement under this
16 subsection if such agreement would unduly and per-
17 manently impact services funded in this Act or any
18 appropriations Act, or provided from any account in
19 the Treasury of the United States derived by the
20 collection of fees.

21 (7) NUMERICAL LIMITATIONS.—Except as pro-
22 vided in paragraphs (8) and (9), there shall be no
23 limit to the number of fee agreements that may be
24 entered into by the Commissioner.

1 (8) AUTHORITY FOR NUMERICAL LIMITA-
2 TIONS.—

3 (A) RESOURCE AVAILABILITY.—If the
4 Commissioner finds that resource or allocation
5 constraints would prevent U.S. Customs and
6 Border Protection from fulfilling, in whole or in
7 part, requests for services under the terms of
8 existing or proposed fee agreements, the Com-
9 missioner shall impose annual limits on the
10 number of new fee agreements.

11 (B) ANNUAL REVIEW.—If the Commis-
12 sioner limits the number of new fee agreements
13 under this paragraph, the Commissioner shall
14 annually evaluate and reassess such limits and
15 publish the results of such evaluation and af-
16 firm any such limits that shall remain in effect
17 in a publicly available format.

18 (9) AIR PORTS OF ENTRY.—

19 (A) CERTAIN COSTS.—A fee agreement for
20 U.S. Customs and Border Protection services at
21 an air port of entry may only provide for the
22 reimbursement of—

23 (i) salaries and expenses of not more
24 than 5 full-time equivalent U.S. Customs
25 and Border Protection officers;

1 (ii) costs incurred by U.S. Customs
2 and Border Protection for the payment of
3 overtime to employee;

4 (iii) the salaries and expenses of em-
5 ployees of U.S. Customs and Border Pro-
6 tection (other than officers specified in
7 clause (i)) to support U.S. customs and
8 Border Protection officers in performing
9 law enforcement functions at air ports of
10 entry, including primary and secondary
11 processing of passengers; and

12 (iv) other costs incurred by U.S. Cus-
13 toms and Border Protection relating to
14 services described in paragraph (4), such
15 as temporary placement or permanent relo-
16 cation of such employees, including incen-
17 tive pay for relocation where appropriate.

18 (B) PRECLEARANCE.—The authority in
19 the section may not be used to enter into new
20 preclearance agreements or initiate the provi-
21 sion of U.S. Customs and Border Protection
22 services outside of the United States.

23 (C) PERMANENT RELOCATION.—Any fee
24 agreement under this Act to provide for the re-
25 imbursement of the permanent relocation of an

1 employee of the U.S. Customs and Border Pro-
2 tection shall certify that the terms of the agree-
3 ment—

4 (i) cannot otherwise be sufficiently
5 met by the person and the U.S. Customs
6 and Border Protection;

7 (ii) would not unduly impact U.S.
8 Customs and Border Protection services at
9 the port of entry from which the relocation
10 of the employee is proposed;

11 (iii) would be consistent with other
12 applicable laws and regulations regarding
13 the relocation of employees of the U.S.
14 Customs and Border Protection; and

15 (iv) all costs of the relocation have
16 been approved by the person.

17 (10) PORT OF ENTRY SIZE CONSIDERATION.—

18 The Commissioner shall—

19 (A) ensure that each fee agreement pro-
20 posal is given equal consideration regardless of
21 the size of the port of entry; and

22 (B) report to the relevant committees of
23 Congress on the number of fee agreement pro-
24 posals that the Commissioner did not enter into
25 due to numerical limits on the number of fee

1 agreements, if the Commissioner adopts such
2 limits.

3 (11) DENIED APPLICATION.—If the Commis-
4 sioner denies a proposal for a fee agreement, the
5 Commission shall provide the person who submitted
6 the proposal the reason for the denial, unless the
7 reason for the denial involves a law enforcement
8 matter or national security interest.

9 (12) CONSTRUCTION.—Nothing in this section
10 may be construed—

11 (A) to require a person entering into a fee
12 agreement to cover costs that are otherwise the
13 responsibility of the U.S. Customs and Border
14 Protection or any other agency of the Federal
15 Government and are not incurred, or expected
16 to be incurred, to cover services specifically cov-
17 ered by an agreement entered into under au-
18 thorities provided by this Act; or

19 (B) to unduly and permanently reduce the
20 responsibilities or duties of U.S. Customs and
21 Border Protection to provide services at ports
22 of entry that have been authorized or mandated
23 by law and are funded in any appropriation Act
24 or from any accounts in the Treasury of the
25 United States derived by the collection of fees.

1 (13) JUDICIAL REVIEW.—Decisions of the Com-
2 missioner under this subsection are in the discretion
3 of the Commissioner and not subject to judicial re-
4 view.

5 (b) FEE.—

6 (1) IN GENERAL.—A person who enters into a
7 fee agreement shall pay a fee pursuant to such
8 agreement in an amount equal to the full cost of
9 U.S. Customs and Border Protection—

10 (A) of the salaries and expenses of individ-
11 uals employed or contracted by U.S. Customs
12 and Border Protection to provide such services;
13 and

14 (B) of other costs incurred by U.S. Cus-
15 toms and Border Protection related to pro-
16 viding such services, such as temporary place-
17 ment or permanent relocation of employees, in-
18 cluding incentive pay for relocation where ap-
19 propriate.

20 (2) ADVANCE PAYMENT.—The Commissioner,
21 with approval from a person requesting services of
22 U.S. Customs and Border Protection services pursu-
23 ant to a fee agreement, may accept the fee for serv-
24 ices prior to providing such services.

1 (3) OVERSIGHT OF FEES.—The Commissioner
2 shall develop a process to oversee the activities for
3 which fees are charged pursuant to a fee agreement
4 that includes the following:

5 (A) A determination and report on the full
6 cost of providing services, including direct and
7 indirect costs, as well as a process, through con-
8 sultation with affected parties and other inter-
9 ested stakeholders, for increasing such fees as
10 necessary.

11 (B) The establishment of a periodic remit-
12 tance schedule to replenish appropriations, ac-
13 counts or funds, as necessary.

14 (C) The identification of costs paid by such
15 fees.

16 (4) DEPOSIT OF FUNDS.—Amounts collected
17 pursuant to a fee agreement shall—

18 (A) be deposited as an offsetting collection;

19 (B) remain available until expended, with-
20 out fiscal year limitation; and

21 (C) be credited to the applicable appropria-
22 tion, account, or fund for the amount paid out
23 of that appropriation, account, or fund for—

1 (i) any expenses incurred or to be in-
2 curred by U.S. Customs and Border Pro-
3 tection in providing such services; and

4 (ii) any other costs incurred by U.S.
5 Customs and Border Protection relating to
6 such services.

7 (5) TERMINATION BY THE COMMISSIONER.—

8 (A) IN GENERAL.—The Commissioner
9 shall terminate the services provided pursuant
10 to a fee agreement with a person that, after re-
11 ceiving notice from the Commissioner that a fee
12 imposed under the fee agreement is due, fails to
13 pay such fee in a timely manner.

14 (B) EFFECT OF TERMINATION.—At the
15 time services are terminated pursuant to sub-
16 paragraph (A), all costs incurred by U.S. Cus-
17 toms and Border Protection which have not
18 been paid, will become immediately due and
19 payable.

20 (C) INTEREST.—Interest on unpaid fees
21 will accrue based on the quarterly rate(s) estab-
22 lished under sections 6621 and 6622 of the In-
23 ternal Revenue Code of 1986.

24 (D) PENALTIES.—Any person that fails to
25 pay any fee incurred under a fee agreement in

1 a timely manner, after notice and demand for
2 payment, shall be liable for a penalty or liq-
3 uidated damage equal to 2 times the amount of
4 such fee.

5 (E) AMOUNT COLLECTED.—Any amount
6 collected pursuant to a fee agreement shall be
7 deposited into the account specified under para-
8 graph (4) and shall be available as described
9 therein.

10 (F) RETURN OF UNUSED FUNDS.—The
11 Commissioner shall return any unused funds
12 collected under a fee agreement that is termi-
13 nated for any reason, or in the event that the
14 terms of such agreement change by mutual
15 agreement to cause a reduction of U.S. Cus-
16 toms and Border Protections services. No inter-
17 est shall be owed upon the return of any unused
18 funds.

19 (6) TERMINATION BY THE SPONSOR.—Any per-
20 son who has previously entered into an agreement
21 with U.S. Customs and Border Protection for the re-
22 imbursement of fees in effect on the date of enact-
23 ment of this Act, or under the provisions of this Act,
24 may request that such agreement make provision for
25 termination at the request of such person upon ad-

1 vance notice, the length and terms of which shall be
2 negotiated between such person and U.S. Customs
3 and Border Protection.

4 (c) ANNUAL REPORT AND NOTICE TO CONGRESS.—

5 The Commissioner shall—

6 (1) submit to the relevant committees of Con-
7 gress an annual report that identifies each fee agree-
8 ment made during the previous year; and

9 (2) not less than 15 days before entering into
10 a fee agreement, notify the members of Congress
11 that represent the State or district in which the af-
12 fected port or facility is located.

13 (d) MODIFICATION OF EXISTING REPORTS TO CON-
14 GRESS.—Section 907(b) of the Trade Facilitation and
15 Trade Enforcement Act of 2015 (Public Law 114–125)
16 is amended—

17 (1) in paragraph (3), by striking “or” at the
18 end;

19 (2) in paragraph (4), by striking the period at
20 the end and inserting “; or”; and

21 (3) by adding at the end the following:

22 “(5) the program for entering into reimbursable
23 fee agreements for the provision of U.S. Customs
24 and Border Protection services established by the
25 Cross-Border Trade Enhancement Act of 2016.”.

1 **SEC. 5. AUTHORITY TO ENTER INTO AGREEMENTS TO AC-**
2 **CEPT DONATIONS FOR PORTS OF ENTRY.**

3 (a) AGREEMENTS AUTHORIZED.—

4 (1) COMMISSIONER.—The Commissioner, in col-
5 laboration with the Administrator as provided under
6 subsection (f), may enter into an agreement with
7 any person to accept a donation of real or personal
8 property, including monetary donations, or nonper-
9 sonal services, for activities in subsection (b) at a
10 new or existing land, sea, or air port of entry, or any
11 facility or other infrastructure at a location where
12 U.S. Customs and Border Protection performs or
13 will be performing services within the United States.

14 (2) ADMINISTRATOR.—Where the Adminis-
15 trator has custody or control of a new or existing
16 land port of entry, facility, or other infrastructure at
17 a location where U.S. Customs and Border Protec-
18 tion performs or will be performing inspection serv-
19 ices, the Administrator, in collaboration with the
20 Commissioner, may enter into an agreement with
21 any person to accept a donation of real or personal
22 property, including monetary donations, or nonper-
23 sonal services, at that location for activities set forth
24 in subsection (b).

25 (b) USE.—A donation made under a donation agree-
26 ment may be used for activities related to construction,

1 alteration, operation or maintenance, including expenses
2 related to—

3 (1) land acquisition, design, construction, re-
4 pair, and alteration;

5 (2) furniture, fixtures, equipment, and tech-
6 nology, including installation and the deployment
7 thereof; and

8 (3) operation and maintenance of the facility,
9 infrastructure, equipment, and technology.

10 (c) LIMITATION ON MONETARY DONATIONS.—Any
11 monetary donation accepted pursuant to a donation agree-
12 ment may not be used to pay the salaries of employees
13 of U.S. Customs and Border Protection who perform in-
14 spection services.

15 (d) TERM OF DONATION AGREEMENT.—The term of
16 a donation agreement may be as long as is required to
17 meet the terms of the agreement.

18 (e) ROLE OF ADMINISTRATOR.—The Administrator’s
19 role, involvement, and authority under this section is lim-
20 ited with respect to donations made at new or existing
21 land ports of entry, facilities, or other infrastructure
22 owned or leased by the Administration.

23 (f) EVALUATION PROCEDURES.—

24 (1) REQUIREMENTS FOR PROCEDURES.—Not
25 later than 180 days after the date of enactment, the

1 Commissioner, in consultation with the Adminis-
2 trator as appropriate, shall issue procedures for eval-
3 uating proposals for donation agreements on a year-
4 round basis and otherwise consistent with the re-
5 quirements of this section.

6 (2) AVAILABILITY.—The procedures issued
7 under paragraph (1) shall be made available to the
8 public.

9 (3) COST-SHARING ARRANGEMENTS.—In
10 issuing the procedures under paragraph (1), the
11 Commissioner, in consultation with the Adminis-
12 trator, shall evaluate the use of authorities provided
13 under this section to enter into cost-sharing or reim-
14 bursement agreements with eligible persons and de-
15 termine whether such agreements may improve facil-
16 ity conditions or inspection services at new or exist-
17 ing land, sea, or air ports of entry.

18 (g) DETERMINATION AND NOTIFICATION.—

19 (1) IN GENERAL.—Not later than 60 days after
20 receiving a proposal for a donation agreement, the
21 Commissioner, and Administrator if applicable, shall
22 notify the person that submitted the proposal as to
23 whether it is complete or incomplete.

24 (2) INCOMPLETE PROPOSALS.—If the Commis-
25 sioner, and Administrator if applicable, determines

1 that a proposal is incomplete, the person that sub-
2 mitted the proposal shall be notified and provided
3 with—

4 (A) a detailed description of all specific in-
5 formation or material that is needed to com-
6 plete review of the proposal; and

7 (B) allow the person to resubmit the pro-
8 posal with additional information and material
9 described under subparagraph (A) to complete
10 the proposal.

11 (3) COMPLETE APPLICATIONS.—Not later than
12 180 days after receiving a completed and final pro-
13 posal for a donation agreement, the Commissioner,
14 and Administrator if applicable, shall—

15 (A) make a determination whether to deny
16 or approve the proposal; and

17 (B) notify the person that submitted the
18 proposal of the determination.

19 (4) CONSIDERATIONS.—In making the deter-
20 mination under paragraph (3)(A), the Commis-
21 sioner, and Administrator if applicable, shall con-
22 sider—

23 (A) the impact of the proposal on reducing
24 wait times at that port of entry or facility and
25 other ports of entry on the same border;

1 (B) the potential of the proposal to in-
2 crease trade and travel efficiency through added
3 capacity;

4 (C) the potential of the proposal to en-
5 hance the security of the port of entry or facil-
6 ity;

7 (D) the funding available to complete the
8 intended use of a donation under this section,
9 if such donation is real property;

10 (E) the costs of maintaining and operating
11 such donation;

12 (F) whether such donation, if real prop-
13 erty, satisfies the requirements of such pro-
14 posal, or whether additional real property would
15 be required;

16 (G) an explanation of how such donation,
17 if real property, was secured; and

18 (H) the impact of such proposal on staff-
19 ing requirements.

20 (h) SUPPLEMENTAL FUNDING.—Any property, in-
21 cluding monetary donations and nonpersonal services, do-
22 nated pursuant to a donation agreement may be used in
23 addition to any other funds, including appropriated funds,
24 property, or services made available for the same purpose.

1 (i) RETURN OF DONATION.—If the Commissioner or
2 the Administrator does not use the property or services
3 donated pursuant to a donation agreement, such donated
4 property or services shall be returned to the person that
5 made the donation.

6 (j) INTEREST PROHIBITED.—No interest may be
7 owed on any donation returned to a person under this sub-
8 section.

9 (k) PROHIBITION ON CERTAIN FUNDING.—The Com-
10 missioner, in collaboration with the Administrator if appli-
11 cable, with respect to an agreement authorized under this
12 section, may not obligate or expend amounts in excess of
13 the value of the donations.

14 (l) ANNUAL REPORT AND NOTICE TO CONGRESS.—
15 The Commissioner, in collaboration with the Adminis-
16 trator if applicable, shall—

17 (1) submit to the relevant committees of Con-
18 gress an annual report that identifies each donation
19 agreement made during the previous year; and

20 (2) not less than 15 days before entering into
21 a donation agreement, notify the members of Con-
22 gress that represent the State or district in which
23 the affected port or facility is located.

24 (m) CONSTRUCTION.—Except as otherwise provided
25 in this section, nothing in this section may be construed—

1 (1) as affecting in any manner the responsibil-
2 ities, duties, or authorities of U.S. Customs and
3 Border Protection or the Administration;

4 (2) to create any right or liability of the parties
5 referred to in this section; or

6 (3) as affecting any consultation requirement
7 under any other law.

8 **SEC. 6. EFFECTIVE PERIOD.**

9 (a) IN GENERAL.—This Act and the amendment
10 made by this Act shall be in effect during the 10-year pe-
11 riod beginning on the date of the enactment of this Act.

12 (b) AGREEMENTS IN EFFECT.—Any agreement made
13 pursuant to this Act that is in effect on the date that is
14 10 years after the date of the enactment of this Act shall
15 continue to have full force and effect on and after such
16 date and remain in effect under the terms of such agree-
17 ment.