IMPORTING & EXPORTING
NEW DEVELOPMENTS IN OCEAN PRICING
AND CUSTOMS SUPPLY CHAIN SECURITY

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New Developments in Importing and Exporting

- New Developments in Ocean Shipping Pricing
  - The right to use quoted, non-tariff rates with nvoccs
  - The right to use indexed rates
  - A broader right to use contract terms that are incorporated by reference

- Proposed New In-Bond Procedures

- C-TPAT 10 Years On
  - Customs provides revalidation guidelines
    - What to expect from Customs
    - What Customs expects from C-TPAT participants
New Pricing Tools for Ocean Shipping Contracts

• Ocean carriers and NVOCCs are allowed to enter into contracts that incorporate terms outside of the contract

• Negotiated Rate Agreements – NVOCCs are allowed to offer services at rates that are not published in their tariffs
Basic rules for ocean rates

• Rates must be either published in a tariff or set forth in a written contract.

• Ocean rates must be in a tariff published by the ocean carrier and/or NVOCC unless:
  • The rate is set forth in a written contract with an ocean carrier that is filed with the FMC as a Ocean Service Contract
  • The rate is set forth in a written contract with an NVOCC that is filed with the FMC in a NVOCC Service Arrangement or NSA.
  • The rate is a written Negotiated Rate Agreement with an NVOCC.

• If a rate is not contained in a service contract, NSA, or NRA, the ocean carrier or NVOCC’s published tariff rate will apply, even if it is much higher than the rate originally quoted to the shipper
Basic Rules for Contracts—Ocean Carriers and NVOCCs

Written contracts must include:
1. Rates.
2. Origin and destination ports or points (trade lanes)
3. Commodities or commodities
4. Minimum quantity commitment (MQC)
5. Service commitments.
6. Line-Haul Rate
7. Liquidated damages for non-performance (if any);
8. Duration, including Effective Date and Expiration Date.
9. All other provisions of the contract.
Basic Rules for Rates

• Contract rates cannot take effect until the contract is filed with the FMC.

• Tariff Rates can only take effect if the rate is published in a tariff
  – New rates and/or rate increases can only take effect after 30 days
  – Rate decreases can take effect immediately.
  – The applicable rate is the rate in effect when the carrier or its agent receives the shipment at origin.
The New Rules:
Greater Flexibility to Reference Terms
Outside of the Contract

• The Old Rule
• Essential Terms may not:
  – Be uncertain, vague, or ambiguous; or
  – Make reference to terms not explicitly contained in the service contract or NSA itself unless those terms are contained in a publication widely available to the public and well known within the industry.

• The New Rule
• Essential Terms may not:
  – Be uncertain, vague or ambiguous; or
  – Make reference to terms not explicitly contained in the NSA itself unless those terms are readily available to the parties and the Commission.
  – Readily available is on 30 days request
  – **NVOCC wrinkle:** Reference may not be made to a tariff of a common carrier other than the NVOCC acting as carrier party to the NSA.
What’s the Purpose of the New Rule?

• Allow shippers and carriers to utilize index rates.
  – An index rate is one which references an outside (usually third party) source to determine a rate.

• Hedge the risk of changing market rates over a one or multiyear contract
  – If overall freight rates go down the shipper gets the advantage of the general market rate level. If overall freight rates go up the carrier gets the advantage of the general market rate level. The contract can be tied to a percentage of the index rate so the shipper gets a guaranteed discount off of the prevailing market rate.

• A Planning Tool. Using an Index eases predictions about the direction of freight rates. Entering into a contract still has an advantage over just using spot market rates, because the shipper gets a minimum guaranteed lifting from the carrier and the carrier gets the minimum quantity commitment from the shipper.
Types of Freight Indexes

Common freight indexes include:
– China Containerized Freight Index (CCFI)
– Shanghai Containerized Freight Index (SCFI)
– Drewry Freight Insight Index
– Transpacific Stabilization Agreement (TSA)
– Consumer Price Index
Should You Use a Freight Index?

• How many shippers currently use freight indexes in their ocean contracts?
  – Not many - yet.
  – 62 out of 46,962 filed service contracts

• But carriers and shippers may start using them more, especially to obtain guaranteed space in a fluctuating market.
  – Shippers may also use them if they separately hedge the rates in their ocean contracts.
NVOCC Rate Agreements

- NVOCC Rate Agreements, or NRAs, were introduced in 2011.
- They are a *de facto* written contract for NVOCC spot market rates.
- Basically, the rate is exempt from the NVOCC tariff publishing rules that would normally apply for rates.
  - However, the NVOCC tariff rules may still apply, including other rate items such as surcharges.
NRA Requirements

NRAs must:

• Be in writing (fax, e-mail, letter, other document)
• Contain the legal name and address of the parties and any affiliates; and the names, title and addresses of the representatives of the parties agreeing to the NRA;
• Be agreed to by both the NVOCC and the NRA shipper prior to receipt of the cargo by the common carrier (including originating carrier in the case of through transportation);
• Clearly specify the rate and the shipment or shipments to which such rate will apply; and
• May not be modified after the time the initial shipment is received.
Differences Between a NRA and a NSA

**NRA**

- NRA is not a comprehensive contract. It is a spot market rate that is exempt from tariff filing. The NVOCC’s rules governing the shipment, including surcharge rules, may still apply unless the written rate quote specifies that the rate excludes some or all of the rule tariff surcharges.

**NSA**

- NSA is a comprehensive written contract that is supposed to set forth all applicable terms and conditions of service and contain a minimum quantity commitment from the shipper.
Traps for the Unwary

• These new rules underline the importance of paying attention to the legal language of the contracts.
  – *Every term governing the rate of the shipment must be in the written agreement or explicitly incorporated by reference.*

• If the contract references the carrier’s rules tariff and/or tariff surcharges, and incorporates them by reference, the substantive terms of the contract can be changed by later changes to the rules tariff provisions.
  – *Best practice* is to have all provisions in the written contract, excluding a reference to the rules tariff or external surcharges.
  – *Second best practice* is to allow reference to rules tariff terms and/or surcharges, but to prohibit the application of any changes that occur after the effective date of the contract.

• In the case of a NRA, the best practice for both shippers and nvoccs is to use a standardized written form.
Traps for the Unwary: Internet Terms

• Carriers, nvoccs, forwarders – and shippers – are increasingly placing terms and conditions of service on the Internet and incorporating them into their contracts.

• The courts have been upholding this practice. Incorporating by reference terms and conditions contained on an Internet website is within the scope of the FMC’s regulations and may increase as a result of the new regulations.
Traps for the Unwary: Bill of Lading Terms and Conditions

• Be wary of the terms and conditions in the carrier’s bill of lading.
• The carrier’s bill of lading may be considered as either a receipt or a separate contract, depending on the circumstances and language of the service contract.
• It will include provisions for loss and damage and may incorporate the carrier’s rule tariff terms and rules for demurrage, detention, and other charges that conflict with your written contract.
• Some courts have held that since the shipment made pursuant to the bill of lading occurs after the first written contract, it is a “second contract” and any inconsistent terms will supersede the first contract.
Traps for the Unwary: Bill of Lading Terms and Conditions

• Terms in a bill of lading that can “trump” the written terms in a contract include:
  – amount of liability for loss and damage
  – the right to sue subcontracted carriers
  – demurrage and storage charges
  – how, when, and where to file and/or litigate a claim
Traps for the Unwary: Bill of Lading Terms and Conditions

• Best Practice:
  – Designate bills of ladings issued under a contract as being “receipts”
  – Include in the service contract all liability and other terms normally included in the terms and conditions of a bill of lading.

• Second Best Practice:
  – Specify in your written contract that the bill of lading terms and conditions for shipments made under a contract shall apply only in the event that they do not conflict with the written terms of the contract. In the event of any conflict in terms, the written contract applies.
Traps for the Unwary:
One Final Caution

• Always Remember:
  – Written contract terms must be followed for the contract to apply. For example, if a contract says that a bill of lading must reference a contract number to qualify under the contract the bill of lading better reference the contract number.
International Supply Chain Security
What’s New at Customs

• Supply chain security remains a priority for U.S. Customs and Border Protection (CBP)

• Two new security developments this year are of importance to importers and exporters
  – Proposed changes to the In-Bond Process
  – Clarification of what to expect in the C-TPAT revalidation process
Proposed Changes to the In-Bond Transportation Process

• Customs has issued a Notice of Proposed Rulemaking proposing significant changes to the in-bond transportation of goods.
  – The comment period closed April 23, 2012.
• Currently 30 to 60 percent of all imports that move through U.S. ports are in-bond shipments.
• If adopted as drafted the proposed rule will have an impact on the importation of imported goods and the management of supply chains.
The Benefits of Using In-Bond Procedures

• The in-bond system provides flexibility to importers by allowing them to:
  – Choose when and where to enter imported merchandise
  – Choose when and where to warehouse or export the merchandise.
  – Delay payment of applicable duties on imported merchandise.
  – Transport merchandise through the U.S. for export without the payment of duties and without having to meet all the entry requirements necessary to enter goods into the commerce of the United States.
Types of In-Bond Entries

• There are several types of in-bond entries. The three most commonly used are:
  – Immediate Transportation (IT)
  – Transportation and Exportation (T & E)
  – Immediate Exportation (IE)

• An IT entry allows merchandise, upon its arrival at a U.S. port, to be transported to another U.S. port, where a subsequent entry must be filed.

• A T&E entry allows merchandise to be entered at a U.S. port for transit through the United States to another U.S. port, where the merchandise is exported without payment of duties.

• An IE entry allows cargo that has arrived at a U.S. port to be immediately exported from that same port without the payment of duties.
Reasons for the Proposed Changes

• 2007 GAO Report concluded that Customs does not adequately monitor and track in-bond goods.
• Result: CBP does not consistently reconcile the in-bond document issued at the port of first arrival with documents at the port of destination or port of export.
• This diminishes CBP’s ability to ensure that cargo is either officially entered, with appropriate duties or quotas applied, or is in fact exported.
• GAO also concluded that the current in-bond system provides “unusual flexibility” for the trade community.
• Depending on mode, current regulations allow carriers from 15 to 60 days to reach their final destination – and the final destination can be changed without notifying CBP.
• Under the current system, inadequate information is collected about the in-bond merchandise, undermining CBP’s efforts to manage associated security risks and targeting of inspections.
Proposed Changes to the In-Bond Procedures

• Except for merchandise transported by pipeline, all carriers or their agents will be required to electronically file the in-bond application.

• CBP will require additional information on the in-bond application, including the six-digit HTSUS number, if available, and information relevant to the safety and security of the in-bond merchandise.

• There will be a 30-day maximum transit time to transport in-bond merchandise between United States ports, for all modes of transportation except pipeline.

• CBP will require carriers to electronically request permission from CBP before diverting the in-bond merchandise from its intended destination port to another port.

• CBP will require carriers to report the arrival and location of the in-bond merchandise within 24 hours of arrival at the port of destination or the port of export.

• In-bond procedures will not change for air transportation, except the changes to the specified maximum transport times and export times.
How the New Rules Could Affect Importers and Exporters

• While the proposed new rules will affect carrier operations, they will also impact shippers.
• Shippers will have to provide more detailed information to carriers about the nature of the cargo for purposes of in-bond transportation.
• In addition to transit times, CBP would also impose restrictions on IE shipments and split shipments for export.
• Proposed IE restrictions. Due to the heavy volume of truck shipments arriving at the U.S. that are entered as immediate exportation and then promptly exported back to the country where the shipment originated, Customs will deny a permit to proceed and turn the truck back or, at discretion of the port director, may allow a new entry to be filed.
• Proposed Export Split Shipment Restrictions. Split shipments that are authorized for export will have to be initiated within 2 days of the date that the split shipment is authorized.
New Customs Guidance on C-TPAT Revalidations

• This year is the 10th anniversary of C-TPAT
• In March, Customs provided guidelines to C-TPAT participants as to what to expect in a C-TPAT revalidation.
• These guidelines are important for all companies active in the international supply chain, not just C-TPAT participants.
• Included in the guidelines are what CBP wants for:
  – An international supply chain risk assessment
  – How Customs selects the foreign business partners it will validate
  – What Customs will inspect during a site visit
  – The personnel that Customs may want to interview; and
  – The documentation that Customs may request
International Supply Chain Risk Assessments

• Many C-TPAT members do not conduct comprehensive risk assessments on their foreign supply chain partners and vendors
• Once in C-TPAT Customs is requiring that this supply chain risk assessment be performed annually, including for overseas counterparts, otherwise the company risks being expelled from C-TPAT.
• Although not mandatory, Customs has a Five-Step Risk Assessment Program that it recommends companies perform when participating in C-TPAT. Steps included in the Program are:
  • Mapping cargo flows and international business partners.
  • Conducting a threat assessment.
  • Conducting a security vulnerability assessment.
  • Preparing an action plan to address vulnerabilities.
  • Document how the security risk assessment is conducted.
CBP Expects to See Cargo Flow Charts for its C-TPAT Revalidations

• CBP wants its C-TPAT participants to be developing and refining cargo flow charts for their supply chains. These flow charts should:
  – Cover the comprehensive logistics of the merchandise.
  – Show each step in the process from when an order is generated to when the goods are received in the U.S.
  – Follow the goods in detail from when they are packed for export to the United States to each transition in their journey.
  – Stress the chain of custody (the responsible company) at each stage.
  – List the companies that physically handle and move the freight
    • And all companies that are involved in arranging the movement of the goods
    • i.e., if a forwarder is hired to move the goods, the companies contracted to actually move the goods must also be known.
Selecting Foreign Business Partners for C-TPAT Revalidation

• For C-TPAT revalidation purposes, Customs has stated that it will examine a C-TPAT participant’s supply chain cargo flows and accompanying risk assessment and will choose to visit entities and sites that are of the highest risk.
• Determining the highest risk involves factors that Customs says C-TPAT participants should be using to calculate their supply chain risk, including factors such as:
  • Volume
  • Complexity of the supply chain
  • Geographic areas with a high risk for terrorism
  • Whether the site has been recently visited by a C-TPAT team
  • An analysis of the risk in each cargo flow, with an evaluation of:
    – How many companies “touch the freight”
    – Distance to be transported; and
    – Freight at rest (either sitting in a warehouse or at port).
Customs Facilities Review

- Areas that the CBP team will focus on when touring a facility may include:
  - Packing/shipping/staging/receiving areas
  - Warehouses utilized in import/export storage/staging
  - Access points into the facility/sensitive areas, including employee and visitor entrances
  - Monitoring equipment such as cameras, video monitors, and alarm installations
  - Monitoring areas
  - Security guard stations
  - Storage of key IT equipment such as the servicer
  - Location of physical access controls such as key log(s)/storage
Customs Facilities Review

- Storage of sensitive documents
- Location of seal storage
- Grounds/perimeter barriers
- Parking areas
- Storage area of containers/conveyances.

Customs will also like to observe security procedures such as:
- Security inspections
- Sealing of containers/trailers
- Receiving of containers/freight.
Personnel Involved with C-TPAT Supply Chain Security

• The C-TPAT Member’s Main Point of Contact to CBP (MPOC).
• Other persons familiar with the process.
• All appropriate personnel who can address the minimum security criteria/guidelines should be present during CBP site visits. These can include:
  – Management or policy makers for Human Resources
  – Information Technology employees
  – Import/Export or Logistics personnel
  – Purchasing personnel
  – Security personnel
  – Any personnel involved with key business partner decisions.
Documents Requested During C-TPAT Re-Validations

- All policy and procedural documents that relate to supply chain security.
- Forms and documents used in written procedures that have been previously validated and that are unchanged will be briefly reviewed, usually on-site.
- If a foreign business partner is visited, and the C-TPAT member requires the business partner to use certain forms and procedures, the partner will be required to produce copies, plus documented evidence of implementation of the procedures.
Documents Requested During C-TPAT Re-Validations

• Customs has provided a comprehensive list of documents and procedures that it may seek to review when conducting a revalidation site visit. It emphasizes that not every procedure or document will pertain to every revalidation.

• **Specific Document Subject Areas**
  • Risk Assessment:
  • Business Partners & Service Provider Requirements
  • Access Controls
  • Conveyance Security
Documents Requested During C-TPAT Re-Validations

- Ltl Cargo:
- Personnel Security
- Procedural Security & Auditing Processes
- Security Awareness & Training Program
- Information Technology (IT) Security Controls
- Physical Security