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OTI MONTHLY RISK MANAGEMENT ALERT

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NEW LAW: OTI AGENTS IN THE U.S. The FMC Order served Nov. 6, 2009 (Docket No. 06-08), based on a decision of the D.C. U.S. Court of Appeals, substantially changes the regulatory structure and the way ocean freight forwarders and NVOCCs can do business in the U.S.

- a) **What OTI activities are covered?** The Order would allow OTIs (both forwarders and NVOCCs) to enter relationships with non-licensed companies or individuals in the United States to perform any OTI services (without limitation as to the type of activity) on behalf of the licensed OTI. This will encourage “franchise” type operations (more cost effective than branch offices) for smaller and mid-sized companies to open operations across the U.S. or for integration of activities of U.S. intermodal surface transportation companies with their NVOCC affiliates.
- b) **How should the “agency” be structured?** The Order emphasizes that the agency relationship must act on behalf of a disclosed licensed OTI. The regulatory concern is that these relationships best be formalized with an agreement which establishes controls by the OTI over the agents. The OTI becomes fully responsible for the acts of its agent under traditional agency law principles.
- c) **Are bonds required for agents?** At this juncture, there is no bond requirement from the FMC for agents, only for branches.
- d) **What about foreign based FMC registered NVOCCs?** Only U.S. domiciled licensed OTIs are covered. Foreign registered NVOCC must still work with licensed OTIs in the U.S.

ISF ENFORCEMENT TO BEGIN. U.S. Customs and Border Protection (“CBP”) will be strictly enforcing the Import Security Filing (“ISF”) regulations commencing January 26, 2010. Non-Automated Manifest System (“AMS”) NVOCCs who must continue to submit the house bill of lading data to ocean carriers to comply with AMS requirements may have a higher risk of penalties than AMS automated NVOCCs under current bill of lading practices.

For ISF purposes, the ISF filer must

transmit the “lowest bill of lading level” that was transmitted into AMS for that specific transaction. In this regard, we have confirmed from the World Shipping Council and CBP that the bill of lading number assigned by the carrier for AMS purposes to a non-automated NVO transaction is an integral part of the import security filing process. Without that correct “regular” bill of lading number, the ISF cannot be matched to a Customs manifest. In other words, without the appropriate bill of lading number, an ISF filing will be rejected, and this could lead to possible penalties, and other sanctions.

It is, therefore, imperative that the ocean carrier communicate this discretely designated “regular” bill of lading number to the non-automated NVOCC at the time of booking or shortly thereafter. Otherwise, neither the NVOCC nor its customers, or agents will transmit an accurate and timely ISF filing to CBP.

Since so much is riding on providing CBP accurate and timely information under both the AMS and ISF programs, the ocean carrier must provide non-automated NVOCCs an accurate regular bill of lading number in a timely manner. Failure to provide this could lead to penalties and other liabilities to the NVO, its customers, and possibly to the ocean carrier.

It is clear that there is a system bias against the non-automated NVOCC by CBP and certain carriers. This is a circumstance that will have impact on the market place. In other words, Importers will tend to lean towards utilizing automated NVOCCs in order to minimize CBP penalty risk. CBP has publicly stated as much. If you are not AMS automated, it is in your best interest to carefully select ocean carriers willing to fully cooperate in passing on timely and accurate bill of lading information. If not, penalties will surely result. Best bet: become AMS automated. Contact: rodriguez@rorlaw.com.

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