CLIENT ALERTS & INSIGHTS

U.S. Cross-Border Logistics Service Licensure and Trade Compliance Obligations

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Featured Industries: Transportation & Logistics, International Trade & Supply Chain Management

Procurement teams going to market for transportation and logistics services often seek a wide range of functional expertise across multiple jurisdictions. One essential question for service providers when developing or reviewing RFP responses is whether, in fact, the desired services may be lawfully offered and performed. Failure to observe basic requirements place service providers at risk for regulatory enforcement and expanded damages along with simple allegations of contract breach and negligence. Shippers of course also bear some risks. There may be failure to comply with internal corporate policies, supply chain interruption impacting performance and customer service, and unnecessary negative headlines.

Understanding the basic regulatory "ground rules" for service performance across jurisdictions throughout North America or around the world is key to business success and customer satisfaction. Understanding the risks associated with handling those transactions, beyond whether service may be performed, is an entirely other category of regulatory analysis that is often overlooked. The following sections address both common logistics licensure requirements as well as key risks of trade compliance for those cross-border transactions.

I. U.S. LICENSE REQURIEMENTS FOR SERVICE PROVIDERS

The following sections identify certain common transportation and logistics services that are often fundamental to integrated services and project logistics: (1) Motor Carrier Brokerage; (2) Ocean Freight Forwarder service; (3) Non-Vessel Operating Common Carrier service; (4) Indirect Air Carrier service; and (5) Customs House Brokerage. The regulated scope of offerings is identified for each as well as its basic registration requirement. Certain other common services where registration is not a requirement for service are also described, such as Intermodal Marketing Companies, Export Forwarding Agents, and Warehousing.

Motor Carrier Brokerage

The term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation. 49 USC § 13102. A person may provide interstate brokerage services as a broker only if that person-- (1) is registered under, and in compliance with, section 13904; and (2) has satisfied the financial security requirements under section 13906. 49 USC § 14916.

Ocean Freight Forwarder

The term “ocean freight forwarder” means a person that-- (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments. Also, the term “ocean transportation intermediary” means an ocean freight forwarder or non-vessel-operating common carrier. 46 USC § 40102. A person in the United States may not advertise, hold oneself out, act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary’s license issued by the Federal Maritime Commission. The Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary. 46 USC § 40901.

Non-Vessel Operating Common Carrier

The term “non-vessel-operating common carrier” means a common carrier that-- (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier. Also, the term “ocean transportation intermediary” means an ocean freight forwarder or non-vessel-operating common carrier. 46 USC § 40102. A person in the United States may not advertise, hold oneself out, act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary’s license issued by the Federal Maritime Commission. The Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary. 46 USC § 40901.

Indirect Air Carrier

The term “air carrier” means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation. 49 USC § 40102. The term “indirect air carrier” (IAC) Indirect air carrier (IAC) means any person or entity within the United States not in possession of an FAA air carrier operating certificate, that undertakes to engage indirectly in air transportation of property, and uses for all or any part of such transportation the services of an air carrier. 49 CFR § 1540.5. No indirect air carrier may offer cargo to an aircraft operator operating under a full program or a full all-cargo program specified in part 1544 of this subchapter, or to a foreign air carrier operating under a program under § 1546.101(a), (b), or (e) of this subchapter, unless that indirect air carrier has and carries out an approved security program under this part. 49 CFR § 1548.5.

Customs House Broker

The term “customs broker” means a person who is licensed under this part to transact customs business on behalf of others. The term “customs business” means those activities involving transactions with CBP concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by CBP on merchandise by reason of its importation, and the refund, rebate, or drawback of those duties, taxes, or other charges. “Customs business” also includes the preparation, and activities relating to the preparation, of documents in any format and the electronic transmission of documents and parts of documents intended to be filed with CBP in furtherance of any other customs business activity, whether or not signed or filed by the preparer. However, “customs business” does not include the mere electronic transmission of data received for transmission to CBP and does not include a corporate compliance activity. 19 CFR § 111.1. Performance as a customs broker is not permitted absent licensure as required by 19 CFR § 111.2.

Lesser Regulated Services

A broad range of core and ancillary integrated supply chain offerings do not carry any significant registration or operational requirements. Intermodal marketing, for example, may be generally conducted without any operating authority although most in the space present FMCSA-issued broker permits as evidence of ability to perform. Export forwarding agents likewise have no operating authority type requirements apart from registering to use services key to that function such as the Census Bureau’s AES Direct. Warehousing services are relatively speaking the least regulated of all. No federal authority is required although those laws of the state and municipality having jurisdiction will govern together with published industry best practices.

II. U.S. TRADE COMPLIANCE OBLIGATIONS FOR SERVICE PROVIDERS

Logistics providers have always held a unique position in the export of goods from the United States. As a community, providers neither have close contact with all parties to the transaction nor have intimate knowledge of cargoes and their potential use. The obligations for compliance with international trade restrictions such as export controls and economic sanctions can nonetheless lay a trap for even the most diligent operators. The following sections level-set on the high impact regulatory landscape, and certain best practices, under the jurisdiction of the Department of Commerce, the Department of State, and the Department of Treasury.

Export Administration Regulations

U.S. Department of Commerce's Bureau of Industry and Security ("BIS") enforces the Export Administration Regulations ("EAR") found at 15 CFR Parts 730 to 780. Those export controls principally restrict the export and reexport of items and technology, including participating in or facilitating such export, based on item, country-specific embargoes, and end users. Items under control include any non-military goods, software, or technology that are physically located in the U.S. or of U.S. origin, of foreign origin but containing more than de minimis U.S. content, or of foreign origin but a direct product of U.S. technology or software. The EAR applies to U.S. persons but also foreign subsidiaries that are controlled, directly or indirectly, by a domestic entity (15 CFR § 760.1). Importantly for transportation and logistics providers, one of the Ten General Prohibitions found in the EAR makes it unlawful to proceed with transactions with the knowledge that a violation has occurred or is about to occur (General Prohibition Ten, found at 15 CFR § 736.2). General Prohibition Ten has appeared as a specific area of enforcement against service providers in recent years.

International Traffic in Arms Regulations

The Department of State's Defense Directorate of Trade Controls ("DDTC") enforces the International Traffic in Arms Regulations ("ITAR") found at 22 CFR Parts 120 to 130. Those export controls restrict the import, export, and temporary import or export, of defense articles, technical data, and defense services. The ITAR applies to any items designated on the United States Munitions List ("USML") found at 22 CFR § 121.1 including missiles, explosives, training equipment, military electronics, optics, and spacecraft systems. The DDTC requires registration of certain actors involved in the trade of arms including, from time to time, service providers particularly where their activities may be considered brokering of defense articles and services. Unlawful brokering and participation with knowledge of violations have been areas of exposure for service providers in recent years.

OFAC Economic Sanctions

The Treasury Department's Office of Foreign Asset Controls ("OFAC") administers approximately 30 different sanctions programs against countries and persons. Those programs generally prohibit the transfer of property or funds, including participating in or facilitating such transfer, to restricted parties. All U.S. Persons must comply including any non-US entities owned or controlled by a U.S. person as determined under the country specific sanction (See 31 CFR § 535.329). A service provider's mere participation in a restricted transaction has been an area for exposure in recent years.

Best Practices for Providers

The task for each provider is to assess risk for the operation and tailor an appropriate program together with training and process controls. There is neither a one-size-fits-all approach to trade compliance nor any real benefit in adopting compliance programs and practices that will not be followed. The tactical elements of a strong compliance program include: developing internal leadership and subject matter expertise on trade controls; sticking to process fundamentals such as denied parties screening; and watching for the gamesmanship among shippers that can cause liability for even the most well-meaning of operators.

An awareness of weaknesses and "red flags" help personnel to remain vigilant and to escalate issues where they arise. The best example of this tactic is found in the "Know Your Customer Guidance" published by the Department of Commerce in Supplement No. 1 to Part 732 of the EAR. That guidance amounts to: (1) deciding whether "red flags" exist; (2) inquiring further if necessary; (3) avoiding self-blinding against bad facts; (4) training sales and operations staff; (5) re-evaluating situations as new facts are learned; and (6) consulting with the respective agencies or counsel before proceeding if "red flags" or other risks cannot be resolved. A few important "red flags" for logistics providers to guard against as part of trade compliance programs include:

- The customer is reluctant to offer information about the end-use of a product.
- The product's capabilities do not fit the buyer's line of business.
- The product ordered is incompatible with the technical level of the country to which the product is being shipped.
- The customer has little or no business background.
- Deliveries are planned for out-of-the-way destinations.
- A freight forwarding is listed as the product's final destination.
- The shipping route is abnormal for the product and destination.
- Packaging is inconsistent with the method of shipment or destination.

If historic violations come to light during the development or updating of a compliance program, or during day-to-day business operations, then options are available for determining the path forward and potentially limiting exposure. Real or potential violations can arise for even the most well-meaning of operators. Exposure for these and similar regimes can often extend five years in the past (today, ten years for OFAC violations) , which is a relatively long tail to consider when a history of violations is found. One of the most useful tools for consideration is the use of voluntary self-disclosures to those agencies having jurisdiction, which are available for the regulatory regimes described here and others that maybe implicated. Giving notice to an agency should not be taken lightly although it can serve as a pathway for closing out a file with mitigated financial exposure (and often little or no exposure).

III. CREDIBLY DELIVERING CROSS-BORDER SERVICE OFFERINGS

The “table stakes” for cross-border service offerings, due to their international character, is far higher than for traditional domestic service within the United States. International traffic is often multimodal which triggers additional agency jurisdiction and licensure requirements that many domestic providers may not possess. The credible offering of a broader service portfolio requires establishing those capabilities far in advance of any RFP response due to the licensure timelines, structural and personnel requirements, and workflow know-how essential to flawless performance. Service providers and shippers alike also share an interest in compliant international traffic to avoid interruption by government intervention. Risk-appropriate compliance programs, operating procedures, and well-trained personnel are critical to day-to-day service delivery even for service providers. Reliance on shipper information alone will not save a provider from government enforcement defense.

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