UNDERSTANDING
U.S. REGULATORY
ISSUES
REGULATORY ISSUES IN OCEAN FREIGHT

FEDERAL MARITIME COMMISSION
About the FMC

- Established by Congress in 1961
- Independent Regulatory Agency
- Regulates Liner Ocean Transportation in U.S. Foreign Trades
FMC Statutes and Regulations

- Shipping Act of 1984, as Amended
  46 U.S. Code 40101 – 41309

- Code of Federal Regulations
  46 CFR Part 500

Much more information at www.fmc.gov
What is a freight forwarder?

From the FIATA Model Rules:

2.1 Freight Forwarding Services means services of any kind relating to the carriage, consolidation, storage, handling, packing or distribution of the Goods as well as ancillary and advisory services in connection therewith, including but not limited to customs and fiscal matters, declaring the Goods for official purposes, procuring insurance of the Goods and collecting or procuring payment or documents relating to the Goods.
7.1 The Freight Forwarder’s liability as Carrier

The Freight Forwarder is subject to liability as principal not only when he actually performs the carriage himself by his own means of transport (performing Carrier), but also if, by issuing his own transport document or otherwise, he has made an express or implied undertaking to assume Carrier liability (contracting Carrier).
The FMC legal model does NOT incorporate the FIATA concept allowing dual or alternate roles for the freight forwarder
Ocean Transportation Intermediaries (OTIs)

• Ocean Freight Forwarder (FF)
  ➢ An agent for the shipper that dispatches shipments from the U.S. via common carrier, books space, processes documents and performs related services

• Non-Vessel Operating Common Carrier (NVOCC)
  ➢ A common carrier of import and export cargo that takes responsibility for the cargo (traditionally consolidators)
Attributes of FFs

- Not a common carrier
- Only serves as agent
- Does not issue bill of lading
- Must identify the shipper on master bill of lading:
  - Cargo owner is listed as shipper; OR
  - “FF as agent for John Doe”

Attributes of NVOCCs

- Common carrier status under FMC regulations
- Serves as a shipper to the vessel operator
- Serves as carrier to its shipper customer(s)
- Shown as shipper on the vessel operator’s Master Bill of Lading
Seems clear;
So, what’s the issue for freight forwarders?
Key differences arise in legal status, with important commercial implications:

Let’s start with NVOCCs:

• US-based NVOCCs are licensed and bonded

• Foreign-based NVOCCs must register, appoint US agent for service of legal process, and post bond
Freight forwarders have own distinct status:

- Freight forwarders in U.S. are separately licensed and bonded

- Foreign freight forwarders are not licensed if not present in US, but cannot serve as shipper for contracting purposes
• *Shipper* means a cargo owner; the person for whose account the ocean transportation is provided; the person to whom delivery is to be made; a shippers' association; or an NVOCC that accepts responsibility for payment of all applicable charges under the service contract.

46 U.S.C. 40102(22) and 46 CFR 530.3.
<table>
<thead>
<tr>
<th></th>
<th>FMC requirement</th>
<th>FMC bond amount</th>
<th>Service contracts with VOCCs</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.-based NVOCC</td>
<td>License required</td>
<td>$75,000</td>
<td>yes</td>
</tr>
<tr>
<td>Foreign-based NVOCC</td>
<td>Registration required</td>
<td>$150,000</td>
<td>yes</td>
</tr>
<tr>
<td>Foreign-based NVOCC</td>
<td>Licensing optional</td>
<td>$75,000</td>
<td>yes</td>
</tr>
<tr>
<td></td>
<td>- if establish a qualifying US branch office</td>
<td></td>
<td></td>
</tr>
<tr>
<td>U.S.-based forwarder</td>
<td>License required</td>
<td>$50,000</td>
<td>no</td>
</tr>
<tr>
<td>Foreign freight forwarder</td>
<td>Not eligible</td>
<td>n/a</td>
<td>no</td>
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</table>
• Service Contracts (46 CFR 530)

• File copy with FMC

• Must be filed prior to cargo moving and contain the following essential terms:
  - Origin and destination port range or areas
  - Commodity or commodities
  - Minimum volume or portion
  - Line-haul rate
  - Duration
  - Liquidated damages for nonperformance, if any
  - Reference to tariff(s) of general applicability and carrier’s essential terms tariff publication number
Service Contract Requirements

- Signature page must contain signatories typewritten names, titles and addresses.

- Shipper parties must meet definition of “shipper” under Commission rules; NVOCCs must provide proof of FMC bond/license and tariff publication.

- Affiliate requires corporate affiliation or ownership interest.

- Multiple unrelated signatory shipper parties to single contract permitted, but each has own liability under contract.
In effect, cannot intermingle your status in negotiating with vessel operators
• If not licensed or registered as NVOCC, cannot enter into service contracts to move your freight, 46 CFR 530.6 and 46 USC 41104 (12)

• If enter service contract as NVOCC, cannot include cargo you service only as forwarder

• If serving only as forwarder, any service contracts with carrier must be in name of the cargo owner as principal (and cannot commingle others’ shipments)
<table>
<thead>
<tr>
<th>Status</th>
<th>Freight rates per tariff</th>
<th>Freight rates per NSA</th>
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</tr>
</thead>
<tbody>
<tr>
<td>U.S.-based NVOCC</td>
<td>Carrier in relation to cargo owner</td>
<td>Published on Internet</td>
<td>Filed with FMC; confidential</td>
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<tr>
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Tariffs

• Publishing tariffs (46 CFR 520)

• All common carriers must publish all rates, rules and charges

• Rate changes
  ➢ Increases no less than 30 days’ notice
  ➢ Reductions effective on date of publication
  ➢ No retroactive publication
• Tariffs must clearly identify the specific rates and charges for each shipment

• Tariffs must include sample bill of lading (Formal “registration” of bill of lading not required)

• Cancellation of Tariffs
  ➢ Must inform BTA in writing and specify effective date
NVOCC Service Arrangements (NSAs)

- NSA requirements (46 CFR 531)
- File copy with FMC
- Must be filed prior to cargo moving and contain the following essential terms:
  - Origin and destination port range or areas
  - Commodity or commodities
  - Minimum volume or portion
  - Line-haul rate
  - Duration
  - Liquidated damages for nonperformance, if any
NSA Requirements

- Signature page must contain signatories’ typewritten names, titles, and addresses

- Shipper parties must meet definition of “shipper” under Commission rules; NVOCCs must provide proof of FMC bond/license and tariff publication

- Affiliate requires corporate affiliation or ownership interest
- Multiple unrelated signatory shipper parties to a single NSA permitted

- NSAs may be amended by mutual agreement of the parties.

- This is the NVOCC equivalent to service contracts.
NVOCC Negotiated Rate Arrangements

• Rules for NRAs published at 46 CFR 532
• Required Written Content:
  ➢ Rate
  ➢ Shipment(s) for which rate applies (i.e. Cargo Quantity)
  ➢ Commodity description
  ➢ Origin and destination pairs
  ➢ Both the names of the Parties and representatives which agree to the NRA
Shipper’s agreement (consent) to NRA must be in writing

Surcharges, accessorials may be included in NRA as part of an “all-inclusive” rate; or may be listed separately

Parties may not modify an NRA after shipment received by NVOCC or its agent

Licensed NVOCCs must amend tariffs to indicate the intention to use NRAs by a prominent notice in its rules tariff.
Continue to publish rules tariff and provide free public access. This requirement bars access fees or subscriptions but does not restrict NVOCCs from requiring users to have a login and password to view its rules tariff.

Commission currently considering whether to extend exemption to foreign registered NVOCCs.
<table>
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<tr>
<th>Country</th>
<th>Qty</th>
<th>Weight</th>
<th>Value</th>
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<tr>
<td>UNITED ARAB EMIRATES</td>
<td>50</td>
<td>50 kg</td>
<td>$500</td>
</tr>
<tr>
<td>DUBAI</td>
<td>10</td>
<td>10 kg</td>
<td>$100</td>
</tr>
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</table>

TOTAL CHARGES: $600

*Protect your investment. Please ask us about cargo insurance for your shipment.*

The company reserves the right to charge for any damage or loss sustained during transportation, regardless of the nature or extent of the damage, or indirect or consequential losses, which would be payable under the United States Tariff Act of 1948.
Which NVOCC status should you adopt?

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Which NVOCC status should you adopt?

• Corporate, tax and liability considerations

• Control, control, control
  Good partners vs. good employees
  Liability for acts of foreign agents

• Future plans and expansion
  Do you expect major commitment to US trades?
Thanks for listening!