FAQ: Shippers' Associations Under the Law

The following questions are the ones most frequently asked about Shippers' Associations potential members and by carriers who deal with them:

1. Are Shippers' Associations regulated, licensed, or bonded?

No. Shippers' Associations have been subject to little or no government regulation since the government commenced regulating the transportation industry in the last century. Shippers' Associations were first statutorily recognized in 1942, as an exemption to the provisions of the Interstate Commerce Act regulating surface freight forwarders, and were essentially unregulated in the domestic market. The Shipping Act of 1984 explicitly recognized them as a separate legal entity in the international trades. The federal government and the judiciary have consistently adopted policies designed to avoid encumbering the operations of Shippers' Associations.

2. Are Shippers' Associations required to file tariffs with any government agency?

No. Shippers' Associations are not common carriers. They do not hold themselves out to serve the general public, but are instead membership organizations. They thus are not legally required to file tariffs with any federal agency of the United States or to publish such rates generally through a privatized system.

3. Is membership in a Shippers' Association limited to beneficial interest shippers or can intermediaries such as NVOCCs, warehousemen, ocean or surface freight forwarders, property brokers, or other companies join an association?

All entities that are shippers (or receivers) can belong to Shippers' Associations. Since associations are not subject to domestic regulation, there is no limitation on the type of member that may belong to an association operating within the United States. This means that, in addition to cargo interests, shippers' agents, brokers, other intermediaries and carriers may form or join associations. As to international operations, government policy has held that, in addition to cargo interests, non-beneficial interest shippers can belong to Shippers' Associations, if they are legally shippers. This means that tariffed and bonded NVOCCs can belong to Shippers' Associations.

4. Are there antitrust ramifications to belonging to Shippers' Associations?

In general, no. The Department of Justice has clearly stated that Shippers' Associations do not have an unreasonable exposure to the antitrust laws. In fact, the Department has been so

clear on this issue that it has discouraged Shippers' Associations from seeking a business review letter. Basically, a Shippers' Association that has an independent management structure to handle day-to-day operations and maintain the confidentiality of sensitive competitive business information of association members will provide adequate safeguards against a violation of the antitrust laws. The Department of Justice has established "safe harbor" guidelines. If the association buys less than 35% of the total carriage supplied on each port (or city) pair and if transportation costs constitute less than 20% of the delivered price of the product, the Association will not be challenged by the Department of Justice. However, any Shippers' Association, as with any other business enterprise, should undertake periodic reviews of the antitrust ramifications of its operations. This is especially true if an association's membership is largely composed of members from a single industry.

5. Are Shippers' Associations required to obtain a business review letter or other form of antitrust clearance before commencing operations?

No. As previously noted, the Department of Justice in general has stated that Shippers' Associations do not need business review letters.

6. Are Shippers' Associations shippers?

Yes. Judicial and federal agency decisions since 1908 have held that Shippers' Associations are legally shippers and are entitled to all rights and privileges accorded to other shippers.

7. Are members of a Shippers' Association jointly and severally liable for the obligations of the association? Need they pay twice if the Association fails to pay the carrier?

On the question of membership liability, there are similarities between members and stockholders. As with any business entity, it is important to review the organization and operation of the association and wording of the association's Articles of Incorporation and bylaws. Properly structured and operated, a Shippers' Association presents no greater risk of double liability for a member than utilization by the member of any other form of transportation so long as a proper immunizing business entity (i.e., a Corporation) is in place and appropriate care is taken in the drafting of the organizing documents. Similarly, care should also be taken in wording contracts with carriers to protect the immunity of members.

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