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## Conflict of interest?

*Brokers could get stuck between serving customer and regulator.*

**T**here is disagreement within industry circles about whether brokers would, or should, serve as a second set of eyes for the client or for Customs.

Is there an obligation, for instance, to tip off regulators since the agency issues the broker's license, or is the obligation to the party that pays the bill?

It's a fuzzy issue, with the broker perhaps suited to playing some sort of middleman role, said Michael Ford, vice president of regulatory compliance and quality for BDP International.

Amy Magnus, district manager of A.N. Deringer and a former Customs inspector, insisted the broker has a fiduciary responsibility to protect the client and advise it to seek counsel if a violation is uncovered. A.N. Deringer often acts as an advocate on behalf of the importer before Customs, helping to respond to Customs and Border Protection questionnaires and arguing against heavy-handed or misguided enforcement.

Whether that would change under CBP's new regulatory vision remains to be seen, she added.

But trade attorney Marian Ladner said CBP has had a longstanding practice of holding brokers accountable to the agency, since it is the one that allows them to be in business. Brokers are supposed to keep their client's import information confidential, but that isn't the same as having a privilege of immunity from notifying the government about observed violations of law, experts point out.

Any revision of broker regulations needs to reflect the fact that the brokerage division at many large logistics companies is a loss leader and that their main revenue comes from managing freight transportation or providing supply chain consulting, Ladner cautioned. That means there could be a conflict between the customer's goal of

delivering their goods as fast and cheaply as possible or following outdated regulations to the letter.

A broker, for example, might face the dilemma of walking away from a customer that doesn't self-disclose a violation to CBP, or just documenting that it offered such advice and continuing to file entries. CBP could penalize the broker for failing to exercise responsible supervision and control if it ever found out about the broker's prior knowledge, Ladner said.

And if the broker is a business partner of the importer then it could lose its \$50 limit on liability protection for making a mistake transacting customs business. Ladner said the problem is easily resolved by the broker and importer agreeing in the contract on liability terms.

Furthermore, although U.S. law says that all customs business and records must be conducted and kept in U.S. territory, many logistics firms are multinational entities. That raises the possibility that some brokerage work could be shuffled around the company, especially at a time when some logistics providers are trying to outsource classification work offshore on the grounds that it simply constitutes data entry and not customs business, Ladner told *American Shipper*.

A managing partner of Houston-based Ladner & Associates and a former COAC member, she said, "So whose payroll are they on? If they're not on the brokerage payroll you've got a problem with who's seeing and having access to the information," which could violate the broker's confidentiality clause.

It makes sense to move back office activities such as billing or entering thousands of tariff codes to where they can be done more efficiently by third parties who are contractually obligated to keep the information confidential or receive redacted

versions of documents, she said.

Brokers are constrained under CBP's narrow interpretation of the law from sharing confidential client information with another party, even if it is a division of the same integrated logistics company. CBP last fall proposed amending its regulations to allow brokers to share client information with related affiliates that offer non-customs services if they receive written consent.

Obtaining such permission should be unnecessary because importers generally want their logistics providers to provide integrated services and use integrated systems to more efficiently handle data in each step of the supply chain so that their goods are delivered more efficiently, Ladner said.

She argued that the conflicts of interest under current laws are archaic and that CBP needs to adjust its regulations to the ways companies do business in a modern, global economy.

Customs, she said, should support integrated logistics because it reduces costs and makes easier document exchanges, which otherwise cause shipment delays when they are not synchronized with the freight movement.

"If you practice with your own relay team all the time for the baton handoff, you can get down each other's speed, rhythm and the position of the hand. When you have multiple carriers involved you always run the risk of one guy not handing stuff off exactly right," Ladner said.

"A broker isn't a utility. It's not a regulated entity whose every service is dictated by U.S. Customs," echoed Jon Kent, legislative representative for the National Customs Brokers and Forwarders Association of America. "There's a big, competitive marketplace out there. In a lot of ways the kinds of things that you want from a broker will be dictated by that marketplace. And I think Customs has to draw a very fine line between what it tells a broker it must do versus what the marketplace expects the broker to do."

As for the issue of who pays the fine if a broker makes a mistake, Ford said that if the broker has become more deeply rooted in the client's operation then it should accept the risk and offer to cover the expense.