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AI in the Supply Chain Under Government Focus




Jonathan R. Todd | Kristopher J. Chandler | Vanessa I. Gomez | Megan K. MacCallum

The U.S. Department of Transportation is seeking input from industry stakeholders on the role of artificial intelligence in the supply chain. The DOT's Advanced Research Projects Agency – Infrastructure is one of many federal agencies that together with the White House are drawing into sharp focus the risks and opportunities of artificial intelligence. This one example signals the importance of seriously examining the commercial, compliance, and national security implications of technological advances.

Five Immediate Areas of DOT Focus on AI

In this instance, the DOT requests comments by July 2, 2024, on the safe and responsible development and use of AI in the transportation sector (See 89 FR 36849.). This inquiry focuses on five key areas of concern: (1) Current AI applications in transportation, (2) Opportunities for AI in transportation, (3) Challenges of AI in transportation, (4) Autonomous mobility ecosystems, and (5) Other considerations in the development of AI for Transportation. The DOT request for information also warns against the submission of confidential information in response, which understandably highlights the highly sensitive and competitive nature of the subject.

Growing Trend of Federal Focus on AI

The federal government has taken a very indirect approach to addressing AI regulation. Like its approach to data privacy and personal information, the federal government has yet to adopt a comprehensive AI law providing compliance obligations for the use and deployment of AI tools.

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Instead, they have relied on enforcement by executive agencies of existing laws to address AI. Though there is no current federal omnibus regulation governing the use of AI tools, some federal agencies have clarified that existing statutes and regulations apply to business operations regardless of a business' use of AI tools. This means that if a law applies to your business, then your use of an AI tool will not alleviate your compliance obligations under that law. Again, similar to the approach taken in the U.S. as it relates to data security and privacy of an individual's personal information, to find a comprehensive law on AI, you need to look to individual states for how they are addressing the use and deployment of AI and the legal pitfalls that come with it.

In contrast, the federal government has taken a very hands-on approach to AI usage by federal agencies. In March 2024, the Office of Management and Budget issued its first government-wide policy as memorandum M-24-10 titled "Advanced Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" (the "AI Memorandum"). Under President Biden's October 2023 AI Executive Order, the AI Memorandum directs federal agencies to "advance AI governance and innovation while managing risks from the use of AI in the federal government, particularly those affecting the rights and safety of the public."

Specifically, the AI Memorandum's requirements and recommendations fall into four categories: (1) strengthening AI governance, (2) advancing responsible AI Innovation, (3) managing risks from use of AI, and (4) managing risks in federal procurement of AI. The risks addressed specifically are those that "result from any reliance on AI outputs to inform, influence, decide, or execute agency decisions or actions, which could undermine the efficacy, safety, equitableness, fairness, transparency, accountability, appropriateness, or lawfulness of such decisions or action." Most of the AI Memorandum applies to "all agencies defined in 44 U.S.C. § 3502(1)" while other provisions only apply to agencies identified in the Chief Financial Officers Act (31 U.S.C. § 901(b)). Certain requirements do not apply to members of the intelligence community as defined in 50 U.S.C § 3003. System functionality that "implements or is reliant on" AI that is "developed, used or procured by" the covered agencies is also subject to the AI Memorandum.

Activity merely relating to AI, including regulatory actions for nonagency AI use or investigations of AI in an enforcement action, and AI deployed as part of a component of a National Security System are not covered.

The AI Memorandum clearly addresses federal agency use of AI and does not extend to the private sector; however, history shows that federal government use and guidance impact the development of best practices adopted by companies. As such, private sector companies using AI will benefit from formally assessing how their current AI practices and policies align with the AI Memorandum and future guidance on the federal government's use of AI.

AI in the Supply Chain Concerns and Implications

Federal interest in exploring AI impacts specific to supply chain services and their national security implications has appropriately taken a broad-based approach. As a comprehensive policy statement, the Biden Administration released its Fact Sheet titled "New Actions to Strengthen America's Supply Chains, Lower Costs for Families, and Secure Key Sectors" on November 27, 2023. Among its many recommendations were a Supply Chain Data and Analytics Summit as well as an AI Hackathon.

The nexus between AI, other emerging technologies, and strengthening the domestic United States supply chain in new and novel ways is clear. The 2023 Fact Sheet is one step in a multiyear bipartisan trend of increased recognition that a country's supply chain and its national security are one and the same. This trend started before the COVID-19 disruptions that brought the conversation into national discourse.

Stepping back five years, the Trump Administration's Executive Order 13873 was issued in 2019 to address foreign exploitation of vulnerabilities in the information and communications technology and services supply chain. The concern at that time was that supply chain-related systems and processes are vulnerable to foreign adversaries due to their high-value target status as the veritable backbone of U.S. critical infrastructure. This risk was addressed by assigning responsibility to the Commerce Department for assessing the risk of foreign parties and their domestic actors from acquiring, transferring, or dealing in information and technology that could yield catastrophic effects for the homeland. Commerce's role in doing so is supported by Treasury, State, Defense, and Homeland Security, among other agencies. For example, Homeland Security will be responsible for identifying entities, hardware, software, and services that pose vulnerabilities to the U.S supply chain.

The Biden Administration continued to ramp up the focus on technological applications within the supply chain and their risks. In 2021, the Biden Administration published Executive Order 14034 with the goal of protecting American sensitive data from foreign interference. More recently, on February 28, 2024, the Biden Administration published Executive Order 14117 to expand the scope of national security concerns addressed in 2019 by President Trump. The expanded scope of national security concerns focuses on minimizing access to Americans' bulk sensitive personal data via data brokerages and supply chain agreements pertaining to third-party vendors, employment, and investments. The Biden Administration highlights the concern that a supply chain stakeholder in a country of concern will be required to meet compliance obligations to transfer Americans' sensitive personal data to that country of concern's intelligence services. The countries of concern include the People's Republic of China, China's Special Administrative Regions of Hong Kong and Macau, Iran, North Korea, Cuba, and Venezuela.

Concerns over international trading relationships and connectivity echo in the recent DOT request for comment as well as other agency activities. As a parallel, Commerce's Bureau of Industry and Security (BIS) has expressed a focus on information and communications technology and services (ICTS) transactions that are essential to the connective vehicles (CV) supply chain. BIS has assessed the potential risks related to the design, manufacturing, and implementation of ICTS in CVs due to CV connectivity to original equipment manufacturers, third-party service providers, and devices like smartphones. A complex web of geopolitics, federal and state jurisdiction, private industry, and consumer interests is emerging.

Private Industry's Path Forward

There is little doubt that interest in AI and adjacent technologies is far from over. The five-year trendline of hardening supply chain protections, particularly from a technological perspective, proves that this is not a flash-in-the-pan occurrence. Absence of substantial comprehensive federal law on the subject does not mean that there are no rules. Instead, this is a moment in time when nimble multidisciplinary approaches are meaningful. Just as a commercial "arms race" is occurring, the best and brightest companies are carefully assessing emerging best practices, the impact on existing compliance obligations, and the threat of geopolitical risks.

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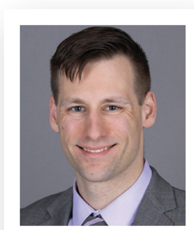
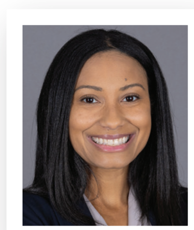
Driving Change: Emissions Regulation Impact and Adaptation

Jonathan R. Todd

Reed W. Sirak



Robert Pleines, Jr.



Vanessa I. Gomez

Environmental regulations, including those under the California Air Resources Board's (CARB's) jurisdiction, present a complex compliance challenge for vehicle fleet managers and operations departments across the country. Many of CARB's compliance obligations are in effect today. A number of other states are adopting similar or identical requirements expanding CARB's reach to trucking fleets nationwide. In an effort to comply with these regulations, fleet managers must start to employ compliance strategies to avoid enforcement issues and advantageously posture for the potential transition to zero emission vehicles (ZEVs).

Regulations Impacting Fleet Managers: There is no shortage of CARB regulations that impact fleet managers. This is an environment in which the key regulations driving change among fleet managers must be understood to develop compliant implementation strategies and programs:

1. **Advanced Clean Fleets Regulation:** The Advanced Clean Fleets Regulation (ACF Regulation) applies to drayage fleets and high-priority fleets, or fleets that own, operate, or direct the operation of fifty (50) or more vehicles or fleets with $50 million or more in annual revenue. Specifically, the ACF Regulation requires high-priority fleets to gradually transition their fleets to ZEVs. Fleets must report their vehicles through California's Truck Regulation Upload, Compliance, and Reporting System (TRUCRS) as a part of this transition. CARB will use TRUCRS to track fleets' progress in shifting to ZEVs.

   CARB uses a "Model Year Schedule" as the default cycle that fleets must follow as they transition to ZEVs. Under the Model Year Schedule, legacy vehicles must be removed

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after the end of their useful life, which is either the earlier of eighteen (18) years or 800,000 miles or a minimum of thirteen (13) years if the truck has over 800,000 miles. High-priority fleets using the "Model Year Schedule" must begin removing internal combustion engine (ICE) vehicles exceeding their "useful life" from fleets beginning in January 2025. Fleet owners using the "Model Year Schedule" that attempt to extend the "useful life" by purchasing new ICE vehicles during the enforcement stay may find themselves unable to register these vehicles in California after 2024 because CARB reserved the ability to deem such vehicles as noncompliant. An alternative to the Model Year approach is the "Milestone" option where high-priority fleets must meet ZEV milestones as a percentage of their total fleet but can still add internal combustion engines. These internal combustion engines, however, must meet CARB's most stringent emissions requirements to comply with the ACF Regulation.

The ACF Regulation also impacts drayage fleets, or in-use Class 7 or 8 vehicles used to transport containers and bulk goods to and from seaports and intermodal railyards. Operators of drayage fleets were required to register their trucks in TRUCRS by December 31, 2023. Legacy drayage trucks can continue to operate through their minimum useful life. Today, however, only zero-emission drayage trucks are permitted to register in TRUCRS to achieve CARB's goal of transitioning to all drayage trucks being zero-emission by 2035.

As noted above, enforcement of the ACF Regulation is currently on hold as it is pending a waiver request with the U.S. Environmental Protection Agency (EPA). We are nonetheless actively advising clients in preparation for compliance so there are no surprises down the road. The impacts to fleet composition require careful planning and consideration to avoid costly charges or penalties.

2. **TRU ACTM:** Another important CARB regulation that imposes compliance requirements on fleets operating in California is the Airborne Toxic Control Measure for In-Use Disel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets, and Facilities where TRUs Operate (TRU ACTM). In 2022, the TRU ACTM was amended to impose new emissions standards that, like the ACF Regulation, require TRU owners to gradually transition to zero-emission TRUs. The TRU ACTM also required owners to report all TRUs operated in California to CARB and turn over at least 15 percent of their truck TRUs to zero-emission technology each year. The 2022 Amendment also addressed TRU leasing, since a rental or leasing entity is presumed to be the owner of a truck or trailer TRU responsible for CARB compliance if the lease agreement is for: a period of less than one (1) year; or a period of one (1) year or longer, unless the terms of the lease agreement identify the lessee as the entity responsible for compliance with state laws. TRU owners, such as lessors, may delegate their compliance responsibilities to lessees based on the term and language in the lease agreement.
3. **The Clean Truck Check:** Day-to-day operational challenges are also on the horizon for compliant fleet managers. The Clean Truck Check program, formerly known as the Heavy-Duty Inspection and Maintenance (HD I/M) regulation, subjects nearly all non-gasoline vehicles with a gross vehicle weight rating (GVWR) over 14,000 pounds that operate in California to periodic emissions testing. These testing requirements help ensure that heavy-duty vehicles operating in California remain equipped with properly functioning emissions controls, and malfunctioning controls get repaired in a timely manner.

The Clean Truck Check program consists of several key components designed to improve emissions compliance and foster the transition to cleaner trucking fleets and is implemented through a multiphased approach. Under the Clean Truck Check program heavy-duty vehicles are subject to regular inspections to assess their emissions performance and compliance with

California's stringent air quality standards. These inspections help identify vehicles that may be emitting excessive pollutants and require corrective action to bring them into compliance. CARB employs robust monitoring and enforcement mechanisms to ensure compliance with Clean Truck Check requirements. Noncompliant vehicles may be subject to penalties, fines, or enforcement actions to encourage adherence to emissions standards and regulatory mandates.

CARB Regulations Beyond California: Fleet managers with terminals and lanes outside California are not spared from the challenge of emissions regulations directly impact their power unit count, traffic routing, and day-to-day compliance obligations. The impact of CARB's regulations extends far beyond California's borders, as other states across the nation increasingly look to adopt similar measures to address environmental challenges. Several states have already adopted CARB's regulations or similar regulations modeled closely on the regulations developed by CARB. These states include Oregon, Washington, Colorado, and several northeastern states. In addition, Illinois is currently considering legislation that would adopt CARB's current and future regulations.

This veritable "patchwork quilt" of compliance obligations poses challenges for fleet managers navigating complex regulatory landscapes. Implementation costs and infrastructure requirements influence the success and effectiveness of regulatory measures aimed at reducing emissions and promoting cleaner technologies. Further, fleet managers must now contemplate how to meet their transportation goals with a number of states throughout the US considering their vehicles as "noncompliant."

Compliance and Strategy: With reporting and ZEV requirements currently in place, or soon to take place, we are advising fleets on measures to meet or exceed the compliance standards. Should CARB or other states fully enforce these regulations, failure to comply could result in significant fines or an inability to operate. Fleet managers and their compliance or operations departments are taking various measures to ensure compliance, including the examples shown below:

1. **Fleet Accountability and Projections:** While compliance with these regulations can be quite the undertaking, fleets may at least obtain accurate counts of their fleet vehicles, including leased vehicles for which they are responsible for reporting under these various regulations. If possible, fleets can forecast growth or reduction to contemplate how they will meet the various thresholds as these regulations take effect and increase the percentage requirement of zero-emission vehicles.

2. **Compliant Vehicle Sourcing:** With the transition to ZEVs impending, some fleets are moving ahead in sourcing ZEVs to meet future compliance requirements. Today there are scarce numbers of compliant vehicles for sale, and some fleets are claiming spots in line by ordering compliant vehicles now to avoid future competition over limited resources. Fleets finding that compliant vehicles are unavailable may find compliance with owning or operating the requisite number of ZEVs to be an issue. Thus, these fleets may then need to start the laborious process of seeking compliance exceptions from CARB based on a lack of available resources, which can help reduce future penalties.

3. **ZEV Availability:** California and the U.S. EPA will impose ZEV production requirements on heavy-duty vehicle manufacturers to facilitate a fleet's transition to ZEVs and compliance with ZEV requirements. Both California's Advanced Clean Truck Regulation (ACT Regulation) and the U.S. EPA's Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles – Phase 3 impose standards on these manufacturers to annually produce an increasing percentage of ZEVs. The ACT Regulation came into effect in 2024 and requires 5%–9% of model year 2024 heavy-duty vehicles sales in California be ZEVs. The U.S. EPA's standards will not come into effect until 2027, although several organizations have announced challenges to the U.S. EPA's new standards. Despite the potential challenges, heavy-duty vehicle manufacturers are already transitioning to the production of additional ZEVs, which should increase the number of available ZEVs for fleets to purchase.

4. **Financial Assistance and Additional Resources:** The initial investment to upgrade or replace vehicles, coupled with ongoing maintenance costs, poses financial hurdles for many fleet managers, particularly smaller ones. CARB offers financial assistance and incentives as well as training and information sessions to support fleet owners in transitioning to cleaner technologies through some of its regulations. For example, agency initiatives such as the Cal Fleet Advisor provides fleets with both ongoing guidance and one-off advice. These resources not only help mitigate the financial burden but also accelerate the adoption of cleaner technologies within the trucking industry.

Preparing You for the Road Ahead: Fleet managers' compliance obligations are only beginning to grow in complexity and geography with more states adopting CARB's regulations, or their own variation of a CARB regulation. The development of a practical operational approach to ensure compliance with CARB regulations while optimizing profit is imperative for fleets that wish to thrive in this new landscape.

Benesch's Transportation & Logistics' Sustainable Transportation Regulatory Environmental Emissions Team (the STREET) is available to assist with developing compliant operations that satisfy CARB requirements.

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A Broker Nuclear Verdict Reversal! (And a Very Good Year [In the Courts] for Brokers)

Eric L. Zalud

Suffice it to say that the past year has been a very good year for brokers; in the courts, that is! While there have been several very favorable preemption decisions across the country, the preemption doctrine is not universally applied to broker lawsuits in all jurisdictions. A recent Illinois case, helped to fill those liability gaps, in tectonic fashion.

In *Cornejo v. Dakota Lines, Inc. et al.* 2023 IL App (1st) 220633, 229 N.E.3d 546, 471 (Ill. Dec. 795), Gustavo Cornejo was severely injured when standing near his family vehicle on the shoulder of a highway. He was struck by an 18-wheel tractor-trailer. His mother brought a negligence suit on behalf of her son against defendants Lewis, the truck driver; his employer, the motor carrier Dakota Lines; and Alliance Shippers, the broker. At trial, the jury found that Lewis, Dakota, and Alliance were liable to the plaintiff and awarded the plaintiff $18,150,750, a nuclear verdict. Alliance appealed the court's judgment confirming the verdict, alleging that, as a matter of law, Dakota was an independent contractor of Alliance and that neither Lewis nor Dakota were the agents of Alliance.

The evidence showed that Alliance *did not* pay Dakota's drivers and withhold taxes from their pay; did not hire, train, or fire the drivers; did not dispatch nor speak to the drivers; did not control the drivers' routes or provide them with tools, equipment, or materials; and did not own the tractors or trailers the drivers used. The evidence also showed that Dakota and Alliance adhered to terms of their contract, which provided that Dakota had full control over its personnel and would perform services as an independent contractor.

Also, Dakota and Alliance did not have an exclusive relationship; Dakota was free to haul freight for other brokers and was not solely Alliance's carrier. Dakota hired, trained, and fired its own drivers; paid them; and withheld taxes from their paychecks.

The plaintiff contended that nonetheless, there were various other facts that connoted an agency relationship. *To wit*, Alliance required Dakota to add Alliance as an additional insured on Dakota's insurance, and to indemnify Alliance. Alliance also had requirements regarding seal integrity, freight bills, and cargo security. Alliance would designate if delivery had to be on a flatbed or via container, and required Dakota to EDI, email, and/or fax Alliance multiple times a day regarding pickup and delivery times. Alliance also required Dakota to notify Alliance immediately regarding issues, like crashes or mechanical problems, that would prohibit Dakota from moving load. Then, Alliance would decide whether Dakota should send another driver to the load.

Alliance could charge Dakota for damages if a delivery was late, damaged, or lost. Alliance kept a scorecard of timeliness of Dakota's deliveries. A decrease in Dakota's score could jeopardize future freight orders from Alliance. The court found that none of these facts showed the degree of control over the work performed (here, hauling loads) that Illinois courts have required when finding that an agency relationship exists.

The court reasoned that there was no evidence that the driver Lewis was trained using materials that said he was part of Alliance's fleet, or otherwise associated with Alliance. He did not wear clothing nor use equipment bearing the Alliance name or brand, nor did he otherwise hold himself out as employee of Alliance. Alliance did not provide any of the equipment Lewis used. The Dakota-Alliance contract specified that Dakota was an independent contractor, with sole responsibility for its employees. Thus, Alliance was specifying the result that it wanted Dakota to accomplish, e.g., moving empty containers or shipping cargo. The court found that type of specifying to be different than dictating the *manner* in which the work of hauling the containers would be performed.

"Albeit, the court does *recognize that, in this just-in-time, fast-paced world, frequent contact between the broker and the motor carrier may be necessary, but will not connote control, nor vicarious liability."*

The court concluded that the "Seventh Circuit's treatment of Illinois law has also been consistent with the cases we have cited here concerning the lack of agency relationship." The fact that Dakota was required to insure Alliance as additional insured and indemnify Alliance simply showed the parties' intent to keep risk of loss with Dakota and its liability insurer. The plaintiff's references to Alliance's marketing and advertising did not support the agency relationship between Alliance and Dakota. Alliance exercised little, if any, control over Dakota's and its drivers' performance of the transportation work, as opposed to control *over the result* of the assigned task or matters ancillary to the work to be performed. Dakota had no authority to bind Alliance contractually to a third party, because the contract between Alliance and Dakota forbade Dakota from subcontracting any of Alliance's work. Thus, all the evidence, viewed in the light most favorable to the plaintiff, overwhelmingly favored the conclusion that Lewis and Dakota were not Alliance's agents. No contrary verdict based on the evidence could ever stand!

For broker liability cases that, for whatever reason, are not federally preempted, this case is a veritable mother lode of ammunition to defend against allegations of vicarious liability on behalf of the broker, in either freight loss and damage, or casualty scenarios. Many of the hallmarks of the business aspects of brokerages, and the fundamental factors underlying the broker model, are discussed in depth by the court. The court reviewed these facets carefully and concluded that the model works, i.e., that in a typical broker/carrier relationship, the carrier is *not* an agent, and the broker will not be vicariously liable for the motor carrier's actions. As this court finds, the broker *can* exercise various contractual and insurance-related rights, without those assertions being found to be indicia of control or liability. The principal theme of the decision is that the broker's actions vis-a-vis the motor carrier should relate to the *results* of the shipping schematic, and not the details of how that result is accomplished. Albeit, the court *does* recognize that, in this just-in-time, fast-paced world, frequent contact between the broker and the motor carrier may be necessary, but will not connote control, nor vicarious liability. One watchword from previous caselaw to all brokers *is to avoid direct contact with the driver of the specific shipment*. All contact should be with the motor carrier dispatcher or other contact person. When brokers cross that line and begin to have direct contact with the actual driver, courts are more likely to find vicarious liability or liability invoking control.

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California Regulators Roll Out Aggressive Framework to Further Freeze Out Carbon Emissions in Refrigerated Transportation

Brian Cullen

On May 22, 2024, the California Air Resources Board (CARB) unveiled a high-level framework for what is known as "TRU Part 2" to eliminate carbon emissions created by refrigerated equipment utilized in the transportation of freight. If enacted, TRU Part 2 may have a very substantial financial and operational impact on both transportation providers and users of refrigerated and temperature-controlled freight transportation in the State of California and beyond.

TRU Part 2 regulates what CARB defines as "Non-truck transportation refrigeration units" aka "Non-truck TRUs." Refrigerated trailers, refrigerated intermodal domestic shipping containers, refrigerated rail cars, and TRU generator sets and powerpacks are all considered by CARB to be Non-truck TRUs. TRU Part 2 is anticipated to have a more profound impact on the overall transportation and logistics of refrigerated or temperature-controlled transportation than "TRU Part 1," which regulated "Truck TRUs," such as refrigerated straight trucks and cargo vans.

The TRU Part 2 framework consists of two proposals. The first proposal will require fleets to turn over a certain percentage of a fleet's Non-truck TRUs. Although fleets are not currently defined in the current proposal, CARB has historically defined "fleets" in the context of its regulations as groups of owned, leased, or rented vehicles operated by a business that are under common ownership or control. Typically, CARB regulations apply to any fleets that conduct business in or travel within the state of California. The current proposed turnover of a fleet's Non-truck TRUs would start in 2028 and aggressively turn over 100% of a fleet's Non-truck TRUs into zero emission Non-truck TRUs by 2035. Under the current proposal, TRU Part 2 would require that a fleet replace 5% of its non-zero emissions Non-truck TRUs with zero emission Non-truck TRUs each year for the years 2028 and 2029. The turnover requirement would then increase to 10% for years 2030 and 2031, 15% for years 2032 and 2033, and then 20% for years 2034 and 2035, respectfully.

Under the second TRU Part 2 proposal, CARB will require that newly manufactured zero emission Non-truck TRUs use either: (i) a refrigerant that has a global warming potential measurement rating of less than 5 or (ii) no refrigerant at all. Therefore, CARB is not only taking aim at the emissions created via powering the Non-Truck TRU itself, but also the emissions generated from creating and/or utilizing a component of the refrigeration system that cools the non-Truck TRU. This second TRU Part 2 proposal is currently scheduled to commence in 2032.

Of note, at the May 22, 2024, meeting, CARB did identify a third area that CARB may seek to regulate under TRU Part 2: infrastructure. CARB is currently seeking public comment on the infrastructure requirements that would be necessary to power the non-Truck TRUs. Similar to Zero Electric Vehicles (ZEVs), there appears to be concern from CARB as to how quickly proper infrastructure can be implemented to ensure that the batteries or other zero-emission fuel systems for the Non-truck TRUs can be repowered in an efficient and effective manner. CARB is contemplating whether to be involved in setting standards or requirements on areas where Non-truck TRUs will operate to ensure such infrastructure is readily and sufficiently available to repower the Non-truck TRUs. CARB identified refrigerated warehouses and distribution centers, grocery stores, seaports, and intermodal railyards as potential areas CARB may seek to impose such standards or requirements.

Benesch's Transportation & Logistics' Sustainable Transportation Regulatory Environmental Emissions Team (the STREET) is available to assist with developing compliant operations that satisfy any of CARB's requirements within the transportation and logistics industry and beyond.

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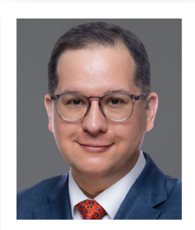
UFLPA Forced Labor Detentions by CBP – Why They Happen and What to Do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We are seeing a steady increase in client imports being detained at port by U.S. Customs and Border Protection (CBP) on grounds of alleged forced labor in the supply chain. The issue of forced labor is appearing in a wide range of industries beyond consumer retail (particularly textiles and fashion), where it has been a challenge for some time. Today, enforcement of the Uyghur Forced Labor Prevention Act (UFLPA) is challenging global product sourcing and domestic inventories in new ways while also offering some new tools. This article summarizes the forced labor issue, the current state of law, and strategies for preventing detention as well as potentially rebutting presumptions of forced labor if goods are stopped.

Forced Labor in China-Sourced Finished Goods and Raw Materials

The UFLPA targets forced labor of the Uyghur peoples in the Xinjiang Uyghur Autonomous Region of China (the Xinjiang Region). The Uyghur are a Muslim ethnic minority group who have their own culture and language and religious practices distinct from the Han majority group in China. The Xinjiang Region has changed control many times in its history. It was most recently occupied by China in 1949 and remains subject to Chinese control today. Recently, China implemented policies of mass detention, forced and coerced labor, political indoctrination, and violence against the Uyghur people and other ethnic minority groups in the Xinjiang Region.

The Xinjiang Region has abundant resources. It produces the vast majority of China's cotton at 80% of the total national production. It also contains the largest natural gas and coal reserves in China. Millions of Uyghur people and other minority group people have been detained in camp facilities and forced to participate in forced labor resulting in significant production of goods exported to the benefit of the Chinese economy. These goods include gloves, hair products, polysilicon, textiles and cotton in particular, thread and yarn, tomato products, and fish.

Many of the goods produced with forced labor are believed to enter U.S. commerce. In response, the U.S. has implemented robust trade policies in an effort to combat the abuses taking place in the Xinjiang Region and continues to assess its approach to the issue.

Historic Withhold Release Orders (WROs)

CBP is at the front lines of the U.S. fight against forced labor. Prior to the UFLPA, one of the mechanisms used to prevent the entry of goods produced by forced labor was to issue Withhold Release Orders (WROs) under Section 307 of the Tariff Act of 1930. WROs allow CBP detain product prior to release into the U.S. A series of WROs have been related to goods produced in China. In 2021, CBP implemented WROs against certain products from the Uyghur Region, including for cotton, tomatoes, and downstream products generally, and for cotton and processed cotton, apparel, garments, hair products, and more from entities exploiting or forcing the labor of the Uyghur people.

Current UFLPA Regime and FLEFT Guidance to Importers

The following year, in 2022, CBP began implementation and enforcement of the UFLPA, which superseded the product and entity WROs. A key feature of the UFLPA is establishment of a broad rebuttable presumption that the import of any goods manufactured in whole or in part in the Xinjiang Region, or produced by certain listed entities, are produced with forced labor and are unlawful for import pursuant to the Tariff Act. The rebuttable presumption means that entry is prohibited unless the Importer of Record can demonstrate the absence of forced labor in the supply chain for the detained good.

The UFLPA also established the Forced Labor Enforcement Task Force (FLETF). The FLETF is composed of seven member agencies: the Office of the U.S. Trade Representative, and the U.S. Departments of Homeland Security (which is the Chair), Labor, State, the Treasury, Justice, and Commerce. FLETF is responsible to enforce the prohibition of Chinese imports manufactured with forced labor. At a high level, its 2022 Congressional Report includes a comprehensive assessment of the risk of prohibited forced labor imported goods from China, evaluates and describes forced labor schemes, recommends efforts and initiatives and tools for effective supply chain diligence and source tracing, offers resources, offers guidance to importers, and establishes a comprehensive collaborative plan to prevent prohibited imports with relevant private and nonprofit stakeholders. Just last year in 2023, FLETF updated its strategy in a Congressional Report, including advancements in an UFLPA Entity List, identification of new resources, and updates on cross-sector efforts to prevent and prohibit the same.

Most recently, on April 5, 2024, the Department of Homeland Security (DHS) signaled strengthened efforts to enforce compliance with the UFLPA. DHS announced that CBP and its sister agency Homeland Security Investigations (HSI) will "crack down" on forced labor in small-package textile shipments subject to CBP's Section 321 program for de minimis low-value imports. DHS also announced that CBP and HSI would conduct special operations to ensure cargo compliance generally, including physical inspections as well as isotopic and composition testing to determine country of origin. Finally, DHS plans to increase its performance of comprehensive audits and textile production verification team visits to high-risk foreign facilities, and will double the number of total foreign verification visits from last year. While it takes these steps, DHS plans to leverage

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UFLPA Forced Labor Detentions by CBP – Why They Happen and What to Do

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industry partnerships to improve legitimate trade and continue building awareness of regulations with importers and suppliers.

A significant development is that these actions are now targeting regions outside the Xinjiang Region, or greater China, and a broad range of goods. For example, CBP has publicly confirmed visits to facilities in Mexico and Honduras. The Department of Labor (DOL) has released similar informal guidance on forced labor against minorities around the world. We have anecdotally witnessed evidence of the new enforcement against other regions and different products across our importer clients experiencing detention.

What to do When It Happens to You

The best defense against CBP detentions is to assess the risk of forced labor in your supplier selection and procurement process. All U.S. companies with significant purchasing, particularly from China, must now develop comprehensive approaches to the forced labor issue in upstream supply. Basic strategies involve implementing internal policies against forced labor and flowing those into purchasing agreements, requiring strong certificates of origin, and as best as possible examining the circumstances of upstream sourcing as well as finished goods production by your suppliers. The goal is to place your company in a position so that if there is an issue, you have a quality file available with documentary evidence showing that the supplier, their raw materials, the region, and manner of production in no way indicate the existence of forced labor.

The clearest and most tangible tool for forced labor compliance is checking an Entity List, similar to how companies approach sanctions compliance. FLETF released a UFLPA Entity List that may be checked during the procurement or supplier onboarding process. The list is available on the DHS UFLPA website and changes are published in the Federal Register. The UFLPA Entity List consolidates the four subcategories for names associated with forced labor practices. The first list names Xinjiang entities using forced labor to fully or partially mine, produce, or manufacture goods. The second directory provides entities collaborating with the Xinjiang government to enlist, traffic, conceal, or obtain forced labor (e.g., from members of persecuted groups such as Uyghurs, Kazakhs, and Kyrgyz). The third list contains exporters of the products from China to the United States made by entities outlined in the first two lists. The final and fourth list includes entities and facilities sourcing material from Xinjiang, including the Xinjiang Production and Construction Corps as well as the regional government, in furtherance of government forced labor schemes (e.g., poverty alleviation and pairing-assistance programs). The UFLPA Entity List is a positive compliance tool, although DHS warns against construing it as an all-encompassing registry of entities engaged in the targeted forced labor practices.

FLETF additionally released a long list of evidence that Importers of Record can provide to rebut the CBP presumption of forced labor in their supply chains under UFLPA. Some of the basic approaches have been around for some time, such as supply chain mapping, active supplier management, and collection of source tracing information. The practical challenge becomes one of collecting and presenting the best available evidence for the absence of forced labor on a particular good. Valuable evidence may include compliance policies, certificates of origin, bills of lading and other documents showing chain of custody, and internal monitoring of company practices as well as external supplier audits.

CBP will also consider any evidence showing that goods, and their raw material inputs, were not produced in Xinjiang Region as useful to rebut the presumption of forced labor. If the goods were definitively produced in the Xinjiang Region, then the presumption of forced labor can be overcome by showing that the goods were not mined, manufactured, or produced with forced labor. Photos of operations and employees as well as examples of employment contracts and employee residential addresses are useful. However, the burden on the importer is high in this case and (as for all of these detentions) it is difficult to prove a negative. The presumption is subjective and may prove difficult to overcome even when armed with the information CBP FLETF describes.

Finally, when a detention notice is ultimately received, there is typically a 30-day window within which to present evidence rebutting the allegation of forced labor. The supply chain mapping, original documentary evidence, and representations of internal compliance programs described in this section serve as the foundation for rebutting as best as possible that allegation. If these steps were accomplished in advance, then requests for additional time may be available to develop a quality record through collaboration with suppliers. Storage fees and other costs will accrue during this period, which makes close collaboration with your freight forwarder helpful, because in some instances lower-cost options (such as third-party bonded warehousing) may be available. Ultimately, if the presumption cannot be rebutted in the sole discretion of CBP, then the goods must be either re-exported to another country or forfeited to the U.S. We then explore the availability of cost recovery and other claims against foreign suppliers of the goods.

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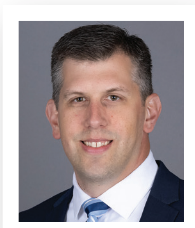
Ocean Carrier Bid Season – 2024 Edition

Jonathan R. Todd



J. Philip Nester

Yet again the ocean freight bid season is unfolding against a backdrop of uncertainty. The 2024 season brings a confluence of economic, geopolitical, trade, and industry-related issues that have created a complex environment for shippers, NVOs, and carriers alike. We all have fresh memories of COVID-19 port congestion, ongoing disruptions and diversions due to the Russia-Ukraine conflict, and the more recent instability in the Middle East and Red Sea. Concerns about route disruptions, vessel availability, labor disputes, election cycles, trade imbalances, new environmental compliance obligations, and the FMC's regulatory changes arising out of the Ocean Shipping Reform Act of 2022 (OSRA 2022) have only added to the complexity that will impact future ocean freight negotiations.

Stakeholders on all sides have a few guiding principles in this environment that can help in managing operational and commercial risk—ideally in pragmatic fashion. We explore some of those principles that we are seeing from a few different angles: (1) rates and charges, (2) inland services, (3) service failures, (4) sanctions and global compliance, and (5) extracontractual terms.

Rates and Charges – Realism About Vessel Capacity, Container Capacity, Shipping Lanes, and Disruption

The first step in operational planning is always some level of forecast for future needs. The added challenge in this market is that sourcing origins and routes may need to be realistically flexible, which can mean greater realized rate variance. As best as is possible, all purchasers of capacity are looking to achieve service-level visibility and cost-related predictability.

Current factors driving rates higher include diversion and capacity constraints, strong demand with increased volumes, an earlier-than-usual start to peak season, and operational disruptions at ports and terminals. Diversions and rerouting vessels to avoid lanes in zones of conflict in the Middle East and Red Sea have led to increased base rates due to longer transit times, higher fuel and labor costs, increased war risk premiums, and container availability issues. The compounding effect of the demurrage, detention, and dwell charges (collectively, D&D Charges) arising out of operational issues and equipment shortages have significantly increased the overall cost of ocean freight in recent years. Despite that OSRA 2022 and the FMC's related regulations sought to mitigate unfair D&D Charges imposed on shippers by ocean carriers and marine terminal operators, the impact of these efforts remains to be seen.

Inland Services – Surface Traffic and Container Management Under Review at Origin

Attention to inland services has grown in recent years, and it continues today, particularly for origin services in the People's Republic of China. Those activities can include outbound consolidation of containerloads, container pooling and management, and forwarding and NVO services, as well as coordination with inland US providers, such as customs brokers and dray operators.

Doing so allows for greater focus on those inland activities in the interest of better visibility and management of cargoes. As a strategy, this approach to inland services is reminiscent of the fragmentation of inland US services that many shippers embarked upon in the early years of COVID-19. Many large global service providers are available to offer comprehensive "control tower" or 4PL services under contract with hopes of greater performance at origin. More localized services are also available. The service delivery may be a technological solution, an asset-light solution such as offering an available container pool, or a comprehensive end-to-end solution with insourced or third-party dray and ocean carriage. A best practice we have observed is to balance complexity against efficacy. Testing services in a market under a durable contractual foundation can allow for alignment of expectations and proof of concept before signing up for global origin services.

Service Failures – Production or Inventory Scheduling May Be Less Precise

Inbound cargoes to the country of consumption or distribution are the first acute casualty of service disruption. One point we have noticed across the supply chain is the growth across

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Ocean Carrier Bid Season – 2024 Edition

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cargo owners and carriers alike in working together to better communicate on needs, services, and reporting. This is positive because it opens the door to a net effect of collaboration, its impact on operational planning, and the possibility for dynamic models accommodating service and cost.

> *"The 2024 season brings a confluence of economic, geopolitical, trade, and industry-related issues that have created a complex environment for shippers, NVOs, and carriers alike."*

The need to work together on throughput is not without cause. Anecdotally many have seen a recent uptick in service failures, including rolled cargo, blank sailings, and diversions, that have helped carriers manage capacity on the one hand but have caused supply chain disruptions and delays on the other. Overbookings and capacity constraints have been the leading causes for rolled cargo, while blank sailings and diversions are reducing available vessel and lane capacity that creates supply shortages to increase freight rate volatility and additional transportation costs. Stakeholders can look to avoid or mitigate the impact of service-level failures by negotiating flexible forecasting terms, an achievable MQC cadence, liquidated damages, dead freight, and escalatory procedures for addressing repeat occurrences of service failures.

Sanctions and Global Compliance – Moving Product Internationally While Staying Out of the Headlines

Trade compliance is an area where risk-appropriate approaches are desirable. There is no off-the-shelf compliance program suitable for every company in every segment of the supply chain. Even so, best practices and high-impact risks do exist that merit consideration by enterprises large and small.

This global shipping environment brings its own unique challenges. It is important to maintain awareness and suitable compliance tools across operations teams. War in the Middle East has elevated the risk of noncompliance with anti-boycott rules. A request from any shipper or its suppliers, or third-party service providers, to boycott a certain country or its companies (e.g. Israel flagged vessels) may be violative and could draw penalties. War in Europe has elevated the risk of noncompliance with economic sanctions. The tangible impact could involve inability to move certain items across the European theater, or transfer funds for the same, but it could even extend to certain ocean carriers that trade with adversaries of the United States (e.g. Russia) requiring contract edits that are typically non-negotiable. Even the longstanding rise of tensions with the People's Republic of China can drive risk. Knowingly carrying, forwarding, or otherwise facilitating semiconductor trade with China is a real possibility today and may well yield a violation of General Prohibition 10 under the Export Administration Regulations. Less dramatic compliance concerns are also appearing in service contracts. The rollout of ocean carrier emissions requirements across Europe has been an increasing point of negotiation as shippers and carriers balance the cost of compliance.

Extracontractual Terms – Remember that Out of Sight is NOT Out of Mind

Every transportation procurement lead, operations manager, and in-house counsel desire certainty of terms as best as possible. In the years since COVID-19, carriers have increasingly pushed to incorporate their own extracontractual terms, such as their tariffs and bill of lading terms and conditions (Carrier Terms), into ocean contracts. If this is done well it can have the effect of certainty rather than merely incorporating extracontractual terms.

The reasons for clearly spelling out Carrier Terms, such as in an exhibit to a service contract, may well exist as a means of compromise. From a carrier's perspective, many wish to allocate risks to their shippers, disclaim or limit liability, give broad continuing lien rights, and have control over the modification of what would otherwise be fixed terms under a service contract. Incorporating Carrier Terms presents certain risks for shippers, primarily on these issues of liability, indemnification, cargo loss and damage, and the fact that carriers can make unilateral changes to terms, rules, rates, and charges after satisfying their notice requirements. Shippers often make concessions and incorporate Carrier Terms, which may be warranted depending on volume needs. However, building additional terms into the service contract that incorporate Carrier Terms can help mitigate their effect by: (1) ensuring there is a strong order of precedence provision so that the service contract supersedes and controls in the event of conflict with any Carrier Terms; (2) attaching the then-current Carrier Terms as an exhibit to the service contract and specifying it will apply as is for the term to nullify the application of any subsequent changes; and (3) calling out in the service contract that any conflicting Carrier Terms will not apply between the parties.

Benesch is well-versed in representing shippers, NVOs, and carriers in all aspects of the ocean transportation contracting as well as all manner of global supply chain compliance.

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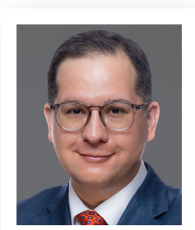
Motor Carrier Safety Department – Why You Need One, How To Improve Yours



Jonathan R. Todd

Thomas O'Donnell

For-hire and private motor carriers face unique compliance and operations challenges that many other business or company functions do not encounter. Operating commercial motor vehicles (CMVs) for your business, or as your business, can impact far beyond the stocking of shelves across America. Noncompliance and negligence yield casualty, vehicular accident lawsuits, and failed government audits. The stakes are rarely so high.

The Federal Motor Carrier Safety Regulations (FMCSRs) that apply "to all employers, employees, and commercial motor vehicles ("CMV") that transport property or passengers in interstate commerce." The U.S. DOT's Federal Motor Carrier Safety Administration (FMCSA) has the authority to regulate, fine, and even put a motor carrier, driver, or CMV out of service based on violations of the FMCSRs.

Who within our organization is responsible for overall compliance and how are we managing compliance? This fundamental question stands behind all regulatory compliance programs. When it comes to motor carrier safety, companies of all sizes are well served to have an answer, whether as part of a stand-alone department or by clearly identifying people and processes from among other roles. A carrier's safety department and personnel are often the first (and last) line of defense.

Why is a Safety Department Needed?

Any form of a safety department addresses three critical needs for any size of for-hire or private carrier: (1) compliance management, (2) liability management, and (3) culture management.

Compliance Management. Violations of the FMCSRs can lead to a multitude of fines and penalties. The regulations are numerous and confusing, and cover everything from proper DOT registration to drivers' hours of service rules. The onus for knowledgeable compliance is found in Section 390.3, which states that "(e) very employer shall be knowledgeable of and comply with all regulations contained in this subchapter that are applicable to that motor carrier's operations." Additionally, it requires that "(e)very driver and employee involved in motor carrier operations shall be instructed regarding, and shall comply with, all applicable regulations contained in this subchapter." It is therefore incumbent on a motor carrier to ensure that it and its employees are familiar with the FMCSRs. The best way to do so is to have a dedicated safety person or department that is fluent in the regulations to train other employees and drivers to fulfill this obligation.

Liability Management. An effective safety department can be a tremendous tool to minimize risk and liability for a motor carrier. Safety training for drivers can help reduce violations of FMCSRs and traffic laws, as well as reduce potential accidents. Additionally, a proper and documented safety program can protect a motor carrier in any litigation against charges of negligent entrustment or general negligence for not providing proper training or complying with the FMCSRs. For instance, consider that your staff may be called as witnesses during litigation. A well-represented motor carrier can show it instituted training and a progressive discipline program and will argue that it took adequate steps to prevent the accident prior to it occurring. This together with defense tactics to outflank any so-called "nuclear verdicts" can have a very real impact on the company beyond minimizing accidents.

Culture Management. As with all compliance functions, your culture is paramount. The culture of your company plays a major role in safety. A functional safety department, with the full backing of senior management, will let all carrier personnel know that safety is a priority and an integral part of the entire organization. Having no safety department drives the opposite message. Visible buy-ins from management and all staff members creates a culture of safety within your organization that helps morale, rewards positive behavior, and instills the self-respect that comes from professional driver experiences.

How is a Safety Department Structured?

The last thing anyone wants to do is develop a counterproductive compliance program, including by implementing policies and systems that will not be followed. Understandably, a motor carrier's size can have a direct impact on the structure and size of its safety department. For a small carrier with only a few drivers and vehicles, one person may wear the hats of a dispatcher, human resources generalist, and safety manager all at once. A larger carrier may have a dedicated safety director and support staff. One size does not fit all. However, there are generally two paths a company can take in structuring its safety department: (1) outsourcing compliance resources and systems or (2) in-house compliance.

Outsourcing Resources and Systems. In today's digital environment, it is common practice to have electronic records for all parts of a motor carrier's operations. Safety records are no exception. There is no shortage of third-party vendors who will perform safety training, driver recruiting and qualification, and other functions of a traditional motor carrier safety department. Many of these third parties are consultants that have previously worked in law enforcement or at a motor carrier. While outsourcing can be a cost-effective option for a motor carrier, it is important to remember that responsibility for employee compliance and training still falls on the motor carrier. Therefore, an internal safety contact remains necessary at a minimum.

In-House Compliance. Beyond identifying an internal safety contact, launching a formal internal safety department provides many benefits not found when outsourcing safety functions. A carrier's own personnel will have more intimate knowledge of its operation and drivers. Internal safety personnel will also be better situated to diagnose and deal with issues that arise on a daily basis. They will also have a better understanding of a motor carrier's management team, and in fact, with the safety manager or director often being a part of that management team. The chief safety person may be a company's vice president, director, manager, or specialist, depending on the size and structure of the company. Additionally, a carrier's operations will also dictate the composition of its safety department. For instance, if a company's operations qualified for the short-haul exception, then it would not have electronic logging devices (ELDs), and the back-office tasks will be different. Similarly, if a motor carrier hauls hazardous materials, then the individual will need to know the hazardous materials regulations well.

What Are the Responsibilities of a Safety Department?

The way in which a safety department is structured and staffed, and the degree of outside support for its functions, may reasonably vary across companies. However, the core responsibilities of a safety department remain largely the same. The three categories of responsibility are: (1) regulatory compliance, (2) managing scores, and (3) recordkeeping.

Regulatory Compliance and Driver Programs. The most important function of any motor carrier safety department is ensuring compliance with the FMCSRs, as well as state and local laws. The FMCSRs govern the actions of a motor carrier and their drivers. The safety department lead implements the people, processes, and technology to achieve compliance as best as possible while reducing the risk of human error. Doing so involves developing tools such as driver handbooks, training programs, incentive programs, and violation tracking. Those tasks require individuals with specific training and knowledge of motor carrier operations rather than other personnel such as human resources generalists, who serve very important but also very different functions.

Managing Compliance, Safety, Accountability (CSA) scores. Although controversial, the FMCSA's CSA program is the current scorecard used by federal regulators and plaintiff's attorneys to judge motor carrier performance. All motor carriers need someone internally with an understanding of the program. This includes not only knowing where the carrier stands in terms of it scores, but also how to improve scores and how those scores are calculated. This is an essential role for any motor carrier to monitor and prepare for any potential FMCSA intervention.

Recordkeeping. Compliance with the FMCSRs includes observing numerous regulations relating to recordkeeping. Knowing what records to keep (and not to keep) and for how long is a vital function of any motor carrier safety department. A recordkeeping violation is often penalized just as harshly as any other violation of the FMCSRs.

What Other Value Does a Safety Department Bring?

Every company is different, but it is common for a safety department to take on other functional roles to drive value. The skill set required to serve as a strong lead on safety also produces a keen eye and leadership in other related areas.

Driver Recruiting, Progressive Discipline, and Injury Reporting. The safety department will often have responsibility for recruiting and retaining drivers. This is a natural fit in that much of recruiting and retention directly interacts with the FMCSRs. Motor carrier safety department personnel are often charged with developing and enforcing progressive discipline policies for drivers regarding accidents, violations, and other safety-related infractions. A safety department will also often take on non-FMCSR duties, such as managing workplace injuries and non-DOT accidents. The environmental, health, and safety (EHS) function includes compliance with OSHA regulations.

Maintenance and Repair of Vehicles. Motor carriers with formal or informal internal vehicle maintenance departments often assign oversight of this function to the safety department. Many maintenance issues correspond directly with the FMCSRs, and knowledge of the fleet can be invaluable when training drivers.

Fuel Taxes and Registrations. There are a number of ancillary taxes and registrations that must be maintained in the day-to-day operations of both for-hire and private carriers.

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New Statute of Limitations Impacts M&A and International Trade Compliance

Jonathan R. Todd

Megan K. MacCallum

New developments in international trade laws will have tangible and far-reaching impacts on transactions as well as day-to-day business operations. President Biden's signing of HR 815 means that once time-barred historic events are now fair game. Our team sees two immediate points of response for savvy general counsel and their internal clients: (1) company investors and buyers in mergers or acquisitions now must diligence 10 years of trade risk rather than five and (2) compliance leadership and operations managers now must consider voluntary self-disclosures of events within the same long-passed window.

President Doubles SOL Periods

President Biden signed into law H.R. 815 effective on April 24, 2024. The bill amends in part the statute of limitations (SOL) for the civil and criminal proceedings from five to 10 years for violations of economic sanctions and export controls. Simply put, the bill expressly doubles the SOL for violations under both International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA).

This change expands the enforcement window for agencies with jurisdiction over international trade activities that may apply the SOL retroactively. As a narrow point, the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) administers and enforces many of its sanctions programs under the authority granted to it by the IEEPA and also the TWEA. OFAC sanctions programs under the IEEPA authority include the Global Magnitsky Sanctions Program, the Ukraine/Russia Related Sanctions, and Russia Harmful Foreign Activities Sanctions. The U.S. Department of Commerce's Bureau of Industry and Security (BIS) also administers and enforces certain export control programs under the TWEA authority, such as its embargo against Cuba under TWEA authority.

Mergers and Acquisitions Impact

International trade compliance diligence is an important part of any investment, acquisition, or arms-length merger. Pragmatic counsel or specialist co-counsel can assess the veracity of compliance programs and activities to date in the interest of assessing risk for a target's operations, the potential risk exposure, and meaningful mitigation. These risks can attach under equity and asset transactions alike depending on the facts and deal structure. Now that zone of risk is twice as broad as it was earlier this year—even for closed deals.

In response, counsel for buyers and investors will expand the scope of their diligence requests from the past five years of activity to 10 years. Lengthier windows for diligence questions are just the start. The quality of a target's compliance program, relative risk of its business, and credibility of its documentary responses and information set the tone for what follows in the deal process. Expect lengthier representation and warranty periods, possibly special indemnity, and swift post-close action items to address perceived risks. As facts develop through diligence, situations may arise where voluntary self-disclosures are advisable prior to close, particularly for asset transactions.

International Trade Compliance Impacted by New SOL

An important part of day-to-day operational compliance and periodic risk assessments is the determination of potential violations. This determination requires exercise of discretion over whether to file a voluntary self-disclosure (VSD) with the agencies having jurisdiction. The ideal benefit of a VSD is to achieve a mitigating effect to reduce liability exposure, in some cases to zero consequence. Many of our clients who choose to file VSDs also do so in the conservative interest of simply "closing the book" on the issue rather than weathering years of uncertainty while hoping to run out the SOL clock.

OFAC and BIS both permit U.S. persons and entities to make a VSD of a violation that has not yet been investigated or reviewed by another agency. Now under the longer SOL, parties considering a VSD filing will need to look back 10 years rather than five so that all related violations are indeed disclosed at the same time. Failing to do so could eliminate the mitigating benefit of the VSD for those earlier years. Similarly, any VSDs filed recently may also benefit from examination of the same issue over the complete 10-year period, with the possibility of further filings to disclose additional violations.

OFAC has a two-phase VSD process, but no set days are prescribed for filing either phase. Instead the process simply requires an initial notification followed by a "report of sufficient detail" to completely understand the circumstances within a "reasonable time" of making the initial notification (Appendix A to 31 CFR Part 501). As with BIS VSDs, parties making OFAC VSDs will likely expand the scope of their internal reviews and request that the "reasonable time period" to make a final report be extended in light of the new SOL. BIS also has a two-phase VSD process where an initial notification is made followed by supplemental disclosures made within 180 days of the initial notification. This 180-day period may be extended. It is likely that businesses that have not yet completed their VSDs will expand the scope of their internal reviews to a 10-year period and bolster their supplemental disclosures or request extended time to file the same.

Looking Ahead to Updating Practices

The practical challenge this change presents for enterprises and their counsel is in effectively implementing the transition. New M&A deals can of course implement this new 10-year SOL. Deals currently in process, or those recently closed, are the hard case, since they will require reasonableness in updating diligence or purchase agreement terms on the one hand and possibly post-close assessments on the other. Trade compliance on a forward-looking basis can similarly implement a new 10-year SOL. However, active internal investigations and assessments may now need to dig deeper, and pending VSDs may need attention before the respective agencies.

The Benesch Team is experienced with the international trade matters that affect parties across the supply chain as well as the lifespan of enterprises. We handle specialty international trade diligence, internal compliance risk assessments, VSDs, defense of enforcement actions, and the development or updating of internal programs and practices for import compliance, export controls, and economic sanctions.

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Motor Carrier Safety Department – Why You Need One, How To Improve Yours

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Those include the International Registration Plan (IRP) for equipment and the International Fuel Tax Agreement (IFTA) for fuel taxes. These responsibilities often fall to a company's safety department due to its handling of related items, such as operating permits and vehicle plating.

Specialized Commodity Compliance. Special commodities require close attention in transportation-related operations. Some require unique use permits that must be managed, such as oversize, overweight, or overlength loads. Some require state-level handling permits, such as alcohol and dairy. Other commodities, such as hazardous materials, bring in an entire set of regulations. Compliance with the Hazardous Materials Regulations (HMRs), for example, often falls upon the safety department. The HMRs, much like the FMCSRs, can be confusing and carry the potential for injuries as well as civil penalties if they are violated. Having personnel or a third party that can effectively navigate the rules related to hazardous materials transportation is essential to any motor carrier handling those commodities.

The Job of Compliance Is Never Done

Compliance is a process. Even a long-standing safety department or lead can suffer from human error or accidents. Mistakes happen, and we can always find ways to improve. The imperative is to identify a team and an approach to compliance. From that point forward the task is continuous improvement. Many companies are shortsighted and do not adequately fund or staff their safety departments. It is sometimes erroneously believed that a safety department does not "make a motor carrier money." Avoiding fines, penalties, and the costs of accident litigation is the equivalent of "making money." In addition, having an effective safety department is often the best way to ensure a for-hire carrier can continue to generate the revenue it desires and for a private carrier to achieve the inventory management and customer satisfaction it requires.

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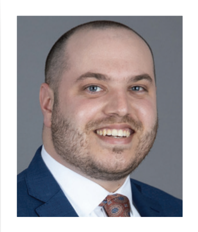
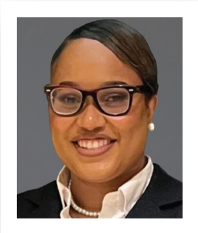
Glossary of Transportation Law Terms


Jonathan R. Todd


Christopher C. Razek


Sara Mishic


Deedra Thompson

Highly regulated operational sectors often have bountiful, and sometimes conflicting, defined terms that make all the difference in legal matters. The domestic and international transportation and logistics sector is no different. The term "commercial motor vehicle" is a classic example of this day-to-day impact in commercial environments as well as the risk of error by using conflicting terms. Commercial motor vehicle is defined at least seven times across Title 49. The definitions are triggered by different activities and equipment types—and their correct application makes all the difference between compliance and noncompliance.

This glossary is a curated list of key transportation law terms. It is intended to serve as a valuable tool in managing precise terminology across the dominant Titles of the United States Code (USC) governing the sector. Those Titles include 14 (Cost Guard, Air), 19 (Customs), 46 (Ocean), and 46 (Surface, Water). Close attention to the applicability of a Title, Chapter, Part, and Section are of course critical to determining whether a term in fact applies to the mode and operation under review. This glossary also includes corresponding definitions under the Code of Federal Regulations (CFR) where appropriate for understanding those USC definitions.

We are pleased to present the full-length glossary online here: https://bit.ly/4cUtZCf.

Benesch's Transportation & Logistics Practice Group includes a deep bench of dedicated transportation and logistics attorneys who spend every day advising on the federal statutes and regulations impacting all aspects of business operations. **JONATHAN TODD**, Vice Chair of the Group, may be reached at (216) 363-4658 and jtodd@beneschlaw.com. **CHRISTOPHER C. RAZEK**, managing associate, may be reached at (216) 363-4413 and crazek@beneschlaw.com. **SARA MISHIC**, paralegal, may be reached at (216) 363-4611 and smishic@beneschlaw.com. **DEEDRA THOMPSON** is a 2024 summer associate.

Hazardous Materials Regulations: A Regulatory Primer

Jonathan R. Todd

Megan K. MacCallum

Over one million shipments of hazardous materials reportedly travel in U.S. commerce every single day. A common misunderstanding is the nature of hazardous materials—they are more commonplace than you think! Another misunderstanding is the scope of regulated parties. Regulatory compliance obligations behind those shipments are a day-to-day challenge for the entire cast of characters in the manufacturing, warehousing, and transportation of goods. Safe and efficient supply chains require attention to the precise commodity-level classifications as well as the physical and paperwork activities that follow.

This article delivers a primer on the federal regulations impacting all participants in hazardous materials movements.

Federal Regulatory Framework

The Hazardous Materials Regulations (HMRs) are enforced by the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) (49 USC 5103). The HMRs apply to enumerated hazardous materials (hazmats). The HMRs contain universal responsibilities for shippers who handle and tender the goods, carriers who haul the goods, and those who may otherwise handle or store the goods along the way (49 USC 5103; 49 CFR Parts 171-180). The HMRs also contain specific regulations based on the party, the material, and the movement. For example, certain regulations may apply only to surface carriage via road or rail while other regulations may apply only to air or ocean carriage. PHMSA periodically updates the regulations and solicits to modernize the rules and improve efficiency and stakeholder engagement. PHMSA considers comments from industry when it makes these regulatory updates and most recently requested public comment on a sweeping range of topics in December 2023.

Regulated Persons and Functions

The HMRs apply to persons and to the functions they perform (49 CFR 171.1(a-c)). Regulated persons are those who manufacture, fabricate, mark, maintain, recondition, repair, or test a package or component of a packaging that is for use in the transportation of hazmats in commerce (49 CFR 171.1(a)). Regulated functions include offering a hazmat for transportation in commerce, incidental loading, unloading, storage, and performing any "pre-transportation functions" such as determining hazard class, marking, labeling, and more (49 CFR 171.(b-c)). Operational functions that are generally not regulated by the HMRs include: storage of freight containers, transport vehicles, or packages containing a hazmat at an offeror facility prior to carrier possession; and rail or motor vehicle movements of a hazmat within a contiguous facility boundary where public access is restricted (49 CFR 171.1(d)).

Regulated Substances and Materials

The HMRs define a hazmat as a substance or material determined to present unreasonable risk to health, safety, and property when transported in commerce and designated as "hazardous" (49 CFR 171.8, 49 USC 5103). There are nine classes of hazardous materials: explosives; flammable and combustible liquids; poisons (toxic) and poisonous inhalants; corrosive materials; gases, oxidizers, and organic peroxides; radioactive materials; miscellaneous and general dangerous materials; flammable solids; and spontaneously combustible and dangerous when wet materials. The HMRs describe a list of Hazardous Substances (excluding radionuclides), and also describe specific regulations applicable to certain hazmats materials and combinations of hazmats in PHMSA's Hazardous Materials Table (49 CFR 172.101 and Appendix A).

Universal Compliance Responsibilities

Each person or party who performs a regulated (or "covered") function has certain responsibilities regardless of what role they perform in a hazmat movement. Persons who perform covered functions must do so in accordance with the HMRs (49 CFR 171.2). General responsibilities for shipping hazmats include maintaining emergency response information, training employees performing covered functions, safety and security planning, and registering with the DOT as necessary (49 CFR Part 172, Subparts G-I).

Emergency Response Information - Persons offering hazmats for transportation, accepting for transportation, storing, or otherwise handling hazmats must ensure that emergency response information is immediately available for use at all times a hazmat is present (49 CFR 172.600(c)(1)). The emergency response information must minimally include an emergency telephone number and a basic description and the technical name of the hazmat; immediate hazards to health it poses, including risks of fire or explosion; necessary precautions in the event of an incident; methods for handling files and spills or leaks; and preliminary first aid instructions (49 CFR 172.600-602). The information must be printed legibly in English and available for use away from the hazmat package, ideally presented on the bill of lading or other shipping document (49 CFR 172.602). Additional and distinct requirements apply to carriers and facility operators (49 CFR 172.602(c)). Carriers, for example, must mark the transport vehicle with the phone number of the motor carrier and must ensure that the hazmat shipping papers, which include the bill of lading and other documents related to the movement, are readily available on the transport vehicle (49 CFR 172.606).

Training - PHMSA defines Hazmat Employers as those who cause hazmats to be transported in commerce, and who employ or use at least one hazmat employee, or who design or manufacture, or perform other functions pertaining to hazmats (49 CFR 171.8). Hazmat Employers are required to train and test their hazmat employees regulations (49 CFR 182.701). Training must include general familiarization regarding applicable regulations and must also include training specific to the function the employee performs, as well as

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safety training, and security awareness training (49 CFR 172.704). Initial employee training should be followed up by recurrent training at least once every three years, but if security plans are revised, then training must occur regarding the new plan within ninety (90) days of implementation (49 CFR 172.704).

Safety and Security Planning - Security plans are required for certain quantities and types of hazmats (49 CFR 172.800). Specific security plan components are also required to mitigate risk, including plans related to risk assessment, personnel security, unauthorized access prevention and mitigation, and en route security measures (49 CFR 172.802). Additional requirements apply for transportation of hazmats by rail (49 CFR 172.820).

Annual Registration - Offerors and transporters of hazmats in foreign, interstate, or intrastate commerce (typically shippers and carriers) must register annually and must pay a registration fee if certain kinds or quantities of hazmats are involved (49 CFR 107.601-620). Registration applies to highway route-controlled quantities of radioactive materials, more than 55 pounds of certain explosive materials in surface transportation, or more than one 1.06 quarts per package of materials that are toxic by inhalation, as well as to certain quantities of shipments (49 CFR 107.601).

Shipper-Specific Compliance Responsibilities

Offerors of hazmats for transportation in commerce (typically shippers) have the general responsibility to classify and describe hazmats offered, determine the appropriate packaging or container, and authorize its use, prepare shipping papers, and perform all functions necessary to bring packaging into compliance with the HMRs (49 CFR 172.3, 49 CFR Part 172).

Classification - A shipper is responsible to classify and correctly describe hazmats (49 CFR 173.22(a)(1)). The hazmat class is indicated by class or division grouping number or class name (49 CFR 173.2). The Hazmat Table designates materials as hazardous for purposes of transportation and identifies hazard class or specifies if a material is forbidden in transportation, and it also identifies regulations that specify exceptions or packaging and other requirements (49 CFR 172.101).

Packaging - A shipper must ensure that the packaging or container in which they offer the hazmat is in compliance with applicable regulations (49 CFR Part 173). Packaging requirements apply based on the type of material and mode of transportation. Specific packaging requirements or exceptions may apply based on mode, quantity, or de minimis materials.

Preparing Shipping Papers - A shipper is also responsible to prepare shipping papers associated with the hazmat movement (49 CFR Part 172 Subpart C). PHMSA defines a shipping paper as a shipping order, bill of lading, manifest, or any other shipping document serving a similar purpose (49 CFR 171.8). Specific form and color requirements apply to shipping papers and the hazmat descriptions contained on them must be legible and printed in English (49 CFR 172.201). If a shipping paper is more than one page long, a continuation paper is required, and an emergency response telephone number must be included (49 CFR 172.201). Shippers must retain shipping papers for two years after acceptance of the hazmat by the carrier (49 CFR 172.201).

Marking - Shippers must satisfy the marking requirements that generally apply to packages and containers (49 CFR 172.300-338). A correct marking will typically show the shipping name, identification number, technical name, consignee and consignor, and address of the hazmat shipment. Additional or other requirements will apply based on the hazmat shipment, the packaging used (bulk or non-bulk), and the quantity of the hazmat. Specific form and application requirements apply to the marking, including that it must be written in English and printed or affixed to the surface of a package or on a label, or tag, or sign. The marking must not be obscured by any labels and must appear in a color that sharply contrasts the background against which the marking sits. PHMSA prohibits marking a package that does not contain the hazmat or residue identified on the marking (49 CFR 172.303).

Labeling - Shippers must also satisfy the labeling requirements that generally apply to packages and containment devices, such as non-bulk and bulk packages and containers, including tanks and overpack (49 CFR 172.400). Labels generally express the hazard associated with the hazmat shipment and typically include the hazard class and hazard division number of the material (for example, a "flammable solid" or "explosive 1.5"). The label including that information must be printed or affixed to the surface of the package or containment device near the shipping name of the material, and it must meet certain durability, size, font, and color requirements (49 CFR 172.406-407).

Placarding - Finally, shippers must satisfy the placarding requirements that generally apply to containers and vehicles, including bulk packaging, freight containers, unit load devices, transport vehicles, and rail cars (49 CFR 172.504). Placards will express the hazard associated with the hazmat or all the hazmat shipments transported. This will indicate hazard class and hazard division number. Placards are used by the carrier on each side and each end of the container or vehicle. Additional requirements, prohibitions, or exceptions may apply based on the hazard class of the hazmat, or the hazmats moved (49 CFR 172.502). While shippers will generally provide the placard and be responsible for regulatory requirements, a motor carrier is responsible to refuse transportation of any hazmat shipment that requires placards and does not have them (49 CFR 172.506).

Carrier-Specific Compliance Responsibilities

Hazmat carriers are responsible for the universal responsibilities described in this primer, including having and maintaining emergency response information, training employees performing covered functions, and safety and security planning. Additional requirements may apply to loading and unloading. One of the more common questions we receive around carrier responsibilities involves required insurance levels. Carriers are required to have insurance by the DOT's Federal Motor Carrier Safety Administration (FMCSA) depending on the operations performed and the size and weight specification of the vehicle or vehicles used (49 CFR 387.7, 387.9). Motor carriers hauling hazmats are subject to insurance requirements that can range from $1 million to $5 million in policy minimums (49 CFR 387.9).

Finally, additional rules can apply based upon transportation mode and nature of commerce. General responsibilities apply to hazmat carriers, while specific responsibilities will vary by mode (road, rail, air, and ocean). The International Air Transport Association's Dangerous Goods Regulations (IATA's DGRs) apply to dangerous goods transported by air carrier. The International Maritime Organization's International Maritime Dangerous Goods Code (IMO IMDG) applies to dangerous goods transported by ocean carrier.

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NHTSA Manufacturer Registration Process

Jonathan R. Todd

J. Philip Nester

Robert Pleines, Jr.

Vehicle manufacturing is a highly regulated process for good reason. The lives of all on the U.S. roadways are at stake every moment during operation. Entry to the U.S. market as a motor vehicle manufacturer or as a motor vehicle equipment manufacturer (Manufacturers) requires application for registration with the National Highway Traffic Safety Administration (NHTSA). NHTSA is the federal agency with jurisdiction over Manufacturers and importers of motor vehicles and motor vehicle equipment. It is tasked with ensuring industry-wide compliance with Federal Motor Vehicle Safety Standards (FMVSS) by conducting investigations, audits, and inspections, and issuing motor vehicle or motor vehicle equipment recalls as necessary.

It is common for domestic and foreign Manufacturers to not know that there is a registration requirement or to experience hurdles during the months-long, multipart process that often requires working closely with NHTSA. Applicants must provide detailed company information, designation of an official representative to liaise with the agency, and submission of a number of supporting documents, including a statement of FMVSS compliance, marketing and advertising information, and motor vehicle or motor vehicle equipment specifications.

Frequent questions arise on whether an operation is or is not a regulated activity. The term "Manufacturer" refers to "a person manufacturing or assembling motor vehicles or motor vehicle equipment; or importing motor vehicles or motor vehicle equipment for resale." [49 U.S.C. § 30102(a)(6).] Manufacturers must register with NHTSA in a time-consuming process. The registration requirement includes electric vehicles (EVs), autonomous vehicles (AVs), and even converting internal combustion engine vehicles (ICEVs) to EVs as an "Alterer," which means a person who by addition, substitution, or removal of components alters a certified vehicle before the first purchase of the vehicle.

A threshold question as part of the registration process is precisely what category of Manufacturer or equipment is intended by the registrant. The available options are found at 49

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NHTSA Manufacturer Registration Process

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CFR 567.3 and include the following options.

Final-Stage Manufacturer: A person who performs manufacturing operations on an incomplete vehicle to turn it into a completed vehicle, or vehicle that requires no further manufacturing operating to perform its intended functions.

Incomplete Vehicle Manufacturer: A manufacturer who assembles components that do not, when taken separately, constitute an incomplete vehicle, meaning an assemblage consisting of at least a chassis structure, power train, steering system, suspension system, and braking system, in the state that those systems are to be part of the completed vehicle, but requires further manufacturing operations to become a completed vehicle.

Intermediate Manufacturer: A person who performs manufacturing operations on a vehicle manufactured in two or more stages, but does not meet the description of an incomplete vehicle manufacturer or a final-stage manufacturer.

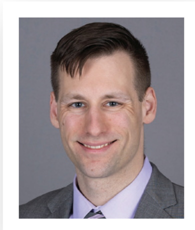
Replica Motor Vehicle: A vehicle produced by a low-volume manufacturer that is intended to resemble the body of another motor vehicle manufactured not less than 25 years before the manufacture of the replica motor vehicle. A replica motor vehicle is manufactured in a single state and the manufacturer cannot produce more than 325 replica motor vehicles in a calendar year.

Completing the NHTSA registration process is an important step in launching new operations and new product lines, and for foreign manufacturers it is a critical item in U.S. market entry. FMVSS compliance in fact begins with properly completing this process. Navigating the registration process can be onerous for companies that have multiple motor vehicle makes and models or that produce motor vehicle equipment or component parts. Start-ups and foreign Manufacturers will be well served to consider the necessary strategic planning to ensure compliance with the agency's regulations, which includes an ongoing commitment to monitor and satisfy any changes or updates to the FMVSS that can impact future production. Failure to do so can result in detentions at U.S. ports during attempted import and, in the extreme, forced re-export of that equipment.

Benesch's Transportation & Logistics Group is experienced in counseling clients to accomplish NHTSA Manufacturer registration across the continuum of the automotive sector as well as FMVSS compliance matters. **JONATHAN R. TODD** is Vice Chair of Benesch's Transportation & Logistics Practice Group and may be reached at (216) 363-4658 and jtodd@beneschlaw.com. **J. PHILIP NESTER** is a senior managing associate in the Group and may be reached at (216) 363-6240 and jpnester@beneschlaw.com. **ROBERT PLEINES, JR.** is a managing associate in the Group and may be reached at (216) 363-4491 and rpleines@beneschlaw.com.

Staying in Your Lane on Vehicular Accident Liability

Jonathan R. Todd



Robert Pleines, Jr.

"For non-carrier operations, every day holds customer and operational pressures to act inconsistent with your role in a movement."

Accidents on the roadways are an unfortunate reality in the transportation business. Any carrier that has been in the business long enough, or that has reached a sizeable scale, experiences accidents despite a zealous focus on safety and training. The question of your liability as a carrier is relatively straightforward and is based upon the carrier's actual or required control and fault in the accident.

Sometimes the path forward is not that simple. The availability of insurance defense, the exposure you face, and the way you manage exposure day-to-day in your business all change if you were not the operating carrier. For non-carrier operations, every day holds customer and operational pressures to act inconsistent with your role in a movement. These can be managed as best as possible through process, training, and paperwork.

The Non-Carrier Lane: The question of your liability is less clear if you were not in fact the operating carrier at the time of the accident. This scenario could arise in a number of ways that draw you in as a defendant despite your role. Brokerage or forwarding to a carrier involved in an accident is the common example. Interchanging a trailer or lawfully interlining a load are other examples. Shippers and consignees are even brought into costly claims and litigation when the documents about a shipment muddy the water as to each party's responsibility. Legal theories of liability that could be used to attach responsibility to you include: vicarious liability, negligent selection, negligent hiring, and respondeat superior. The basic strategy for plaintiffs' lawyers is to establish negligence through your relationship with the operating carrier, or the way you held yourself out to the shipper, rather than through examining operation of the vehicle—because that was not you!

Non-Carrier Best Practices: Operational practices and paperwork will draw or defend liability in the event of a serious accident involving a carrier with whom you do business. Using the brokerage example, your basic duty is to exercise reasonable care when selecting third-party providers. This duty is met in large part by confirming that the carrier can lawfully and safely perform the services at the time of tender. Operationally this means reviewing at least the carrier's operating authority, safety rating, and insurance. Vigilance does not end there. As the non-carrier, it is key to not control the activities of the carrier. Direct communications with drivers and overreach, including pressure to accomplish loads too quickly, can be used as facts suggesting responsibility for the accident or to keep a non-carrier in a lawsuit longer than anticipated. Any documentation or communications suggesting responsibility for carriage, such as issuing a bill of lading in the broker's name, accepting responsibility for equipment operation in a shipper contract, or electronic messages misrepresenting your role, can be detrimental by creating evidence suggesting that you should bear the carrier's liability.

Business operations are an art and not a science. Still, arms-length relationships between non-carriers and the carriers with whom they interact can be maintained as best as possible by developing defensible structures between relationships, training staff appropriately, and papering relationships accordingly. Our team has seen all manner of business operations, day-to-day paperwork, website content, contract structures, and relationships with third parties. We are always available to proactively advise on current best practices to avoid falling into high-value, headline-grabbing traps.

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Document Retention for Motor Carriers and Transportation Brokers

Jonathan R. Todd

Transportation services providers are increasingly facing new technology-oriented threats in day-to-day business. Recent cyberattacks and the potential for serious disruption from threat actors have drawn the attention of the Transportation Security Administration (TSA) and the Cybersecurity and Infrastructure Security Agency (CISA) in recent rulemakings and informal guidance. Data privacy, information security, and cybersecurity are top of mind for Chief Technology Officers and Chief Information Officers.

Technology drives safety, operational performance, and customer experience across the industry. This raises strategic risk management decision points beyond merely having a Document Retention Policy and following it closely. Savvy enterprises will focus on broader impacts, including regulatory compliance and legal exposure based upon records held or destroyed in the event of litigation, as well as the security awareness and assessed risks essential to information technology best practices. At the core of this exercise is a key question: What information do we hold, what do we need to hold, how long should we keep it, and when should it be destroyed?

The "Schedule of Records and Periods of Retention" at Appendix A of 49 CFR Part 379 often serves as the basic foundation for a transportation providers Document Retention Policy upon which all other compliance, information technology, and security items may be added as appropriate. At a very high level, this "Schedule" includes the following categories and minimum preservation requirements:

1. **Corporate and General Records** – Transportation operating authorities must be held until expiration or cancellation. Annual reports and service contracts must be held for three (3) years, except that transportation service agreements are to be held until expiration. Real estate-related documents must be held until disposition of the property. Most other corporate records, such as documents of formation and minutes, may be held for as long as necessary under broader best practices, such as may be required by other federal or state agencies.

2. **Treasury Records** – Stock records and other securities, as well as their ledgers, may be generally held for as long as necessary, similar to general corporate records. There are some exceptions to this rule, including for long-term debt records, which must be held until redemption plus three (3) years.
3. **Financial and Accounting Records** – General ledgers, balance sheets, cash books, vouchers, accounts receivable, and records of accounting codes or instruction must generally be held until discontinuance of use plus three (3) years. Lesser documents, such as authorizations to write off receivables or aging reports, may be held only one (1) year.
4. **Property and Equipment Records** – Property records that address valuation, improvements, and depreciation must generally be held for three (3) years after disposition of the property.
5. **Personnel and Payroll Records** – Personnel and payroll records must be held for one (1) year.
6. **Insurance and Claims Records** – Insurance records that include policies, their schedules, and records of losses or claims must be held until expiration and then for one (1) year afterward. An exception to this general rule is for records related to specific transportation-related claims, such as details of authorities issued to others for participation in claims, reports of personal injury or property damage not necessary to support a claim, or authorities for disposal of unclaimed, damaged, and refused freight. Those items must be held for three (3) years.
7. **Tax Records** – Tax records are scheduled but not with specific time periods for preservation. These must be held for as long as necessary under broader best practices, including as may be required by the Internal Revenue Service.
8. **Purchases and Stores Records** – Most day-to-day shipping documents, including bills of lading, shippers instructions, waybills, freight bills, agency records, and other core transportation documents, must generally be held for one (1) year.
9. **Certain Other Transportation Records** – Specialized transportation services or unique circumstances must observe certain other requirements in addition to the general rule of one (1) year. For example, any import and export records, including those for bonded freight, must be held for at least two (2) years. Records of diversion or reconsignment must also be held for two (2) years. Weight tickets, their records and reports, must be held for three (3) years.
10. **Supporting Data for Reports and Statistics** – Basic supporting data for periodic reporting of accidents, inspections, tests, hours of service, and repairs must be maintained for six (6) months. All other statistical reporting data used by the FMCSA, the STB, and the BTS must be held for three (3) years. Those items include financial, operational, and statistical items that are reported to those agencies in the ordinary course of business.
11. **Other Miscellaneous Records** – Finally, companies are expected to produce an index of all records (such as a Document Retention Policy) that is maintained until it is updated with a new structure. Any records prematurely destroyed or lost should also be identified, and that record is to be maintained for the same period as required that would otherwise apply.

"What information do we hold, what do we need to hold, how long should we keep it, and when should it be destroyed?"

The key to managing a company's information and data is to plot a clear path forward and, fortunately for our industry, that road map exists—but the inquiry does not end there. These basic rules get a little more complex when you read Appendix A closely or when you recognize the other recordkeeping requirements found throughout Title 49 of the regulations. Additional targeted recordkeeping requirements also exist for specific functions and services of motor carriers. For example, 49 CFR Section 395.11 contains a list of certain "supporting documents" that a motor carrier must retain on a 24-hour basis to verify a driver's on-duty not driving time. Similarly, drug and alcohol records must be maintained under 49 CFR Section 40.333 for periods ranging from one (1) to five (5) years, depending on the record, although electronic record storage is expressly permitted. Probably the most well-known example of another requirement outside of Appendix A are the broker-specific requirements at 49 CFR Section 371.3, which set out a three-year (3-year) preservation rule.

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Recent Events

Transportation & Logistics Council (TLC) 50th Annual Convention
Eric L. Zalud presented *What are the "Best Practices" for Selecting and Vetting a Transportation Provider*? **Martha J. Payne** attended.
March 18–20, 2024 | Charleston, SC

Truckload Carriers Association (TCA) Truckload 2024 Conference
Jonathan R. Todd attended.
March 23–26, 2024 | Nashville, TN

Trucking Industry Defense Association (TIDA) Cargo Seminar
Marc S. Blubaugh presented *Update on the Freight Broker Landscape*.
April 9, 2024 | Memphis, TN

Transportation Intermediaries Association (TIA) Capital Ideas Conference
Marc S. Blubaugh presented *Catch Me if You Can: The Definitive Toolkit for Preventing and Mitigating Fraud in the Supply Chain*. **Eric L. Zalud** presented *Taking The Offensive! Enforcing Brokers' Contractual and Common Law Rights and Keeping Broker Rates Confidential*. **Eric** also presented *Where Worlds Collide: Legal Issues at the Crossing Between Brokers & Motor Carriers*. **Jonathan R. Todd** presented *Flat Earth—Tips and Tricks for Cross-Border North American Brokerage*. **Eric L. Zalud** moderated "Along the Serpents Back: Defending and Preventing Nuclear Verdicts Against Brokers." **Kelly E. Mulrane** was a panelist. **Eric L. Zalud** also moderated "Protecting, Mining, & Monetizing Your Technology and Intellectual Property." **Thomas B. Kern** was a panelist. **Martha J. Payne** attended.
April 10–13, 2024 | Phoenix, AZ

Raymond James Transportation Conference & Golf Outing
Eric L. Zalud attended.
April 17–18, 2024 | Sea Island, GA

2024 IWLA Annual Convention & Expo
Marc S. Blubaugh, Eric L. Zalud, and **Christopher C. Razek** attended.
April 21–23, 2024 | Orlando, FL

Journal of Commerce: Breakbulk and Project Cargo Conference 2024
J. Philip Nester attended.
April 23–25, 2024 | New Orleans, LA

ATA's 2024 Safety, Security & Human Resources National Conference & Exhibition (SSHR)
Eric L. Zalud and **Lauryn T. Robinson** presented *What, Me Worry! Exploring Negligent Hiring Selection Retention and Training Claims and How to Defend and Prevent Them*.
April 25–27, 2024 | Phoenix, AZ

Jefferies 2024 Logistics & Transportation Conference
Marc S. Blubaugh and **Eric L. Zalud** attended.
April 30–May 1, 2024 | Coral Gables, FL

Transportation Lawyers Association (TLA) 2024 Annual Conference
Eric L. Zalud and **Peter K. Shelton** presented *An M&A and Transactional Survival Guide: Navigating Transactional Aspects of the Practice and the Legal Role in Merger, Acquisition, Consolidations and Integrations*. **Marc S. Blubaugh** presented *Multi-Modal Update*. **Deana Stein** attended.
May 1–4, 2024 | Rio Grande, Puerto Rico

Intermodal Association of North America (IANA) Intermodal Operations, Safety & Maintenance Business Meeting
Marc S. Blubaugh presented *Intermodal Policy Forum*.
May 6–8, 2024 | Lombard, IL

Columbus Logistics Conference
Marc S. Blubaugh presented *Transportation & Logistics Law Update*.
May 15, 2024 | Columbus, OH

National Retail Federation (NRF)
Jonathan R. Todd presented *Retail Supply Chain – Expectations and Considerations for 2024 and Beyond*.
May 21, 2024 | Virtual

ATA National Accounting & Finance Council (NAFC) 2024 Annual Conference & Exhibition
Eric L. Zalud, Jonathan R. Todd, Christopher C. Razek, and **Megan K. MacCallum** attended.
June 3–5, 2024 | Cleveland, OH

Conference of Freight Counsel
Eric L. Zalud attended.
June 8–10, 2024 | Québec City, Canada

TerraLex Global Meeting
Eric L. Zalud attended.
June 24–27, 2024 | Amsterdam, The Netherlands

International Association of Defense Counsel (IADC) 2024 Annual Meeting
Martha J. Payne is attending.
July 6–11, 2024 | Vancouver, Canada

On the Horizon

ATA Legal Forum
Marc S. Blubaugh is presenting *The Shifting Landscape of Broker Liability*. **Jonathan R. Todd** and **Eric L. Zalud** are presenting *From the Trenches: A Deep Dive Perspective, and Roadmap, on Regulatory Investigations and Audits*. **Richard A. Plewacki** is attending.
July 16–19, 2024 | Minneapolis, MN

National Home Delivery Association (NHDA) Annual Forum
Marc S. Blubaugh is presenting *Fighting for the Independent Contractor Model in Washington*.
July 28–August 3, 2024 | Austin, TX

Infiniti-I Workforce Solutions
Eric L. Zalud and **Lauryn T. Robinson** are presenting *What Me Worry! Exploring Negligent Hiring, Selection, and Training Claims and How to Defend and Prevent Them*.
August 1, 2024 | Virtual

Intermodal Association of North America (IANA) Intermodal EXPO
Marc S. Blubaugh and **Martha J. Payne** are attending.
September 9–11, 2024 | Long Beach, CA

Transportation Intermediaries Association (TIA) Policy Forum
Marc S. Blubaugh is attending.
September 16–18, 2024 | Washington, D.C.

Trucking Defense Advocacy Council (TDAC) 2024 Conference
Eric L. Zalud is attending.
September 18–19, 2024 | Fayetteville, AR

Ohio Trucking Association's (OTA) Annual Conference
Marc S. Blubaugh is attending.
September 23–24, 2024 | Westerville, OH

American Trucking Association (ATA) Management Conference & Exhibition
Marc S. Blubaugh is attending.
October 12–15, 2024 | Nashville, TN

Transportation Intermediaries Association (TIA) 2024 Technovations Conference
Eric L. Zalud is attending.
October 15–17, 2024 | Ponte Vedra Beach, FL

Trucking Industry Defense Association (TIDA) 32nd Annual Seminar
Eric L. Zalud is attending.
October 23–25, 2024 | San Juan, Puerto Rico

Transportation Lawyers Association (TLA) Transportation Law Institute
Eric L. Zalud is presenting *From the Trenches: A Deep Dive Perspective, and Roadmap, on Regulatory Investigations and Audits*. **Christopher C. Razek** is presenting *Be Wary not Weary: Warehousing ABCs—from Accessorials to Bonds to Contracts—Practical Legal Advice Your Clients Need to Know*. **Marc S. Blubaugh, Martha J. Payne,** and **Jonathan Todd** are attending.
November 8, 2024 | Pittsburgh, PA

TerraLex 2024 Global Meeting
Eric L. Zalud is attending.
November 13–16, 2024 | Santiago, Chile

Fourth Annual Benesch Investing in the Transportation & Logistics Industry Conference
Marc S. Blubaugh, Peter K. Shelton, Jonathan R. Todd, and **Eric L. Zalud** are moderating the panels.
December 5, 2024 | New York, NY

For further information and registration, please contact **MEGAN THOMAS**, Director of Client Services, at mthomas@beneschlaw.com or (216) 363-4639.

Pass this copy of *InterConnect* on to a colleague, or email **MEGAN THOMAS** at mthomas@beneschlaw.com to add someone to the mailing list.

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