



October 2016

SETTING THE TABLE

Current Issues in Food Transport, Storage and Security from Benesch's Transportation & Logistics Practice Group

The Buck Starts Here—What Shippers and Brokers Must Do to Comply with FSMA's Sanitary Transportation Rule



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In Spring 2016, the FDA released its long-awaited Final Rule on Sanitary Transportation of Human and Animal Food (the "Rule"). The regulation, which constitutes one of seven final rules implementing the

Food Safety and Modernization Act ("FSMA"), was closely watched by many throughout the industry—and for good reason. Based on the earlier proposed version of the Rule, many commentators feared the Rule in its final form would be an inflexible regulation with the potential to impact the very way that food transporters operate—and not always in ways that made sense.

With this expectation, the transportation industry breathed a collective sigh of relief when the Final Rule turned out to be far less prescriptive and heavy-handed than some anticipated. Indeed, the Final Rule, as the FDA describes, "builds on current food transportation best practices" rather than dictating those practices.

Those in food transportation operations should not, however, mistake the FDA's deferential approach as a "free pass" to compliance, as the Rule requires that all in the supply chain take affirmative steps to comply.

This is especially the case for shippers and brokers, who are given primary responsibility under the Rule for defining what, precisely, the "transportation best practices" contemplated by the regulation entail for food products. As such, shippers are responsible for establishing and conveying the key food safety requirements for their products to carriers, receivers, subsequent loaders, and in turn, the rest of the supply chain.

Just as a shipper enjoys discretion in setting these standards, however, the shipper *also* stands as a single point of failure (and, potentially, primary point of liability) pursuant to the FSMA's framework if it fails to live up to its responsibility in setting and communicating these standards.

With many parties facing compliance dates effective in Spring 2017, shippers should begin by reviewing their agreements with carriers as well as their internal procedures to ensure they are prepared to convey temperature control, sanitation control, and equipment standards to carriers. Brokers, who are unambiguously included in the Rule's definition of "shipper," are similarly responsible for ensuring that these guidelines are set and communicated. For brokers, addressing these items is best accomplished through harmonized agreements with carriers and shippers.

Although full discussion of FSMA compliance for shippers and brokers exceeds the scope of this

brief article, identifying answers to the below questions represents a good starting point in crafting a compliance strategy:

- What are the temperature control requirements for the product?
- Are the temperature control requirements intended for food safety or for food quality?
- What pre-cooling requirements exist before loading?
- Who will be responsible for the loading?
- How will these requirements be communicated to the carrier?
- How will the carrier demonstrate proof of compliance with temperature control requirements?
- What are the equipment requirements for the carrier, including sanitation requirements?
- What procedures should be in place to prevent load tampering?
- Will the product be transported in "bulk" (i.e., will the product come in contact with the transportation equipment)? If so, what procedures should be in place to protect against cross contamination? How will you verify what was previously hauled in that transportation equipment?

Once again, these questions provide a strong starting point. Please let us know how we can help you in your efforts to ensure that your business is in compliance with the Rule.

For more information

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