Winter 2020–2021

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A publication of Benesch Friedlander Coplan & Aronoff LLP's Transportation & Logistics Group

Export Controls—The Forwarder's Perspective

In this issue:

Jonathan R. Todd

The international forwarding community was not immune from headlines, advisories, and rulemaking dealing with U.S. export controls and economic sanctions in 2020 despite never-ending attention due the global COVID-19 pandemic. Those developments include the issuance of a Final Rule by the U.S. Department of Commerce's Bureau of Industry and Security (BIS) on April 28 that further restricts exports to military end users and tightens the Electronic Export Information (EEI) filing requirements among other changes. Shortly thereafter, a Sanctions Advisory issued by the U.S. Department of Treasury (among other agencies) on May 14 warned against illicit global shipping and sanctions evasion practices particularly dealing with trade involving proscribed countries such as Iran and North Korea.

Now is the time to evaluate and improve upon trade compliance programs, operating procedures, and internal controls—rather than in defense of a regulatory investigation that could find its way to both bottom lines and the headlines. Forwarders have always held a unique position in the export of goods from the United States. As a community, forwarders have neither close contact with all parties to the transaction nor intimate knowledge of cargoes and their potential use. The obligations for compliance with international trade restrictions such as export controls and economic sanctions can nonetheless lay a trap for even the most diligent operators. Changes in the regulatory landscape, particularly during the worst global health crisis in living memory, make this moment in time uniquely challenging for international forwarders.

A level-set is always helpful as we look to take stock in our current operations for purposes of risk assessment and improvement. The U.S. regulatory landscape is complex, although, in general, all parties involved in the export of goods must pay close attention to three government agencies: the Department of Commerce, the Department of State, and the Department of Treasury. Key programs maintained and enforced by each of those agencies are summarized below.

Export Administration Regulations—BIS enforces the Export Administration Regulations (EAR) found at 15 CFR Parts 730 to 780. Those export controls principally restrict the export and reexport

continued on page 2

Export Controls—The Forwarder's Perspective

continued from page 1

of items and technology, including participating in or facilitating such export, based on item, country-specific embargoes, and end users. Items under control include any non-military goods, software, or technology that are physically located in the U.S. or of U.S. origin, of foreign origin but containing more than de minimis U.S. content, or of foreign origin but a direct product of U.S. technology or software. The EAR applies to U.S. persons but also foreign subsidiaries that are controlled, directly or indirectly, by a domestic entity (15 CFR 760.1). Importantly for transportation and logistics providers, one of the Ten General Prohibitions found in the EAR makes it unlawful to proceed with transactions with the knowledge that a violation has occurred or is about to occur (General Prohibition Ten, found at 15 CFR 736.2). General Prohibition Ten has appeared as a specific area of enforcement against service providers in recent years.

International Traffic in Arms Regulations—The Department of State's Defense Directorate of Trade Controls (DDTC) enforces the International Traffic in Arms Regulations (ITAR) found at 22 CFR Parts 120 to 130. Those export controls restrict the import, export, and temporary import or export, of defense articles, technical data, and defense services. The ITAR applies to any items designated on the United States Munitions List (USML) found at 22 CFR 121.1, including firearms, ammunition, missiles, explosives, training equipment, military electronics, optics, and spacecraft systems. The DDTC requires registration of certain actors involved in the trade of arms, including, from time to time, service providers, particularly where their activities may be considered brokering of defense articles and services. Unlawful brokering and participation with knowledge of violations have been areas of exposure for service providers in recent years.

OFAC Economic Sanctions—The Treasury Department's Office of Foreign Asset Controls (OFAC) administers approximately 30 different sanctions programs against countries and persons. Those programs generally prohibit the transfer of property or funds, including participating in or facilitating such transfer, to restricted parties. All U.S. persons must comply, including any non-US entities owned or controlled by a U.S. person as determined under the country-specific sanction (See 31 CFR 535.329). A service provider's mere participation in a restricted transaction has been an area for exposure in recent years. Traffic involving Cuba and Iran have been a unique area of difficulty for industry due to the swift evolution of U.S. policy over the last decade.

The task for each forwarder is to assess risk for the operation and tailor an appropriate program together with training and process controls. There is neither a one-size-fits-all approach to trade compliance nor any real benefit in adopting compliance programs and practices that will not be followed. The tactical elements of a strong compliance program include: developing internal leadership and subject matter expertise on trade controls; sticking to process fundamentals, such as denied parties screening; and watching for the gamesmanship among shippers that can cause liability for even the most well-meaning of operators.

An awareness of weaknesses and "red flags" helps personnel to remain vigilant and to escalate issues where they arise. The best example of this tactic is found in the "Know Your Customer Guidance" published by the Department of Commerce in Supplement No. 1 to Part 732 of the EAR. That guidance amounts to: (1) deciding whether red flags exist; (2) inquiring further if necessary; (3) avoiding self-blinding against bad facts; (4) training sales and operations staff; (5) re-evaluating situations as new facts are learned; and (6) consulting with the respective agencies or counsel before proceeding if red flags or other risks cannot be resolved. A few important red flags for transportation and logistics providers to guard against as part of trade compliance programs include:

- The customer is reluctant to offer information about the end use of a product.
- The product's capabilities do not fit the buyer's line of business.
- The product ordered is incompatible with the technical level of the country to which the product is being shipped.

- The customer has little or no business background.
- Deliveries are planned for out-of-the-way destinations.
- A freight forwarding is listed as the product's final destination.
- The shipping route is abnormal for the product and destination.
- Packaging is inconsistent with the method of shipment or destination.

If historic violations come to light during the development or updating of a compliance program, or during day-to-day business operations, then options are available for determining the path forward and potentially limiting exposure. Real or potential violations can arise for even the most well-meaning of operators. Exposure for these and similar regimes can often extend five years in the past, which is a relatively long tail to consider when a history of violations is found. One of the most useful tools for consideration is the use of voluntary self-disclosures to those agencies having jurisdiction, which are available for the regulatory regimes described here and others that maybe implicated. Giving notice to an agency should not be taken lightly although it can serve as a pathway for closing out a file with mitigated financial exposure (and often little or no exposure).

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Government Gone Wild! Another First-Of-Its-Kind Regulation Targets the Logistics Industry

Marc S. Blubaugh

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The early days of the Biden Administration have given commercial users and providers of transportation and logistics services a lot to consider. In the first week of his presidency alone, President Biden signed 22 executive orders as well as numerous presidential proclamations and memoranda, far more than any past president. These presidential actions were primarily designed to address the COVID-19 pandemic, climate change, immigration, and undoing various policies implemented by the Trump Administration. Likewise, new political appointments to federal agencies such as the U.S. Department of Transportation will undoubtedly begin to exert influence on overall policy direction.

While these federal executive actions, as well as those yet to come, will certainly bring new challenges for the providers and users of the transportation and logistics industry, the industry must also remain vigilant about developments at the state and local level. After all, creative state regulators have a history of implementing rules that target the users and providers of transportation and logistics services in various ways, ranging from worker classification to data privacy.

California's South Coast Air Quality Management District (SCAQMD or District) Proposed Rule 2305 - Warehouse Indirect Source Rule (Indirect Source Rule or Proposed Rule) provides a vivid example of a new state regulatory encroachment that will detrimentally affect owners and operators of warehouses and distribution centers. Retailers, distributors, and logistics companies that operate warehouses or distribution centers in California should take notice.

Background

The South Coast Air Basin, which is regulated by the SCAQMD, is home to approximately 17 million people who reside in Los Angeles, San Bernardino, Orange, and Riverside counties. This area is also home to some of the worst smog in the country. The South Coast Air Basin is consistently out of compliance with both state and federal ambient air quality standards for ozone and particulate matter.

To address nonattainment in the South Coast Air Basin, the District developed the Air Quality Management Plan (AQMP) in 2016. The AQMP identified nitrogen oxides (NOx), a precursor to formation of ozone or smog, from mobile sources as the main cause of smog in the South Coast Air Basin.

The 2016 AQMP identified five Facility-Based Mobile Source Measures to reduce indirect sources of NOx emissions, including emissions from warehouses and distribution centers tied to the massive growth of e-commerce. The SCAQMD then developed the proposed Indirect Source Rule pursuant to its authority under California Health and Safety Code Sections 40716(a)(1) and 40440(b)(3) to regulate emissions from trucks while idling at warehouses or distribution centers. Warehouses and distribution centers are themselves relatively clean operations except for the air emissions from trucks that enter such facilities.

The District has traditionally regulated air pollution from stationary sources, like factories. It does not have the authority to regulate directly the emissions from mobile sources like trucks. Authority to regulate such emissions rests with US EPA and the California Air Resources Board.

The Indirect Source Rule represents the first time that the District has attempted to regulate truck emissions from warehouses indirectly as facility-based sources of ozone and particulate matter emissions.

Overview of the Proposed Indirect Source Rule

The stated purpose of the Indirect Source Rule "is to reduce local and regional emissions of nitrogen oxides and particulate matter, and to

continued on page 4

Government Gone Wild! Another First-Of-Its-Kind Regulation Targets the Logistics Industry

continued from page 3

facilitate local and regional emission reductions associated with warehouses and the mobile sources attracted to warehouses in order to assist in meeting state and federal air quality standards for ozone and fine particulate matter." The Proposed Rule would apply to owners and operators of new and existing warehouses located in the South Coast Air Basin "with greater than or equal to 100,000 square feet of indoor space in a single building that may be used for warehousing activities by one or more warehouse operators."

The Indirect Source Rule purports to achieve its purpose by instituting a fairly byzantine regulatory scheme. More specifically, the rule would impose a "Warehouse Points Compliance Obligation" (WPCO) on warehouse operators. Operators would then be allowed to satisfy the WPCO by accumulating "Warehouse Actions and Investments to Reduce Emissions Points" (WAIRE Points) in a given 12-month period. WAIRE Points would be awarded by implementing measures to reduce emissions listed on the WAIRE Menu, or by implementing a custom WAIRE Plan approved by the District.

The WAIRE Menu currently awards WAIRE Points for acquiring zero-emission (ZE) or near-zero-emission (NZE) trucks, the number of ZE or NZE truck trips to the operator's warehouse, or for acquiring ZE or NZE yard trucks. The WAIRE Menu also awards WAIRE Points to warehouse owners and operators for installing onsite electric charging stations and hydrogen fueling stations, installing onsite solar panels, and installing air filtration systems in the community.

The WPCO is calculated based on the weighted annual truck trips (WATTs) multiplied by a "Stringency" factor and an "Annual Variable." Although the Stringency factor and the Annual Variable are unknown in the Proposed Rule, this formula is weighted to reflect varying emissions from trucks used to transport goods from a given warehouse. The Proposed Rule would also provide a default formula based on the size of the warehouse and number of operating days for warehouse operators that do not have enough data to determine the warehouse's WATTs.

WAIRE Points would be transferable. The operator of a warehouse could transfer excess WAIRE Points from one warehouse to another warehouse that it controls. The warehouse owner could also transfer WAIRE Points it earns to the operator of the same warehouse. However, the Proposed Rule does not allow WAIRE Points to be transferred between owners of different warehouses, or between unaffiliated operators.

Warehouse operators that do not accumulate enough WAIRE Points would be able to come into compliance with the Proposed Rule by paying a Mitigation Fee in the amount of $1,000 for each unearned WAIRE Point. The Proposed Rule, however, does not specify the factors needed to calculate the annual number of WAIRE Points an operator must acquire to satisfy the Proposed Rule.

Outlook

The final Indirect Source Rule is expected to be released this spring. If approved, large warehouses over 250,000 square feet would be required to comply with the initial reporting obligations by August 2, 2022. Warehouses over 150,000 square feet would have comply with the initial reporting obligations by August 1, 2023, and warehouses over 100,000 square feet would have to comply with the initial reporting obligation by July 31, 2024. Benesch will continue to monitor the Indirect Source Rule.

In the meantime, retailers, distributors, and logistics companies that own or operate warehouses and distribution centers in Southern California should make their voices heard. Moreover, those who own or operate warehouses in other jurisdictions should keep in mind that other states often look to California for regulatory inspiration of their own.

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Cabotage Primer: The Basics and Pitfalls of Cross-Border Motor Carriage

Jonathan R. Todd

Kristopher J. Chandler

Cabotage as a legal principle is neither new nor specific to the United States. It exists as a legal means to shield domestic carriers and their workforce from foreign competition. This protectionist goal is tempered by the need for efficient international supply chains, particularly for valuable North America trade. The challenge that arises for motor carriers and their enterprise shippers when modeling traffic flows and the lanes on which goods will travel is to navigate applicable regulation and policy.

The regulatory basis for cabotage restrictions arises from two distinct agency jurisdictions with two very different areas of focus. U.S. Customs and Border Protection (CBP) promulgates and enforces regulation regarding the entry of goods and equipment. U.S. Citizenship and Immigration Services (Immigration) promulgates and enforces regulation regarding the entry of persons. The application of these competing perspectives on cross-border movements can yield conflicting results. Liability can arise for motor carriers, as well as their drivers personally, where a movement violates one or both of these areas of enforcement. It is often the case that a particular movement is in fact compliant under CBP regulations and yet runs afoul of Immigration regulations, which is a conflict yielding very real risk of enforcement.

CBP Framework

The general rule is that foreign-based operators may engage in international traffic, even if carriage occurs in the United States, but those operators may not engage in purely local traffic: "Trucks, busses, and taxicabs, however owned, which have their principal *base of operations in a foreign country* and which are *engaged in international traffic*, arriving with merchandise or passengers destined to points in the United States, or arriving empty or loaded for the purpose of taking out merchandise or passengers, *may be admitted without formal entry or the payment of duty*. Such vehicles *shall not engage in local traffic* except as provided in paragraph (c) of this section."[1]

This general rule operates to prohibit point-to-point movements that would be otherwise performed by domestic motor carriers. However, this is not a binary analysis. In the interest of promoting North American trade, it is permitted for foreign carriers to complete movements in domestic interstate or intrastate commerce provided that any such movement is incidental to the immediately prior or subsequent engagement of that vehicle in international traffic.[2]This concept of movements "incidental to international traffic" is the critical point of analysis when examining the lawfulness of traffic from a CBP enforcement perspective.

CBP has released informal guidance to help Canadian operators identify permissible movements that the agency would consider as satisfying the "incidental to international traffic" requirement.[3]

- Drivers may deliver a shipment from Canada to one or more U.S. locations.
- Drivers may then pick up a return shipment from one or more U.S. locations for delivery to Canada.
- Drivers may deliver a shipment from Canada to a U.S. location, deadhead with the same trailer to another U.S. location, and load that trailer for delivery to Canada.
- Drivers may deliver a shipment from Canada to a U.S. location, deadhead with the same trailer to another U.S. location, drop the trailer, and pick up a second trailer for delivery to Canada.
- Drivers may drop a loaded trailer from Canada at one location in the U.S., bobtail to another location, and pick up a loaded trailer for delivery in Canada.
- Relay drivers may drive entirely domestic segments of an international delivery if the drivers are employed by the same company and the domestic portion is necessarily incident to the international nature of the trip (HOS Compliance).
- Drivers may perform activities that are "necessary incidents" of international commerce, such as loading and unloading international cargo.

To further exemplify the concept, CBP has take a step further and identified movements that are impermissible, as they prohibit cabotage movements.[4]

- Drivers may not pick up a shipment at one U.S. location and deliver that shipment to another U.S. location.
- Drivers may not reposition an empty trailer between two points in the U.S. when the driver did not either enter with or depart with that trailer.
- Drivers may not "top up" an international shipment with U.S. domestic shipments.
- Drivers may not solicit shipments for domestic deliveries while in the U.S.

In summary, the key question arising from the "incidental to international traffic" consideration is exactly what occurs with the vehicle and its load before the domestic leg of the transportation and what happens after the domestic leg of the transportation. The CBP enforcement risk is arguably low if each side of the domestic leg involves cross-border international movement. Even traffic in domestic commerce may be allowed if movements are in the general direction of necessary activity to further international traffic. This can be valuable in the interest of facilitating trade, but it is unfortunately not the end of the analysis. Immigration regulations play a key role that is also prohibitive of certain cross-border movements.

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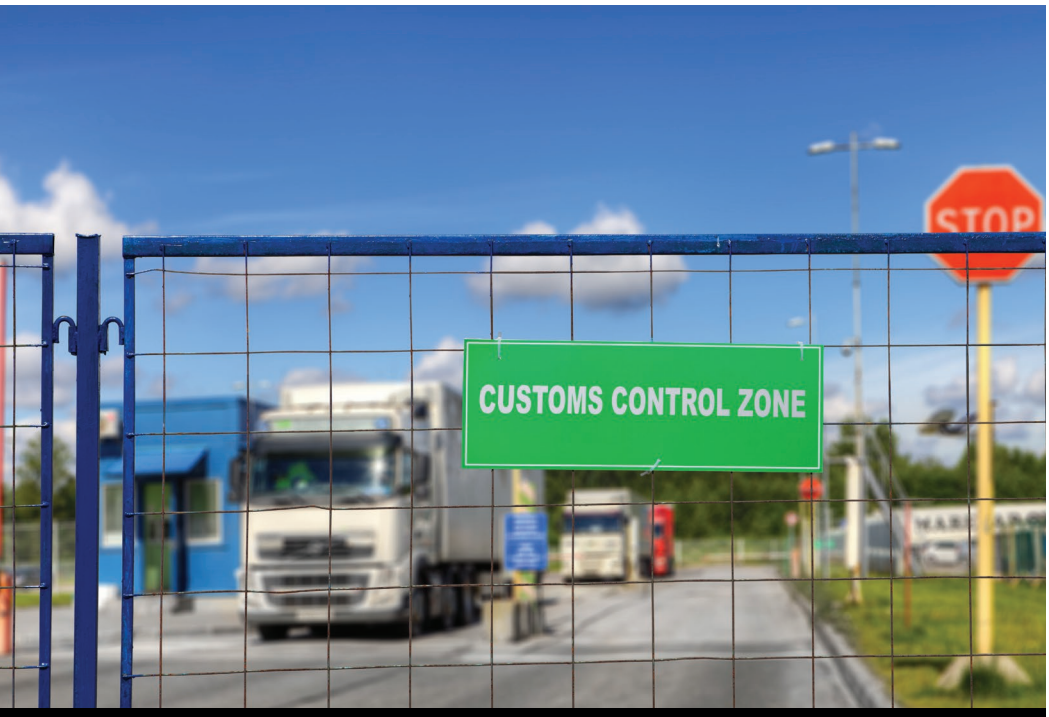

Cabotage Primer: The Basics and Pitfalls of Cross-Border Motor Carriage

continued from page 5

Immigration Framework

United States immigration regulations are based on the concept that foreign drivers are considered business visitors, alien non-immigrants.[5] Because of this status, foreign drivers must generally meet the entry requirements as a visitor for business and must only transport cargo traveling in the stream of international commerce within the meaning of immigrations laws and Immigration regulations. The transportation operator provisions are intended to allow the free movement of goods across the border, an activity that is international in scope, but not to facilitate access to the domestic labor market: "Purely domestic service or solicitation, in competition with the United States operators, is not permitted."[6] Therefore, care is due to ensure that the driver of a movement is in compliance with all applicable Immigration regulations, which ofte times includes the need to apply for and secure a B-1 Visa as a business visitor.

Navigating the Cabotage Conflict

Cross-border motor carriers must observe both the CBP regulations as well as the Immigration regulations. The second, Immigration-related restrictions, are often the greatest obstacle to modeling a cross-border supply chain at the lane level. The immigration statutes governing the entry of drivers are more restrictive than those governing customs activities and do not allow as much flexibility in the regulatory and policy process. The USMCA and precedent decisions interpreting the visitor for business statute expressly forbid point-to-point hauling within the United States by alien drivers—without the availability of cover from an "incidental to international traffic" exception.

The practical reality is that a Canadian driver may enter the United States with a load, drop that load, and then deadhead back to Canada or pick up another load for cross-border movement into Canada. Any movement between those inbound and outbound activities in international commerce may be subject to a high, and sometimes insurmountable, level of scrutiny. Immigration has been known to take the enforcement position that such movements are prohibited even where clear guidance exists from a CBP perspective—because such guidance only addresses the movement of equipment and cargoes. A driver faces a far steeper challenge, which, in the extreme, can result in the denial of entry privileges back into the United States as well as civil and criminal penalties for both him or her and the employer motor carrier. This challenge, and the resulting necessity to employ local drivers or to incorporate unprofitable deadheading without cargo, can often turn the economics of a lane model upside down and thereby prevent the commercial feasibility of an operation.

Benesch's deep bench of transportation, customs, and immigration attorneys are experienced in examining cross-border traffic models to determine operational and regulatory feasibility. In the event of enforcement, Benesch is experienced in representing clients facing investigations and penalties from both CBP and Immigration.

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[1] 19 CFR § 123.14(a) (emphasis added).

[2] 19 CFR § 123.14(c).

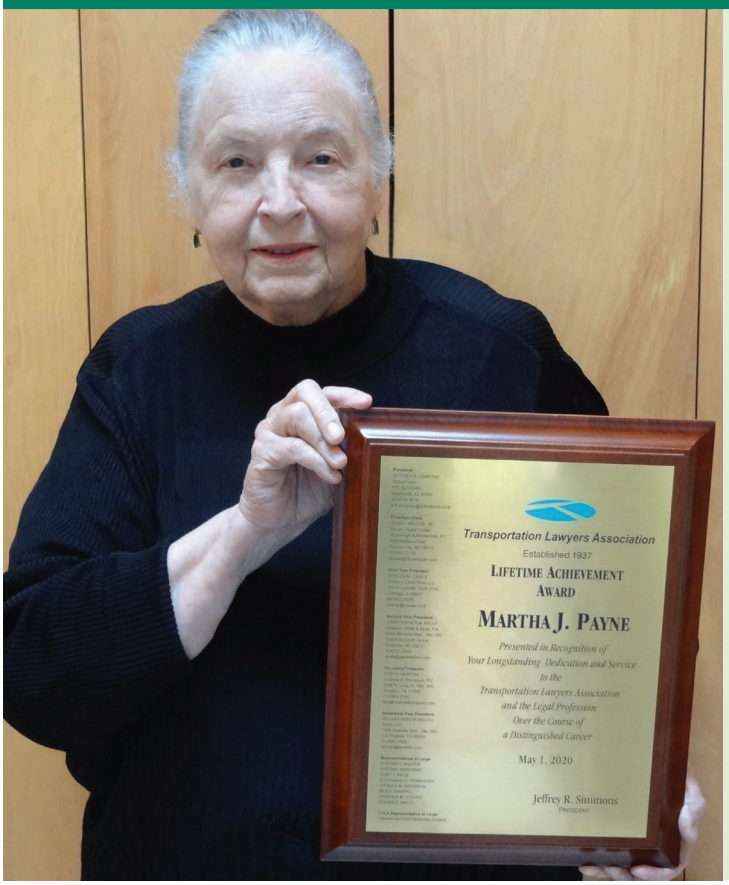
[3] Guidelines for Compliance of Motor Vehicles (CMV) and CMV Drivers Engaged in Cross-Border Traffic May 2012), https://www.dhs.gov/sites/default/files/publications/dhs-cross-border-trucking-guidelines_0.pdf.

[4] *Id.*

[5] 8 USC § 1101.

[6] 8 CFR § 214.2(b)(4)(i)(E).

Martha Payne Receives Transportation Lawyers Association Lifetime Achievement Award



Benesch is pleased to announce that **MARTHA PAYNE** has received the Transportation Lawyers Association (TLA) Lifetime Achievement Award.

The TLA presents this award when it believes one of its members merits recognition of the member's longstanding dedication and service to the association and the legal profession over the course of their career. In presenting the award, Eric Zalud mentioned that Martha has broken many glass ceilings by being one of the first women to be active in the transportation and logistics industry and has been an inspiration to many other women to join TLA and to take active roles in the organization and in the industry. She served (and continues to serve) on many committees, including the Freight Claims Committee, the E-Commerce and Logistics Committee, and the Corporate Counsel Committee.

Martha's role in Benesch's award-winning Transportation & Logistics Practice Group cannot be overstated. She represents American transportation and logistics providers and users on a multitude of transportation issues. She has extensive experience in drafting and negotiating domestic and international transportation, logistics, and supply chain management contracts. She advises shippers, carriers, and 3PLs of all sizes regarding cargo liability, risk management, contracting, and collection issues.

Prior to joining Benesch, Martha had more than 30 years' experience in the transportation industry, including terminal operations, accounting, pricing, collections, cargo claims management, and finally Senior Attorney for a U.S. multinational motor carrier and logistics company.

Household Goods Motor Carrier Regulation—A Primer and Update

Jonathan R. Todd

The household goods segment of the motor carrier industry is particularly challenging and, increasingly, a gating issue for new and innovative last-mile or do-it-yourself service offerings. Understanding whether the statutory and regulatory requirements associated with household goods services are triggered can have direct implications on the viability of a commercial offering, its price, and the precise operational requirements. If a service constitutes household goods moving, then the world of antiquated pre-deregulation legal requirements and significant consumer protection regulations apply to the provider, whether as a motor carrier or broker.

Definitional Matters

The basic question of whether a service offering triggers the statutes and regulations applicable to household goods service begins with the definitions set forth at 49 USC § 13102. The net effect of statutory definitions is that the determination of household goods regulation principally turns on the nature of the service rather than the nature of the commodity.

Household goods are defined essentially as "personal effects and property used or to be used in a dwelling" and "similar property if arranged and paid for by the householder" or "arranged and paid for by another party." On its face, this is an incredibly broad definition that includes almost any consumer good. A definitional carve-out, however, exists for "property moving from a factory or store, other than property that the householder has

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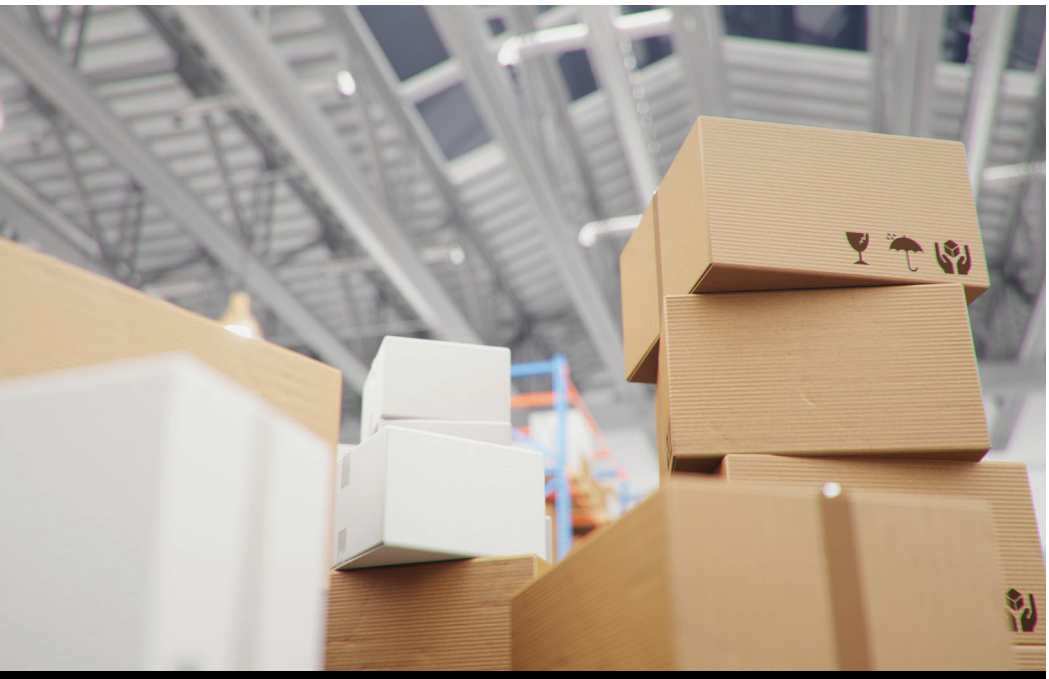

Household Goods Motor Carrier Regulation— A Primer and Update

continued from page 7

purchased with intent to use in his or her dwelling and is transported at [his or her] request…." This of course excludes most last-mile delivery service offerings.

Household goods motor carriers, or movers, are defined more narrowly than the term household goods. Regulated household goods motor carriers are motor carriers that "in the ordinary course of providing transportation of household goods, [offer] some or all of the following additional services: (i) binding and nonbinding estimates, (ii) inventorying, (iii) protective packing and unpacking of individual items at personal residences, and (iv) loading and unloading at personal residences." This set of consumer-centric services are consistent with market expectations for traditional moving and establish the character of service subject to unique consumer protections due to its impact on the lives of everyday people and their personal effects. In the event of enforcement, that determination is made by the U.S. DOT's Federal Motor Carrier Safety Administration (FMCSA) on a case-by-case basis.

One important definitional carve-out also exists for household goods motor carriers. The Limited Service Exclusion, also at 49 USC § 13102, establishes that the term "household goods motor carriers" does not include those that provide "transportation of household goods in containers or trailers that are entirely loaded and unloaded by an individual (other than an employee or agent of the motor carrier)." This effectively draws containerized, drop trailer, and other increasingly popular do-it-yourself type services outside the definition of household goods motor carriers. Typically those services do not include the enumerated "additional services" used to define the scope of a traditional mover.

Unique Requirements

Household goods motor carriers are subject to more stringent statutory and regulatory requirements than carriers of general commodities, and many of those requirements are remnant of the era prior to deregulation of the industry. The FMCSA imposes a number of threshold requirements that must be met even before registration, including publication of a tariff, use of an arbitration program to settle consumer disputes, maintenance of cargo liability insurance, and proficiency with the federal consumer protection regulations. Those requirements are set forth in 49 USC § 13902. Key elements for certain of those requirements are described below.

1) **Tariff Publication**—The most significant legacy requirement is the necessity of a tariff, found at 49 USC § 13702. The historic "filed rate doctrine" and "reasonable rate" requirements apply to movers. Movers must publish their tariff, shippers must receive notice of the same, and application of those rates and rules is binding subject to potential invalidation by the Surface Transportation Board (STB).

2) **Binding Arbitration Program**—Movers are required to offer a binding arbitration program to their shippers in the interest of settling loss and damage disputes. Any dispute where the amount in controversy is less than $10,000 must be submitted to the program with binding effect. A mover may elect for binding effect for greater amounts in controversy. The precise requirements of a compliant arbitration program are found at 49 USC § 14708.

3) **Cargo Liability and Insurance**—Another legacy requirement is the necessity to hold cargo insurance with minimum policy limits of $10,000 per occurrence and filed on FMCSA Form BMC-34. Legal liability for cargo loss and damage is governed by Released Rates Orders published by the STB. Movers must

offer carrier liability of either $0.60/lb at their standard rates or full liability for actual loss and damage subject to any charges or deductibles. Precise language is required for the presentation of those options, which a shipper may change at any point until loading begins.

4) **Estimate, Order for Service, and Bill of Lading**—Written estimates are required prior to commencement of service as set forth in 49 USC § 14104. Those estimates may be either binding or nonbinding, and the choice between the two directly impacts the amount that a mover may collect upon delivery for COD service. Delivery must be completed for collection of the amounts stated on a binding estimate even if additional services were provided. The lawful amounts associated with those services must be invoiced and collected at a later date. Delivery may be completed for collection of 110% of the amount stated on a nonbinding estimate, with subsequent invoicing for lawful amounts owed. An Order for Service must also be issued to confirm the shipper's order together with precise disclosures and data points that must be included on the Bill of Lading.

5) **Consumer Protection Regulations**—Movers must observe the Federal Consumer Protection Regulations in 49 CFR Part 375. The regulations are drafted with a question and answer format in order to be easily understood by the moving public. They address issues such as the way in which in-home estimates, instructional documents, payment and collection, paperwork, weighing, and disputes must be managed. Similar, but far less voluminous, requirements apply to household goods brokers under 49 CFR Part 371.

6) **Hostage Goods Enforcement**—Failure to release household goods shipments upon tender of payment for those amounts lawfully owed incurs strict consequences for FMCSA enforcement action as well as action by state attorneys general's offices. Hostage goods activities can net up to $10,000 per day, per violation, in civil penalties. It can also yield criminal penalties with up to two years imprisonment. The prohibition against hostage goods practices, and the empowerment of state AGO's for enforcement, is found at 49 USC §§ 14710, 14915.

Intrastate Jurisdiction

Many states have enacted their own consumer protection-oriented statutes and regulations focused on activities in the household goods segment. Those states paying close attention to the issues tend to have high inbound and outbound traffic as well as high frequencies of consumer abuse, particularly targeting the elderly. California is one such example. The state recently moved its enforcement jurisdiction from the Public Utilities Commission to the newly formed Bureau of Household Goods and Services. California takes an expansive view of activities that constitute regulated household goods service within state jurisdiction. Compliance with applicable rules requires many elements similar to the federal standards, including the provision of and adherence to a tariff known as the California MAX-4.

New Developments

The United States Congress recently addressed the regulatory burden for household goods movers as balanced against the efficacy of consumer protections. Specifically, a FMCSA Household Goods Consumer Protection Working Group was mobilized by Section 5503(d) of the FAST Act. The Working Group included representation by both industry and consumer protection interests and ultimately offered 19 recommendations for improvement. Those recommendations included: (i) modernizing the tools and resources available for industry and consumers, (ii) allowing industry to deliver documentation electronically, (iii) simplification of certain documents that are required to be presented to shippers, (iv) allowing for greater flexibility in offering physical surveys and issuance of Orders for Service, and (v) elimination of the need to disclose interlining carriers on the Bill of Lading. The FMCSA delivered its report to Congress in response to those recommendations in September of 2019.

Important Takeaways

The household goods motor carrier segment is truly a highly regulated space within a heavily regulated industry. Many of the benefits of deregulation that industry at large has enjoyed are less prevalent for movers due to their direct impact on the livelihoods of consumers. However, despite the compliance burden, the threshold question to consider when determining whether a service is or is not regulated turns on the offering of services with the look and feel of traditional household goods moving. The absence of estimates, inventories, and in-home services tends to draw operations outside the scope of household goods service. The existence of commercial delivery of new items can often also draw an operation outside the scope of regulated service. If a business operation does qualify as household goods service then a wide range of technical statutory and regulatory requirements at the federal and possibly state level must be observed, which, in egregious cases, include significant civil and criminal penalties in the event of violations.

JONATHAN R. TODD is a partner with Benesch's Transportation & Logistics Practice Group. He was honored to receive an appointment by U.S. Transportation Secretary Anthony Foxx to represent the household goods moving industry on the FMCSA Household Goods Consumer Protection Working Group. You may reach Jonathan at (216) 363-4658 or jtodd@beneschlaw.com.

Recent Events

2020 Transportation Law Institute
Marc S. Blubaugh presented *The Shipment of Goods between the United States and Canada: The "Conflicts of Law" Dynamic*. **Martha J. Payne, Eric L. Zalud, Jonathan R. Todd**, and **Richard A. Plewacki** attended.
November 13, 2020 | Virtual

Transportation Intermediaries Association's (TIA) 3PLXtend Virtual Experience
Eric L. Zalud and **Jonathan R. Todd** presented *A Logistics Contracting Lightning Round: Maximizing Benefits and Minimizing Risks in Logistics Contracts, And Ensuring that You Protect Your Contractual Rights (With Top 5 Bonus 2021 Legal Trends!)*. **Martha J. Payne** attended.
November 17–19, 2020 | Virtual

APICS Toledo Chapter Meeting
Jonathan R. Todd presented *Transportation and Logistics Procurement.*
December 2, 2020 | Virtual

Conference of Freight Counsel
Martha J. Payne and **Eric L. Zalud** attended.
January 9, 2021 | Virtual

The Council of Supply Chain Management Professionals—Columbus Roundtable
Marc S. Blubaugh presented *Transportation and Logistics in 2021: If You Don't Know Where You Are Going, You Might Not Get There*!
January 15, 2021 | Virtual

BGSA Holdings Supply Chain Conference 2021
Marc S. Blubaugh, Peter K. Shelton, and **Eric L. Zalud** attended.
January 20–22, 2021 | Virtual

Transportation Lawyers Association (TLA) Chicago Regional Seminar & Bootcamp
Marc S. Blubaugh, Jonathan R. Todd, Martha J. Payne, Richard A. Plewacki and **Eric L. Zalud** attended.
January 21–22, 2021 | Virtual

Air Cargo Virtual Conference
Martha J. Payne and **Jonathan R. Todd** attended.
January 27, 2021 | Virtual

Transportation Intermediaries Association Webinar
Martha J. Payne was a panelist on the "Ask the Expert" Panel Discussion.
February 2, 2021 | Virtual

The Dave Nemo Show - RoadDog Trucking Radio
Marc S. Blubaugh was the featured guest speaker.
February 3, 2021 | Sirius XMRadio

Stifel Transportation Conference
Marc S. Blubaugh and **Eric L. Zalud** attended.
February 9–10, 2021 | Virtual

The Transportation and Logistics Council (TLC) - Virtual Workshop
Martha J. Payne moderated the "Loss Prevention and Mitigation of Damages" Panel.
February 10, 2021 | Virtual

What's Trending

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On the Horizon

Truckload Carrier Association (TCA) Virtual Workshop
Helen M. Schweitz and **Jonathan R. Todd** are presenting *Transportation Technology Workshop: Technology, Data Privacy, and IC Relationships—Understanding the Impact!*
February 23, 2021 | Virtual

AvatarFleet Webinar
Marc S. Blubaugh is participating on the panel "How You Can Prevent a Nuclear Verdict."
March 25, 2021 | Virtual

Truckload Carriers Association (TCA) Truckload2021 Conference
Jonathan R. Todd and **Eric L. Zalud** are attending.
April 17–20, 2021 | Las Vegas, NV

Truckload Carriers Association Webinar
Eric L. Zalud is presenting *The Technological Tsunami Meets the Golden Hour—How New Technology Impacts Catastrophic MVA Litigation and Prevention.*
April 20, 2021 | Virtual

Transportation Intermediaries Association (TIA)—Capital Ideas Conference and Exhibition
Marc S. Blubaugh is presenting *Evaluating Business Opportunity Risk.* **Martha J. Payne** and **Eric L. Zalud** are attending.
May 11–13, 2021 | Virtual

Institute for Supply Management (ISM) World | A 360° Perspective
Jonathan R. Todd is presenting *Future of Contracting Post Pandemic: Legal Tools to Mitigate Risk.*
May 18, 2021 | Virtual

TerraLex Global Meeting 2021
Eric L. Zalud is attending.
TBD June | Virtual

Conference of Freight Counsel
Martha J. Payne and **Eric L. Zalud** are attending.
June 5–7, 2021 | Annapolis, MD

Transportation Lawyers Association (TLA) Executive Committee Meeting
Marc S. Blubaugh is attending as Voting Past President. **Eric L. Zalud** is attending.
June 23, 2021 | Lake Tahoe, CA

Transportation Lawyers Association (TLA) Annual Conference
Eric L. Zalud is presenting *Plummeting Head First Down a Steep Track: When Cargo is Detained, Retained, or Abandoned.* **Marc S. Blubaugh, Martha J. Payne, Jonathan R. Todd, Kelly E. Mulrane,** and **Richard A. Plewacki** are attending.
June 23–26, 2021 | Lake Tahoe, CA

American Trucking Association's (ATA) Trucking Legal Forum
Marc S. Blubaugh is presenting *Quick Hits: Practical Solutions to Routine Legal Dilemmas.* **Helen M. Schweitz** and **Jonathan R. Todd** are presenting *Technology and Data Privacy Implications for Independent Contractor Relationships.* **Martha J. Payne** and **Eric L. Zalud** are attending.
July 25–28, 2021 | Washington, D.C.

Claims and Litigation Management (CLM) 2021
Eric L. Zalud is attending.
August 11–13, 2021 | Atlanta, GA

DRI 2021 Product Liability Conference
Eric L. Zalud is attending.
August 19–21, 2021 | Nashville, TN

American Trucking Association Webinar
Eric L. Zalud is presenting *Where Worlds Collide: Legal Issues at the Interstices Between Brokers and Motor Carriers.*
August 31, 2021 | Virtual

Intermodal Association of North America (IANA) Intermodal Expo 2021
Marc S. Blubaugh and **Eric L. Zalud** are attending.
September 12–14, 2021 | Long Beach, CA

International Warehouse Logistics Association (IWLA) Convention & Expo 2021
Marc S. Blubaugh and **Eric L. Zalud** are attending.
November 1–3, 2021 | San Antonio, TX

Please note that some of these events may be canceled or postponed due to the COVID-19 pandemic. Check with event representatives for more information.

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

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