Q1 – 2024

BEST LAW FIRMS RANKED BY Best Lawyers
UNITED STATES
TRANSPORTATION LAW TIER 1
2024

InterConnect

For the eleventh consecutive year (2014-2024), Benesch received a **national first-tier ranking** in Transportation Law by U.S. News & World Report/ Best Lawyers® "Best Law Firms. We were named Transportation Law Firm of the Year in 2014, 2016, 2017, 2020, 2022, and 2023.

The U.S. News & World Report/Best Lawyers® "Best Law Firms" rankings are based on an evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process. For more information on Best Lawyers, please visit www.bestlawyers.com.

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

An Act of God Carve-Out Survives in Cargo Litigation, in the High-Tech Era

In this issue:

Eric L. Zalud

Lauryn T. Robinson

Courts have clearly established that a shipper cannot prevail in a freight claim against a carrier if an "Act of God" caused the freight loss or damage. The Act of God defense is an original, and one of the most battle-scarred, defenses in any Carmack Amendment claim for freight loss and/or damage. It was intended to be asserted in shipment schematics involving severe, natural phenomena such as earthquakes, tsunamis, hurricanes, avalanches, volcanic eruptions, and the like. As predictive meteorological, seismic, and volcanological technology has exponentially improved, however, these natural, and sometimes devastating, events have become easier and easier to predict—and to plan to avoid—for motor and rail carriers. Consequently, as Carmack/Act of God jurisprudence has evolved, the overall defense is less and less likely to be adopted and endorsed by the courts. Nonetheless, one last remaining vestige of the Act of God defense to a Carmack Amendment complaint seems to live on, even in this era of high-tech meteorological and seismic predictive analysis. That category of the Act of God defense is the "high winds defense." Recent case authority, and practical, empirical data and policymaking, leads to the conclusion that this defense *can still be asserted* successfully by motor and rail carriers in appropriately turbulent meteorological circumstances.

So, the Act of God standard is *still* a viable defense in certain situations related to high winds—and across several various modes of transport and storage. While weather forecasting technology has significantly developed over the years, the Act of God defense does not turn "upon technical, meteorological definitions, but upon the issue of whether the disturbance causing the damage … is of such unanticipated force and severity as would fairly preclude charging a carrier with responsibility for [the] damage." *See g.n. Cornish ex rel. St. Paul Fire & Marine Ins. Co. v. Renaissance Hotel Operating Co.*, No. 8:06-CV-1722-T-27EAJ, 2008 WL 1743861, *6 (M.D. Fla. 2008).

continued on page 2

An Act of God Carve-Out Survives in Cargo Litigation, in the High-Tech Era

continued from page 1

The Carmack Amendment applies to motor carriers involved in interstate transport. In most circumstances, the Carmack Amendment renders the carrier strictly liable for damage to the cargo being transported. However, *inter alia*, high winds and windstorms are a recognized condition that falls within the Act of God exception to carrier Carmack liability. *See American International Insurance Co. v. Vessel SS Fortaleza*, 446 F.Supp. 221 (D. P.R. 1978); *Compania de Vapores Insco, S.A. v. Missouri Pacific Railroad Company*, 232 F.2d 657 (5th Cir. 1956). The general standard is:

1. Whether the winds were expected;
2. Whether the winds were controllable; and
3. Whether human negligence significantly caused the damage.

Even if only *some* of these factors are satisfied, the Act of God defense may still apply. For example, in *Cornish ex rel. St. Paul Fire & Marine Ins. Co. v. Renaissance Hotel Operating Co.*, the court considered whether high winds from a hurricane passing in a neighboring city qualified as an Act of God. The defendant knew about the nearby tropical storm, but the district court still found that the winds were an Act of God because they were stronger than expected. As a result, the court found that the winds were "uncontrollable and unforeseeable," and any damage caused by human negligence was rebutted by the windstorm.

When evaluating this issue, courts consider various factors to determine whether the high winds qualified as an Act of God (and a commensurate viable COGSA defense), including (1) the duration of the storm, (2) the size of the vessel, (3) the wave intervals, (4) crossing seas, (5) structural damage to the vessel, and (6) "other" unidentified considerations. Further, the courts also caution against a mechanical approach in which one simply measures the force of the winds or the height of the waves to see if a storm amounts to an Act of God. The analysis, then, is non-formulaic and considers not only the extant meteorological realities but also the nuances of the particular shipment, including vessel size, seaworthiness, and other aspects of the unique capabilities and characteristics of the carrier.

When actually litigating an Act of God defense case involving alleged high winds, there is much more to do than simply assert the defense and cite to the above referenced body of case law. Often, meteorological experts are required to analyze factors such as the (past tense) forecast of expected weather conditions on the day of the accident, speed statistics related to high winds, prior incidents on the particular stretch of highway or waterway, and vehicle height, weight, and spatial configuration. These cases often, consequently, require expert analysis, consult, and testimony.

In reviewing high winds exception cases, though, it becomes clear that the high winds defense is not one to be asserted lightly. If it *is* to be asserted, there will invariably be expert testimony, expert reports, and expert consult on meteorological conditions and other related factors. The assertion of the defense, or countering it, will also require discovery tools, such as subpoenas to local news and weather agencies, newspapers, and surrounding property owners, and also Public Records Act/FOIA requests to local, state, and federal meteorological governmental agencies. It is probably a defense that will be difficult to prevail upon on summary judgment, in light of these variable meteorological and expert-related factors. However, courts currently *do* recognize it, and in the proper situation, it can be asserted and prevailed upon. So when defending, keep the wind at your back!

ERIC L. ZALUD is a partner and Co-Chair of Benesch's Transportation & Logistics Practice Group and may be reached at (216) 363-4178 and ezalud@beneschlaw.com.

LAURYN T. ROBINSON is an associate in Benesch's Transportation & Logistics Practice Group and may be reached at (216) 363-6110 or lrobinson@beneschlaw.com.

A Whole New World: FMC Issues Final Rule on Demurrage and Detention Billing Requirements

Marc S. Blubaugh

Jonathan R. Todd

J. Philip Nester

Vanessa I. Gomez

On February 26, 2024, the Federal Maritime Commission (FMC) published its long-awaited final rule (the Final Rule) establishing various regulations governing the imposition of demurrage and detention. The Final Rule will be effective on May 28, 2024. The Final Rule is intended to address concerns about the manner in which ocean carriers, marine terminal operators, and non-vessel-operating common carriers (each "a Billing Party") invoice and collect demurrage or detention from others (each "a Billed Party"). This development flows from rulemaking requirements contained in the Ocean Shipping Reform Act of 2022 (OSRA 2022).

Here is a quick summary of the changes that will be effective on May 28, 2024:

General Billing Requirements and Practices

- Failure to include the minimum information in an invoice as outlined in this Part eliminates the Billed Party's obligation to pay the applicable charges. [(46 CFR 541.5).]
- A Billing Party can only issue invoices for demurrage or detention to either (1) the person for whose account the Billing Party provided ocean transportation or storage of cargo; or (2) the consignee. [(46 CFR 541.4).] A Billing Party may not issue invoices for the same charges to both the consignee and the contracting party.
- A Billing Party must issue a demurrage or detention invoice within thirty (30) calendar days from the date of the last incurred charge. [(46 CFR 541.7(a)).]
- A Billing Party may reissue an invoice originally misdirected to an incorrect person as long as such issuance remains within thirty (30) calendar days from the date of the last incurred charge. [(46 CFR 541.7(d)).]

NVOCC-Specific Billing Requirements

- Non-vessel-operating common carriers (NVOCCs) must issue a demurrage or detention invoice within thirty (30) calendar days from the date the NVOCC receives the invoice from another party. [(46 CFR 541.7(b)).]
- When an NVOCC is acting as both a Billing Party and Billed Party in relation to the same charge, due to its intermediary role, it can communicate disputed charges to its Billing Party on behalf of its Billed Party. [(46 CFR 541.7(c)).] The underlying Billing Party must provide an additional thirty (30) calendar days for the NVOCC to dispute the charge.

Fee Mitigation, Refund, or Waiver

- The Billing Party must give the Billed Party at least thirty (30) calendar days from the invoice issuance date to request mitigation, refund, or waiver of fees. [(46 CFR 541.8(a)).]
- The Billing Party must attempt to resolve a request for mitigation, refund, or waiver of fees within thirty (30) calendar days after receiving any such challenge from its Billed Party. [(46 CFR 541.8(b)).]

The FMC has delayed the implementation of 46 CFR 541.6, stating that the invoicing requirements under this part are "pending approval of the associated Collection of Information by the Office of Management and Budget." The FMC will publish a notice when the approval is granted, upon which time 46 CFR 541.6 shall become effective and enforceable, including the following additional elements that were not in OSRA 2022:

Delayed Implementation of Invoicing Requirements Beyond OSRA 2022

- Invoices must include additional information identifying the respective container(s), such as Bill of Lading numbers and the basis for why the Billed Party is liable for the charges. [(46 CFR 541.6(a)(1, 4)).]
- The Billing Party must provide additional timing information including the invoice date, invoice due date, the specific date(s) for detention or demurrage charges, and the basis for why the Billed Party is the proper party of interest. [(46 CFR 541.6(b)(1-2, 8)).]
- An invoice may include digital means (i.e., a URL address, QR code, or digital watermark) to readily identify a contact to whom the Billed Party may direct invoice-related questions or concerns as well as the process to request fee mitigation, refund, or waiver. [(46 CFR 541.6(d)(3)).]

Practical Takeaway

This Final Rule endeavors to provide clarity regarding the FMC's position on detention and demurrage invoicing and collection processes. All stakeholders, including beneficial cargo owners, will benefit from quickly digesting the Final Rule and evaluating the impact it may have on longstanding, existing business practices relating to the billing and collection of demurrage and detention. Indeed, the FMC expressly acknowledged in its comments that it was declining to follow various widely accepted and longstanding practices. In short, all stakeholders in the intermodal industry will need to adapt over the next ninety (90) days to the new world ushered in by the publication of the Final Rule. Additional rulemaking on other ocean-related topics is expected if the FMC's charge from the U.S. Congress is to be met under OSRA 2022. Therefore, while the FMC has attempted to create further clarity and consistency with respect to detention and demurrage practices in the Final Rule, industry stakeholders should be prepared for more to come on other subjects from the FMC.

continued on page 7

Airline Security Threat Environment and Regulatory Compliance

Jonathan R. Todd

Government reporting contains no shortage of signals that threat actors, including traditional terroristic actors, are eager to disrupt global shipping and supply chains. This threat environment of frequent negative headlines and internal risk assessments is a stark reminder of our collective vulnerabilities—and we need not look back two decades for examples of potential impact. The COVID-19 pandemic showed us how acute supply constraints nearly immediately trigger chaos. It is time to yet again assess our efforts to fortify operational compliance and risk mitigation.

This article provides a brief functional summary of the security environment in which all-cargo aircraft operators perform their duties within the United States. All of this content is derived from published regulations under the jurisdiction of the Transportation Security Administration (TSA). There is no Sensitive Security Information contained here.

Full All-Cargo Security Programs—The laboring oar of global air cargo capacity is the all-cargo freighter. All-cargo aircraft operators are subject to their own set of airline security regulatory requirements to ensure the safety of those in the skies and on the ground. Airlines in the full all-cargo aircraft operator segment must receive a written security program from the TSA. The term "full all-cargo program" refers to an aircraft operator with operations having a maximum certificated takeoff weight of more than 45,500 kg (100,309.3 pounds) and carrying only cargo and authorized persons but no passengers. Additional regulatory requirements found in Title 49 CFR apply to the program as well as other terms and notifications issued by the TSA. The basic public details of any such security program are found at 49 CFR Part 1544.

Cargo Screening—The essential objective of a security program is for operators to exercise sufficient control over business operations to prevent unauthorized carriage and unauthorized access by persons. As a result, participation in the full all-cargo program requires steadfast implementation of the security measures disclosed in that program to screen property (and persons) in an effort to prevent or deter unauthorized persons, weapons, explosives, incendiary devices, and other destructive items. Screening or inspection of cargo as required is a key element of this program as well as certain proscriptions, such as refusing tender from shippers who do not permit required inspection.

Personnel Screening—Security Threat Assessment (STA) requirements extend to all personnel with unescorted access to cargo, access to information regarding such cargo, and certain other security-sensitive functions. Aircraft operators are also required to implement and enforce certain criminal history record checks (CHRC) across all covered persons. These requirements essentially amount to FBI background checks. The CHRC process involves fingerprinting, written declarations, and verification of identification. Those covered persons include personnel with unescorted access authority, screening function authority, and Security Identification Display Area (SIDA) access, among other critical roles. A list of 28 disqualifying criminal offenses are provided in the regulation. The look-back period is 10 years. Operators must also observe forward-looking screening obligations for covered persons following the initial screen.

Physical Security—Similar to personnel, aircraft operators also face heightened scrutiny for the measures taken to ensure physical security. Operators must prevent unauthorized access to facilities, equipment, and cargoes as part of the security program. Cargo facility and aircraft operations on-site at airport facilities occur within SIDA perimeters established by airport operators. The SIDA requirement includes areas such as cargo facilities; loading and unloading vehicle docks; and areas where an aircraft operator, foreign air carrier, or indirect

air carrier sorts, stores, stages, consolidates, processes, screens, or transfers cargo. Essentially, access to the SIDA is restricted to only those having appropriate identification media. Aircraft operators are also required to arrange for local law enforcement personnel qualified for incident response. Crewmembers and personnel must gain awareness of procedures for obtaining law enforcement assistance in the event of incidents at a facility.

Ongoing vigilance of airline operations, their personnel, and the indirect air carriers as well as commercial users of those services is, of course, key. We are all tasked with protecting the homeland. These are issues of national security as much as they are focused on regulatory compliance and operational continuity. Continued and growing awareness together with proactive steps to maintain best practice for every load on every flight is an essential part of day-to-day business operations.

JONATHAN R. TODD is a partner and Vice Chair in the Transportation & Logistics Practice Group at Benesch. His practice includes representation of airlines, indirect air carriers, and large enterprise shippers in aviation regulatory compliance, enforcement defense, and commercial matters. Jonathan is available at (216) 363-4658 and jtodd@beneschlaw.com.

Jonathan Todd Named Vice Chair of Benesch's Transportation & Logistics Practice Group

JONATHAN TODD
Vice Chair of Benesch's Transportation & Logistics Practice Group
T: 216.363.4658 | jtodd@beneschlaw.com

Jonathan leads the team widely recognized as the best in the business focused on transactional and regulatory matters in the transportation and logistics sector. This deep bench of attorneys serves domestic and international clients in all manner of transportation, logistics, warehousing, forwarding, supply chain management, and international trade compliance issues that arise when goods move in the U.S., cross-border, and internationally. Jonathan's professional career has solely and exclusively focused on transactional and regulatory disciplines of the supply chain. He joined Benesch in 2016 following an in-house career in the industry.

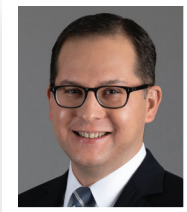
"Jonathan is one of the nation's leading supply chain attorneys," said Benesch Managing Partner Gregg Eisenberg. "We—and our clients—are fortunate to have his skill set and expertise among the leadership of our preeminent Transportation & Logistics practice."

Benesch's Transportation & Logistics Practice Group is recognized nationwide and in foreign jurisdictions. The Practice maintains a nationwide Band 1 ranking by *Chambers USA* and has been awarded the national "Law Firm of The Year" distinction for Transportation Law six times by "Best Law Firms." Today, the firm's coast-to-coast footprint exceeds 400 lawyers across seven offices.

Benesch

beneschlaw.com

Cybersecurity Threats Trigger Industry-Wide Call to Action for Transportation and Logistics Providers



Jonathan R. Todd

Megan K. MacCallum

Cybersecurity vulnerability is emerging as a top-of-mind issue for transportation and logistics service providers, regulators, and criminals alike. Recent years have yielded headline-worthy ransomware attacks on domestic industry and critical infrastructure, including malicious operations by foreign-threat actors. The risk of public, costly, and potentially crippling incidents is on the rise, as is risk mitigation.

Examples of real or potential threats paint a stark picture. In May 2021, criminal hackers launched a ransomware cyberattack on American oil company Colonial Pipeline. The attack on this often-overlooked means of surface transportation resulted in a multimillion-dollar ransom payment in just hours. The impact included a reported six-day shutdown of the company's operating systems.

The federal government publicly ramped up directives around cybersecurity in an effort to raise industry awareness and instill best practices in subsequent years. In March 2021, President Biden signed the Cyber Incident Reporting for Critical Infrastructure Act into law. The Act applies broadly to covered entities identified as critical to infrastructure across sectors. The Act requires that covered entities report certain cybersecurity incidents to the U.S. Cybersecurity and Infrastructure Security Agency (CISA) within 72 hours and report ransomware payments to CISA within just 24 hours. In February 2022, Russia's invasion of Ukraine stepped up the urgency of cybersecurity matters and particularly their impact on the global supply chain. CISA issued a public warning regarding the risk of Russian cyberattacks against U.S. networks in retaliation for U.S. sanctions. By March, the White House issued intelligence-based warnings that Russia is considering engaging in cyberattacks against domestic U.S. interests. Private industry is viewed as critical to CISA's "Shields Up" strategy to prepare for and respond to cyberattacks.

Transportation and logistics as a sector may be particularly vulnerable to attack due to its essential character in all manner of industry and its voluminous interconnected relationships around the world (often with antiquated systems). Domestically, the Transportation Security Administration (TSA) stands at the forefront of the cybersecurity issue for the transportation sector. Following the Colonial Pipeline attack in 2022, the TSA issued a Security Directive under its emergency authority. The Directive required pipeline owners and operators to: (1) report actual and potential cybersecurity incidents to CISA; (2) designate a Cybersecurity Coordinator to serve as a point person between a service provider and the TSA who is available 24 hours a day, seven days a week; (3) review current practices applicable to cybersecurity; and (4) identify vulnerability in cybersecurity and develop a plan to address cybersecurity risks and report the results to TSA and CISA. The TSA later updated its guidance to require additional measures including: (1) implementation of mitigation measures to protect against ransomware and IT attacks; (2) implementation of a cybersecurity contingency and recovery plan; and (3) conducting a cybersecurity architecture design review.

The TSA's attention quickly spread to other modalities under its jurisdiction. The Administration issued similar directives for other segments, including the railroad industry and public transportation. The published Security Directives were designed to target higher-risk freight railroads, passenger rail, and public bus transportation. The operational framework largely mirrors the pipeline industry: (1) reporting cybersecurity incidents to CISA; (2) designation

of a round-the-clock cybersecurity coordinator; (3) developing a cybersecurity incident response plan; and (4) developing a cybersecurity vulnerability assessment to identify gaps in security. The TSA has since continued its urgent cybersecurity initiatives. Most recently, in March 2023, it issued new cybersecurity amendments on an emergency basis to TSA-regulated airport and aircraft operators requiring updates to their security programs.

Other new federal programs outside the jurisdiction of transportation agencies have direct impact on the sector. The White House has introduced a Freight Logistics Optimization Works (FLOW) initiative designed to promote the sharing of critical freight information between different supply chain participants. The digital infrastructure of FLOW is intended to strengthen supply chains by facilitating more frequent and more accurate information. The objective is to reduce COVID-type disruptions and guard against interference through cybersecurity vulnerabilities and other threats. The initial participants in FLOW include the U.S. Department of Transportation and the Ports of Long Beach and Los Angeles, as well as the Georgia Ports Authority, terminal operators, private businesses, and logistics and warehousing providers. Private participants are reported to include Nike Inc., Albertsons Companies, Target Corp., Walmart Inc., Union Pacific Corp., FedEx Corp., and Maersk.

Just as modern supply chains are global, these cyber concerns and mitigation efforts are not unique to the U.S. On Dec. 14, 2022, the European Parliament issued a Directive on measures for a high level of cybersecurity across the E.U. The Directive designated as "sectors of high criticality" key industry hubs and participants, including airports, airlines, traffic control authorities, ports, port equipment operators, and shipping lines. Each of those identified will be required under the Directive to put together an incident response team with resources and technical capabilities to handle cybersecurity threats in real time. The Directive also bolstered reporting requirements incumbent on companies that suffered a cybersecurity attack by requiring the European Union Agency for Cybersecurity (ENISA) to develop rules for measuring and handling cybersecurity readiness and to develop a template for incident response.

The global effort against nefarious actors, and the well-being of private industry, requires vigilant day-to-day practices in order to be effective. Our industry has long concerned itself with operational best practices for achieving key metrics, such as on-time delivery. It is now time to also give attention to building tech-savvy teams that can conduct nuanced vulnerability reviews to address the receipt of critical data, including personal information, and the personnel who can access it. Scrutiny of owned and leased systems that process critical data, including through cloud-based applications, and of the technical and organizational controls in place to protect such data, is often a key point of internal risk assessment together with the contractual relationships supporting those systems. While that exercise may be familiar, the need to act on information is evolving. An emerging development is the criticality of ensuring that teams have the tools and skills to report and act upon incidents promptly. Current operational best practices include maintaining an incident response plan and conducting annual training regarding the plan.

The importance of the transportation and logistics industry is increasingly under review from a global competitiveness, national security, and domestic safety perspective. This is positive for a segment that has long viewed itself as the "backbone" of the U.S. and, at least since the COVID-19 pandemic, is widely known across the country as holding that role. Along with that newfound visibility and esteem comes a call to action. The industry, like many other sectors, must remain on guard against the crippling effects that could all too easily be brought about by our enemies.

JONATHAN R. TODD is a partner and Vice Chair in Benesch's Transportation & Logistics Practice Group whose practice includes advising clients on technical aspects of transportation operations and regulatory compliance. Jonathan may be reached at (216) 363-4658 and jtodd@beneschlaw.com.

MEGAN K. MACCALLUM is an associate in the Transportation & Logistics Practice Group and may be reached at (216) 363-4185 and mmaccallum@beneschlaw.com.

A Whole New World: FMC Issues Final Rule on Demurrage and Detention Billing Requirements

continued from page 3

Benesch's Transportation & Logistics Practice Group has a history of counseling and representing all participants in the global ocean shipping market. Our team is available to assist all stakeholders with developing practical approaches to address the business and regulatory impact of the FMC's demurrage and detention billing requirements including as appropriate resolving disputes that emerge.

MARC S. BLUBAUGH is a partner and Co-Chair of Benesch's Transportation & Logistics Practice Group and may be reached at (614) 223-9382 and mblubaugh@beneschlaw.com.

JONATHAN R. TODD is a partner and Vice Chair in Benesch's Transportation & Logistics Practice Group and may be reached at (216) 363-4658 and jtodd@beneschlaw.com.

J. PHILIP NESTER is an associate in Benesch's Transportation & Logistics Practice Group and may be reached at (216) 363-6240 and jpnester@beneschlaw.com.

VANESSA I. GOMEZ is an associate in Benesch's Transportation & Logistics Practice Group and may be reached at (216) 363-4482 and vgomez@beneschlaw.com.

State Legislatures Confront California Vehicle Emissions Regulations

Jonathan R. Todd

Robert Pleines, Jr.

Motor carriers and equipment manufacturers are closely watching federal and California Air Resources Board (CARB) developments in the future of vehicle emissions. The headline has long been that a transition from internal combustion engines to clean power sources is coming and relatively date-certain, so production and fleets must take notice. A number of challenges to this forced approach have gained attention, although most rely upon litigation as the tool for change. Now, other states are looking to their legislatures to pick sides on the issue by following California's lead or by clearly challenge the federal and CARB trendline.

Recent developments and decisions by the U.S. Environmental Protection Agency (EPA), U.S. Department of Transportation (DOT), and Federal Highway Administration are driving states to take a stance on whether they will adopt or oppose regulations that increasingly impact their citizens. Last year, the EPA granted a waiver excluding certain CARB restrictions from federal preemption under the Clean Air Act. The impact of this waiver means that a number of California's regulations can be more restrictive than federal law, including the Heavy-Duty Vehicle and Engine Emission Warranty Regulations and Maintenance Provisions, Advanced Clean Trucks Regulation, Zero Emission Airport Shuttle Regulation, and Zero-Emission Power Train Certification Regulation. Another CARB regulation, the Advanced Clean Fleets Regulation, is currently pending a preemption waiver by the EPA with a decision expected later this year. Further, the DOT and Federal Highway Administration issued a rule requiring the states to establish targets for reducing carbon dioxide emissions.

While California leads the way in electric vehicle transitions and emissions reduction regulations, many other states are adopting CARB's regulations verbatim or are referencing CARB's regulation in their own legislation. For example, 10 states have announced that they adopted or are adopting CARB's regulations applicable to heavy-duty vehicle standards, and another 17 states have adopted or are adopting CARB's light-duty vehicle regulations. A number of other states are also currently contemplating whether to adopt CARB's regulations.

Not all states are open to adopting CARB's regulations and complying with the federal government's push to transition to electric vehicles. Currently, 21 states are suing the Biden Administration, DOT, and Federal Highway Administration and their efforts to regulate greenhouse gas emissions. In addition to litigation, some states are turning to their own legislation as a means to further their interests and prohibit the implementation of CARB's regulations to their state.

On December 28, 2023, Ohio's governor, Mike DeWine, signed House Bill 201 into law, placing Ohio in opposition to the implementation of CARB's regulations. House Bill 201 will go into effect in March 2024 and will "prohibit a state agency, county, or township from restricting the sale or use of a motor vehicle based on the energy source used to power the motor vehicle; [and] to prohibit a state agency from adopting the California emissions standards for motor vehicles …." House Bill 201 could not be any clearer in its intent to prohibit the adoption of CARB's regulations by the Ohio General Assembly.

In addition to Ohio, California's neighbor, Arizona, has adopted legislation barring the state from restricting the use or sale of a vehicle "based on its energy source" and prohibited local governments from implementing such restrictions as well. Other states have also considered a similar ban with varying degrees of success. For instance, in 2023 Wisconsin's governor vetoed a bill that would have prevented Wisconsin's localities from banning the use of gas-powered vehicles. With the passage of state laws curbing CARB's regulatory reach, such as Ohio's House Bill 201, additional states in opposition to CARB's regulations may contemplate similar legislative actions.

The are a number of potential impacts for motor carriers and equipment manufacturers resulting

from the growing divide between the states. For instance, a fleet manager will need to consider fleet composition on a state-by-state basis and determine when transitions to electric vehicles are required by the various states. Further, manufacturers will need to actively review and stay current with state law in the states where they sell or deliver vehicles for sale. State law on the opposite ends of the emissions regulatory spectrum creates a mixture of rules and regulations that must be carefully navigated by players in the transportation industry to ensure compliance and mitigate penalties.

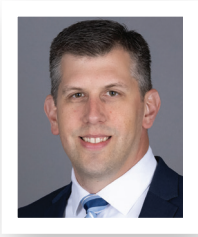
Benesch is assisting fleets and vehicle producers in navigating this ever-changing landscape while planning for a compliant future, whether in California or other states seeking to follow the path blazed by CARB. Our cross-functional team is available to tackle this operational impact as well as all other day-to-day compliance obligations as emissions regulations emerge.

JONATHAN R. TODD is a partner and Vice Chair in Benesch's Transportation & Logistics Practice Group and may be reached at (216) 363-4658 and jtodd@beneschlaw.com.

ROBERT PLEINES, JR. is an associate in the Transportation & Logistics Practice Group and may be reached at (216) 363-4491 and rpleines@beneschlaw.com.

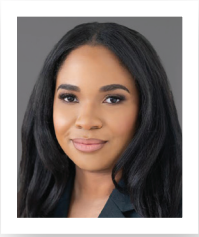
FMC Dispute Resolution: A Guide for Using CADRS to Resolve Ocean Carriage Disputes

Jonathan R. Todd



J. Philip Nester

Megan K. MacCallum



Ashley Rice

Many shippers and service providers are looking toward the upcoming ocean carrier bid season while still reeling from the effects of the global pandemic. It is not uncommon to identify colorable claims against any number of market participants in this environment or conversely to plan for avoiding claims in the future. Whatever may come, it is helpful to bear in mind that the Federal Maritime Commission (FMC) offers a valuable forum for dispute resolution short of litigation.

The FMC's Office of Consumer Affairs and Dispute Resolution Services (CADRS) provides commercial ocean shipping parties a process to explore the resolution of claims. CADRS is a free service staffed by the FMC to provide a neutral and confidential forum for the disputing parties to negotiate and resolve claims without the time and expense of formal litigation. CADRS aims to provide practical and efficient solutions to such disputes and is charged with helping parties to resolve disputes relating to ocean shipments of cargo or household goods, and even cruise line service disputes or lost luggage.

Initiating CADRS Services

The parties who can use CADRS services include shippers and shippers' associations, NVOCCs, OFFs, VOCCs, MTOs, port authorities, inland transportation service providers, and cruise operators and passengers. A party can request CADRS services by emailing or faxing the office a completed copy of the correct Dispute Resolution Service Request–a Form FMC-32 for a cruise-related dispute or a Form FMC-33 for a cargo-related dispute. Practically, the email or fax should include the name and contact information of the filing party, whether an individual or company (if an attorney or some other person assists with the filing, the name, contact, and relationship of the assisting person to the party in interest) and the name and contact information of the opposing party.

The request should also include a factual description of the dispute (including any attempts the filing party made to resolve the problem prior to filing the CADRS services request), the desired outcome, and any supporting documentation, such as invoices, receipts, bills of lading, or other relevant records used to substantiate the filing party's claims. Because the CADRS process is voluntary, both the filing party and the opposing party must agree to the process pursuant to 46 CFR § 502.403.

Upon filing, CADRS reviews the submission, acknowledges receipt, and assigns a reference number to the dispute. A CADRS staffer will email or have a conversation with the filing party to determine whether additional information or records are needed to support the claim and to get a clear view of what the desired outcome is before reaching out to the opposing party. Importantly, CADRS will not proceed under circumstances where a legal resolution of the matter is required, the matter may impact policy issues that would require formal procedure or run counter to the FMC's policies, where a public record would be considered important to the industry, or where the FMC would need to maintain continuing jurisdiction over the matter with the authority to alter the outcome. *Id.*

Selecting a Non-Adjudicative or Adjudicative Service

CADRS allows the parties to choose precisely which dispute resolution service they wish to use. Parties opting to use CADRS services can elect to resolve disputes through any of four discrete services that fall under "non-adjudicative services" on the one hand, including ombuds/Rapid Response Teams (RRTs), mediation, or facilitation, or "adjudicative services" through arbitration on the other.

continued on page 10

FMC Dispute Resolution: A Guide for Using CADRS to Resolve Ocean Carriage Disputes

continued from page 9

Non-Adjudicative Services—Parties can elect to use ombuds/RRTs services for what is often fast and efficient resolution. CADRS uses the term "ombuds" to mean a range of services, including information gathering, coaching, and short-form telephone mediations where the parties can resolve issues as quickly and efficiently as possible. CADRS mediation services can be in-person or by teleconference, which is akin to private mediation where a neutral mediator is in the room as the disputing parties work toward resolution. Mediation may be particularly useful to avoid a formal adjudicative proceeding in contractual, regulatory, tort, or other commercial issues. Parties who select facilitation may benefit from a broader and more fluid resolution style. Such a resolution process may be as simple as the parties having a discussion about best practices between themselves or even brainstorming about the path to resolution.

Adjudicative Services—Where the parties wish to have a formal adjudicative proceeding, yet short of litigation, the CADRS arbitration process provides such recourse. In arbitration, CADRS appoints a staff member of the parties' choosing to hear the dispute, and the arbitrator will issue a legal opinion and award of damages (if any). The arbitrator has the authority to dismiss a dispute altogether. Requesting arbitration requires the parties to submit a written agreement that has the legal effect of creating jurisdiction for CADRS to issue a decision that will be legally binding on the parties. Such a written agreement can be achieved by a stand-alone agreement, or the parties can amend the applicable service contract to include a dispute resolution clause identifying CADRS as the agreed-upon forum and arbitrator. In either case, the agreement must also set forth a potential cap for the award of damages.

Arriving at Resolution

The FMC will appoint a neutral once the parties agree upon the particular CADRS service. If the parties choose a person other than an official or employee of the FMC, then the parties must bear any and all expenses and fees for that person's services. The appointed neutral and the CADRS staff work with the parties with the stated goal of achieving a resolution and settlement. Once a party files a submission with CADRS, the process can take as little as 30 days to reach a resolution. CADRS services are flexible, fast, and efficient, but it is important to bear in mind that the outcomes reached are not legally binding unless otherwise agreed to by the parties under the arbitration option. Under all circumstances, the CADRS process and outcome is to remain confidential.

Balancing Pros and Cons of CADRS as a Resource

Parties can benefit in a number of ways by using CADRS services; for example: (i) CADRS is free even if the parties decide to walk away and litigate, which means there is nothing to lose by giving it a try; (ii) there is controlled risk, as the OMBUDS/RRT, mediation, and facilitation services are grounded in what the parties agree to do; and (iii) arbitration controls risk, as the FMC requires the parties to enter into a written agreement setting forth a maximum potential exposure, which provides security for potential outcomes. In these ways, CADRS services can help to enhance commercial relationships by establishing operational parameters and party recourse in the event of loss or service failures, while also providing practical, collaborative, and quick resolutions.

The team at Benesch is well versed in all aspects of the ocean transportation market and is available to assist in developing pragmatic approaches for clients to participate in the market, contract for services, build compliant operational practices, and resolve disputes through direct business-to-business negotiations, the use of CADRS services, or formal litigation before the FMC.

JONATHAN R. TODD is a partner and Vice Chair in Benesch's Transportation & Logistics Practice Group and may be reached at (216) 363-4658 and jtodd@beneschlaw.com.

J. PHILIP NESTER is an associate in the Transportation & Logistics Practice Group and may be reached at (216) 363-2460 and jpnester@beneschlaw.com.

MEGAN K. MACCALLUM is an associate in the Transportation & Logistics Practice Group and may be reached at (216) 363-4185 and mmaccallum@beneschlaw.com.

ASHLEY RICE is an incoming associate with Benesch and a third-year law student at Cleveland State University College of Law.

BEST LAW FIRMS
RANKED BY Best Lawyers
UNITED STATES
TRANSPORTATION LAW
TIER 1
2024

Our Road to Delivering For You

Over a dozen attorneys with top industry experience call Benesch's Transportation & Logistics Practice Group home. We are proud to have the deepest bench of attorneys who hail from the industry across our entire 400+ attorney law firm. These are the faces of unparalleled expertise.

Meet Our Industry Alumni:

Brian Cullen
Schneider National

Vanessa Gomez
O'Neill Transport
Agent for Odyssey Logistics

Peter Kirsanow
Leaseway Transportation

Robert Naumoff
ArcBest
USA Truck

Phil Nester
National Interstate
Insurance Company

Tom O'Donnell
Amazon
New Century Transportation

Leo Pan
COSCO Dalian

Martha Payne
Consolidated Freightways

Joel Pentz
Port of Cleveland

Robert Pleines
Logistics Officer, United States
Marine Corps Reserve

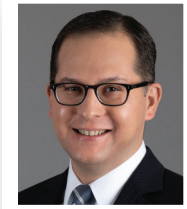
Richard Plewacki
Roadway Services

Jonathan Todd
United Van Lines
Mayflower Transit

Benesch

www.beneschlaw.com

Export Controls Evolving for Infosec Threats to Cloud, SaaS, IaaS, AI Platforms



Jonathan R. Todd

Kristopher J. Chandler

Megan K. MacCallum

The growth of cloud services, Software-as-a-Service (SaaS) and Infrastructure-as-a-Service (IaaS) arrangements, as well as Artificial Intelligence (AI) models and increased reliance on the use of outsourced technology service providers in recent years, has been no less than exponential. Many enterprises rely upon these services, as do many consumers, without awareness of the technology supporting these platforms or the risks. Regulators with jurisdiction over aspects of these information technology products and their use are beginning to adapt to this environment.

We are tracking new guidance and rules across a number of regulatory agencies addressing threats to United States domestic industry and national security. Action out of the U.S. Department of Commerce's Bureau of Industry and Security (BIS) is a perfect example of the changing information security terrain. BIS has shown an increasing focus on regulating the export, transfer, and release of software and technology. This action takes the form of clarifying existing regulations in terms of their applicability to emerging use of technology and also issuing new rules that address perceived threats.

On September 18, 2023, BIS made a technical change to regulatory provisions in an effort to clarify an ambiguity in the Export Administration Regulations (the EAR) by identifying when a transfer of access information is akin to the release of software[1] and technology[2] and would accordingly require a comparable authorization. Earlier this year, BIS also issued a Notice of Proposed Rulemaking for the implementation of Executive Orders governing IaaS Providers (89 FR 5698) and certain requirements to combat an increasing threat of malicious cyber-enabled activity in the United States.

BIS Clarifications on Transfer of Access Information and Release

In a recent Final Rule,[3] BIS enacted a technical correction that "serves to clarify provisions of the EAR pertaining to the release of 'software'" and to "[clarify] an ambiguity in the EAR by adding a cross-reference addressing access information[4] in the section on releases of 'technology' and 'software.'" BIS stated that the new changes reflect the interpretation of terms BIS always intended, and the changes now make its intent crystal clear (the "Final Rule").

As originally enacted on June 3, 2016, and pursuant to 15 CFR § 734.15 (Release), a release of software and technology occurred either through: (1) Visual or other inspection by a foreign person of items that reveals "technology" or source code subject to the EAR to a foreign person or (2) Oral or written exchanges with a foreign person of "technology" or source code in the United States or abroad.

The Final Rule clarifies through a cross reference to 15 CFR § 734.19 (Transfer of Access Information) that a "release" of software and technology also occurs, and a comparable authorization from BIS is required, when there is a transfer of access information *with* knowledge that such transfer would result in the release of such technology or software without a required authorization.

The Final Rule also expands on transfer of access information, making it clear that with respect to such transfer, "software" includes *both* source code and object code, and not just source code. This eliminates potential uncertainly that the definition of release under

15 CFR § 734.15 (Release) limits 15 CFR § 734.19 (Transfer of Access Information) might only control transfers of access information that release source code.

All regulated parties will now need to ensure they carefully consider whether the transfer of access information is akin to a software/technology release under the regulations that would require appropriate authorization, in order to avoid potential pitfalls and federal enforcement actions.

BIS Proposed Rules on IaaS Provider Compliance

IaaS Providers will need to pay special attention to updates on the transfer of access information as well as to release of software and technology. Providers will also face the new obligation to conduct diligence, collect and report information, and change relationships with foreign resellers when IaaS products may enable malicious cyber activities.

BIS's Notice of Proposed Rulemaking issued on January 29, 2024, (the "Notice") solicited comment on proposed regulations to implement two Executive Orders (89 FR 5698). EO 13984, published three years ago in 2021, directs the Department of Commerce to propose regulations to require U.S. providers of IaaS products (IaaS Providers) to verify the identity of foreign customers and to expand BIS oversight authority to implement measures to defer malicious foreign cyber actors from the use of U.S. IaaS products. EO 14110, published more recently in 2023, directs the adoption of regulations requiring IaaS Providers to submit certain AI training reports to Commerce if there may be malicious cyber-enabled activity implications.

Acknowledging increased malicious cyber activities utilizing IaaS products, these Executive Orders and the proposed rulemaking are designed to address bad actors' leverage of new and evolving IaaS products to commit intellectual property and sensitive data theft, engage in covert espionage activities, and threaten national security by targeting U.S. critical infrastructure.

Specifically, the Notice first draws upon authority from EO 13984 (Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities) to require that IaaS Providers utilize a Know-Your-Customer (KYC) program or Customer Identification Program (CIP) for verification of users that sign up for, or maintain accounts that access or use, U.S. IaaS Providers' products or services. BIS will establish certain minimum standards for IaaS Providers to verify these identities and will also describe the documentation and procedures required to verify the identities of any foreign persons acting as lessee or sub-lessee of IaaS products or services. BIS will additionally outline the records that IaaS Providers must maintain and methods for limiting third-party access to the information collected.

Under EO 13984, BIS may also prohibit or impose conditions on a foreign person, or a person acting on behalf of a foreign person, from opening or maintaining certain IaaS accounts when the foreign person offers, engages in a pattern of offering, or is otherwise known to obtain U.S. IaaS products for a malicious cyber-enabled activity. BIS may do this if the foreign person is located in a foreign jurisdiction with a significant number of foreign persons offering U.S. IaaS products that are used for malicious cyber-enabled activities or if the account is on behalf of such a foreign person.

The Notice then draws upon authority from EO 14110 (Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence) to propose regulations for certain IaaS Providers to report when a foreign person contracts with that IaaS Provider or reseller to train a large AI model with malicious potential capability for malicious cyber-activity. The report must minimally include the identity of the foreign person involved and the existence of a training run that meets certain established criteria. BIS must also determine the set of technical conditions that a large AI model must possess in order to have the potential capabilities that could be used in malicious cyber-enabled activity, and to make updates as required.

Finally, under EO 14110, BIS requires that IaaS Providers prohibit any foreign reseller of U.S. IaaS products from providing those products unless the foreign reseller submits a report to the IaaS Provider, which the IaaS Provider must then provide to Commerce detailing each instance in which the foreign person transacts with foreign resellers to use the products to train a large AI model with potential capabilities that could be used in malicious cyber-enabled activity. The IaaS Provider must also ensure that foreign resellers verify the identity of any foreign person that obtains an IaaS account through their sales. BIS will establish minimum identity verification standards for IaaS Providers to require from foreign resellers.

These new rules proposed by BIS provide expansive compliance obligations on entities leveraging new technologies and certainly will impact business operations. Those interested in providing comments to BIS regarding these proposed new rules must do so by April 29, 2024.

Risk Assessments, Focused Compliance, and Operational Awareness Key

Our clients are facing a dynamic threat environment as geopolitics and emerging technologies collide. These technologies, particularly the potential for AI, make it increasingly critical for enterprises implementing new and evolving tools in everyday business operations to remain vigilant. These changes out of BIS are just one example of things to come. With new regulation comes new compliance burdens to protect essential connectivity, data, infrastructure, and even national security. Additional legislative, agency rulemaking, and enforcement actions are expected for 2024 and beyond as these tools continue to transform our workplaces.

A cross-functional team effort is required within and outside our clients. Benesch stands ready to assist with our resource set as your teams confront these risks and compliance obligations. Collaboration between our Intellectual Property,

continued on page 15

Transportation Brokering, Double Brokering, Co-Brokering, Interchange, and Interlining—Legal Rules in the Era of Fraud

Jonathan R. Todd

Double brokering has emerged as a hot topic in this era of supply chain fraud, hostage loads, and cargo theft. The term "double brokerage" is used sweepingly as a reference to a wide range of operational practices where the acting motor carrier is a different company than the party originally intended to haul. It is increasingly derided and often referred to as illegal. This article breaks down the true story of these practices when viewed from their legal foundations.

FALSE: MAP-21 Strictly Prohibited Double Brokering.

President Obama signed into law the Moving Ahead for Progress in the 21st Century Act (P.L. 112-141) on July 6, 2012. This legislation, referred to as MAP-21, is the statutory basis for today's industry concerns around double brokering—12 years down the road.

Two provisions found in MAP-21 are key. First, conducting regulated freight broker activities without a license was made clearly unlawful by 49 USC § 14916. The officers, directors, and principals of unlawful brokers can suffer personal liability to the United States and to aggrieved parties for harms due to violating this law. Second, every transportation agreement with shippers must "specify, in writing, the authority under which the person is providing such transportation or service." This law found at 49 USC § 13901 is intended to require clarity on whether the contracting provider is offering motor carriage, brokerage, or another regulated service, such as freight forward. Doing so eliminates the opportunity to falsely characterize a service.

Together these provisions require broker permits for regulated broker activity and prohibit misleading others in the flow of transportation about the actual service that will be performed. They are particularly helpful tools for both commercial users of transportation services and the industry. They do not, however, prohibit double brokering but rather unlawful brokering or fraudulently representing services.

TRUE: Regulated Brokerage Activities Require License.

It is clear that broker activities require an FMCSA broker permit. What exactly constitutes a regulated broker activity is often less clear to both the industry and to press. In practice the key to understanding regulated brokerage tends to be the broad "arrangement" term within the statutory definition at 49 USC § 13102. Classic broker activities involve the arrangement of motor carriage for compensation. In simple

terms, there is no regulated brokerage activity without arrangement, motor carrier services, and compensation.

All lawful brokers must register with the U.S. DOT's Federal Motor Carrier Safety Administration (FMCSA) and must also hold a $75,000 surety bond or trust fund, described as financial responsibility, to protect those with whom the broker deals from harms arising during its activities. [(49 USC § 14916).] A minority of states also regulate broker activities in intrastate commerce. These are relatively simple obligations, but they provide for DOT oversight, recourse in the event of bad behavior, and publicly verifiable records.

FALSE: Co-Brokering and Interchange Are Unlawful.

No part of MAP-21 prohibited co-brokering. In the industry, co-brokering is the practice of one lawful broker offering a load to another lawful broker who then arranges the motor carriage. In other words, Broker A holds the customer relationship and engages Broker B who holds the motor carrier relationship. Doing so is often conducted under a Co-Broker Agreement between Broker A and Broker B. This practice is not presently unlawful, although many Broker Shipper Agreements do contractually prohibit the activity.

Another lawful and often overlooked transportation operations activity is equipment interchange. Interchange occurs when a duly authorized motor carrier provides transportation as the originating carrier, physically transports the cargo at some point, retains liability for the cargo and pays other performing carriers, and interchanges equipment (the trailer) with another carrier. This practice is expressly permitted by 49 USC § 13902 without a broker permit. It is often conducted under an Interchange Agreement.

TRUE: Convenience Interlining Is Unlawful, but Interlining Is Not.

One of the other more common misconceptions is that MAP-21 prohibited all interlining. This is the practice of one motor carrier delivering service in part through the performance of another motor carrier. The *de facto* prohibition under MAP-21 is a restriction against "convenience interlining" where one carrier simply offers a load to another carrier, without holding a broker permit, and without performing any service. Convenience interlining is clearly unlawful, since it amounts to brokerage. However, the FMCSA has been clear in its guidance that traditional interlining where one originating motor carrier issues a bill of lading for the entire through movement and works with another motor carrier for a leg of that movement can do so without a broker permit. This often involves an interchange relationship, although that is not required. In some scenarios, implementing an Interline Agreement can also be appropriate to manage those lawful interline relationships.

Time for Clarity and Lawfulness

We can all agree that every unlawful actor and any disreputable behavior is a blight on law-abiding actors in the industry and the efficient workings of our domestic supply chain. Unlawful brokering must end. Fraud must end. Those who are harmed should exercise the best possible courses of action with practical maneuvers for recovering stolen or hostage loads and legal remedies for financial exposure, including, oftentimes, double payment to resolve the issue. Still, we will all benefit from awareness of precisely what are and are not prohibited transportation broker or carrier operations.

JONATHAN R. TODD is a partner and Vice Chair in Benesch's Transportation & Logistics Practice Group. He may be reached at (216) 363-4658 or jtodd@beneschlaw.com.

Export Controls Evolving for Infosec Threats to Cloud, SaaS, IaaS, AI Platforms

continued from page 13

Artificial Intelligence, and Transportation & Logistics teams provides that multidimensional clarity of vision. Our attorneys are experienced in developing sophisticated and business-friendly practices and procedures for all manner of safety and security threat or regulatory compliance.

JONATHAN R. TODD is a partner and Vice Chair in Benesch's Transportation & Logistics Practice Group who provides supply chain, export controls, economic sanctions, and import compliance counsel across a wide range of industries. You may reach him at (216) 363-4658 or jtodd@beneschlaw.com.

KRISTOPHER J. CHANDLER is an associate in the firm's Intellectual Property and Transportation & Logistics Practice Groups and is the leader of the Benesch AI Commission. He may be reached at (614) 620-2207 or kchandler@beneschlaw.com.

MEGAN K. MACCALLUM is an associate in the Transportation & Logistics Practice Group and may be reached at (216) 363-4185 and mmaccallum@beneschlaw.com.

Endnotes

[1] Software means: A collection of one or more "programs" or "microprograms" fixed in any tangible medium of express. 15 C.F.R. § 772.1.

[2] Technology means: Information necessary for the "development," "production," "use," operation, installation, maintenance, repair, overhaul, or refurbishing (or other terms specified in ECCNs on the CCL that control "technology") of an item. 15 C.F.R. § 772.1.

[3] Federal Register Vol. 88, No. 179, Export Administration Regulations (EAR): Transfer of Access Information and Release of Software (Source Code and Object Code, 09/18/2023.

[4] Access Information means: Information that allows access to encrypted technology or encrypted software in an unencrypted form. Examples include decryption keys, network access codes, and passwords. 15 C.F.R. § 772.1.

New Customs Regulations Effective for Low-Value Imports

Jonathan R. Todd

Robert Naumoff

Vanessa I. Gomez

Megan K. MacCallum

New changes went into effect on February 15, 2024, for imports of low-value items under a program that has gained great significance with the rise of cross-border e-commerce. U.S. Customs and Border Protection (CBP) published these changes in a Federal Register Notice (the Notice) dated January 16, 2024 [(89 FR 2630).] The popular Section 321 program that allows for imports of articles valued under US$800 for single importers without payment of duties was modified by this Notice. In short, CBP's test program for Entry Type 86 Shipments intended to increase use of Section 321 of the Tariff Act of 1930 (Entry Type 86 Shipments) has been updated to protect against abuse in the supply chain and to refine technical requirements for certain duty-free entries.

Background

CBP increased the de minimis value for duty-free imports under 19 USC 1321 (Section 321) to $800 in February 2016. This change was prompted by the global shift to e-commerce and allows for one person (i.e., importer of record), in any one day, to import goods valued at or below $800 without the obligation to pay duties or taxes. Unsurprisingly, this increase greatly expanded the number of imports qualifying for the benefits provided under Section 321 and also led to an increased effort by retailers and service providers to leverage Section 321.

The benefits of this change are clear in the world of e-commerce retail. However, Section 321 can prove difficult to implement as the "one person on one day" criteria requires that the goods are sold to an individual consumer serving as the importer of record in lieu of the importation of high-volume shipments on a corporate account prior to sale. In an effort to manage this restriction, many retailers and service providers are looking to update their supply chain to take advantage of Section 321 imports as best as possible. For example, we have advised clients on creative strategies for landing product prior to the parcel-by-parcel entry under this program, thereby preserving the lower cost to consumers.

Changes to the Entry Type 86 Program

CBP shares an interest in driving adoption of the Section 321 program, although abuse can understandably occur in addition to practical operational challenges. In response, CBP implemented the Entry Type 86 test program in September 2019. [(84 FR 40079).] Under the program, Entry Type 86 Shipments can be entered under expedited and informal procedures.

Effective February 15, 2024, CBP is updating the Entry Type 86 program as follows:

Entry Deadline Changes—CBP now requires that Entry Type 86 must be filed in advance of arrival of the cargo in port or upon arrival of the cargo in port. [(89 FR 2630).] Previously, Entry Type 86 could be filed "within 15 days" of the arrival of the cargo in port. [(89 FR 2630).] CBP states that the 15-day time frame was inconsistent with the expedited process it sought to implement for Entry Type 86 Shipments. [(89 FR 2630).]

Technical Requirements for Shipments—When filing an Entry Type 86, no bond and entry summary documentation is required. The importing party is also exempt from payment of the usual harbor maintenance tax and merchandise processing fee otherwise applicable to imports. [(Sect. Iv, 899 FR 2630).] The data elements required to be filed for Entry Type 86 Shipments are: (i) bill of lading or air waybill number; (ii) entry number; (iii) planned port of entry; (iv) shipper name, address, and country; (v) consignee name and address; (vi) country of origin; (vii) quantity; (viii) fair retail value in the country of shipment; (ix) 10-digit HTSUS number; and (x) the importer of record number, if the shipment is subject to PGA reporting requirements. [(Sect. IV, 89 FR 2630).] The following regulatory waivers apply to the extent that they are inconsistent with the requirements of the Notice [(Sect. V, 89 FR 2630).]:

- The duty-free and tax-free shipment requirements for imports of less than $800 for "release from manifest" are inconsistent with requirements in the Notice. [(19 CFR 10.151).]
- Certain additional information requirements in manifests are waived for Entry Type 86 Shipments. [(19 CFR 128.21(a)).]
- Other regulations for shipments valued at $800 or less, or which qualify for informal entry or for all cargo generally, that pertain to: such shipments in general; manifest segregation for shipments; and bill of lading and manifest information and additional information requirements. [(19 CFR 128.21(a), 128.24(e), 143.23(j-k), 143.26(b)).]

Additionally, the Notice clarifies that CBP may require that Entry Type 86 Shipments be entered formally, and, in such instances, no Entry Type 86 filing will be acceptable. [(Sect. V, 89 FR 2630).] No exemption from Partner Government Agency (PGA) regulations applies to Entry Type 86 Shipments. [(Sect. I, 84 FR 2630).]

Consequences of Misconduct—The Notice also clarifies that participants in the test program for Entry Type 86 Shipments may be subject to civil and criminal penalties, administrative sanctions, or liquidated damages as provided by law for the following actions: failure to follow the rules, requirements, terms, and conditions that pertain to Entry Type 86

Shipments; failure to exercise reasonable care in the execution of obligations under the program; and failure to abide by applicable laws and regulations that have not been waived. [(Sect. VIII, 89 FR 2630).]

JONATHAN R. TODD is a partner and Vice Chair in Benesch's Transportation & Logistics Practice Group and is a licensed U.S. Customs Broker in addition to practicing as a lawyer. Jonathan may be reached at (216) 363-4658 and jtodd@beneschlaw.com.

ROBERT NAUMOFF is Of Counsel with the Practice Group and was previously in-house counsel for two large transportation providers. Robert may be reached at (614) 223-9305 and rnaumoff@beneschlaw.com.

VANESSA I. GOMEZ is an associate and may be reached at (216) 363-4482 and vgomez@beneschlaw.com.

MEGAN K. MACCALLUM is an associate and may be reached at (216) 363-4185 and mmaccallum@beneschlaw.com.

FMCSR Waivers and Exemptions—Game Plan When You Can't Strictly Comply

Jonathan R. Todd

Thomas O'Donnell

Public safety on the roadways is the chief objective of the Federal Motor Carrier Safety Regulations (FMCSRs). Some safety and operations teams will from time to time encounter unique circumstances where strict compliance can be challenging or may in fact yield lower relative efficiency (and even safety) compared to other operational practices. The Federal Motor Carrier Safety Administration (FMCSA) contemplates this possibility. As a result, the agency maintains waiver and exemption options that can be sought to help industry accommodate those circumstances. This article provides a high-level summary of those options and how they work.

Waivers from FMCSR Compliance

The FMCSA will grant waivers as temporary relief from one or more of the FMCSRs. Waiver provides the person with relief from the precise regulation for up to three months. A waiver is intended for nonemergency and unique events where the regulated party cannot meet, subject to restrictions from the Administration, one or more of the requirements contained in the following Parts and Sections of Title 49:

- Part 380—Special Training Requirements
- Part 382—Controlled Substances and Alcohol Use and Testing
- Part 383—Commercial Driver's License Standards; Requirements and Penalties
- Part 384—State Compliance with Commercial Driver's License Program
- § 390.19 Motor Carrier Identification Report
- § 390.21 Marking of commercial motor vehicles
- Part 391—Qualifications of Drivers
- Part 392—Driving of Commercial Motor Vehicles
- Part 393—Parts and Accessories Necessary for Safe Operation
- Part 395—Hours of Service of Drivers
- Part 396—Inspection, Repair, and Maintenance (except § 396.25)
- Part 399—Step, Handhold, and Deck Requirements

A waiver may be requested if one or more of those FMCSRs would prevent the regulated party from using or operating Commercial Motor Vehicles (CMVs), or would make it unreasonably difficult to do so, in each case during a unique non-emergency event that will take no more than three months to complete. Practical alternatives must be considered in advance of filing a request for waiver, since, in many instances, waiver is not absolutely necessary from some or all of the impacted Parts and Sections.

Written requests for waiver are filed with the FMCSA Administration. The request must contain certain required elements, including, as appropriate, identifying the regulated party seeking waiver, that party's contact information, U.S. DOT No., the unique non-emergency circumstance, the precise regulations to be waived, the number of CMVs impacted, and how vehicle safety will be maintained despite the waiver. Waiver requests are typically resolved within 60 days, although it may take up to 120 days. Responses are delivered in writing to the regulated party seeking waiver.

Exemptions from FMCSR Compliance

The FMCSA will grant exemptions for relief from one or more of the FMCSRs. Exemptions are intended to be temporary, and carry a term, although terms may be renewed. Exemptions may only be granted from one or more of the requirements contained in the following parts and sections of the FMCSRs:

- Part 380—Special Training Requirements
- Part 382—Controlled Substances and Alcohol Use and Testing
- Part 383—Commercial Driver's License Standards; Requirements and Penalties
- Part 384—State Compliance with Commercial Driver's License Program
- Part 391—Qualifications of Drivers
- Part 392—Driving of Commercial Motor Vehicles
- Part 393—Parts and Accessories Necessary for Safe Operation

continued on page 20

Recent Events

Intermodal Association of North America's Intermodal EXPO
Marc S. Blubaugh attended.
September 10–13, 2023 | Long Beach, CA

Wisconsin Motor Carriers Association Annual Meeting
Brian Cullen attended.
September 18–19, 2023 | Green Bay, WI

Trucking Defense Advocates Council Annual Conference (TDAC)
Eric L. Zalud attended.
September 20–21, 2023 | Fayetteville, AR

Journal of Commerce: Inland Distribution Conference 2023
J. Philip Nester attended.
September 25–27, 2023 | Chicago, IL

Transportation Intermediaries Association (TIA) 2023 3PL Policy Forum
Marc S. Blubaugh attended.
September 25–27, 2023 | Washington, D.C.

Transportation Lawyers Association (TLA) Webinar
Eric L. Zalud presented *Reprise: The Sun Never Sets on Broker Liability (Unfortunately): Surveying the Panorama of Broker Liability Issues (Cargo and Casualty) and the State of the Law in 2023—and What To Do About It!*
October 10, 2023 | Virtual

Ohio Trucking Association (OTA) Safety Director Bootcamp
Vincent J. Michalec and **Kelly E. Mulrane** presented.
October 11, 2023 | Westerville, OH

Trucking Industry Defense Association (TIDA)
Eric L. Zalud attended.
October 11–13, 2023 | Las Vegas, NV

TerraLex Annual Global Conference
Eric L. Zalud attended.
October 16–19, 2023 | Melbourne, Australia

3PL Valuation Creation Summit 2023
Marc S. Blubaugh presented on *Mitigating Risks: Transportation and Logistics Law in 2023.*
October 18–19, 2023 | Chicago, IL

Transportation Intermediaries Association (TIA) Technovations Conference
Eric L. Zalud attended.
October 18–20, 2023 | San Diego, CA

Canadian Transport Lawyers Association (CTLA) 2023 Annual General Meeting and Educational Conference
Martha J. Payne attended.
October 19–21, 2023 | Montreal, Canada

2023 Transportation Law Institute
John C. Gentile presented *When Beset by Fraudsters, Will the Supply Chain be Unbroken.*
Marc S. Blubaugh, Martha J. Payne, and **Eric L. Zalud** attended.
October 27, 2023 | Salt Lake City, UT

NDTA-USTRANSCOM Fall Meeting
Christopher C. Razek and **Robert Pleines, Jr.** attended.
October 31–November 3, 2023 | Orlando, FL

Women in Trucking – Accelerate! Conference & Expo
Martha J. Payne, Vanessa Gomez, and **Megan MacCallum** attended. **Megan MacCallum** presented *Getting Things Done: The Art of Stress-Free Productivity.*
November 4–8, 2023 | Dallas, TX

The Traffic Club of Chicago Transportation & Logistics Customer Forum
Brian Cullen attended.
November 9, 2023 | Chicago, IL

Third Annual Benesch Investing in the Transportation & Logistics Industry Conference
Marc S. Blubaugh moderated the "Innovative Technology Disrupting the World of Transportation & Logistics" panel. **Christopher D. Hopkins** moderated the "M&A Outlook 2024" panel. **Jonathan R. Todd** moderated the "North America Opportunities and Challenges" panel. **Eric L. Zalud** moderated the "So Happy Together! Post-Deal Closing: Moving Forward with Integration and Unification" panel.
December 7, 2023 | New York City, NY

Conference of Freight Counsel
Martha J. Payne, Lauryn T. Robinson, and **Eric L. Zalud** attended.
January 6–8, 2024 | Sedona, AZ

ASCM Brandywine Valley Chapter – Chapter Meetings or Events
Jonathan R. Todd and **Robert Pleines, Jr.** presented *Global Transportation & Logistics Contracting and Risk Management.*
January 9, 2024 | Virtual

Columbus Roundtable of the Council of Supply Chain Management Professionals
Marc S. Blubaugh moderated "The Annual Transportation Panel."
January 12, 2024 | Columbus, OH

Transportation Lawyers Association (TLA) Chicago Regional Seminar and Bootcamp
Marc S. Blubaugh, Vanessa I. Gomez, Megan K. MacCallum, J. Phillip Nester, Christopher C. Razek, Robert Pleines, Jr., Eric L. Zalud, Brian Cullen, Robert Naumoff, Jonathan R. Todd, and **Caroline Hamilton** attended.
January 18–19, 2024 | Chicago, IL

BG Strategic Advisors Supply Chain Conference
Marc S. Blubaugh, Peter K. Shelton, and **Eric L. Zalud** attended.
January 24–26, 2024 | Palm Beach, FL

IWLA Essentials of Warehousing Course
Marc S. Blubaugh presented *Fundamentals of Transportation Law: What Those New to Warehousing Need to Know About Transportation.*
January 30–February 2, 2024 | Chicago, IL

Stifel Transportation Conference
Marc S. Blubaugh, Peter K. Shelton, and **Eric L. Zalud** attended.
February 12–14, 2024 | Miami, FL

International Association of Defense Counsel (IADC) Mid-Year Meeting
Martha J. Payne attended.
February 18–23, 2024 | Miami, FL

Council of Supply Chain Management Professionals (CSCMP) and Benesch Event
Jonathan R. Todd and **Christopher C. Razek** presented Understanding the Risks in Warehouse Contracting.
March 14, 2024 | Virtual

On the Horizon

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

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

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

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

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

ATA's 2024 Safety, Security & Human Resources National Conference & Exhibition (SSHR)
Eric L. Zalud and **Lauryn T. Robinson** are presenting *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** are attending.
April 30–May 1, 2024 | Coral Gables, FL

Transportation Lawyers Association (TLA) 2024 Annual Conference
Eric L. Zalud is presenting *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** is presenting *Multi-Modal Update.* **Martha J. Payne** and **Deana Stein** are attending.
May 1–4, 2024 | Rio Grande, Puerto Rico

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

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

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

Conference of Freight Counsel
Martha J. Payne and **Eric L. Zalud** are attending.
June 9–12, 2024 | Québec, Canada

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

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

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

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

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.

The content of the Benesch, Friedlander, Coplan & Aronoff LLP *InterConnect* Newsletter is for general information purposes only. It does not constitute legal advice or create an attorney-client relationship. Any use of this newsletter is for personal use only. All other uses are prohibited. ©2024 Benesch, Friedlander, Coplan & Aronoff LLP. All rights reserved. To obtain permission to reprint articles contained within this newsletter, contact Megan Thomas at (216) 363-4639.

What's Trending

Friend us on Facebook:
www.facebook.com/Benesch.Law

Follow us on X (formerly Twitter):
www.twitter.com/BeneschLaw

Subscribe to our YouTube Channel:
www.youtube.com/user/BeneschVideos

Follow us on LinkedIn:
http://www.linkedin.com/company/benesch-friedlander-coplan-&-aronoff/

FMCSR Waivers and Exemptions—Game Plan When You Can't Strictly Comply

continued from page 17

- Part 395—Hours of Service of Drivers
- Part 396—Inspection, Repair, and Maintenance (except for § 396.25)
- Part 399—Step, Handhold, and Deck Requirements

An exemption may be requested if one or more of the FMCSRs prevent a regulated party from implementing more efficient or effective operations. The level of safety achieved by those operations must remain equal to or greater than the safety effect that would result from the respective regulation as applied. As with waivers, practical alternatives should be considered in advance of seeking an exemption as well as clarity around precisely which Parts or Sections require exemption.

Written requests for exemption must be filed with the FMCSA Administrator. The required elements of an exemption request are similar to those for a waiver, although the rationale behind the two programs triggers additional requirements: justification for the exemption, including quantifiable impacts if the exemption is not granted, as well as any written analysis or papers supporting the safety result from the proposed operation and exemption. Upon filing, the FMCSA will issue a Federal Register notice to publicize the request and to allow the opportunity for public comment. The FMSCA decision will also be published in the Federal Register. Resubmission is available in the event of denial. Most FCMSA decisions are rendered within 180 days of filing.

JONATHAN R. TODD is a partner and Vice Chair in Benesch's Transportation & Logistics Practice Group. He may be reached at (216) 363-4658 or jtodd@beneschlaw.com.

THOMAS O'DONNELL is Of Counsel with the Transportation & Logistics Practice Group. Tom is former General Counsel and Safety Director of two motor carriers. He may be reached at (302) 442-7007 and todonnell@beneschlaw.com.

For more information about the Transportation & Logistics Group, please contact any of the following:

ERIC L. ZALUD, Co-Chair | (216) 363-4178
ezalud@beneschlaw.com

MARC S. BLUBAUGH, Co-Chair | (614) 223-9382
mblubaugh@beneschlaw.com

JONATHAN R. TODD, Vice Chair | (216) 363-4658
jtodd@beneschlaw.com

MICHAEL J. BARRIE | (302) 442-7068
mbarrie@beneschlaw.com

ALLYSON CADY | (216) 363-6214
acady@beneschlaw.com

KEVIN M. CAPUZZI | (302) 442-7063
kcapuzzi@beneschlaw.com

KRISTOPHER J. CHANDLER | (614) 223-9377
kchandler@beneschlaw.com

NORA COOK | (216) 363-4418
ncook@beneschlaw.com

BRIAN CULLEN | (312) 488-3297
bcullen@beneschlaw.com

JOHN N. DAGON | (216) 363-6124
jdagon@beneschlaw.com

WILLIAM E. DORAN | (312) 212-4970
wdoran@beneschlaw.com

JOHN C. GENTILE | (302) 442-7071
jgentile@beneschlaw.com

VANESSA I. GOMEZ | (216) 363-4482
vgomez@beneschlaw.com

JOSEPH N. GROSS | (216) 363-4163
jgross@beneschlaw.com

JENNIFER R. HOOVER | (302) 442-7006
jhoover@beneschlaw.com

CHRISTOPHER D. HOPKINS | (614) 223-9365
chopkins@beneschlaw.com

TREVOR J. ILLES | (312) 212-4945
tilles@beneschlaw.com

PETER N. KIRSANOW | (216) 363-4481
pkirsanow@beneschlaw.com

DAVID M. KRUEGER | (216) 363-4683
dkrueger@beneschlaw.com

NICOLAS P. LACEY | (614) 223-9384
nlacey@beneschlaw.com

STEVEN D. LESSER | (614) 223-9368
slesser@beneschlaw.com

CHARLES B. LEUIN | (312) 624-6344
cleuin@beneschlaw.com

MEGAN K. MACCALLUM | (216) 363-4185
mmaccallum@beneschlaw.com

MICHAEL J. MOZES | (614) 223-9376
mmozes@beneschlaw.com

KELLY E. MULRANE | (614) 223-9318
kmulrane@beneschlaw.com

ROBERT NAUMOFF | (614) 223-9305
rnaumoff@beneschlaw.com

J. PHILIP NESTER | (216) 363-6240
jpnester@benecshlaw.com

MARGO WOLF O'DONNELL | (312) 212-4982
modonnell@beneschlaw.com

THOMAS O'DONNELL | (302) 442-7007
todonnell@beneschlaw.com

LIANZHONG PAN | (011-8621) 3222-0388
lpan@beneschlaw.com

MARTHA J. PAYNE | (541) 764-2859
mpayne@beneschlaw.com

JOEL R. PENTZ | (216) 363-4618
jpentz@beneschlaw.com

ROBERT PLEINES, JR. | (216) 363-4491
rpleines@beneschlaw.com

RICHARD A. PLEWACKI | (216) 363-4159
rplewacki@beneschlaw.com

JULIE M. PRICE | (216) 363-4689
jprice@beneschlaw.com

DAVID A. RAMMELT | (312) 212-4958
drammelt@beneschlaw.com

CHRISTOPHER C. RAZEK | (216) 363-4413
crazek@beneschlaw.com

ABBY RIFFEE | (614) 223-9387
ariffee@beneschlaw.com

HELEN M. SCHWEITZ | (312) 624-6395
hschweitz@beneschlaw.com

PETER K. SHELTON | (216) 363-4169
pshelton@beneschlaw.com

REED W. SIRAK | (216) 363-6256
rsirak@beneschlaw.com

DEANA S. STEIN | (216) 363-6170
dstein@beneschlaw.com

CLARE TAFT | (216) 363-4435
ctaft@beneschlaw.com