



November 2015

# SETTING THE TABLE

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

## Will the FDA's Proposed Rule on the Sanitary Transportation of Food Apply to International Shipments?



Stephanie S. Penninger



Brittany L. Shaw

Yes, the FDA's Proposed Rule, required to be published by March 31, 2016, will apply to food shipments being transported into the U.S., directly, by motor or rail vehicle, or transferred onto a motor or rail vehicle for transportation in U.S. commerce, if the food will be consumed or distributed within the U.S.

### **What are the steps for determining whether the Proposed Rule applies to an international shipment?**

First, it is important to determine what modes of transportation will be used to transport the food shipment. The Proposed Rule's requirements will only apply to food transported within the U.S. by motor or rail vehicle. For instance, if a shipper engages a motor or rail carrier, to transport an international food shipment, through a broker, or otherwise, directly into the U.S., *e.g.* from Mexico to the U.S., by truck, and then transported further within the U.S., by truck or rail, the new regulations would apply. Further, an entity outside of the U.S., exporting an

international food shipment, by container ship or via an air carrier, would have to comply with the Proposed Rule, as a shipper, if that exporter were to arrange for the intact container's transloading onto a motor or rail carrier for transportation within the U.S. This is because the exporter would be initiating a shipment of food, by motor or rail carrier, to enter U.S. commerce, notwithstanding having done so from abroad.

However, if the shipper or broker and carrier conduct the international transportation operation by a direct shipment to the U.S., by way of another mode, besides motor or rail carrier, such as food shipped from China, by ocean vessel, and then, subsequently, transported within the U.S. by air carriage, the Proposed Rule would not apply.

Second, shippers and brokers should determine the purpose and final destination of the food shipment because, under one exception, food shipments entering into and being transported within the U.S. that will not be consumed or distributed into the U.S. market will be excepted from coverage under the Proposed Rule. For instance, food transhipped from a foreign country, *e.g.*, Mexico, through the U.S., and into another foreign country, *e.g.*, Canada, would not be governed by the Proposed Rule. Similarly, food shipments that are transported from abroad

to a facility within the U.S. for processing, and, subsequently, exported to another foreign country, without being consumed or distributed within the U.S., would also be free from coverage by the Proposed Rule.

### **What are the consequences for non-compliance with international food shipments?**

As with any shipper, should the importer or exporter fail to comply with the Proposed Rule's requirements, and the FDA determine that the food shipped to the U.S. was, consequently, adulterated, then the food shipment could be rejected, and refused admission, upon being offered for entry, into the U.S.

### **What is the takeaway for brokers?**

Brokers should keep in mind, when arranging the transportation of international food shipments, to be consumed or distributed within the U.S., that, as the initiator of a shipment, or as required by the shipper, they will likely have to comply with the Proposed Rule where the move includes inland transportation, within the U.S., by motor or rail carrier. Following the aforementioned two-step approach should streamline the process of determining whether the new FDA's regulations would govern a particular international food shipment.

*(continued)*

**For more information**

Contact **STEPHANIE S. PENNINGER** at [spenninger@beneschlaw.com](mailto:spenninger@beneschlaw.com) or (317) 685-6188 or **BRITTANY L. SHAW** at [bshaw@beneschlaw.com](mailto:bshaw@beneschlaw.com) or (317) 685-6118.

**STEPHANIE S. PENNINGER** is Chair of Benesch's Maritime Transportation focus area. Her experience includes representing motor carriers, third party logistics providers, ocean transportation intermediaries, national shippers, large private fleets and water carriers in the domestic, non-contiguous trade lanes concerning transportation and logistics matters, including: providing counseling concerning maritime and admiralty law issues and regulatory compliance, handling maritime casualty matters, drafting ocean transportation service agreements and prosecuting and defending freight charge disputes and cargo claims for loss, damage or delay.

Ms. Penninger works out of the firm's Indianapolis office, and is an active member in numerous transportation and logistics industry groups and organizations.

**BRITTANY L. SHAW** is an associate in the firm's General Practice Group. Her practice focuses on working with clients in the Transportation & Logistics field as well as dealing with matters involving Real Estate.

Ms. Shaw works out of the firm's Indianapolis office, and is also certified in civil mediation.

**Additional Information**

For additional information, please contact:

**Transportation & Logistics Practice Group**

**Michael J. Barrie** at (302) 442-7068 or [mbarrie@beneschlaw.com](mailto:mbarrie@beneschlaw.com)  
**Marc S. Blubaugh** at (614) 223-9382 or [mblubaugh@beneschlaw.com](mailto:mblubaugh@beneschlaw.com)  
**Tamar Gontovnik** at (216) 363-4658 or [tgontovnik@beneschlaw.com](mailto:tgontovnik@beneschlaw.com)  
**Matthew D. Gurbach** at (216) 363-4413 or [mgurbach@beneschlaw.com](mailto:mgurbach@beneschlaw.com)  
**James M. Hill** at (216) 363-4444 or [jhill@beneschlaw.com](mailto:jhill@beneschlaw.com)  
**Jennifer R. Hoover** at (302) 442-7006 or [jhoover@beneschlaw.com](mailto:jhoover@beneschlaw.com)  
**J. Allen Jones III** at (614) 223-9323 or [ajones@beneschlaw.com](mailto:ajones@beneschlaw.com)  
**Thomas B. Kern** at (614) 223-9369 or [tkern@beneschlaw.com](mailto:tkern@beneschlaw.com)  
**Peter N. Kirsanow** at (216) 363-4481 or [pkirsanow@beneschlaw.com](mailto:pkirsanow@beneschlaw.com)  
**David M. Krueger** at (216) 363-4683 or [dkrueger@beneschlaw.com](mailto:dkrueger@beneschlaw.com)  
**Christopher J. Lalak** at (216) 363-4557 or [clalak@beneschlaw.com](mailto:clalak@beneschlaw.com)  
**Andi M. Metzel** at (317) 685-6159 or [ametzel@beneschlaw.com](mailto:ametzel@beneschlaw.com)  
**Kelly E. Mulrane** at (614) 223-9318 or [kmulrane@beneschlaw.com](mailto:kmulrane@beneschlaw.com)  
**Steven A. Oldham** at (614) 223-9374 or [soldham@beneschlaw.com](mailto:soldham@beneschlaw.com)  
**Lianzhong Pan** at (86 21) 3222-0388 or [lpn@beneschlaw.com](mailto:lpn@beneschlaw.com)  
**Martha J. Payne** at (541) 764-2859 or [mpayne@beneschlaw.com](mailto:mpayne@beneschlaw.com)  
**Stephanie S. Penninger** at (317) 685-6188 or [spenninger@beneschlaw.com](mailto:spenninger@beneschlaw.com)  
**Richard A. Plewacki** at (216) 363-4159 or [rplewacki@beneschlaw.com](mailto:rplewacki@beneschlaw.com)  
**Peter K. Shelton** at (216) 363-4169 or [pshelton@beneschlaw.com](mailto:pshelton@beneschlaw.com)  
**Clare R. Taft** at (216) 363-4435 or [ctaft@beneschlaw.com](mailto:ctaft@beneschlaw.com)  
**Katie Tesner** at (614) 223-9359 or [ktesner@beneschlaw.com](mailto:ktesner@beneschlaw.com)  
**Eric L. Zalud** at (216) 363-4178 or [ezalud@beneschlaw.com](mailto:ezalud@beneschlaw.com)

**[www.beneschlaw.com](http://www.beneschlaw.com)**

*As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.*

UNITED STATES TREASURY DEPARTMENT CIRCULAR 230 DISCLOSURE: TO ENSURE COMPLIANCE WITH REQUIREMENTS IMPOSED BY THE IRS, WE INFORM YOU THAT, UNLESS EXPRESSLY STATED OTHERWISE, ANY U.S. FEDERAL TAX ADVICE CONTAINED IN THIS COMMUNICATION (INCLUDING ANY ATTACHMENTS) IS NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (i) AVOIDING PENALTIES UNDER THE INTERNAL REVENUE CODE, OR (ii) PROMOTING, MARKETING OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION OR MATTER ADDRESSED HEREIN.