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The Transportation Brief®

Global Expansion of Bribery Law Enforcement Tests Transportation and Logistics Links in the Supply Chain

For years, U.S. companies handling international transactions faced the challenging and often solitary task of saying "no" to corrupt practices in foreign business. They often found it necessary to explain why a unique U.S. law, the Foreign Corrupt Practices Act (FCPA), meant that they could not approve, be part of or even ignore payments to foreign government officials in order to obtain, retain or expedite business — even in places where such practices were considered normal. Other countries with laws that technically prohibited bribery seldom enforced those rules. Competitors frequently ridiculed U.S. naiveté and sought to take advantage of the situation in order to win business.

The world has changed. More and more countries, including the UK, Brazil, Russia, India, China, Mexico and many others have enacted and begun enforcement of new, tough anti-corruption laws, often more strict than the FCPA. Headlines around the world now report almost daily the prosecution of government officials who have received bribes and those who paid them. Although the international business playing field has begun to level, the risk of running afoul of the FCPA has never been greater for U.S. companies and their intermediaries — in part because of information received by U.S. authorities from foreign investigations.

The U.S. Department of Justice (DOJ) has made a series of recent announcements indicating that FCPA enforcement efforts are moving into a new era. The DOJ has added 10 new staff members to its FCPA unit, hired a compliance expert and tripled the number of FBI agents dedicated to investigating foreign corruption. The intention to prosecute more high-level individuals and to deny sentencing credit to companies that do not self-report or do not make available full information about executive inattention to or involvement with bribery are stated DOJ policies. These policies and an increase in whistleblower reporting will make internal investigations more complex and more important.

As FCPA and foreign anti-corruption enforcement gains greater attention and momentum, shippers of all types are passing anti-corruption compliance contractual requirements down the supply chain to transportation and logistics providers. The development and implementation of comprehensive, global anti-corruption compliance programs is of paramount importance to transportation and logistics providers, from both competitive and risk-management perspectives.

John Hove, Dallas/Ft. Worth
Jake Fisher, Philadelphia

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Briefly...

Sanitary Food Transportation Rules — Do Your Contracts Protect Your Company's Interests?

The FDA's long-awaited final rule regarding Sanitary Food Transportation was published on April 6th. Compliance is required by April 6, 2017, except for small businesses (as defined in the rule), which must comply by April 6, 2018. The rule regulates carriers, receivers, shippers and loaders, and includes property brokers in the definition of shippers. While the final rule is less onerous than the original proposal (for instance, it allows the shipper and carrier to determine the appropriate means of measuring and recording temperature of food in transit), it also assumes that shippers and carriers will enter into contractual arrangements that assign responsibility for various food safety related obligations. As such, companies subject to the rule should consider the following: (1) adopt terms and conditions that govern in the absence of such contractual arrangements; (2) review all transportation contracts and documents related to food transport with the new rule in mind; and (3) anticipate shipper-imposed contractual obligations in the months leading up to the compliance dates.

Nathaniel Saylor
Craig Helmreich,
Indianapolis

SOLAS

After months of uncertainty about what effects the SOLAS amendments will have when they go into effect on July 1, 2016, the U.S. Coast Guard has declared that existing U.S. laws and regulations addressing verified container weights are sufficient to meet the requirements in SOLAS Regulation VI/2 for providing the verified gross mass (VGM) of the container. How this declaration translates into practice has yet to be seen, but the U.S. Coast Guard has provided two examples of acceptable methods for determining the VGM. First, the terminal operator may weight the container at the port and verify the weigh on behalf of the shipper. Second, the shipper and carrier can agree that the shipper will verify the weight of the cargo, dunnage, and other securing material, and the carrier will add the container's tare weight to obtain the VGM.

John Dimitry,
Dallas/Ft. Worth

FMCSA Proposes Sweeping Changes to Carrier Safety Ratings

Earlier this year, the FMCSA published a proposed rule establishing new methods for determining interstate motor carriers' fitness to operate. The rule would eliminate the existing three-tier safety rating system (i.e., Satisfactory, Conditional, Unsatisfactory) in favor of a single determination of Unfit.

Unlike current safety ratings that require an on-site FMCSA investigation, the proposed ratings would be based on roadside inspection data, on- or off-site FMCSA investigations, or a combination of the two. The agency would assess carriers on a monthly basis using fixed failure metrics for each of the seven Behavior Analysis and Safety Improvement Categories (BASICs) in the agency's CSA program. Carriers that "fail" two or more of the BASICs in a given month would receive a proposed Unfit rating, subject to administrative review.

The rule has already proven contentious, particularly because it comes on the heels of the U.S. Congress's FAST Act legislation, which removed carriers' CSA percentile scores from public view and directed the agency to commission a study concerning the effectiveness of its CSA program.

Timothy Wiseman
Brandon Wiseman,
Indianapolis

Congress Moves Forward with For-Hire Delivery by Drone in FAA Reauthorization Legislation

Congress is establishing a framework to make delivery by drone a reality. In February, the House Transportation and Infrastructure Committee adopted an amendment to its FAA reauthorization bill that would allow small unmanned aircraft systems (sUAS) to carry property on a for-hire basis. The full Senate passed its version in April with a similar provision. Both bills require the FAA to issue a final rule authorizing sUAS to carry property for-hire pursuant to a newly created sUAS air carrier certificate — a process less burdensome than traditional air carrier certification. The current House version sets a one-year deadline for issuing the final rule, whereas the Senate allows two years. The full House needs to consider the legislation and then the differences need to be resolved before a final bill can be sent to the President.

Prasad Sharma,
Washington, D.C.
John Thomas Young,
Indianapolis

Mileposts

3PL and 4PL Services

While the transportation of freight certainly gives rise to an array of legal challenges, the supply chain management attendant to moving that freight from Point A to Point B suffers no shortage of its own unique legal concerns. This is particularly true as traditional logistics services and functions are more frequently outsourced to third- and fourth-party logistics providers.

Scopelitis attorneys deal with issues that arise in third-party and fourth-party logistics operations on a daily basis, regularly counseling clients on matters ranging from corporate transactions to litigation. The Firm's Logistics practice area is led by Indianapolis partners, Andy Light and Nathaniel Saylor. They and other Scopelitis attorneys draft and review logistics contracts; advise logistics clients about potential risks, including overall risk assessments, coverage analysis, and carrier-selection protocols; assist with obtaining appropriate federal and/or state authorities; and defend clients in suits premised on theories of negligent hiring/selection.

The Firm counts some of the nation's largest and most respected logistics companies as clients, and also serves as outside counsel for well-established logistics associations. Its attorneys participate and present at national logistics conferences and regularly publish articles dealing with logistics issues in national journals.

For the Record

Congratulations to Chicago partner, Jerry Cooper for being sworn in as a Fellow of the National College of Workers' Compensation.

Congratulations to Adam J. Eakman, Nicholas E. Lenard and Lucas C. Robinson, who began their law practices this spring as associates in the Indianapolis office.

We are pleased to announce that Allyson E. Feary and Alaina C. Hawley, associates in the Indianapolis office, recently added Indiana and California, respectively, to the states in which they are licensed to practice law.

Kevin Phillips received the Pinnacle Award from the International Warehouse and Logistics Association in appreciation for his work with the association and the warehousing industry.

On the Road

Mike Tauscher will present an update on freight claim and freight charge cases at the Conference of Freight Counsel's, June 2016 Seminar, June 4-6, in **Toronto, Canada**. Kathleen Jeffries and Fritz Damm will also attend.

Greg Feary will present "IC Operating Model in Trucking" at the American Home Furnishings Alliance's Specialized Furniture Carriers' Annual Meeting, June 7, in **Greensboro, North Carolina**.

Jake Fisher will speak on a panel addressing freight forwarders and e-commerce at the Air Cargo Conference, June 8-10, in **Phoenix**.

Craig Helmreich will present "Lesson Learned: Transportation Claims" at the Global Cold Chain Expo, June 20-22, in **Chicago**.

Fritz Damm will participate as a member of the DRI Trucking Law Conference Steering Committee's Summer Meeting, June 28-29, in **Chicago**.

Greg Feary, Shannon Cohen, Chris Eckhart and Prasad Sharma will present an "Update on IC Status" at the American Trucking Associations' Forum for Motor Carrier General Counsel, July 17-20, in Belleview, Washington. Allison Smith and Fritz Damm will also attend.

Kathleen Jeffries, Fritz Damm and Mike Tauscher will attend the Transportation Lawyers Association 2016 Executive Committee Summer Retreat, July 16-17, in Chicago.

Greg Feary will present "Millennials Favoring Labor Unions" at the North Carolina Trucking Association's Annual Conference, July 24-26, in **Hilton Head, South Carolina**.

Tim Wiseman will speak at the Machinery Haulers Association meeting, July 28, in **Lake Geneva, Wisconsin**.

Greg Feary will present "The Changing Landscape of Independent Contractors in Home Delivery" at the National Home Delivery Association's Annual Forum, August 16, in **Chicago.**

Mike Langford will attend and is the Seminar Co-Chair for the American College of Transportation Attorneys' Annual Conference, August 17-18, in **Atlanta**.

Mike Tauscher will attend the Michigan Trucking Association 2016 Annual Meeting, August 25-27, in **Mackinac Island, Michigan**.

Jim Hanson will speak on Class Action issues at NATERA's Annual Conference, August 28-30, in **New Orleans**. Don Vogel will also attend.

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U.S. Department of Labor Misclassification Initiatives Inspire State Unemployment Tax Audits

The Firm is seeing an uptick in the number of motor carriers audited for state unemployment tax (UET) compliance as a result of the U.S. Department of Labor's (DOL) recent employee misclassification initiatives. Compliance initiatives like this one are not always expressly stated; however one Iowa auditor and another in New Mexico recently revealed that the DOL investigation was part of a broader national effort to combat misclassification, and specifically named the trucking industry as Iowa's "primary focus."

Beginning in 2014, the DOL plainly expressed its intent to "crack down" on the misclassification of employees as independent contractors. It did so in its Administrator's Interpretation No. 2015-1, via its agreement to share information and resources with at least 29 state departments of labor. The DOL then issued roughly $60 million in a series of grants to state UET departments to improve worker misclassification detection and encourage active policing of independent contractor misclassification. Importantly, some of the earliest grants issued by the DOL and accepted by state UET agencies in 2014 are scheduled to sunset on September 30, 2016. Those 19 states must exhaust the DOL grants for their intended purpose or repay the funds. This will likely prompt a further increase in UET audit activity in these states this year, followed by increased activity in states that received 2015 grants before they sunset in 2017.

With these storm clouds on the horizon, it is important for non-asset based motor carriers to be prepared for a potential visit from state UET auditors. A review of independent contractor operations, documents and practices in conjunction with each state's UET classification laws is vital. The Firm offers a specific independent contractor audit program geared toward UET. If you would like to learn more about the program, please contact Steve Pletcher or Becky Trenner.

Steven A. Pletcher
Rebecca S. Trenner,
Indianapolis

Dispatches

According to Andy Light, the Federal Motor Carrier Safety Administration will require all new and existing FMCSA regulated entities to establish FMCSA portal accounts through which the entities obtain a user name and password. The requirement becomes effective October 1, 2016. Thereafter, all new filings and updates must be made electronically through the URS System using the portal account user name and password. USDOT Carrier and FMCSA Docket PINs will continue to be used for existing entities through September 30, 2016.

Jeff Jackson reports that the Firm is seeing a marked increase in the number of clients with California-based operations being audited by workers' compensation insurers. The insurers often take the unilateral action of assessing back premium for independent contractor owner-operators. The Firm recommends pushing back on these assessments and asserting the drivers' independent contractor status.

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