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Logistics on the Offensive: Using Contractual and Common Law Rights as a Sword

Eric L. Zalud

We are now in the era of freedom of contract in the logistics arena. While contracts provide many *protections* to contracting parties, they can also be used *offensively*, to *affirmatively* protect legal rights. There are many common law and contractual causes of action available to transportation contracting parties (shippers, brokers, and carriers), including breach of contract, breach of covenant of good faith, and misappropriation of trade secrets. Also, in many instances, *the attorneys' fees spent to prosecute the claim in litigation may be recoverable*. The potential wrongs for which there may be recourse include: double brokering (huge casualty/cargo exposure); back solicitation (your hard-earned customers!); confidentiality clauses (knowledge is an asset); trade secrets/noncompetition/customer lists (most important asset).

The Critical Clauses

Clauses that should be considered in virtually every transportation contract include:

Exclusivity Clauses: These are the gold standard and are worth enforcing. They keep those big customers locked in for a time-certain duration. They are also valuable for capacity and financial forecasting, and are particularly valuable in times of economic (or epidemiological) uncertainty.

Noncompetition Clauses: These clauses are typically contained in contracts with employees (and sometimes, independent contractors). Although, the FTC has attempted to ban them, that ban has been, essentially, judicially stayed, so they remain viable. These clauses protect the entity's customer lists and other technological/proprietary information, which often are the most important assets in a logistics enterprise. Common law rights are very narrow here, so it is imperative to infuse these protections into an actual, enforceable contract. Non-solicitation clauses may be the most important here, and those will probably remain viable, regardless of the FTC outcome.

"No Double Brokering" Clauses: Logistics contracts (of shippers and brokers) should include provisions prohibiting double brokering, a scourge of a practice that can result in huge casualty/

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Logistics on the Offensive: Using Contractual and Common Law Rights as a Sword

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cargo exposure. Double brokering also often spawns freight charge issues, involving factorers and collection agencies. It may also have MAP 21 implications, which can subject individual officers and owners to liability.

"No Back Solicitation" Clauses: Logistics contracts of brokers should include provisions prohibiting back solicitation. These provisions help logistic companies protect their hard-earned customers and preserve the shipper/broker/carrier model. They are also potent weapons in contract litigation.

How to Make a Successful Claim - The Liability Prong

Various theories of liability in these actions include straightforward breach of contract actions (the strongest), or ancillary breach of covenant of good faith and fair dealing causes of action. There may also be tortious interference with existing or prospective business relationship claims, and misappropriation of trade secrets claims (although difficult without an actual contract). These actions apply particularly in noncompetition agreements. (It is imperative that a noncompetition clause have a reasonable duration and geographic scope, and restriction on dissemination of confidential information).

The Liability Prong/Damages

If there *is* liability, there also has to be damages. One challenge in these cases can be actually proving damages. That is because proving up damages involves discovery from potential or prior customers, which is often problematic from a business standpoint. Also, it is possible that the plaintiff did a very good job of *keeping* its customer's business, even *in spite of* the violative conduct, and thus has little out-of-pocket damage. So, in light of the frequent difficulty in proving up ascertainable damages, some of these contracts have a liquidated damages provision. However, those too must bear some reasonable relationship to the actual damages anticipated to be incurred. Importantly, many of these contracts also provide for attorney's fees to the prevailing party. The notion of who "prevails" can also be litigation point. One measure of damages, which has been approved by several courts, is extrapolating prior revenue/earnings from the relationship, to the remaining years on the contract, after the breach occurred.

In cases of back solicitation, one critical fact is whether the defendant, either a competing broker or motor carrier, had previously conducted business with the shipper, prior to the initiation of the contract that contained the back solicitation clause. Pre-existing relationships *can* take the teeth out of these claims for back solicitation and exclusivity.

The Caselaw Supports Successful Contractual Lawsuits by Logistics Entities. For instance, in *All-Ways Logistics, Inc. v. USA Truck, Inc.*, 2007 U.S. Dist. LEXIS 48034 (E.D. Ark. Jul. 2, 2007), the Plaintiff/Broker/Agent, All-Ways, and motor carrier, USA Truck, entered into a brokerage commission agreement, by which All-Ways would receive a 5% commission for USA freight brokered by All-Ways. USA terminated the agreement and then contracted directly with Rheem, one of All-Ways' shipper customers. Consequently, All-Ways sued for (1) breach of contract; and (2) tortious interference. The court found that whether the commission agreement contained an implied prohibition against back solicitation was a question of fact for the jury (a good result for the plaintiff broker). Also, whether the back solicitation violated the implied covenant of good faith and fair dealing was also to be determined by the jury. There were also factual issues of actual reliance upon USA's promise not to engage in back solicitation, and whether that reliance was reasonable. The court also refused to grant summary judgment to USA on All-Way's tortious interference claim, because there was evidence of secret conversations with the customer and USA about contracting directly with USA. Also, the punitive damage claims stayed in case. So, all the plaintiff brokers' claims withstood summary judgment, and the case went to the jury—every plaintiff's dream!

Confidentiality Clauses Can Also be Judicially Enforced. For instance, in *Brown v. Rollett Bros. Trucking Co., 291 S.W. 3d 766 (Mo.Ct.App. 2009)*, Brown had worked as a dispatcher for Rollett Logistics. He was

responsible for finding loads by contacting established and prospective customers. Brown terminated his employment with Rollett and went to work for a competitor. Rollett then sent Brown's new employer a letter claiming that Brown had breached his noncompete provision. The court found that the Agreement was not enforceable because the noncompete provision did not operate to protect customer contacts or trade secrets. The court found that Brown's interaction with customers did not rise to the level of "customer contacts," because the customers ultimately made decisions based upon price—not upon a pre-existing relationship with a sales representative. Also, the defendants' customer list, rate sheets, and pricing process were not trade secrets, because most of the information on customer lists was publicly available, the information contained on the rate sheets was not a "process" or device for continuous use in the business," and the plaintiff was never involved in the pricing process anyway. *Moral: It is tough to protect trade secrets without a specific contractual provision*.

Check those Contracts! So, if the transportation entity's contractual relationship ends, or is terminated by business exigencies, or a breach by the adverse contracting party, *do not walk away and do nothing* without conducting some due diligence on possible recourse in the courts, on valid breach of contract claims (or other contractual or common law claims). In other words, don't keep that contractual arrow in the quiver, because it may be right on target!

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.

Benesch Attorney Megan MacCallum Honored with 2024 Women in Supply Chain Award

MEGAN K. MACCALLUM
Associate
T. 216.363.4185
mmaccallum@beneschlaw.com

Benesch is pleased to announce that Megan MacCallum, an associate in the firm's Transportation & Logistics and Litigation Practice Groups, has been named a recipient of the 2024 Women in Supply Chain Award in the Rising Star category by *Food Logistics* and *Supply & Demand Chain Executive*. This prestigious award recognizes young or newer professionals (39 and under) whose achievements, hard work, and vision have shaped the supply chain network.

Megan's approach to compliance is both pragmatic and action-oriented. She advises businesses on standing up operations, managing agency enforcement, and addressing day-to-day operational and strategic challenges. Her experience spans customs, export controls, economic sanctions, hazardous materials, and regulated commodities such as foodstuffs, alcohol, and pharmaceuticals. Megan is trained in export controls and certified in hazardous materials compliance in ground transportation, leveraging her wide visibility in the supply chain sector to offer strategic business guidance.

"Every year, this award continues to amaze me. But this year especially, it's all about the quality of the submissions. These women are doing remarkable things for their communities, organizations, and teams and are paving the way for future young female leaders to be a part of an industry that's making a difference," noted Marina Mayer, Editor-in-Chief of *Food Logistics* and *Supply & Demand Chain Executive* and Co-Founder of the Women in Supply Chain Forum.

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FMC Final Rule on “Refusal to Deal or Negotiate”

Marc S. Blubaugh

Jonathan R. Todd

J. Philip Nester

Vanessa I. Gomez

Megan K. MacCallum

The Federal Maritime Commission (FMC) issued its Final Rule on July 22, 2024, establishing its approach to determining what constitutes an unreasonable refusal to deal or negotiate cargo space and vessel space accommodations under the Ocean Shipping Reform Act of 2022 (OSRA 2022). The Final Rule governing vessel-operating common carriers (VOCCs) will be effective on Sept. 23, 2024, and applies to private-party complaints and enforcement cases brought by the FMC. Non-vessel operating common carriers (NVOCCs) are not subject to the Final Rule. The purpose of the Final Rule is to improve trade imbalances, transport delays, and access to vessel capacity by establishing the necessary elements and definitions for terms that the FMC will use when analyzing the reasonableness of a VOCC's refusal to accommodate.

Here is a quick summary of the material components of the Final Rule and the definitions for new terms used under OSRA 2022:

1. Refusal of Cargo Space Accommodations

Elements. The FMC identified three required elements for a beneficial cargo owner to establish a *prima facie* case under OSRA 2022 at 46 U.S.C. 41104(a)(3). These elements must be met to assert that a VOCC's refusal to accommodate cargo space is prohibited:

- The respondent must be a VOCC (46 C.F.R. 542.1(c)(1));
- The respondent refuses or refused cargo space accommodations when such space is available (46 C.F.R. 542.1(c)(2)); and
- The VOCC's conduct is unreasonable (46 C.F.R. 542.1(c)(3)).

Once a beneficial cargo owner establishes its *prima facie* case, the burden shifts to the VOCC, which must demonstrate that its refusal was *not* unreasonable.

Evaluating Reasonableness. The FMC will consider the following factors on a case-by-case basis when evaluating the reasonableness of a carrier's conduct in connection with its refusal to provide cargo space accommodations:

- Whether the VOCC followed a documented export policy that enables the timely and efficient movement of export cargo (46 C.F.R. 542.1(d)(1);
- Whether the VOCC made a good faith effort to mitigate the impact of a refusal (46 C.F.R. 542.1(d)(2));
- Whether the refusal was based on legitimate transportation factors (46 C.F.R. 542.1(d)(3)); and;
- Any other relevant factors or conduct (46 C.F.R. 542.1(d)(4)).

Unreasonable Conduct. The FMC will consider the following nonexclusive list of conduct to constitute unreasonable refusals to provide cargo space accommodations:

- Blank sailings or schedule changes with no advance notice or with insufficient advance notice (46 C.F.R. 542.1(e)(1));
- Vessel capacity limitations not justified by legitimate transportation factors (46 C.F.R. 542.1(e)(2));

- Failing to alert or notify beneficial cargo owners with confirmed bookings of any other changes to the sailing that will affect when their cargo arrives at its destination port (46 C.F.R. 542.1(e)(3));
- Scheduling insufficient time for cargo tendering or vessel loading so that cargo is constructively refused (46 C.F.R. 542.1(e)(4));
- Providing inaccurate or unreliable vessel information (46 C.F.R. 542.1(e)(5)); or
- The de facto, absolute or systematic exclusion of exports in providing cargo space accommodations (46 C.F.R. 542.1(e)(6)).

2. Refusal to Deal or Negotiate Vessel Space Accommodations

Elements. Similarly, the FMC identified three required elements of a *prima face* case for claims brought under OSRA 2022 at 46 U.S.C. 41104(a)(10), alleging that a particular refusal to deal or negotiate with respect to vessel space accommodations is unreasonable:

- The respondent must be a VOCC (46 C.F.R. 542.1(f)(1));
- The respondent refuses or refused to deal or negotiate with respect to vessel space accommodations (46 C.F.R. 542.1(f)(2)); and
- The VOCC's conduct is unreasonable (46 C.F.R. 542.1(f)(3)).

Again, upon a beneficial cargo owner's establishing a *prima facie* case, the burden shifts to the VOCC to demonstrate why its conduct was not unreasonable.

Evaluating Reasonableness. The FMC will consider the following factors on a case-by-case basis when evaluating the reasonableness of a VOCC's conduct in connection with its refusal to deal or negotiate vessel space accommodations:

- Whether the VOCC followed a documented export policy that enables the timely and efficient movement of export cargo (46 C.F.R. 542.1(g)(1));
- Whether the VOCC engaged in good faith negotiations (46 C.F.R. 542.1(g)(2));
- Whether the refusal was based on legitimate transportation factors (46 C.F.R. 542.1(g)(3)); and
- Any other relevant factors or conduct (46 C.F.R. 542.1(g)(4)).

Unreasonable Conduct. The FMC will consider the following nonexclusive list of conduct to constitute unreasonable refusals to deal or negotiate vessel space accommodations:

- Quoting rates that are so far above current market rates they cannot be considered a good faith offer or an attempt at engaging in good faith negotiations (46 C.F.R. 542.1(h)(1)); or
- The de facto, absolute, or systematic exclusion of exports in providing cargo space accommodations (46 C.F.R. 542.1(h)(2).

3. Definitions for New Terms Used Under OSRA 2022

The Final Rule also provides new definitions for terms material to the refusal analyses that were not previously defined under the Shipping Act or OSRA 2022 (or which now have new, bespoke meaning for purposes of the Final Rule), including:

- **Blank Sailing** – A sailing is skipping one or more specific port(s) while traversing the rest of the scheduled route or the entire sailing being canceled.
- **Cargo Space Accommodations** – A space that has been negotiated for or confirmed aboard the vessel of a VOCC for laden containers being imported to or exported from the United States. Cargo space accommodations include the services necessary to access and load or unload cargo from a vessel calling at a U.S. port.
- **Documented Export Policy** – A written report produced by an ocean common carrier that details the VOCC's practices and procedures for U.S. outbound services.
- **Transportation Factors** – Factors that encompass the vessel operation considerations underlying a VOCC's ability to accommodate laden cargo for import or export, which can include, but are not limited to, vessel safety and stability, weather-related scheduling considerations, and other factors related to vessel operation outside the vessel operator's control and not reasonably foreseeable.
- **Unreasonable** – VOCC conduct that unduly restricts the ability of beneficial cargo owners to meaningfully access ocean carriage services from that VOCC.
- **Vessel Space Accommodations** – Space available aboard a vessel of a VOCC for laden containers being imported to or exported from the U.S. Vessel space accommodations also include the services necessary to book or access vessel space accommodations.

4. Practical Takeaways

This long-awaited Final Rule establishes the FMC's playbook for evaluating whether a VOCC's refusal of cargo space accommodations or its refusal to deal or negotiate vessel space accommodations constitutes a violation of OSRA 2022. As a result, certain changes in commercial practices, as well as claims and defense strategies, are likely to follow. For instance, VOCCs will presumably begin developing "documented export policies" in order to defend against a claim for refusing to deal. For their part, beneficial cargo owners now have visibility into FMC expectations for VOCC practices on this issue, which has received widespread attention since the COVID-19 pandemic. This perspective will be valuable during ocean contract bid negotiations and even production or inventory planning.

On the other hand, the introduction of new claims and definitions under the Final Rule is certain to invite questions and litigation regarding their meaning. While multifactor balancing tests provide a tribunal with the flexibility to evaluate every case on its merits, such tests can also fall short of providing the type of predictable, "bright-line" guidance often desired by commercial interests. Even precise requirements themselves, such as the "documented export policies" element of the Final Rule, may be subject to vigorous challenges after the fall of *Chevron* deference. As with almost any new regulation, only time will tell whether the application of this Final Rule will yield greater visibility and predictability for market participants in the U.S. trades.

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Double Brokering and Hostage Load Action Plan: What to Do When You're Asked to Pay More or Pay Twice

Jonathan R. Todd

Kelly E. Mulrane

You just received a demand that you must pay an unknown party to receive your cargo—NOW WHAT? Shippers and brokers too frequently receive payment demands for transportation services that far exceed contracted amounts or any reasonable variance. Those demands are increasingly coming from unknown third-party brokers or motor carriers. Demands can reach multiples of anticipated transportation spend. Sometimes even double payment is necessary to gain release of loads.

This article explains the legal background for freight payment disputes and what to do when you're asked to pay more or pay twice due to double brokering or hostage load scenarios.

Ground Rules for Who Can Demand Freight Charges

In a traditional brokering scenario the shipper with a load to move contracts with a broker or carrier to either arrange for carriage or accomplish that movement. If a broker is involved this means that the shipper will pay the broker who then pays the carrier. If the broker fails to pay the carrier, then in most instances the carrier has a right to pursue the shipper for its freight charges. If the payment terms were collect-on-deliver, then the carrier can withhold release of the load until those agreed-upon amounts are paid.

The flow of funds and services grows more complicated if double brokering is involved. This occurs where multiple brokers or even multiple carriers hand a load off to one another and receive a part of the proceeds. It is a myth that this practice is always illegal. Unlawful brokering is prohibited by statute but double brokering is not. Unlawful brokering refers to arranging for motor carriage, for compensation, without holding the necessary permit and bond to do so. This rule was signed into law on July 6, 2012, in a bill referred to as MAP-21. The codified statute at 49 USC § 14916 states that conducting regulated freight broker activities without a license is unlawful. The officer, 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.

However, 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.

Equipment interchange is sometimes also used to lawfully accomplish service through multiple motor carriers. 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.

These operating scenarios mean that anyone buying services, whether shipper or broker, should have an idea who they will pay and the role the party they are paying is performing (this is specifically required by statute at 49 USC § 13901). Those expectations can be strengthened by prohibiting double-brokering, co-brokering, or interlining in the transportation agreement and requiring indemnity or other remedies when that occurs. The challenge is that those instances do occur from time to time.

What To Do When You Receive A Payment Demand

Are You a Shipper or Consignee? Check your paperwork! Does your company have a contract with the broker who brokered the shipment, or does your company have a contract with the motor carrier who was engaged to carry the load? If so, your contract with the broker or motor carrier will often outline who is responsible for freight charges and who may be contractually responsible if the transporting carrier does not get paid.

Review the Bill of Lading, if the shipment was being transported on a shipper bill of lading, check to see if the shipper included and invoked "Section 7: Non-recourse" language, letting the transporting carrier know that the shipper would not be liable for freight charges. The bill of lading should also indicate if the freight charges are "collect."

Confirm with your company's records to see whether your company has already paid someone for the transportation and determine how much was paid to whom. This will help you understand whether the payment being demanded is reasonable for the transportation that was conducted.

Review the demand you received and analyze who it came from, and the reasoning that company or person states it is entitled to be paid for the transportation. For example, if a collections company is demanding payment on behalf of the transporting motor carrier, but the transporting motor carrier is utilizing a factoring company, the transporting motor carrier may no longer have a legal right to try to collect the freight charges. In that case, a defense to payment may be that the collections company is not entitled to payment because the motor carrier has already promised those funds to someone else.

After your review of the paperwork and investigation of the circumstances surrounding the transportation, you may need to seek legal advice regarding whether you are legally liable for the demand or whether you have viable defenses. The facts regarding the transportation and relationships are important, and the same approach may not be reasonable for every demand.

Are You a Broker? Check your paperwork! Does your company have a contract with the shipper, consignee, or motor carrier your company engaged to transport the load? In most cases, this contract (or contracts) will outline who is responsible for freight charges. However, brokers are often in the unenviable position of choosing to preserve a relationship with a shipper or consignee by paying the transporting carrier even when the broker has already paid the contracted carrier, or trying to enforce the contract terms that generally state that the shipper/consignee is responsible for all freight charges and souring the relationship with the shipper/consignee.

Often, a broker will choose to pay the transporting motor carrier to prevent the motor carrier from approaching the shipper/consignee. While this may make good business sense in many cases, as a broker, you should still conduct an investigation prior to paying any demand. Collections companies will often use aggressive and threatening language to get you to pay before allowing you to investigate, but agreeing to pay before conducting an investigation can be a costly mistake.

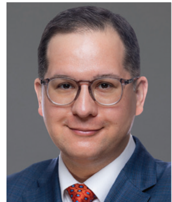
In your investigation, you should evaluate the paperwork and the motor carrier to ensure that it was the transporting carrier and that it has retained the legal right to the freight charges. As discussed above, the motor carrier may have assigned its legal rights to the freight charges to a factoring company. If your company pays the motor carrier, your company could face yet another demand from the factoring company if the factoring company does not receive a payment it is entitled to receive.

After review of your paperwork and investigation of the circumstances surrounding the transportation, you may need to seek legal advice regarding whether you are legally liable for the demand or whether you have viable defenses. The facts regarding the transportation and relationships are important, and the same approach may not be reasonable for every demand. Sometimes it will make business sense to pay the transporting motor carrier even when you are not legally obligated to do so; other times, the broker, shipper, and consignee may all have legal defenses to paying, and you, as the broker, may be the best position to advance those legal defenses.

JONATHAN R. TODD is Vice Chair of the Transportation & Logistics Practice Group at Benesch. He is available at 216.363.4658 and jtodd@beneschlaw.com.

KELLY E. MULRANE is a partner in the Transportation & Logistics Practice Group. She is available at 614.223.9318 and kmulrane@beneschlaw.com.

Cargo Theft – Bill in Congress Proposes $100 Million Solution



Jonathan R. Todd

Applause can be heard from diverse sectors of private industry as the U.S. Congress redoubles its resolve against threats in the supply chain. New bills introduced in recent months target supply chain challenges at home and abroad. The vital importance of domestic manufacturing, warehousing, transportation, and logistics to our national security stands front and center.

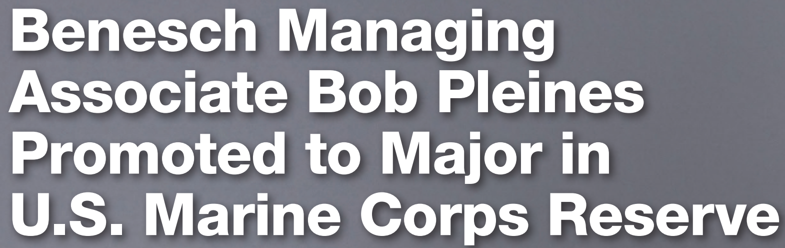
The Safeguarding our Supply Chains Act (H.R. 8834) was introduced by Representative David Valadao (R-CA 22) on June 25, 2024. The bill has received wide-ranging commendations from trade associations, including the American Trucking Association, the Association of American Railroads, and the Retail Industry Leaders Association. It is intended to identify and defeat organized crime operations behind the statistical rise in cargo thefts.

The bill commits $100 million in appropriations between 2025 and 2029 to carry out its mission by fostering stronger coordination between federal agencies, law enforcement, and private sector. A new Supply Chain Crime Coordination Center will be established within Homeland Security Investigations (HSI), a division of the Department of Homeland Security (DHS). The bill explains that the Center will "collect and analyze data related to supply chain fraud and theft; and identify regions in the United States, modes of transportation, distribution networks, and retail stores that are experiencing high volumes of organized crime."

The bill will also create a new Supply Chain Fraud and Theft Task Force. This Task Force will be led by HSI and the Federal Bureau of Investigations, although it will have a diverse membership, including law enforcement, carriers, and others in the private sector. The Task Force must be formed quickly within 120 days after enactment. Its stated mission is to "address supply chain fraud and theft throughout the rail, motor carrier, and intermodal systems, as well as detect, disrupt, and defer organized theft groups that are targeting all stages of the supply chain" through five targeted activities: (1) facilitating collaboration between stakeholders; (2) enhancing information sharing; (3) tracking trends on organized crime; (4) establishing private sector relationships; and (5) leveraging HSI and FBI systems to secure the information sharing on organized crime. The Task Force will issue a report to the U.S. Congress within 180 days of its formation and annually thereafter detailing its activities and their impact on supply chain challenges.

America's place in the global supply chain and the impact that geopolitics play in our national security interests are the subject of another new bill. The Promoting Resilient Supply Chains Act of 2024 (S. 4375) was introduced in the Senate by Maria Cantwell (D-WA) and Marsha Blackburn (R-TN) on May 21, 2024. This bill is similar to corresponding efforts introduced earlier in the House. It tasks the Department of Commerce with forming a Supply Chain Resiliency and Crisis Response program for identifying and addressing vulnerabilities in domestic manufacturing capacity for critical industries and emerging technologies. The bill recognizes that those potential vulnerabilities may take the form of warehousing, transportation, and distribution operations supporting domestic manufacturing.

JONATHAN R. TODD is Vice Chair of the Transportation & Logistics Practice Group at Benesch. He may be reached at 216.363.4658 and jtodd@beneschlaw.com.



Benesch Managing Associate Bob Pleines Promoted to Major in U.S. Marine Corps Reserve

ROBERT PLEINES, JR.
Managing Associate
T. 216.363.4491
rpleines@beneschlaw.com

Benesch is pleased to announce that Managing Associate Bob Pleines has been promoted from Captain to Major in the United States Marine Corps Reserve.

In a ceremony held Saturday in Highland Park, Illinois, Bob was officially honored with his new rank in front of his wife, Anja, and the Marines and Sailors of Headquarters and Service Company, 2d Battalion, 24th Marines.

Bob commissioned as a second lieutenant in the Marine Corps Reserve in August of 2014 and has served in many roles over the past decade, including as platoon commander, company executive officer and, most recently, as the Company Commander of Headquarters and Services Company, 2d Battalion, 24th Marines.

In his role with the firm, Bob represents a variety of commercial shippers, motor carriers, freight brokers, manufacturers, and distributors with regulatory compliance counseling, contract and policy drafting, and business consultation.

Integrating Sustainability into Transportation Contracts: A Guide for Shippers

Brian Cullen

Robert Pleines, Jr.

As concerns about environmental degradation and climate change intensify, shippers across a wide variety of industry verticals are seeking ways to make their supply chain operations more environmentally sustainable. With greater focus on emissions, or those resulting from assets not under a shipper's direct ownership or control (i.e., scope 3 emissions), many shippers are placing greater focus on the sustainability practices of their motor carriers, brokers, and other transportation service providers (collectively "Transportation Service Providers"). By including specific sustainability requirements in their shipping contracts, shippers can require their Transportation Service Providers to adopt or otherwise utilize more environmentally friendly processes when providing their services.

This article provides shippers with ways to contractually incorporate environmentally conscious policies and sustainability requirements within their Transportation Services Provider contracts.

Why should shippers integrate sustainability into their transportation agreements?

Shippers are facing increasing pressure from federal and state governmental entities, as they are now targeted to comply—and ensure their Transportation Service Providers comply—with environmental laws and regulations. In addition, the consumers of a shippers' goods influence the shipper behavior as they align with generally accepted global climate goals and expend substantial efforts and resources to reduce their own carbon emissions. Implementing sustainability initiatives via contract with their Transportation Service Providers also helps shippers improve efficiency and reduce costs by minimizing fuel consumption and maximizing container/trailer space; enhance brand reputation and customer loyalty through a demonstrated commitment to sustainable practices; and possibly create a market differentiator for the shipper vs. its competition.

Key Strategies for Including Sustainability Requirements in Shipping Contracts

1. **Setting Clear Performance Targets.** A key step for shippers to promote sustainability through their contracts with their Transportation Service Providers is by establishing clear sustainability performance targets. Such targets should be quantifiable and aligned with the shipper's broader sustainability goals. For example, a shipper could contractually require a motor carrier to:

   - **Reduce Fuel Usage.** Reduce fuel consumption by a certain percentage over a specific period.
   - **Utilize Alternatives to Diesel Fuel.** Require Transportation Service Providers to utilize alternatives such as biodiesel, renewable natural gas, or hydrogen in a specific portion of their fleet or with their third-party motor carriers.
   - **Utilize Zero-Emission Vehicles.** Commit to using zero-emission vehicles for a minimum percentage of shipments. Although not common in agreements now, this requirement will become more common as states adopt laws and regulations to transition heavy-duty vehicles to clean energy.

   A shipper including these quantifiable goals not only holds the Transportation Service Provider accountable, but also signifies the shipper's serious commitment to reducing the environmental impact within its supply chain.

2. **Incentive Use of Green Technology.** The continuous development of new technology to improve fuel efficiency across all modes of

transportation permits shippers to encourage motor carriers to transition toward green technologies or provide greater visibility to potential opportunities for further reducing carbon emissions. Shippers are even including specific clauses in their contracts to prompt Transportation Service Providers to adopt these new technologies. For example, some shippers include clauses within their Transportation Service Provider agreements to require the following:

- **Access to Data/Business Intelligence.** Shippers may request access to real-time data on vehicle or route performance for the purposes of seeking opportunities to optimize routes, improve fuel efficiency, and reduce idle time.
- **Aerodynamic Enhancements.** With respect to motor carriers and their vehicles, these enhancements often include wheel covers, trailer skirts, air deflectors, trailer tails, and other devices on the truck or trailer to reduce fuel consumption.
- **Electric and Hybrid Vehicles.** By using monetary incentives, shippers encourage Transportation Service Providers to transition to electric, low-emissions, and/or hybrid vehicles as they become available at an increasing rate.
- **Driver-Assist Systems.** Shippers often require Transportation Service Providers to use or implement technology that improves driving behavior, such as adaptive cruise control and lane assist or automatic transmission, which can help reduce fuel consumption.

3. **Require Adherence with Generally Accepted Standards or Certifications.** Another possible lever that shippers can pull to drive sustainable practices among their Transportation Service Providers is to require compliance with certain environmental standards or certifications. Examples include:
   - **EPA's SmartWay Program.** This is a voluntary program that helps both shippers and Transportation Service Providers advance supply chain sustainability. The SmartWay Program measures and benchmarks Transportation Service Providers for the purpose of improving freight transportation efficiency. Shippers can require that Transportation Service Providers participate in the SmartWay Program and/or meet or exceed certain performance thresholds.
   - **ISO 14001 Certification.** This standard provides a framework for effective environmental management systems. Although an uncommon approach, a shipper requiring Transportation Service Providers to achieve ISO 14001 certification demonstrates a shipper's commitment to pushing sustainable practices among its Transportation Service Providers.
4. **Integrate Sustainability into Bid Process or Selection Criteria.** While contractually requiring Transportation Service Providers to incorporate sustainability standards is effective at driving sustainable practices within the shipper's supply chains, there may be circumstances that may prevent a shipper from being able to take this approach. As an alternative, shippers can integrate similar sustainability initiatives into their broader procurement, bid, and Transportation Service Provider selection process. Shippers can request information from their prospective Transportation Service Providers at the procurement or bid stage, and then utilize this information when deciding which Transportation Service Providers should receive bid awards. Some potential areas for shippers to assess during the award/selection process include:
   - The Transportation Service Provider's use of the aforementioned eco-friendly technologies and fuel-efficient vehicles.
   - The Transportation Service Provider's participation in programs like SmartWay.
   - The Transportation Service Provider's willingness to provide business intelligence and data for the purposes of seeking initiatives to utilize more sustainable practices.

   By considering sustainability in the selection process, shippers signal that environmental performance is an important factor in their business when making bid awards or Transportation Service Provider selections.
5. **Collaboration on Sustainability Initiatives with Multi-Mode Transportation Service Providers.** Shippers and larger and/or multi-mode Transportation Service Providers have greater opportunity to collaborate on driving sustainable practices that can be a win-win for both sides. These efforts can take many forms, including:
   - **Route Optimization Efforts.** Working with Transportation Service Providers to develop more efficient routes that reduce miles traveled and fuel consumption.
   - **Greater Sharing of Data and Insights.** Sharing information and strategic insights on energy consumption, vehicle performance, and emissions so both parties can identify opportunities for improvement.
   - **Mode Conversion Opportunities.** Working with Transportation Service Providers to seek out opportunities that are both cost-effective and environmentally efficient, such as converting over-the-road shipments into intermodal shipments, converting contracted lanes into a dedicated transportation model, or consolidating multiple less-than-truckload shipments to maximize utilization of trailer space.
   - **Incentive Programs.** Incentivizing Transportation Service Providers to meet or exceed sustainability goals by offering bonuses and/or preferential treatment for future contracts. Further, for dedicated arrangements, there could possibly be cost-sharing arrangements for utilizing zero- or low-emission vehicles that could be attractive for both parties.

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Integrating Sustainability into Transportation Contracts: A Guide for Shippers

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Monitoring and Enforcing Sustainability Requirements

An important aspect of any contract clause is the ability to actually enforce the clause. Contractual clauses addressing sustainability requirements among Transportation Service Providers are no different. Accordingly, it is imperative that the shipper be able to ensure that its Transportation Service Providers are actually meeting their sustainability commitments. Below are some ways in which shippers can ensure such compliance:

- **Reporting and Auditing.** Agreements should require the Transportation Service Provider to submit regular reports on its environmental performance. These reports could include data on fuel consumption, emissions, and the adoption of green technologies. Shippers should also retain the right to audit the Transportation Service Provider's operations to verify the accuracy of these reports and assess compliance with sustainability requirements.
- **Performance Reviews and Continuous Improvement.** In addition to monitoring compliance, shippers should schedule regular performance reviews with their Transportation Service Provider to assess progress toward sustainability targets and identify areas for improvement. If a Transportation Service Provider consistently fails to meet its sustainability commitments, the shipper may need to consider penalties, contract renegotiation, or, in extreme cases, termination of the agreement.
- **Require Proof of Compliance.** Shippers can require and request the applicable permits, certificates, and/or applicable documentation demonstrating the Transportation Service Provider's compliance with the applicable environmental laws and regulations. This could include emissions test results, maintenance records, or certifications of compliance with certain federal or state standards.

Conclusion

As shippers across all industry verticals seek ways to "green" their external supply chain by incorporating sustainability requirements into their contracts, shippers can effectively reduce their environmental impact and drive efficiency within their supply chain. When taking this approach, the shipper's overall goal should be to set clear, measurable performance goals, encourage the adoption of sustainable technologies, and foster collaboration with strategic Transportation Service Providers to achieve sustainability objectives that can benefit both parties.

BRIAN CULLEN is Of Counsel in the firm's Transportation & Logistics Practice Group and may be reached at 312.488.3297 or bcullen@beneschlaw.com.

ROBERT A. PLEINES, JR. is a managing associate in the Group and may be reached at 216.363.4491 and rpleines@beneschlaw.com.

FMC Final Rule on "Refusal to Deal or Negotiate"

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Benesch's Transportation & Logistics Practice Group has a long-standing history of counseling and representing clients in maritime matters. They are available to assist in developing pragmatic approaches to address the business and regulatory impacts this Final Rule may have on stakeholders.

MARC S. BLUBAUGH is a partner and Co-Chair of Benesch's Transportation & Logistics Practice Group. He can be reached at 614.223.9382 and mblubaugh@beneschlaw.com.

JONATHAN R. TODD is a partner and Vice Chair of the Practice Group. He can be reached at 216.363.4658 and jtodd@beneschlaw.com.

J. PHILIP NESTER is a senior managing associate in the Practice Group. He can be reached at 216.363.6240 and jpnester@beneschlaw.com.

VANESSA I. GOMEZ is an associate in the Practice Group. She can be reached at 216.363.4482 and vgomez@beneschlaw.com.

MEGAN K. MACCALLUM is an associate in the Practice Group. She can be reached at 216.363.4185 and mmaccallum@beneschlaw.com.

Surviving a DOT Audit

Thomas O'Donnell

To most Americans, the word "audit" conjures up a visceral fear of the IRS combing through their records and finances. However, to those in the motor carrier industry, "audit" means something much different, but no less terrifying. A Department of Transportation (DOT) audit, or "investigation," conducted by the Federal Motor Carrier Safety Administration (FMCSA), can pose a direct risk to a carrier's ability to operate and survive as a going concern. They are used to determine a motor carrier's compliance with the Federal Motor Carrier Safety Regulations (FMCSRs). Therefore, it is imperative that a carrier understands what a DOT audit entails and how to act during its course.

What provokes a DOT Audit?

FMCSA has to prioritize carriers for audits. Understanding what factors the Agency uses to prioritize carriers for an audit is important for all carriers to understand so that they can do their best to keep out of the crosshairs. The most common triggers for a DOT audit are: (1) High Safety Management System (SMS) Behavior Analysis and Safety Improvement Categories (BASIC) scores; (2) Significant DOT recordable accident(s); and (3) Non-Frivolous Complaints.

High SMS BASIC scores. SMS BASICs assess a motor carrier's safety performance in seven areas: Unsafe Driving, Hours-of-Service Compliance, Driver Fitness, Controlled Substances/Alcohol, Vehicle Maintenance, Hazardous Materials Compliance, and Crash Indicator. This assessment comes from data collected on roadside inspections, DOT crashes, and previous reviews and enforcements. If a motor carrier has a BASIC score above the threshold level established by the FMCSA, it can be a target for a DOT audit. It normally requires at least two or more BASIC scores above the threshold for any investigation to occur. However, those with high hours of service, vehicle maintenance, and unsafe driving BASICs are more likely to find themselves the target of an FMCSA investigation.

Significant DOT recordable accident. A Significant Crash is a crash involving a commercial motor vehicle (CMV) involving a fatality, an unusually high number of injuries, or crashes involving a CMV that are likely to result in heightened interest. An accident of this type can result in the FMCSA launching an investigation of a motor carrier.

Non-frivolous complaint. When there is a substantive complaint made against a motor carrier (example: forcing drivers to drive over hours), that motor carrier may be made part of an FMCSA investigation.

Unresolved prior acute or critical violations. Previous acute or critical violations found during a previous DOT audit can subject a motor carrier to an additional investigation if that violation has not been resolved.

There are 3 types of DOT audits conducted by an FMCSA Safety Investigator(s) (SI) or their state partners:

Off-site investigation: As the name implies, off-site DOT audits are held remotely without the SI coming the carrier's location. Companies called on for an off-site audit will be required to electronically submit the information requested by the auditor. This involves requests for documentation from the carrier followed by an in-depth review of available information to determine the nature and extent of safety issues identified as reasons for the audit. While an off-site investigation includes the same investigative processes as an on-site investigation, the sampling numbers and documents requested are often less onerous.

On-site comprehensive investigation: The on-site comprehensive investigation, often referred to as a "compliance review," takes place at the carrier's place of business. This audit type occurs when the FMCSA believes the carrier exhibits broad and complex safety problems. During an on-site comprehensive audit, **all** BASICs and related FMCSRs Parts are investigated.

On-site focused investigation: The on-site focused investigation also takes place at the carrier's place of business. Here, the SI concentrates on the specific safety problem areas identified for the investigation. It involves reviewing records, interviewing personnel, analyzing practices, and identifying corrective actions. If violations in other areas are discovered, this may expand to a comprehensive DOT audit.

The COVID pandemic saw the FMCSA cut back on their on-site investigations and perform more off-site investigations. However, that trend has been reversed in the last few years. According to the **FMCSA's Motor Carrier Management Information System (MCMIS) data snapshot as of 8/30/2024**, on-site investigations rose 77% in 2023 over the 2020 level. *See chart below.*

	CY 2020			CY 2021			CY 2022			CY 2023		
INVESTIGATION TYPE	**FED**	**STATE**	**TOTAL**	**FED**	**STATE**	**TOTAL**	**FED**	**STATE**	**TOTAL**	**FED**	**STATE**	**TOTAL**
Total Investigations	7,048	4,412	11,460	7,990	4,353	12,343	8,236	4,282	12,518	7,827	4,545	12,372
CSA Investigations	7,002	4,340	11,342	7,950	4,279	12,229	8,133	4,229	12,362	7,690	4,458	12,148
Onsite Comprehensive	485	1,489	1,974	688	1,657	2,345	1,531	2,090	3,621	1,543	2,558	4,101
Onsite Focused	2,831	778	3,609	3,916	1,094	5,010	3,915	1,467	5,382	4,419	1,408	5,827
Offsite	3,686	2,073	5,759	3,346	1,528	4,874	2,687	672	3,359	1,728	492	2,220
Cargo Tank Facility Reviews (only)	13	13	26	21	9	30	43	8	51	51	7	58
Shipper Reviews (only)	2	0	2	1	0	1	0	0	0	0	25	25
Non-Rated Reviews (only)	31	59	90	18	65	83	60	45	105	86	55	141
Total Security Contact Reviews	91	73	164	45	58	103	0	35	35	1	35	36
Total Terminal Investigations	11	23,696	23,707	8	22,771	22,779	15	20,001	20,016	18	19,090	19,108

Data Source: FMCSA's Motor Carrier Management Information System (MCMIS) data snapshot as of 12/29/2023, including current year-to-date information for CY 2023. The data presented above are accurate as of this date but are subject to updates as new or additional information may be reported to MCMIS following the snapshot date.

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Surviving a DOT Audit

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Possible Consequences of a DOT Audit

Investigation expansion. If the investigation starts off as an off-site or on-site focused investigation and violations in other areas are found, the investigation could expand to an on-site comprehensive investigation.

Fines. A Notice of Claim (NOC) for violations found during an investigation will assess monetary fines to a carrier. These fines are determined by the type and number of violations found. The FMCSA increased the fine amounts for 2024 in a Final Rule published December 28, 2023. For example, the maximum amount for a recordkeeping violation increased from $14,960 to $15,445.

Safety rating downgrade. A DOT audit can result in one of the following safety ratings: (1) Satisfactory; (2) Conditional; (3) Unsatisfactory; or (4) No rating. While a Satisfactory or non-rated investigation will have minimum to no impact on a motor carrier's operations, the same cannot be said for a proposed Conditional or Unsatisfactory safety rating. A Conditional safety rating, if it becomes final, can result in increased insurance costs and possible loss of business if a carrier's customers require a Satisfactory or no safety rating. A final Unsatisfactory safety rating will result in the motor carrier's loss of operating privileges.

Know What to Expect

Notification/Initial contact call. An SI will normally notify a motor carrier that it is subject to an investigation. This usually comes in the form of a phone call followed up by an investigation letter. The SI will then inform the carrier of the type of investigation to be performed. In the case of an on-site investigation, it is likely the SI will schedule the investigation sometime between 48 hours and two weeks after the notification. However, in certain cases, such as a major DOT accident, there may be no prior notification, and the SI will show up at the carrier's location.

Initial request for documents. In most instances the SI will request an initial list of regulated drivers and vehicles from the carrier. Keep in mind, even before requesting any initial documents, the SI has already gone through the motor carrier's records regarding SMS scores, accidents, and other information contained in the FMCSA databases.

Expectations by type of audit. The expectations regarding the procedures of an audit differ by investigation type.

Off-site audits will normally consist of the SI calling and sending a letter requesting documents from the motor carrier. The requested information will center on documents related to the reason for the investigation, such as hours of service. The SI will then remotely review these documents and send any supplemental requests for documents. The motor carrier will upload these documents through the FMCSA's SMS website. Once this review is completed, the SI and motor carrier's representative(s) will have a final closing call to discuss the findings, including any proposed safety rating.

For on-site focused investigations, the SI will also likely request an initial list of drivers and vehicles prior to arriving at the motor carrier's location. Once on-site, the SI will conduct an initial interview with the motor carrier's management discussing the scope and expectations of the investigation. After this, the SI will request specific records related to the safety areas they are investigating. If these records indicate violations in additional compliance areas, the investigation could be expanded to an on-site comprehensive investigation. In such a case, the SI will examine all areas of a motor carrier's compliance with all FMCSRs, including driver qualifications, hours of service, accidents, and vehicle maintenance. An on-site comprehensive investigation can originate on its own based upon the safety violations that prompted the investigation. In the case of any on-site investigation, once the SI has completed their review of the documents, they will hold a close-out meeting with the motor carrier's management. During this meeting, the SI will discuss their findings and any proposed safety rating. They will normally provide the motor carrier with a copy of the audit report with

a proposed safety rating to the motor carrier at this meeting.

Preparing for the Safety Investigation

Ideally, a motor carrier would have a near "bullet-proof" compliance and safety program when the FMCSA comes calling. In these cases, the carrier would have completed internal "mock" DOT audits to look for and correct any deficiencies found. However, few motor carriers actually do this. When they receive notice of an impending DOT audit, they must scramble to search for documents and correct any deficiencies found. The amount and type of preparation will often be contingent upon the type of investigation and amount of time provided before the investigation begins. It is important to remember that this preparation should be ongoing throughout the investigation in anticipation of additional document requests.

Initial driver and vehicle lists. As discussed previously, most investigations begin with the SI requesting the motor carrier's driver and vehicle list. Normally this request will be for any driver or vehicle used by the carrier in the previous 365 days. Before handing over any list, ensure that no drivers or vehicles are included that have not been used in the previous 365 days. Additionally, clean the lists of any drivers or vehicles that are not regulated by the FMCSA.

Identify "red flag" violations and other roadside violations. During any investigation, the SI will look for egregious violations of the Federal Motor Carrier Safety Regulations. These violations are called "red-flag violations." If a red-flag violation is found, the investigator will look to see if the violation has been corrected. Therefore, it is important a motor carrier identify any "red flag" violations their drivers have had on a roadside inspection and ensure the violation has been corrected. A list of "red flag" violations can be found on the FMCSA CSA FAQs website.

Check driver qualification files. It is imperative to review the driver qualification files of drivers who have had a roadside violation (particularly an out-of-service violation) or a DOT recordable accident. These are the files an SI will likely request first for their sampling.

Hours of service (HOS). If HOS is a part of an off-site or on-site focus investigation, or for any on-site investigation, a motor carrier should take several immediate steps. Review the logs or ELDs of any driver with an HOS violation on a roadside inspection during the previous 6 months. For ELDs, ensure the log has been certified by the driver. All unassigned driving time should be assigned, if possible. For any outstanding required paper logs, have drivers have complete and submit as soon as possible. It is also prudent to collect and organize any supporting documents the motor carrier used to check for falsifications. Any critical violation found in the HOS area will result in a "conditional" safety rating, regardless if no other violations are found.

Complete vehicle files. Similar to actions previously discussed, it is prudent to complete as many vehicle files as possible, particularly if vehicle maintenance will be part of the investigation. The first files to examine and complete should be those vehicles with out-of-service violations or involved in DOT accidents within the previous 12 months. It is during this process that the carrier should look to complete any overdue annual inspections and preventive maintenance, time permitting.

Verify drug and alcohol testing. The motor carriers should immediately request any missing records, such as quarterly reports and testing results, from the third-party administrator (TPA) or laboratory they use to administer their drug and alcohol testing program. This will be necessary to prove the carrier has met the minimum random testing and that they have a program as required by the FMCSRs. It is also useful to go and document the reasons for missing a post-accident test.

Update DOT accident register. Immediately following notification of a pending investigation that may involve examining DOT crashes, it is prudent for a motor carrier to ensure their DOT accident register is complete and up to date. At a minimum, this should include that the accident register includes all accidents on the FMCSA's SMS and Portal websites.

Identify "good" files. An SI will already know what issues they will be investigating before they even make initial contact with the motor carrier. With access to the FMCSA's database, they will also have specific drivers and vehicles they intend to investigate. However, they often will still ask the motor carrier to pull additional driver and vehicle files to meet their sampling quotas. Therefore, it is always good practice to identify driver qualification files, driver logs, vehicle files, and other documents that are compliant and ready for review.

Develop a game plan. When notification occurs, it is important to identify the points of contact within your organization who will be responsible for finding and reviewing the documents and files needed for the upcoming investigation. This will also carry over once the investigation is ongoing and additional document requests from the SI occur. Motor carriers should also identify one person who will "run point" during the audit. That designated representative should have all contact with the SI regarding document requests, providing documents, and answering questions. During on-site investigations, the SI may request to interview individuals in charge of certain areas of the business (safety, operations, driver recruiting and training, etc.). Notify the most qualified personnel to speak on these topics in advance so that they can prepare and no surprises will occur. It is always recommended that the motor carrier have a meeting with all internal and external personnel who will be involved in the audit process to ensure everyone is aware of the overall company strategy.

How to Navigate the DOT Audit

Cooperate with the SI (but not too much). The SI has legal authority to conduct the investigation. It is important that the motor carrier be seen as cooperative. However, this does not preclude the motor carrier from asking the SI for identification, the reasons for the investigation, or expected scope and time frame.

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The motor carrier is only obligated to produce records and documents that are specifically requested by the SI. For instance, if the SI requests a driver qualification file, the carrier should only include items specifically required under Part 391.51. Any other items that may have been kept in the driver qualification file, such as drug tests results, training records, or policy acknowledgment sheets, should be culled before the file is submitted.

Locate the SI(s) in a physical location away from daily operations and drivers. For on-site investigations, it is good practice to determine where the SI(s) will be physically located in the motor carrier's building before the investigation begins. The SI should be placed in an area away from the operations of the company. The location should minimize any possible contact with the motor carrier's personnel, including drivers. By doing so, this allows the motor carrier to exercise more control over whom within the company has contact with the SI.

Do not provide access to internal program and systems. Many motor carriers have their files and documents stored digitally. For instance, they may have an electronic driver qualification program. However, it is highly advisable to present the SI with photocopy documents rather than access to the carrier's internal systems. This allows a company to control what documents an SI can review and limits it to the documents requested.

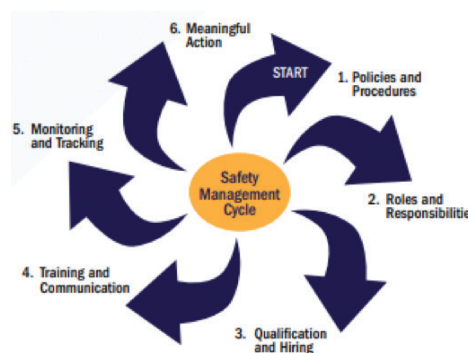
Forward-Looking Preparation

If a motor carrier waits until the FMCSA audit before preparing for a safety investigation, it may already be too late. A motor carrier needs to commit the time and resources to compliance prior to that notification. Fortunately, there are numerous actions a motor carrier can take to help survive a DOT audit.

Know the FMCSRs. It is imperative that a motor carrier knows what is required of it under the FMCSRs. The regulations are numerous and often confusing. However, someone within the organization must understand the FMCSRs, even if outside consultants are used. Designating a safety person or safety department to track compliance with the regulations is the first step in insulating a motor carrier from adverse DOT audit results.

Prepare. A wise person once said, "an ounce of prevention is worth a pound of cure." This is very true regarding a DOT audit. Regularly reviewing files and operational models for compliance with FMCSRs, SMS scores and violations, and other records will allow a motor carrier to gauge its safety program. That is the time to make corrections, complete records and files, address roadside violation patterns, and take other steps to bring its operations into compliance. The FMCSA provides a valuable tool to motor carriers to review its internal safety compliance program, the Safety Management Cycle (SMC). According to the FMCSA it "developed the SMC to help SIs and motor carriers effectively address motor carrier safety and compliance issues and to improve compliance with" the FMCSRs. The FMCSA also states that "(a)pplying the SMC is a step-by-step process that looks at "why" the safety and compliance issues are occurring rather than just identifying the violation (the "what"). The tool provides a framework for brainstorming remedies, choosing solutions, and designing and implementing plans to improve the motor carrier's safety operations."

The SMC consists of six Safety Management Processes (SMPs):



The SMC can be used when a motor carrier examines its violations and crashes found in its SMS history. In doing so, a carrier can find the root causes of its compliance issues and develop policies and standard operating procedures to reduce or eliminate those issues going forward.

Conduct internal "mock" DOT audits. A valuable tool in preparing for any potential DOT investigation is for a motor carrier to conduct a "mock" DOT audit on itself. A mock audit can be done by internal personnel or an external source, such as a DOT attorney. It can also be conducted as either a focused or comprehensive review. A mock audit is one way to identify and address any violations or issues with the FMCSRs before they manifest themselves in ways that put the motor carrier on the FMCSA's radar.

Conclusion

A DOT audit can be an intimidating process for any motor carrier. The consequences of the outcome can have a profound impact on the carrier's business. However, a motor carrier can effectively influence the results of any potential audit with a proper understanding of the process and effective preparation. The time to start preparing is now. The most effective way to survive a DOT audit is understanding the process and implementing an effective safety and compliance program to avoid the audit altogether.

THOMAS O'DONNELL is Of Counsel in the Transportation & Logistics Practice Group and may be reached at 302.442.7007 and todonnell@ beneschlaw.com.

Trailer Manufacturing, Leasing, Interchange Liability

Jonathan R. Todd

The trucking industry recently received 450 million reasons to pay closer attention to best practices for trailer safety and the business relationships involving trailer use. On September 5, 2024, plaintiffs suing trailer manufacturer Wabash National Corporation received a jury verdict awarding punitive damages of $450 million in the case *Perkins, et al. v. Wabash National Corp., et al.* The punitives arose from allegedly failing to take adequate measures ensuring the safety of a trailer that was two decades old. Two people died in 2019 when their vehicle crashed into the Wabash trailer. Wabash's legally compliant rear-underride guards did not prevent the loss of life.

> *"As the industry considers what this verdict means… [take] pause to recognize that safety is a process with tangible milestones."*

The Wabash case is expected to be appealed. Regardless of how liability ultimately lands when the dust settles, this is a cautionary tale with implications far beyond product defect cases. Transportation is a relationship business with many moving parts, literally and figuratively. All companies involved the business of our ubiquitous 53´ trailers can take this moment to reflect on the best ways to protect our companies and the motoring public.

Among the trailer-based relationships there are four points of meaningful focus: (1) equipment manufacturer best practices, (2) equipment leasing best practices, (3) equipment interchange best practices, and (4) equipment use best practices.

Equipment Manufacturer FMVSS Best Practices – Motor vehicle equipment manufacturers must comply with the National Highway Transportation Safety Administration's (NHTSA's) registration and safety standard certification requirements. The Federal Motor Vehicle Safety Standards (FMVSS) are found in regulation at 49 CFR Part 371. Our self-certification regime places responsibility on manufacturers to confirm requirement with, for example, the rear-underride standards at FMVSS No. 224, which was updated in 2022. In this litigation environment the equipment industry is challenged to consider whether minimal safety compliance remains practically sufficient.

Equipment Lease Agreement Best Practices – Large trailer leasing companies and smaller enterprise equipment companies often lease those trailers to the operating motor carriers. This is documented by a Trailer Lease Agreement that establishes among other key points the parties responsible for maintenance and insurance of the trailer unit. The Graves Amendment at 49 USC 30106 protects those leasing-only companies from practically all liability for any vehicular accident arising from use of the equipment. In this litigation environment the leasing industry, and intercompany relationships to manage enterprise risk, are challenged to maintain the "trade or business of renting or leasing" standard set in the Graves Amendment as well as clear allocation of responsibilities in Trailer Lease Agreements.

Equipment Interchange Best Practices – Motor carriers who own or lease trailers are in the business of using those assets as efficiently as possible to ensure return on investment and customer satisfaction. Sometimes efficiency is accomplished by interchanging a trailer to another motor carrier on a through bill of lading. This practice is permitted under regulation at 49 CFR 376.31. The rules that an originating motor carrier sets for the carrier to whom it offers the trailer are often presented in a short form Interchange Agreement. In this litigation environment the motor carriers involved in trailer interchange are challenged to responsibly paper when, where, and how possession and use of the trailer transfers—and the responsibilities that follow for physical damage, vehicular accident, and cargo loss or damage.

Equipment Use Best Practices – All motor carriers are responsible for the systematic inspection, repair, and maintenance of equipment they operate. Those regulatory requirements are found at 49 CFR Part 396. During day-to-day operation, drivers are of course on the defensive front line. For example, the obligation to produce Driver Vehicle Inspection Reports under 49 CFR 396.11 requires daily reporting of defect or deficiency in trailer brakes and brake connections, coupling devices, lamps and reflectors, tires, wheels and rims, and emergency equipment. In this litigation environment motor carriers are challenged to continue as best as possible in exercising vigilance in driver training and a risk-appropriate safety program together with the constant attention required to maintain safety.

No one takes satisfaction in litigation, particularly arising from vehicular accident, and especially where there is loss of life. As the industry considers what this verdict means, the entire range of companies and professionals that touch the humble 53´ trailer, from manufacturers to lessors, carriers, and drivers, can also benefit from taking pause to recognize that safety is a *process* with tangible milestones. It saves lives, it is complex, it changes every day, and it is never done.

JONATHAN R. TODD is Vice Chair of the Transportation & Logistics Practice Group at Benesch. He may be reached at 216.363.4658 and jtodd@beneschlaw.com.

Small Business, Big Wins: Small Businesses and Government Contracting

Robert Pleines, Jr.

Christopher C. Razek

So often in the fierce competition for growth, small businesses get frustrated with enterprise players' ability to undercut pricing and leverage relationships within the private sector to the disadvantage of equally suitable providers. Government contracts represent significant opportunities for small businesses, particularly those in the transportation and logistics industry. In the ever-evolving landscape of government contracting, small businesses play a crucial role in driving innovation and economic growth. The federal government actively encourages, and at times mandates, small business participation in its procurement processes, creating a wealth of opportunities for these enterprises. This article explores the advantages small businesses have in government contracting, the criteria for qualifying as a small business, and how companies can set up to maximize their potential in this arena.

Advantages Held by Small Businesses. There is no shortage of advantages that can help small businesses hold their own over larger businesses when obtaining government contracts. While not inclusive of all advantages, the list below highlights some of the more common benefits that small businesses receive.

1. **Set-Aside Programs.** One of the most notable advantages is the small business set-aside programs, where a percentage of government contracts are exclusively reserved for small businesses. This not only reduces competition but also levels the playing field, enabling smaller firms to compete against larger corporations for lucrative contracts.
2. **Simplified Bidding Process.** The bidding process for government contracts can often be cumbersome; however, small businesses may benefit from simplified processes, particularly for contracts below a certain dollar threshold. These simplified procedures reduce barriers to entry, making it easier for small firms to secure contracts without the extensive resources often required by larger businesses.
3. **Financial Assistance and Resources.** Small businesses can access various forms of financial assistance, including grants, loans, and incentives aimed at boosting their ability to bid on and fulfill government contracts. Organizations like the Small Business Administration (SBA) provide resources and guidance tailored to help small businesses navigate the complexities of government contracting.

Small Business Criteria. To qualify as a small business for the purpose of government contracting, the business must meet specific criteria established by the SBA. There is no certification process for a "small business" or a small disadvantaged business, as these types of business can self-certify. Other types of businesses, however, such as Veteran-Owned and Service-Disabled Veteran-Owned Small Business must apply for certification through the U.S. Department of Veteran Affairs; and Women-Owned, HUBZone, or 8(a) Small Business must apply for certification through the SBA. The SBA establishes small business size standards on an industry-by-industry basis. Generally, these standards review:

1. **Size Standards:** The SBA defines size standards based on the industry, often measured by average annual receipts or the number of employees. For most industries, a business must have fewer than 500 employees, but some sectors have different thresholds.
2. **Independence:** The business must be independently owned and operated, not be dominant in its field, and must adhere to the SBA's regulations.
3. **Location and Legal Structure:** The business must be organized for profit and located in the United States. Additionally, it must be a sole proprietorship, partnership, or corporation.

Setting Up Small Businesses. Given the self-certification process and advantages small businesses have in obtaining government contracts, many existing companies strategically establish related small businesses to enhance their chances of securing government contracts. Businesses must put some deliberate thought to this endeavor, as it may take some time for a contractor to win its first government contracting bid. Businesses commonly follow these general guidelines when establishing an entity to secure government contracts:

1. **Identify Complementary Services:** Existing businesses should analyze their operations and identify areas where they can spin off smaller firms that provide complementary services. This could enhance their overall competitiveness in government contracting.
2. **Utilize Existing Resources:** Leverage the resources, expertise, and networks from the parent company to support the new small business. This includes access to funding, technology, and skilled personnel.
3. **Focus on Niche Markets:** New small businesses can target niche markets within the government contracting space, allowing the existing company to diversify its offerings and capture more contracts.
4. **Engage in Joint Ventures:** SBA requirements generally permit two or more small businesses to pool their efforts by forming a joint venture. That joint venture can still qualify for small business set-aside contracts, provided that its documentation meets SBA requirements. Forming joint ventures with other small businesses can enhance capabilities and qualifications, making it easier to bid on larger contracts together.
5. **Develop a Capabilities Statement:** Create a clear and concise capabilities statement that outlines the business's strengths, past performance, and relevant experience. This document serves as a marketing tool to showcase its qualifications to potential government clients.
6. **Performance Limitations:** Small businesses must keep abreast of the additional regulatory requirements applicable to work performed under small business set-aside programs, such as the restriction on subcontracting for many contracts secured under these programs.

Conclusion. The landscape of government contracting is ripe with opportunities for small businesses. By understanding the advantages available and the criteria for qualification, as well as leveraging existing businesses to create new avenues, small enterprises can effectively tap into this lucrative market. With the right strategy and preparation, small businesses can not only survive but also thrive in the realm of government contracting.

ROBERT A. PLEINES, JR. is a managing associate in the Practice Group and may be reached at 216.363.4491 and rpleines@beneschlaw.com.

CHRISTOPHER C. RAZEK is an associate in the Practice Group and may be reached at 216.363.4413 and crazek@beneschlaw.com.

Post-*Chevron* Transportation & Logistics Regulatory Enforcement

Jonathan R. Todd

Robert Naumoff

The United States Supreme Court recently brought to a close 40 years of "*Chevron* deference" and its guidance for legal interpretation of certain federal agency decision-making authority. In two instances, the United States Congress wasted no time in exploring the impact of this decision on agencies with jurisdiction over transportation and logistics operations. This article explains how the tangible impact in a post-*Chevron* world is far more nuanced than a wholesale change to the power of the Executive Branch.

Immediate signs of change emerged, although much remains to be seen. On July 10, 2024, less than two weeks after the Supreme Court decision overturned *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 47 U.S. 837, two House chairmen began a letter-writing campaign to examine the decision's fallout.

Letters signed by Transportation and Infrastructure Committee Chairman Sam Graves (R-Mo.), together with Oversight and Accountability Chairman James Comer (R-Ky.), were issued to Transportation Secretary Pete Buttigieg and Homeland Security Secretary Alejandro Mayorkas as well as other cabinet secretaries. Those letters argue that an expansive "administrative state" emerged after *Chevron* under which the Judicial Branch "abdicated" its role by "enabling" the Executive Branch to grow all too powerful and "usurp" the Legislative Branch.

In a separate press release, the chairmen summarize the letters by requesting that the secretaries "send any information about legislative rules proposed or promulgated, agency adjudications initiated or completed, enforcement actions brought by agencies, and agency interpretive rules proposed or issued since January 20, 2021." The statement also requests "information about any judicial decisions to which agencies have been party since the 1984 *Chevron* decision." Information requests for each respective agency were largely identical.

Chevron Deference Background and Why It Mattered

In *Chevron*, the question before the court was essentially whether the Environmental Protection Agency acted appropriately within its discretion as it applied amendments to the Clean Air Act. The court held that judicial review of an agency's

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Post-*Chevron* Transportation & Logistics Regulatory Enforcement

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decision-making requires a two-part process. First, courts must determine whether legislative intent is unambiguously clear on the face of the respective statute or through legislative history. If this is so, then the legislative intent governs the permissibility of an agency's interpretation. Second, if legislative intent is ambiguous, then courts must give deference by examining the reasonableness of the agency's interpretation, as if the agency were expert in its field, rather than itself issuing a judicial interpretation. As a result, courts following *Chevron* could not exercise independent judgment when reviewing the propriety of agency statutory interpretations.

Loper Bright Eliminates *Chevron* Deference and Why It Matters

The case that challenged *Chevron* deference was this year's *Loper Bright Enters. v. Raimondo* (2024 U.S. LEXIS 2882). *Loper Bright* involved a federal agency known as the National Marine Fisheries Services (NMFS) and its finding that fishing vessels operating within the economic area of the United States must pay for federal observers pursuant to the Magnuson-Stevens Act. In its holding, the Supreme Court specifically found that a lower court's use of *Chevron* deference was an improper delegation to the Executive Branch of the judiciary's constitutionally mandated responsibility of statutory interpretation. The court's ruling aims to correct that perceived error of *Chevron* by reinstating the judiciary's obligation to exercise "independent judgment" in the interpretation of statutes and resolving ambiguities. As such, courts may still consider an agency's interpretation of a statute when making rulings, but those agency interpretations are no longer dispositive.

Where Transportation & Logistics Operations Go From Here

Loper Bright overrules the long-standing "*Chevron* deference" by declaring that when confronted with ambiguous statutory language, the role of interpreter rests firmly with the courts and not the agencies. The high court held that, while agency statutory interpretation can be considered, the framers of the Constitution "anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by *exercising independent legal judgment*" (emphasis added). *Chevron* deference as a default legal principle is no longer the law of the land.

The concrete effects immediately following *Loper Bright* will not be quite as apparent as the Congressional letter-writing campaign. However, as of this writing, *Loper Bright* has been cited in over 200 cases with both positive and negative treatment, and prior rulings that relied upon *Chevron* remain good law until subsequent challenge. Even where there are narrow legal challenges to existing or new agency decisions, a court may still consider agency statutory interpretations and may ultimately choose to rely upon the same. The difference for the first time in 40 years is that courts must now exercise their own independent judgment in that process. Also, while express delegation by Congress is permissible and must be respected by the courts, we can surely expect to see stronger challenges of whether agencies exceeded the scope of their delegation during enforcement or rulemaking activities, and we have already begun to see regulated parties proactively raise the *Loper Bright* decision with respect to forward-looking interpretations far in advance of litigation. Collectively, these effects may lead to a degree of "venue shopping" as would-be plaintiffs seek favorable outcomes from a newly independent-minded judiciary.

We know all too well that transportation and logistics are heavily regulated sectors with a wide range of stakeholders. Interested parties in any agency action include not only the immediately regulated parties, such as for-hire carriers and transportation intermediaries, but also the private carriers and beneficial cargo owners who must comply with regulation and may bear enforcement. For now, the post-*Chevron* world means that we stay the course in dutifully complying with the letter of the law and regulation—understanding that new avenues for challenging agency discretion are now available.

JONATHAN R. TODD is Vice Chair of the Transportation & Logistics Practice Group at Benesch. He may be reached at 216.363.4658 and jtodd@beneschlaw.com.

ROBERT NAUMOFF is Of Counsel in the Practice Group. He may be reached at 614-223-9305 or rnaumoff@beneschlaw.com.

The Transportation Security Screening Modernization Act (H.R. 5840) Offers Potentially Significant Benefits to the Transportation & Logistics Industry

Brian Cullen

During a presidential election year, it is very difficult to get both sides of the aisle to agree on anything. However, thus far, the Transportation Security Screening Modernization Act (H.R. 5840) recently passed by the Senate and House Homeland Security committees appears to be an exception. This bill, which will modernize and streamline security screening processes and improve the efficiency and safety of transportation operations, should greatly benefit both shippers and motor carriers. This article delves into the key aspects of H.R. 5840 and the benefits it potentially offers to shippers and motor carriers, highlighting the implications for security, operational efficiency, and compliance.

"This bill…will modernize and streamline security screening processes and improve the efficiency and safety of transportation operations…."

Understanding H.R. 5840: Key Provisions

The goal of H.R. 5840 is to modernize the current security screening processes used across various transportation sectors, including trucking. The bill proposes several reforms for the purpose streamlining and driving efficiencies with Transportation Security Administration (TSA) protocols. H.R. 5840 attempts to accomplish this goal primarily by using technology and increasing collaboration between the public and private sectors. Key provisions of the bill include:

1. **Technology Advancements:** H.R. 5840 emphasizes the integration of new technologies, including artificial intelligence (AI) to enhance and drive efficiencies within the TSA screening process. The new technologies aim to detect potential threats more effectively, thereby reducing the need and volume of manual inspections by the TSA that cause delays in the current screening process.
2. **Data Sharing:** H.R. 5840 increases data sharing between the TSA and shippers and motor carriers. With an increase in the depth and frequency of security-related information being exchanged between the TSA and the shipper or motor carrier, the anticipated result is that H.R. 5840 will create a more proactive and efficient TSA screening process.
3. **Streamlining of Processes:** H.R. 5840 aims to reduce delays associated with TSA security screenings by reducing overlap and redundancy within the TSA screening process. This includes using data to create a more risk-based approach to screening that prioritizes shipments that are of higher risk of having issues or concerns, while expediting the TSA screening for lower-risk or low-value cargo.
4. **Funding and Support for Continuous Improvement Modernization Efforts:** H.R. 5840 allocates funding to support research and development of new security technologies and training programs to continually improve upon the overall goals and purpose of H.R. 5840.

Benefits of H.R. 5840

For shippers and motor carriers, H.R. 5840 brings several potential benefits to their respective operations.

1. **Reduced Delays and Operational Costs.** Modernizing the security screening process will certainly reduce the potential for delays. Current security protocols are cumbersome and not data-driven, often leading to long wait times at checkpoints that impact delivery times and increasing costs. By streamlining these processes, motor carriers especially can save valuable time and reduce operational expenses.
2. **Enhanced Security via Technology.** The implementation and use of more advanced screening technologies will result in potential threats or issues being identified sooner, which should greatly reduce instances where the flow of goods is disrupted. Specifically, the implementation of artificial intelligence that can quickly analyze data and identify problems proactively should both increase overall security of the cargo while also minimizing the potential impact on the flow of goods.
3. **Improved Efficiency.** Prioritizing shipments that pose higher risks and expediting the screening of low-risk cargo will benefit the sectors that should want increased security screening, while reducing disruption to lower-risk or lower-value goods. H.R. 5840's targeted approach will reduce unnecessarily burdensome checks on routine shipments, which will speed up the screening process.
4. **Proactive Management of Issues or Threats.** The increased data-sharing provisions of H.R. 5840 should enable both shippers and motor carriers to be better informed about current security threats and compliance requirements. This allows both shippers and motor carriers the opportunity to adapt, which should further minimize operational disruptions.
5. **Potential Cost Savings to Shippers and Motor Carriers.** Fewer disruptions and less idle time for shipments should translate into cost savings for both shippers and motor carriers. Both shippers and motor carriers stand to benefit from more predictable

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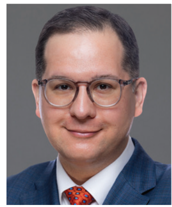
Supply Chain Security Is National Security: Cyber, Physical, and Personnel Protections


Jonathan R. Todd

Vanessa I. Gomez

Megan K. MacCallum

U.S. supply chain security is increasingly under threat. The White House's National Security Strategy describes this moment as an inflection point. Many federal agencies have taken charge in elevating the very concept of "supply chain security" to a subject matter expertise with serious national security implications. The geopolitical basis for this change in tone are ever present. In this year alone, Russia's attack on Ukraine dragged on as an enduring cross-border war, U.S. tensions with China have grown from a trade war to tensions in the South China Sea, and conflict in the Middle East escalates with little sign of resolution, including Houthi attacks on cargo ships. In many ways supply chain professionals now work on the front lines of U.S. national security.

Threat Assessments for Supply Chains

Company supply chain security efforts target three types of risks: Cyber Threats, Physical Security Threats, and Personnel Threats. This article surveys certain federal programs targeting historic and emerging threats within these risk categories together with the corresponding regulatory requirements. This simple three-part construct for assessing categories of threat applies to all asset and non-asset operations. It helps to manage risk assessments, deployment of resources, incident response, and corrective actions in the context of national security. Its value extends well beyond minimum regulatory compliance.

Cybersecurity Controls

Cyber threats are reported with such great frequency they are now fixed in the national consciousness. Supply chains are no different. Two federal agencies that have increased attention on this vulnerability in supply chains are the U.S. Cybersecurity and Infrastructure Agency (CISA) and the Transportation Security Administration (TSA). The theme of these efforts is a need for steadfast awareness and reporting of activities by potential threat actors.

CISA Incident Reporting – The ransomware cyberattack on Colonial Pipeline in 2021 resulted in a multimillion-dollar loss paid to the hackers and nearly a weeklong shutdown of the company's operating systems. The shutdown impacted the U.S. fuel supply, causing localized gasoline, diesel fuel, and jet fuel shortages. This impact was exacerbated by panicked individuals rushing to buy and stockpile fuel for fear of a national shortage. In 2022, President Biden signed into law the Cyber Incident Reporting Critical Infrastructure Act, which requires covered entities, including a number of supply chain participants, to develop a cybersecurity incident reporting plan with near-immediate escalation to CISA. Incidents must be reported within 72 hours and ransomware payments within 24 hours.

TSA Security Directives – The TSA published Security Directives aimed at the rail industries and pipeline operators shortly after the Colonial Pipeline incident. The rail Security Directive targeted freight and passenger rail transportation and public bus transportation. The Directive requires operators to: (1) report actual and potential cybersecurity incidents to CISA; (2) designate a round-the-clock available Cybersecurity Coordinator to serve as a point of contact between the TSA; (3) review current cybersecurity risks; (4) identify vulnerabilities in cybersecurity and develop a plan to address those risks; (5) implement mitigation measures to protect against ransomware and IT attacks; (6) implement a cybersecurity contingency and recovery plan; and (7) conduct a cybersecurity architecture design review. Later in 2023 the TSA issued similar measures for TSA-regulated airport and aircraft operators. Those measures include access control limits for critical cyber

systems, and continuous monitoring and detection policies for cybersecurity threats and anomalies.

Physical Security Controls

Physical threats are more traditional in their risk profile, although they remain significant. The protection of cargoes, transportation movements, and facilities has long been a point of concern. National security threats of terrorism, espionage, and even theft are appreciable throughout the supply chain. A wide range of federal agencies have long maintained programs and regulatory requirements to mitigate risk exposure from physical threats. New efforts are emerging for specific geopolitical concerns.

CBP C-TPAT Program – U.S. Customs and Border Protection (CBP) has collaborated with industry under the Customs-Trade Partnership Against Terrorism (C-TPAT) program since 2006, although the roots of the program extend to the immediate post-9/11 era. The program seeks to strengthen the integrity of international supply chains and, more importantly, the importer and service provider relationships throughout those supply chains. Today there are approximately 11,400 certified program participants across the trade community. Those private companies have entered agreements with CBP to bolster supply chain security, including by identifying security gaps in the chain and implementing specific security measures and best practices. In return, the partners receive benefits, including a reduced number of CBP examinations, front of line inspections, shorter wait times at the border, and access to Free and Secure Trade (FAST) Lanes, among others.

TWIC Cards and FCLs – Credentialing and requirements for escorted access to certain facilities, and for those performing certain services, are a widespread tool supporting supply chain security. For example, security clearances and access cards can protect against terrorist violence, theft, and espionage. The Maritime Transportation Security Act requires that workers who access secure areas of maritime facilities and secure vessels are screened and credentialed. The TSA developed and implemented the Transportation Worker Identification Credential (TWIC) card to help meet this need as well as others. These physical security measures protect the U.S. ports as well as carriers and goods that move through them by requiring personnel to pass Security Threat Assessments (STAs). Similar programs exist for other fact patterns, such as the Department of State's facility security clearance (FCL) program that manages levels of access to classified information for Government contractors.

TSA Security Programs – The TSA is also on the front lines of managing physical security for passenger and all-cargo air carrier operations. Public security program requirements for air carriers, indirect air carriers, and certified cargo screening facilities include stringent STAs, facility security, chain of custody, cargo screening standards, and known shipper requirements. These protocols aim to prohibit introduction of explosives and incendiaries in air traffic while also guarding against violence and air privacy.

PHMSA Security Plan – The U.S. Department of Pipeline and Hazardous Materials Safety Administration (PHMSA) regulates transportation of hazardous materials over U.S. rail, highways, and waters. One of the ways that PHMSA addresses the risk of terrorist threats on hazardous materials in transportation is the requirement for certain parties to develop and maintain a security plan. Movements of explosives, flammable or poisonous gases, flammable liquids, and spontaneously combustible materials, as well as certain toxins and chemicals, require the security plan. It must include an assessment of transportation security risks associated with facilities, such as unauthorized access, and must provide appropriate measures to address those risks. The security plan must also address security of active shipments and of shipments stored incidental to those movements.

BIS Export Controls and OFAC Economic Sanctions – The concept of physical security also extends to export controls and economic sanctions, particularly from a national security perspective. Many of these restrictions were aimed at stifling the economic power and weapons development potential of government, military, and leaders. For example, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) has addressed tensions with China through export controls, along with other agencies, including the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC). BIS and OFAC use export controls and trade sanctions respectively to advance national security interests by preventing receipt of sensitive items, such as semiconductor technology, and "blocking" high-risk individuals and entities from transactions. Additionally, BIS maintains a Military End Use List of high-risk entities prohibited from receiving U.S. exports to China. The agencies have also implemented a series of broad-based trade restrictions applicable to dealings with Russia following the invasion of Ukraine.

Personnel Security Controls

Personnel threats are another long-standing risk receiving attention throughout the supply chain. These extend well beyond screenings for who may have access to certain facilities, such as TWIC cards or certain domestic technologies such as deemed export restrictions. Most fundamentally the question of personnel security is seen in restrictions around who may hold certain roles, and responsibility for important functions, with high-impact significance for supply chain security and national security.

TSA Security Coordinator – TSA requires regulated functions, including Indirect Air Carriers (IACs), to appoint both a Cybersecurity Coordinator and a Security Coordinator. The Security Coordinator is a management-level employee who undergoes an STA, which amounts to an FBI background check, and who must be on call 24 hours as the primary point of contact for security-related activities and communications with the TSA.

FMC Qualified Individual – The U.S. Federal Maritime Commission (FMC) similarly requires appointment and scrutiny of a specified individual responsible for compliance of international shipping conducted by Non-Vessel Operating Common Carriers (NVOCCs). Those persons are referred to in regulation as the Qualifying Individuals (QIs). NVOCCs must appoint a QI to be responsible for compliance

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CBP and TSA Facility Bonding and Special Authorizations

Jonathan R. Todd

Christopher C. Razek

"These seven facility-related CBP and TSA authorizations have proven to be extremely valuable in driving efficiencies in the performance of international and air cargo movements."

Service providers fulfill a range of lesser-known regulated activities to accomplish international and air cargo movements. Some of the less frequently utilized roles available under U.S. Customs and Border Protection (CBP) and Transportation Security Administration (TSA) jurisdiction have proven to be extremely valuable in driving efficiencies. Those functions involve a high degree of collaboration with the federal government, often under surety bond or strict security protocols, to ensure our national objectives are achieved with maximum flexibility and minimum hindrance to domestic industry using those services.

This article summarizes seven facility-related authorizations, the services they provide, and their legal basis under CBP and TSA authority: Customs Bonded Warehouses, Foreign Trade Zones, Container Freight Stations, Centralized Examination Stations, Express Consignment Carrier Facilities, Centralized Hub Facilities, and Certified Cargo Screening Facilities.

Customs Bonded Warehouse (CBW) – CBW services allow the landing of import inventories in the United States while delaying the time of customs entry for up to five years. CBWs are relatively prevalent and can serve a valuable role in managing duty impact or in lowering overall storage fees during customs review. The statutory authority for establishing a bonded warehouse is found at 19 USC § 1555.

Foreign Trade Zone (FTZ) – FTZ services provide greater utility relative to CBW because they allow for manufacturing, manipulation of product, and withdrawal for customs entry on a unit basis. FTZs and sub-zones conduct business under Operating Agreements and often under a public utility basis with published rates. The basic regulatory rules for FTZ operations are found at 19 CFR Part 146.

Container Freight Station (CFS) – CFSs are secured areas within warehouse facilities dedicated to the consolidation and deconsolidation of containers before export or upon import. Shippers utilize CFS most often when a warehouse facility provides short-term storage of merchandise prior to import or export and can gain efficiencies in the consolidation of LCL (Less than Container Load) shipments. A CFS can be established by filing an application with the local CBP Port Director, obtaining its approval, and posting a bond. This basic procedure is found at 19 CFR § 19.40.

Centralized Examination Station (CES) – CESs are privately operated facilities where merchandise is made available to Customs Officers for physical examination. A CES may be established by application to the local CBP Port Director. CESs are operated pursuant to written agreement between CBP and the CES operator. This basic procedure is found at 19 CFR Part 118.

Express Consignment Carrier Facility (ECCF) – ECCFs are specialized facilities approved by a CBP Port Director for the examination and release of express consignment shipments. Express consignment shipments contain imported merchandise carried by express consignment operators and carriers, including couriers, under special procedures. ECCFs are uniquely authorized and qualified to process the staggering volume of parcels arriving in the United States during the import process. The basic regulatory rules are found at 19 CFR Part 128.

Centralized Hub Facility (Hub) – Hubs are separate, unique, single-purpose facilities normally operating outside CBP operating hours. Each are approved by the local Port Director for entry filing, examination, and release of express consignment shipments. The basic regulatory rules are found at 19 CFR Part 128.

Certified Cargo Screening Facility (CCSF) – CCSFs operate under TSA jurisdiction rather than CBP, although they have an equally important role in protecting the public and implementing national security objectives. CCSFs allow private operators to accomplish required air cargo screening. The TSA approves CCSF applications and issues required security programs pursuant to 49 CFR § 1549.

The team at Benesch is well experienced in securing, maintaining, and contracting for these operations as well as representing operators during government investigations and enforcement.

JONATHAN R. TODD is Vice Chair of the Transportation & Logistics Practice Group at Benesch. He may be reached at 216.363.4658 and jtodd@beneschlaw.com.

CHRISTOPHER C. RAZEK is an associate in the Practice Group. He may be reached at 216.363.4413 and crazek@beneschlaw.com.

The Transportation Security Screening Modernization Act (H.R. 5840) Offers Potentially Significant Benefits to the Transportation & Logistics Industry

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delivery schedules via the overall reduction of delays and detentions that plague the current system.

6. **Faster Shipping Times.** Shippers and motor carriers should expect faster transit times for their goods via the efficiencies gained under H.R. 5840. This should be most beneficial for industries that have a higher volume of time-sensitive deliveries.

Types of Freight that Benefit the Most from H.R. 5840

While all shippers and motor carriers will benefit if H.R. 5840 becomes law, certain industry verticals will reap significant advantages. Below are a few modes of transportation that stand to benefit the most if H.R. 5840 becomes law:

1. **Tank Truck Transportation.** Shippers and motor carriers that transport hazardous materials like chemicals or fuel will greatly benefit from enhanced security measures that prioritize safety without causing undue delays.
2. **Refrigerated Transportation.** Shippers and motor carriers that handle perishable goods, such as food or pharmaceuticals, will benefit from the efficiencies gained. This should help preserve product quality and ensure timely deliveries, avoiding potentially significant loss or damage to cargo.
3. **High-Value Goods Transportation.** Shippers and motor carriers transporting electronics, luxury goods, jewelry, cosmetics, or other theft-prone items will benefit from advanced security screenings that offer better protection against theft while also maintaining efficient transportation operations.

If passed, H.R. 5840 should positively impact efficiency within the transportation & logistics industry. As of the date of this article, this bill will very likely be passed this year. Shippers and motor carriers should consider making preparations in the immediate future to adjust their operations to comply with the new law and reap the benefits of the more efficient screening processes—particularly if the shipper or motor carrier is engaged in tank truck, refrigerated, or high-value goods transportation.

BRIAN CULLEN is Of Counsel in the firm's Transportation & Logistics Practice Group and may be reached at 312.488.3297 or bcullen@beneschlaw.com.

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and to be accountable to the FMC as a condition to receiving and maintaining their FMC license. The QI must hold an officer-level role at the company, must have at least three years' experience in the ocean transportation intermediary space, must provide employment and professional experience references, and must pass a background check.

CBP Customs Broker – CBP similarly establishes strict requirements for a person to become a licensed U.S. Customs Broker and, importantly from an enterprise perspective, to serve as the Broker-Officer securing a company's license. Brokers hold responsibility for lawfully entering goods into the U.S. for their importer clients, including the financial aspects of calculating and remitting customs duties. The sensitive nature of this role for our supply chain is seen in the need to pass a rigid license examination and post a bond to perform as a broker. An entity seeking license must appoint an individual broker as an officer and must be empowered under its formation documents to conduct customs business, and individuals must undergo background checks including fingerprinting.

Risk-Appropriate Supply Chain Security Programs

Now is the time to take supply chain security seriously. The federal government's approach to these issues has been largely decentralized to date. Collectively these regulatory requirements and their enforcement serve to fortify the supply chain against threats to domestic commercial interests and national security.

As the risk environment grows in response to geopolitical pressures, the need for companies to remain vigilant also grows in importance. Effective supply chain security efforts begin with minimal regulatory requirements but necessarily require tailored focus. No supply chain is exactly like another due to complexities of operational needs, global footprint, and unique relationships. There is no one-size-fits-all solution to Cyber Threats, Physical Security Threats, and Personnel Threats. Each company is free to assess its own risks and programmatic solutions to those vulnerabilities that extend beyond minimum requirements. Enterprise performance, public reputation, and national security are at stake.

JONATHAN R. TODD is Vice Chair of Benesch's Transportation & Logistics Practice Group. He may be reached at 216.363.4658 and jtodd@beneschlaw.

VANESSA I. GOMEZ is an associate with the Practice Group and may be reached at 216.363.4482 and vgomez@beneschlaw.

MEGAN K. MACCALLUM is an associate with the Practice Group and may be reached at 216.363.4185 and mmaccallum@beneschlaw.com.

Cargo Liability – Global Comparative Analysis of Legal Regimes

Jonathan R. Todd

Robert Pleines, Jr.

J. Philip Nester

Christopher C. Razek

Megan K. MacCallum

Vanessa I. Gomez

International laws for cargo liability impact the way enterprises procure transportation and logistics services, the contracts under which those services are purchased, the process for claims adjudication, and the liability for loss, damage, or the delay of goods. Consider for example the international conventions that apply recovery in a SDR/kg metric: ocean service yields 2 SDR per kg; road service yields 8.33 SDR per kg; rail service yields 17 SDR per kg; and air service yields 22 SDR per kg. These standards vary greatly across mode, and each are different from domestic United States liability regimes, which also vary across mode. Variance also exists in the form of claims notice periods, limitations on the time in which one may file a lawsuit, the requirements for proving a claim, and the exclusions available to service providers in denying claims.

Supply chain professionals across the world around navigate these extremes and their impact on the procurement or delivery of services. This article compares those key differences in legal liability regimes.

Surface Transportation Liability

The principal surface transportation modalities are road and rail transport. For surface-based transportation providers, liability and its limitations are determined by the location where loss occurred as well as the specific mode.

CMR Convention – The CMR Convention is an international treaty that governs the transportation of goods by road across international borders. Under the CMR Convention, motor carriers are generally liable for the loss, damage, or delay of goods occurring during transport if the loss, damage, or delay was due to their fault or negligence. The CMR Convention stipulates that a motor carrier is not liable if it can prove that the loss, damage, or delay resulted from specific exempted circumstances such as inherent defects in the goods, acts of war, or natural disasters. In addition to addressing the scope of liability, the CMR Convention also establishes specific limits of liability for motor carriers in the event of loss, damage, or delay of goods during transit. The motor carrier's liability is limited to 8.33 Special Drawing Rights (SDR) per kilogram of gross weight of the lost or damaged goods. A number of countries have adopted the CMR Convention, including many European Union member states as well as other countries such as Switzerland, Turkey, and Russia.

COTIF Convention – Liability for international rail carriers is governed by COTIF. Rail carriers are liable for loss or damage to the goods between the time of acceptance and delivery, as well as for loss and damage resulting from time during which the transit period was exceeded. A rail carrier may be relieved of liability if the loss, damage, or delay resulted from a fault or order of the person entitled to relief, by the inherent vice of the goods, or by circumstances that the rail carrier could not avoid and the consequences of which it was unable to prevent. The rail carrier is also relieved of liability when the loss or damage arises from the special risks inherent in specified circumstances. In addition, COTIF also applies limitations of liability based on the goods carried or circumstances of the loss, including completion of administrative formalities. While COTIF is not globally adopted, its rules have been adopted by the European Union member states and other countries.

Carmack Amendment – The United States applies Carmack to motor carrier liability and also rail carrier liability, which is found under statute at 49 U.S.C. § 14706 (and for rail carriers at § 11706). Under Carmack, motor carriers in interstate commerce are generally liable for the full value of the goods lost or damaged unless they can prove that the loss or damage results from specific exceptions, such as an act of God, public enemy, authority of law, or inherent vice in the goods. These exceptions are asserted as defenses to a claim. They are similar to those available to motor carriers under the CMR Convention. Another similarity is that loss caused by the shipper's own negligence or improper handling is excepted. A motor carrier's liability for loss or damage under Carmack is uncapped, although parties will often agree to limitations in exchange for favorable service rates (for example, $100,000 USD per truckload of cargo).

Air Transportation Liability

As with surface transportation, the liability of air carriers can depend on the location of the transportation. The Montreal Convention (Montreal) is the leading force in determining liability for air carriers in international travel. Although the United States has adopted Montreal for international transportation, the convention does not apply to domestic air traffic, which is instead subject to common law.

Montreal Convention – Montreal is a multilateral treaty that governs the international liability for air carriers. Montreal is a two-tier liability system allowing shippers to recover with a near strict-liability regime for claims up to an SDR threshold and a negligence standard for claims over that threshold. Air carriers are subject to Montreal's liability standards between the place of departure and destination as well as while the air carrier is being embarked or disembarked. Although Montreal applies a near strict liability, air carriers can seek exemptions if they can prove damage was caused by events outside the control of the air carrier and could not have been avoided even with the air carrier's exercise of due care. Montreal sets a limitation that the air

carriers' liability for cargo loss or damage shall not exceed 22 SDR; however, the parties are free to contract to set a recovery amount that exceeds 22 SDR. Montreal also sets out a claims period for damaged goods that is 14 days from the date of receipt and a claims period for delay goods of 21 days from the date of delivery.

U.S. Common Law – United States common law governs cargo liability for domestic flights. Air carriers are liable for cargo loss when the loss occurs due to the air carrier's failure to exercise reasonable care in handling the cargo. As with Montreal, the air carrier's liability applies unless the loss resulted from factors beyond its control, such as inherent defects in the cargo or natural disasters. Most air carriers in the United States seek to limit their liability for domestic flights through an air waybill, which is typically $0.50 USD per pound, unless the shipper demands a higher amount. Unlike Montreal, however, U.S. federal common law and judicial precedents provide additional guidance on interpreting liability terms and resolving disputes related to cargo damage. It is common for parties to elect for Montreal to govern domestic U.S. air cargo for convenience and consistency with international movements.

Ocean Transport Liability

Like surface and air-based transportation, several factors can determine the liability scheme that applies to a particular ocean-based movement, but the Hague/Hague-Visby Rules (Rules) and the Carriage of Goods by Sea Act (COGSA) are the two prevailing regimes that govern liability for cargo loss, damage, or shortage that may occur in international trade and United States trade.

Hague-Visby – The Rules are an international convention applicable to contracts of carriage that are covered by a BOL or similar document of title related to the carriage of goods by sea where: (1) the BOL is issued in a contracting nation state; or (2) the carriage is from a port in a contracting nation state; or (3) the contract contained in or evidenced by the BOL provides that the Rules or the legislation of any contracting nation state governs the contract. Unless one of Rules' 17 enumerated defenses apply, the carrier is liable for loss or damage to cargo in an amount not to exceed 666.67 SDR per package or unit or 2 SDR per kilogram of gross weight of the goods that were lost or damaged, whichever is the higher. Under the Rules, shippers must assert a claim or bring suit with respect to the goods carried within one year of delivery or the date when they should have been delivered.

Carriage of Goods by Sea Act – COGSA applies to contracts or carriage between shippers and ocean carriers for the international carriage of goods by sea (except for live animals), to or from foreign ports and United States ports. A carrier's liability under COGSA is from "tackle to tackle" and predicated on: (1) a failure to exercise due diligence to make the vessel in all respects seaworthy and to properly man, equip, and supply the vessel; (2) fault; or (3) negligence. Unless one of COGSA's eight enumerated defenses apply, the ocean carrier is liable for loss or damage to cargo in an amount not to exceed $500 USD per package or per customary freight unit if the goods are not shipped in packages. COGSA preempts the application of other liability regimes for contracts of carriage in the United States foreign trade, but the Harter Act or Carmack will apply to contiguous and non-contiguous domestic trade, including coastwise shipping, inland water shipping, and movements in interstate or intrastate commerce. Shippers have a one-year statute of limitations from the delivery or the expected delivery of the goods for a shipper to file a lawsuit for cargo loss, damage, or shortage under COGSA.

Warehouseman Liability

Unlike transportation, there is no international convention that governs the accepted liability of a warehouseman. This places warehousing services almost entirely in a commercial realm as opposed to a heavily regulated environment. The regime for liability pertaining to lost, stolen, damaged, or destroyed goods in storage requires consultation not only with the jurisdiction where the goods are stored but also industry custom in that jurisdiction.

Fault-Based Liability – Absent contrary terms accepted by a depositor, a warehouseman's liability is singularly focused on fault. In common law jurisdictions, including the vast majority of the United States, fault is determined under the theory of negligence. That is, a depositor must establish a warehouseman's duty of care relating to the goods, breach of that duty of care, causation, and damages. In the United States, this proposition is also codified in each state's Commercial Code. Simply, a warehouseman is liable for damages for loss of or injury to the goods caused by its failure to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances. Conversely, a warehouseman is not liable for damages that could not have been avoided by the exercise of that care. The establishment of a liability regime based on fault negates the common misconception among depositors that a warehouseman is an insurer of the goods in its possession. Practically, this means that warehousemen are customarily not responsible for loss, damage, or destruction of goods caused by Acts of God or other events typically described as "force majeure" absent showing a fault.

Negotiated Limitations of Liability – The limitation of that liability is not set by convention but rather by industry practice and commercial negotiation. However, certain organizations publish standard warehousing terms in their jurisdictions that help establish market expectations; notably, those include the Dutch Warehousing Conditions in Europe and the Standard Contract Terms and Conditions for Merchandise Warehouses issued by the International Warehouse Logistics Association in the United States. Practically, the limitation of liability will depend materially on the value of the goods in storage, the strength and sophistication of the respective parties, and the availability of either the depositor's or the warehouseman's applicable insurance policies to cover the loss or damage.

Comparative Differences and Procurement or Sale Terms

The practical effect of these variances is meaningful in terms of risk to cargo owners and exposure for service providers. The cost of service, necessity of first-party insurance cover, and standard operating procedures for filing of claims are each influenced by these legal regimes. Consider that these establish the industry standards of minimum liability, although each allows parties to contract for higher standards. This means that high-value cargoes may receive higher levels of liability but

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Recent Events

ATA Legal Forum
Marc S. Blubaugh presented *Shaking Things Up: Plaintiffs Stumble in Aftershocks of FAAAA Earthquake!* **Jonathan R. Todd** and **Eric L. Zalud** presented *From the Trenches: A Deep Dive Perspective, and Roadmap, on Regulatory Investigations and Audits*. **Richard A. Plewacki** attended.
July 16–19, 2024 | Minneapolis, MN

National Home Delivery Association (NHDA) Annual Forum
Marc S. Blubaugh presented *Fighting for the Independent Contractor Model in Washington*.
July 28–August 3, 2024 | Austin, TX

Infiniti-I Workforce Solutions
Eric L. Zalud and **Lauryn T. Robinson** presented *What Me Worry! Exploring Negligent Hiring, Selection, and Training Claims and How to Defend and Prevent Them*.
August 1, 2024 | Virtual

Local Association for Supply Chain Management, Akron Chapter
Jonathan R. Todd, Vanessa I. Gomez, and **Megan K. MacCallum** presented *News Headlines Impacting International Trade Compliance*.
August 21, 2024 | Akron, OH

Intermodal Association of North America (IANA) Intermodal EXPO
Marc S. Blubaugh presented *Roadability Regulations: Back to the Future*.
September 9–11, 2024 | Long Beach, CA

Transportation Intermediaries Association (TIA) Policy Forum
Marc S. Blubaugh attended.
September 16–18, 2024 | Washington, D.C.

ASCM Cleveland Chapter Professional Development Meeting
Jonathan R. Todd, Vanessa I. Gomez, and **Megan K. MacCallum** presented *Current Events and Global Supply Chain Law*.
September 18, 2024 | Cleveland, OH

Trucking Defense Advocacy Council (TDAC) 2024 Conference
Eric L. Zalud attended.
September 18–19, 2024 | Fayetteville, AR

McGriff Transportation Symposium
Marc S. Blubaugh presented *Assessing and Navigating a Challenging Claims Environment*.
September 23, 2024 | Sarasota, FL

Ohio Trucking Association's (OTA) Annual Conference
Robert Naumoff and **Kelly E. Mulrane** attended.
September 23–24, 2024 | Westerville, OH

University of Wisconsin E-Business Consortium Annual Conference: Business Best Practices and Emerging Technologies in Supply Chain
Brian Cullen attended.
October 1, 2024 | Madison, WI

Armstrong & Associates 3PL 2024 Summit
Eric L. Zalud presented *Mitigating Risks: Transportation & Logistics Law 2024*.
October 8–9, 2024 | Chicago, IL

Keller Logistics Customer Summit
Marc S. Blubaugh presented *Taking Your Supply Chain to the Next Level: Evaluating Commercial Risk*.
October 9, 2024 | Defiance, OH

American Trucking Association (ATA) Management Conference & Exhibition
Marc S. Blubaugh attended.
October 12–15, 2024 | Nashville, TN

Transportation Intermediaries Association (TIA) 2024 Technovations Conference
Eric L. Zalud attended.
October 15–17, 2024 | Ponte Vedra Beach, FL

Ballast CEO Focus Session
Eric L. Zalud presented *Seven Hottest Logistics Legal Issues for 2025*.
October 18, 2024 | Virtual

Harris Williams 3PL Conference
Marc S. Blubaugh and **Eric L. Zalud** attended.
October 21, 2024 | Nashville, TN

2024 International Warehouse Logistics Association (IWLA) Warehouse Legal Practice Symposium
J. Philip Nester presented *Transportation Law 2024: Demurrage & Detention*. **Kevin M. Capuzzi** presented *Bankruptcy and Creditor's Rights Law*.
October 22–23, 2024 | Washington, DC

Trucking Industry Defense Association (TIDA) 32nd Annual Seminar
Eric L. Zalud attended.
October 23–25, 2024 | San Juan, Puerto Rico

Logistics and Transportation National Association (LTNA) Conference 2024
Eric L. Zalud attended.
October 27–29, 2024 | Clearwater Beach, FL

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On the Horizon

Transportation Lawyers Association (TLA) Transportation Law Institute (TLI)
Eric L. Zalud is presenting *From the Trenches: A Deep Dive Perspective, and Roadmap, on Regulatory Investigations and Audits*. **Christopher C. Razek** is presenting *Be Wary not Weary: Warehousing ABCs—from Accessorials to Bonds to Contracts—Practical Legal Advice Your Clients Need to Know*. **Marc S. Blubaugh, Martha J. Payne, Jonathan R. Todd, Megan K. MacCallum,** and **Ashley Rice** are attending.
November 7–9, 2024 | Pittsburgh, PA

Election Insights: Impact on Trade Seminar
Brian Cullen is attending.
November 12, 2024 | Milwaukee, WI

Women in Supply Chain Forum
Megan K. MacCallum and **Ashley Rice** are attending.
November 12–13, 2024 | Atlanta, GA

TerraLex 2024 Global Meeting
Eric L. Zalud is attending.
November 13–16, 2024 | Santiago, Chile

Fourth Annual Benesch Investing in the Transportation & Logistics Industry Conference
Marc S. Blubaugh, Peter K. Shelton, Jonathan R. Todd, and **Eric L. Zalud** are moderating the panels.
December 5, 2024 | New York, NY

Columbus Roundtable of the Council of Supply Chain Management Professionals
Marc S. Blubaugh is moderating the "Annual Transportation Panel."
January 10, 2025 | Columbus, OH

BGSA Supply Chain Conference 2025
Marc S. Blubaugh, Peter K. Shelton, and **Eric L. Zalud** are attending.
January 22–24, 2025 | Palm Beach, FL

Transportation Lawyers Association (TLA) Chicago Regional Conference
Marc S. Blubaugh is chair of the Freight Claims Boot Camp. Eric L. Zalud is presenting *What, Me Worry? Exploring Ways to Defend and Prevent Negligent Selection, Retention, Training, and Wrongful Termination Claims*. **Brian Cullen** is attending.
January 23–24, 2025 | Chicago, IL

For further information and registration, please contact **MEGAN THOMAS**, Director of Client Services, at mthomas@beneschlaw.com or 216.363.4639.

Cargo Liability – Global Comparative Analysis of Legal Regimes

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at higher service rates. The bargained exchange between higher liability and reasonable rates of service may mean that first-party insurance is actually more cost-effective than paying for a carrier's liability. Insurance cover will also respond differently in the event of a claim, since the standards applied will be under the policy terms rather than exclusions available under law applicable to the carrier's service. Even in the earliest event of a claim, the fact that a Montreal claim may need to be filed within 14 days while a Carmack claim must be filed within 9 months challenges the standard operating procedures around receiving shipments, inspection of count and condition, and delivering notice to the responsible service provider.

Benesch's Transportation & Logistics Practice Group is experienced in practical strategies for managing risk and administrative burden in all types of global supply chain-related functions.

JONATHAN R. TODD is Vice Chair of the Transportation & Logistics Practice Group at Benesch. He may be reached at 216.363.4658 and jtodd@beneschlaw.com.

ROBERT A. PLEINES, JR. is a managing associate with the firm who routinely offers regulatory compliance counseling, operational guidance, and negotiation strategies to shippers and surface-based transportation intermediaries and providers. He may be reached at 216.363.4491 and rpleines@beneschlaw.com.

J. PHILIP NESTER is a senior managing associate with the firm who regularly provides strategic legal, commercial, and operational guidance to clients across the continuum of participants in the ocean transportation industry in international trade and the domestic trade of the United States. He may be reached at 216.363.6240 and jpnester@beneschlaw.com.

CHRISTOPHER C. RAZEK is a managing associate with the firm who regularly assists depositors and warehousemen to navigate commercial and regulatory issues and strategize gaining efficiencies in the market. He may be reached at 216.363.4413 and crazek@beneschlaw.com.

MEGAN K. MACCALLUM is an associate with the firm who drafts and negotiates contracts, offers compliance counsel, including in international trade, and provides operational guidance to clients across industries and modes from end to end of the supply chain. She may be reached at 216.363.4185 and mmaccallum@beneschlaw.com.

VANESSA I. GOMEZ is an associate with the firm who is passionate about advising clients on trading, transporting, and storing goods across the globe. She may be reached at 216.363.4482 and vgomez@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 | 541.961.7802
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

Pass this copy of *InterConnect* on to a colleague, or email **MEGAN THOMAS** at mthomas@beneschlaw.com to add someone to the mailing list.

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