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## MEMORANDUM

TO: Clients  
FROM: Edward D. Greenberg  
DATE: December 3, 2015  
RE: **FMCSA Issues Final Rules on Coercion of Truck Drivers**

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Several of the provisions of the Moving Ahead for Progress in the 21st Century Act (“MAP-21”) addressed safety issues. As relevant here, one particular section of the law responded to complaints by truck drivers that they were often compelled to drive beyond regulatory time limits or face sanctions, such as lost income or even being fired.

With that in mind, Section 32911 of MAP-21 was drafted to protect drivers from being compelled to move cargo when doing so would violate safety regulations. To fully implement that Congressional intent, the Federal Motor Carrier Safety Administration (“FMCSA”) initiated a rulemaking in May, 2014, that proposed regulations making it unlawful for carriers, shippers and transportation intermediaries from coercing drivers into violating the hours of service regulations. Essentially, the proposed rule prohibited parties from coercing drivers by withholding current or future work if they refused to handle a load.

On behalf of the National Customs Brokers and Forwarders Association, we filed comments supporting the goal of the regulation, but pointed out that as worded the proposed rule would have significant unintended consequences that could disrupt the transportation system. In its final rules, which were issued in the FMCSA’s Docket 2012-0377 and published in the November 30, 2015 edition of the Federal Register at 74,695, the FMCSA took the unusual step of quoting the concerns we raised at length. The FMCSA stated:

NCBFAA pointed out that if a shipper, receiver, or transportation intermediary discovered an “[hours of service] issue – which would likely only be the case because the driver happened to say something about it – any decision to refuse to tender the shipment could be construed as violating the proposed regulation. For then,

it would be knowingly ‘withholding . . . work opportunities from a driver’ when it ‘knew’ the driver was unable to lawfully handle the load. In that case, because the motor carrier elected to dispatch a driver that could not lawfully handle the load, the cargo would not be able to move until such time as the driver in question was again able to operate the equipment.”

After going on to note that this concern correctly identified an unintended consequence of the proposal, the FMCSA decided to amend the proposed definition. In the final rule, it is now accordingly clear that a shipper or transportation intermediary can lawfully tender a shipment to another driver or another motor carrier if it knows that the initial driver is unable meet the necessary delivery schedule.

What does this mean for OTIs?

First and foremost, it is important to recognize that the term “transportation intermediaries” applies to motor carrier property brokers and freight forwarders. In the context in which the term “transportation intermediaries” is used in the regulation, it is likely that FMCSA would conclude that the term also embraces ocean freight forwarders, NVOCCs and IACs/air freight forwarders, as well as customs brokers that issue delivery orders or other requests for trucking services. Consequently, all OTIs and customs brokers need to be aware of the regulation and the risk entailed by trying to push drivers to exceed the DOT hours of service regulations. In other words, a desire to keep cargo moving should be tempered by not asserting inappropriate pressure on truck drivers.

Second, the effect of this regulation is intended to prevent situations where parties put any kind of pressure, including economic pressure, on drivers to handle loads in a way that would violate the FMCSA’s safety regulations. The final rule does put the initial burden on the driver, who must – in order to come within the protection of this regulation – affirmatively advise the shipper or transportation intermediary that he/she cannot lawfully handle a given load within the time period that is necessary. Once a driver gives that kind of notice, however, the burden then shifts to the shipper or transportation intermediary. At that point, one may either agree to wait until the driver is able to lawfully handle a load; alternatively, you can properly insist that the trucking company provide a different driver, or elect to utilize a different trucking company. But, trying to put pressure on the driver would entail significant risk.

There are other aspects of the new regulation that would seem to be of greater concern to drivers and trucking companies than to shippers and transportation intermediaries, but for the sake of being complete, those points are:

- A driver alleging a violation of these regulations has 90 days to make a complaint to FMCSA.
- The definition of coercion is found at 49 C.F.R. §390.5.
- The specific prohibition addressed in the rule is found in Section 390.6(a)(1).

- The prohibitions of the rule apply not just to the trucking company, shipper or transportation intermediary, but also to their representatives, agents and officers.
- Although these regulations specifically reference the possibility that officers of companies could be liable, FMCSA has emphasized that there would need to be specific evidence that an officer was involved in the coercive activity before individuals at that level would be held liable.
- The prohibition against coercion applies not just to instances where the driver does ultimately agree to handle the load, but also unsuccessful attempts to coerce the driver to do so.

Unless stayed, this final rule is scheduled to become effective on January 29, 2016.

We would be happy to answer any questions you may have about this.