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MAP-21: Are You Ready for Some (More) Regulation?

I. Introduction

On July 6, 2012, President Obama signed into law the "Moving Ahead for Progress in the 21st Century" Highway Bill, known as "MAP-21," which amended and supplemented Title 49 of the U.S. Code as it pertains to motor carriers, freight forwarders and brokers. Rulemaking was immediately undertaken by the U.S. Federal Motor Carrier Safety Administration and, at present, the FMCSA is in the process of issuing its "interim final rule" to implement the new regulations to bring them in line with the existing statute. The "interim final rule" will be part of sixteen rules that the FMCSA refers to as an "omnibus rulemaking," which is scheduled for release in September, 2013. This article discusses briefly the key components of MAP-21, with emphasis on the new regulatory and disclosure-related burdens to be imposed upon carriers which tender freight to other carriers without the proper federal authority to do so.

II. Summary of MAP-21 Provisions Applicable to Brokers and Freight Forwarders

The stated purpose of MAP-21 is, broadly, to strengthen the transportation infrastructure in the United States and to better protect the motoring public and shippers by codifying more stringent entry requirements for transportation service providers and by making brokers and carriers more accountable for their actions in supply chains. MAP-21 replaces the prior transportation funding and regulatory regime, known as SAFETEA-LU, and contains a broad range of regulatory and enforcement provisions that affect all links in the supply chain, from driver training to cargo claims.

Perhaps most significantly, MAP-21 requires motor carriers and freight forwarders that broker freight to obtain and maintain separate broker authority for each specific service they provide. MAP-21 states that "A person may provide transportation as a ***motor carrier*** . . . or service as a ***freight forwarder*** . . . or service as a ***broker*** . . . only if the person is registered under this chapter [Chapter 139 of Part B or Subtitle IV of Title 49] if the person is registered under this chapter to provide such transportation or serve." 49 U.S.C. § 13901(a) (emphasis added). There must now be a distinct registration number (i.e. MC#) for each authority that includes an "indicator" of the type of authority it is. This new "indicator" is intended to provide full disclosure to shippers who hire transportation service providers as to what specific service the provider is actually performing. So, a motor carrier who accepts freight from a shipper and then "brokers" it to another carrier must now have separate broker authority and must disclose to the shipper that it has acted in the capacity as a broker in tendering the load to the downstream carrier. (These regulations are not supposed to apply to interline shipments).

In addition, the provider must notify the shipper in writing of the specific service it is providing. Gone, presumably, are the days when a shipper has no knowledge of which carrier is actually hauling its freight. When a cargo claim arises, MAP-21 should, presumably, greatly assist the shipper in identifying the carrier in possession of the load at the time of loss. Moreover, MAP-21 should assist brokers in defending cargo claims when shippers argue that the broker was "wearing its carrier hat" when it accepted the load.

To fully comply with this requirement, brokers should implement a system through which their customer and the carrier are notified, in writing, as to the specific role that the broker is fulfilling. This should be done with a broker-carrier agreement and/or a load/rate confirmation sheet. These documents should contain references to the carrier's broker authority.

The civil penalty against a carrier or freight forwarder that fail to comply with these new disclosure requirements, or which fail to obtain the necessary broker authority, is $10,000 per transaction, regardless of the value of the load. See 49 U.S.C.§14916. These provisions do not apply to NVOCCs, ocean freight forwarders, customs brokers or indirect air carriers. 49 U.S.C. §14916(b)

MAP-21 also contains heightened standards to obtain authority as a motor carrier, freight forwarder or broker. Gone, too, presumably, are the days when a prospective transportation services provider can "check a box" and write a check to obtain federal authority. Applicants must now establish and certify that they know and will comply with the applicable safety requirements and, eventually, must pass a written proficiency examination as part of this process. MAP-21 specifically applies to household goods carriers, passenger carriers and Mexican and Canadian domiciled applicants. In addition, all applicants must establish their experience in the business and have at least three years of experience or provide sufficient information to establish that they know the applicable regulations and industry practices. Moreover, the applications must be renewed and reviewed every five years.

III. Bond Requirements

MAP-21 separately increases the amount of the required broker surety bond from $10,000 to $75,000. While there has been some confusion and debate regarding when this new bond requirement takes effect, the FMCSA recently confirmed that October 1, 2013 is the firm effective date for the new bond requirement. The requirement applies "regardless of the number or branch offices or sales agents of the broker," 49 U.S.C. §13906(b)(3). Moreover, a broker must update its registration information with the FMCSA within thirty days of any change in its address, process agent or "other essential information." 49 U.S.C. §13904(g). Penalties for non-compliance include fines and a suspension of authority.

IV. Purpose and Effect of MAP-21

As a result of MAP-21, the common practice of some motor carriers to accept shipments and immediately broker or sub-contract or otherwise arrange for another motor carrier to transport the shipments is now illegal. In these instances, only if the motor carrier both "physically transports" the shipment and retains liability for the shipment and for payment to the other carrier will the motor carrier be providing "legal" carrier service. The "physically transports" requirement arguably negates the broad spectrum of transportation services defined in 49 U.S.C. 13102(23)(b). Under this provision, "transportation" is defined to include such services as receipt, loading, refrigeration, ventilation, storage and unpacking. Clearly, however, none of these presently defined services are consistent with MAP-21's "physically transports" language.

For years, transportation service providers have arranged transportation largely without regard for the relevant statutory regime for property brokers. While the qualifications for brokers have been in effect since 1988, the absence of a viable enforcement regime has allowed providers to broker freight under the guise of subcontracting or interlining with impunity. MAP-21, as noted, will change this regime. So, if you are a broker arranging for the transportation of freight in interstate commerce, or if you are a carrier that "brokers" loads to other carriers, whether across state lines or into or out of the United States, you should be well-aware of the new disclosure and registration/authority provisions of MAP-21.

V. Other Provisions of MAP-21

In addition, MAP-21 requires family-owned transportation businesses to disclose to shippers which specific company division is owned by which family member. This is a fraud prevention measure intended to prevent these multiple-owner entities to engage in a shell game to avoid liability for a loss. It is also now illegal to close down a failed trucking company and then start over with new authority. This ban on "reincarnated" companies is clearly a response to the recent intercity bus accidents involving such reincarnated carriers, but it applies to trucking companies as well. Attorneys representing such small companies must take great care to advise their clients of this new reality under MAP-21.

MAP-21 also requires Electronic On-Board Recorders (EOBRs) by 2014, regardless of the size of the trucking company. MAP-21 also establishes a national registry of drivers with CDLs, including driving history and drug and alcohol test results. In addition, MAP-21 requires the Department of Transportation to establish a national standard for driver training.

VI. Effect Upon and Applicability to Canadian Brokers and Carriers

The foregoing provisions of MAP 21 apply to entities subject to the jurisdiction of the FMCSA under Chapter I of Chapter 135 of Section 49 of the United States Code, which states that jurisdiction exists "over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier--

(1) between a place in--

> **(A)** a State and a place in another State;
>
> **(B)** a State and another place in the same State through another State;
>
> **(C)** the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;
>
> **(D)** the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or
>
> **(E)** the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

Thus, the question for Canadian transportation providers is whether the new provisions set forth in MAP-21 apply to them. To the extent the transportation service is between the United States and a place in a foreign country (i.e., Canada), the answer would appear to be in the affirmative, to the extent the "transportation is in the United States." Is, then, MAP-21 ultimately

a U.S. enforcement issue? What, then, is the “trigger” in MAP-21? In other words, when is a Canadian company “doing business” in the United States for purposes of MAP-21? Does MAP-21 purport to regulate entities not having bases of operation in the United States, or is the intent of MAP-21 to have extra-jurisdictional reach over entities located in Canada who facilitate the carriage of goods with routing through, or into, the United States? If the answers to these questions are “yes,” how would MAP-21 be enforced against or applied to Canadian companies?

In this author’s opinion, MAP-21 would apply to Canadian domiciled applicants who broker freight and provide transportation services in the United States. While MAP-21 retained the former provision of reciprocity with respect to the safety fitness ratings issued by Canadian safety authorities, there are no specific provisions in the new law that answer specifically the questions asked above. Nonetheless, it appears that Canadian brokers and carriers who conduct business in the United States should be prepared to comply with the new provisions regarding broker authority and bond requirements.

Brokers in Canada are, and have been, largely unregulated. The only statutory provision for brokers under Canadian law can be found in Ontario by virtue of section 191.0.1(3) of the *Ontario Highway Traffic Act* . Thus, in the absence of a distinct and competing regime under Canadian law which specifically provides a different set of regulations upon which Canadian brokers can rely when faced with potential U.S.-based enforcement actions under MAP-21, it is this author’s opinion that Canadian transportation providers would be well-advised to adopt and implement procedures which comply with MAP-21 if they are brokering freight in the United States or if they carry goods in the United States or between the United States and Canada.

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