A LOOK AT NEW LEGISLATION IN THE TRANSPORTATION INDUSTRY

New legislation just passed and signed by the President, known as the "Commercial Motor Vehicle Safety Enhancement Act of 2012", provides a layer of regulation new to the industry.

HR 4348 was passed by the House, and by a congressional Conference Committee. The following will provide a review of its provisions for the readers' edification.

The new legislation essentially amends existing sections, and adds some sections to Title 49 and in identifying the various provisions, only the general section numbers will be set forth below without citation of the many the multiple subsections involved. (Note: This review is being undertaken without the benefit of seeing the revisors writing of the new regulations as amended or added to Title 49.)

Section 13901, Requirements for Registration. This section requires that motor carriers, freight forwarders and brokers shall be issued distinctive registration numbers in order to identify them and the particular operating authority under which they are registered. The number will specify the type of transportation service for which the registration is issued. The section goes on to state that, "For each agreement to provide transportation or service for which registration is required...the registrant shall specify in writing the authority under which the person is providing such transportation service." This is an obvious attempt to clarify the often muddy waters under which transportation services are rendered and the capacity of the various parties to the transaction. As we know, Courts often look to the sum of the facts and circumstances of the transaction to determine the capacity of the parties involved for purposes of determining liability and damages. This requirement may be somewhat helpful as it may provide evidence of intent of the parties. Those drafting shipping contracts should take this provision into account.

Section 13909 requires the secretary to make the registration information publicly available on the Internet.

Section 32915, Additional Motor Carrier Registration Requirements. This section provides that, "A motor carrier may not broker transportation services unless the motor carrier has registered as a broker under this chapter." This requirement closes the old argument of whether a motor carrier has authority to broker freight without having separate broker registration. Additionally, in what appears to be an attempt to clarify the meaning of what motor carrier services can be brokered, it goes on to state that the carrier can only provide "motor carrier service" if it owns or leases motor carrier equipment, or interchanges under regulations issued by the secretary, (this presumably

covers draymen) if the originating carrier physically transports the cargo and retains liability for the cargo and payment of the interchange carriers. In case once is not enough, it then provides that such carriers may not arrange transportation as a forwarder or broker without separate registration. Since motor carriers may provide services in addition to the physical transportation of freight, those services would not require separate brokerage authority. This section is focused on physical transportation of freight which cannot be brokered without separate operating authority. (See footnote setting out the exact wording of this section for your reading enjoyment!)

Section 32916, Registration of Freight Forwarders and Brokers. Under this section, a new requirement is imposed on brokers and freight forwarders which provides that they shall employ as an officer an individual who has at least three years of relevant experience in the industry. The section further requires that they may not provide motor carrier transportation unless it is registered as a motor carrier.

Both forwarders and brokers must provide evidence that the individual has knowledge of related rules, regulations and industry practices. The three year requirement parallels the requirements for NVOCC authority.

Section 32917 deals with effective periods of registration. Under this section, not later than four years after the enactment of this Commercial Motor Vehicle Safety Enhancement Act of 2012, (July 6th, 2012), the secretary shall require freight forwarders and brokers to renew their registration. Once initial registration is completed, it must be renewed every five years to avoid expiration.

Section 32918, Financial Security of Brokers and Freight Forwarders. This section requires new bonding requirements and provides that proof of trust or other financial security must consist of assets readily available to pay claims without the resort to personal guarantees or collection of pledged accounts receivable. This section would appear to increase the capital requirements for brokers and forwarders generally.

The new broker bond must provide that the bond will pay claims against the broker if: (1) the broker consents to the payment, or (2) if the broker does not respond to notice and take reasonable steps to deal with the claim, and the claim is reduced to a judgment. While this language is different from the existing bond requirements, the result is the same, i.e. payments on the bond are to be made if the broker either consents, or if there is a judgment imposed against the broker.

The section further requires that a surety respond to a claim within 30 days, and in the event of a denial, it must provide in details the grounds for the denial. This is an attempt to clean up some

of the unsavory bonding companies that have been operating in the industry which often denied claims without specifying the reasons. The prevailing party may recover reasonable costs and attorney's fees in any action against a surety for violations of this section

This section imposes a $75,000 amount necessary for the broker bond. Prior to this figure being determined, there was much industry discussion that indicated that the broker bond would be raised to $100,00. This figure makes the broker bond consistent with the NVOCC bond which is also $75,000. The section also requires that the holder of financial security must provide electronic notification to the secretary of cancellation at least 30 days before cancellation, and the secretary is required to place this notice on a public web site. The secretary shall immediately suspend registration of a broker where the financial security falls below the amount required.

This raises an interesting question where a claim of virtually any amount is paid under a bond, and the broker has not yet had opportunity to "replenish" the bond amount. How does the secretary know the amount that has been paid? Why should the bond be cancelled while the broker is in the process of refinancing or repaying the bond? How this works in practical reality is an open question. The legislation provides no specified amount of time for the broker to "replenish" the bond.

The next subsection deals with the payment of claims in cases of financial failure or insolvency. No definition of "financial failure" or "insolvency" is provided. Thus, the initial question to be raised here is whether the "financial failure" or "insolvency" is within the definition found in the Bankruptcy Act and if so, whether the Bankruptcy Act "trumps" the financial payment obligations which are found in this section. This section provides that in the event of financial failure or insolvency, the broker shall submit a notice to cancel the bond, publicly advertise for claims for 60 days, and pay not later than 30 days after expiration of the 60-day period, all uncontested claims, and if claims exceed the bond amount, make pro rata payments of claims until the bond amount is exhausted. This section further provides that the secretary or the attorney general of the US can bring a civil action to enforce the payment obligations stated, and states that if the surety provider violates this section, it can be subject to a civil penalty not to exceed $10,000. If the surety provider is found liable for violating this section, it can be prohibited (be ineligible) for providing financial security for three years. This section is an obvious attempt to cull out some of the less than legitimate bonding companies that have been plaguing the transportation industry.

Finally, there is a subparagraph which states that the amount of the bond may not be subject to reduction for attorney's fees or administrative costs. This too is designed to prevent industry

excesses.

Next, the subsections dealing with the freight forwarder financial security requirements mirror the requirements for brokers, including the requirement of a $75,000 bond.

Lest you be concerned about the impact of all of this on your current clients, the act provides that the effective date is one year after the date of the enactment of this act. (There is no "grandfathering" of bonds for brokers. Thus, the new bond amount, $75,000, will be in effect, come July 6th, 2013.)

Finally, **Section 14916** provides that these provisions do not apply to non-vessel operating common carriers, customs brokers, and indirect air carriers.

Notable for its absence in the bill is anything regarding CSA or the SMS carrier scoring system which is now so controversial. It is also interesting that with so much effort expended to obtain clarity for the transportation industry, that nothing in the bill deals with the role of third party logistics companies (3PLs) and whether they must register as brokers or forwarders, when arranging motor carrier services. To date ,there is no legal definition of 3 PL and the only case which has mentioned it, is Jones v D'Sousa U.S. Dist. LEXIS 45325 (2008), where the court commented that CH Robinson was acting as a 3PL which included brokerage services.

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