UNITED STATES

FOOD AND DRUG ADMINISTRATION

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Sanitary Transportation of Human and Animal Food

Proposed Rule

Docket No. FDA-2013-N-0013

COMMENTS

SUBMITTED BY THE

TRANSPORTATION INTERMEDIARIES ASSOCIATION

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The Transportation Intermediaries Association (TIA) submits these comments in response to the Food and Drug Administration's (FDA) February 5, 2014 notice of proposed rulemaking on the Sanitary Transportation of Human and Animal Food.

The Transportation Intermediaries Association (TIA) commends the FDA for publishing this proposed rule, pursuant to the Sanitary Food Transportation Act of 2005, and its mission to focus on prevention of food safety problems throughout the food chain.

While the proposed rule does not specifically affect Department of Transportation (DOT) licensed property brokers, as one of the largest users of motor carriers, the brokerage industry will be required to play a significant role in the implementation of these rules. A DOT licensed property broker will likely be required by their customers to have knowledge of the rules, and make thorough business decisions by contracting with Food and Drug Administration (FDA) compliant motor carriers and railroads on their behalf.

For reasons set forth in more detail below, TIA submits the following comments on the role of the broker, as it relates to this proposed rule and comments outlining a few concerns our industry has identified with the rule.

IDENTITY AND INTEREST OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION

TIA is the professional organization of the $162 billion third-party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all disciplines that conduct business in domestic and international commerce. TIA is the voice of transportation intermediaries to shippers, carriers, government officials, and international organizations.

TIA members include approximately 1,400 motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and non-vessel-operating common carriers), air freight forwarders, customs brokers, warehouse

operators, logistics management companies, intermodal marketing companies, and motor carriers. TIA members employ more than 60,000 people.

TIA is also the U.S. member of the International Federation of Freight Forwarders Associations (FIATA), the worldwide trade association of transportation intermediaries representing more than 40,000 companies in virtually every trading country.

THE ROLE OF TRANSPORTATION INTERMEDIARIES

Transportation intermediaries or third party logistics professionals act as the "travel agents" for freight. They serve tens of thousands of shippers and carriers, bringing together the transportation needs of the cargo interests with the corresponding capacity and special equipment offered by rail, motor, air, and ocean carriers.

Transportation intermediaries are primarily non-asset based companies whose expertise is providing mode and carrier neutral transportation arrangements for shippers with the underlying asset owning and operating carriers. They get to know the details of a shipper's business, then tailor a package of transportation services, sometimes by various modes of transportation to meet those needs. Transportation intermediaries bring a targeted expertise to meet shippers' transportation needs.

Many shippers in recent years have streamlined their acquisition and distribution operations. They have reduced their in-house transportation departments, and have chosen to deal with only a few "core carriers" directly. Increasingly, they have contracted out the function of arranging transportation to intermediaries or third party experts. Every Fortune 100 Company now has at least one third party logistics company ("3PL") as one of its core carriers. Since the intermediary or 3PL, in turn, may have relationships with dozens, or even thousands of underlying carriers, the shipper has many service options available to it from a single source by employing an intermediary.

Although intermediaries are described in the business and trade literature as "non-asset-based," many intermediaries in fact own some assets, broadly defined. These include local pick-up and delivery vehicles, over the road trucks, warehouses, and cargo consolidation centers, complex computer and telecommunications systems, dispatching centers and sales offices. It is, therefore, difficult to describe a typical intermediary, or to divide them into fixed categories. They range from small, family owned businesses to multi-billion dollar, publicly traded corporations.

SHIPPERS AND CARRIERS RELY ON TRANSPORTATION INTERMEDIARIES

Shippers rely upon 3PLs to arrange for the smooth and uninterrupted flow of goods from origin to destination, and carriers rely upon them to keep their equipment filled and moving. Many carriers, especially the thousands of small motor carriers and owner operators rely on motor carrier brokers to find freight for them, and to process the paperwork necessary for the movement.

TIA and its members support outsourcing part or all of an entity's supply chain to a third party logistics professional. To be successful, both parties need to be clear about what is expected, how it will be measured, and how it will work. The shipper and its 3PLs work together to construct the best solution by lane and circumstance to meet the shipper's needs.

Thus, in the comments that follow, TIA has taken into account the experience and needs both of its own members and of the customers they serve.

THE ROLE OF THE BROKER AS IT RELATES TO THIS PROPOSED RULE

As one of the largest users of motor and rail carriers, Federal Motor Carrier Safety Administration (FMCSA) licensed property brokers or Third-Party Logistics Providers (3PLs), play a significant role in the facilitation of the movement of food products along the supply-chain. As previously mentioned, our membership is primarily comprised of non-asset based companies,

who strictly perform the arrangement of the transportation and never physically touch the freight or exert control over a motor carrier. To limit their exposure to vicarious liability, brokers, shippers, and other entities engaging motor carriers, do not exercise any control over how a motor carrier, conducts its operations.

Since the broker neither physically touches the freight, nor exercises any control over the motor carrier, we agree with the FDA position, that FMCSA licensed property brokers should not be brought under the purview of this proposed rule. TIA views the requirements of this proposed rule as analogous to the broker requirements for the movement of hazardous materials. Simply put, if a broker simply connects a shipper with a carrier to move hazardous materials, the broker does not have to register with the Department of Transportation (DOT) for a hazardous materials safety permit. But, if the broker performs any of the pre-transportation functions (packaging, labeling, classifying, etc.), it is required to register with the DOT and subject to all applicable requirements.

TIA strongly agrees with the FDA assessment that the shipper and/or receiver, are in the best position to perform the requirements of this proposed rule, as they should be the entity with the most familiarity with the product and the precise specifications for the proper transportation of that product.

TIA implores the Agency to include clarification language in the Final Rule, outlining that DOT licensed property brokers are not subject to the requirements of this proposed rule.

ENFORCEMENT AND PENALTIES CONCERNS

TIA states, for the record, that since FDA has drafted rules, affecting carriers and brokers in the chain of custody, that it strongly advocates for the inclusion of fresh produce as a commodity to be covered by the Carmack Amendment or the regulation of carriers and brokers under the Perishable Agricultural Commodities Act (PACA) Regulation.

TIA has strong concerns over the lack of clarity as to who will act as an arbiter when disputes arise. The transportation industry suffers from an enormous amount of fragmentation with respect to the governmental authorities involved (City, State, and Federal Agencies) all denying or ignoring jurisdictions when a serious incident, or even a criminal event, occurs. We caution that, more regulation, without an explicit framework for enforcement, would cause an even greater degree of complexity to the civil contract.

If the Agency is not willing to develop an explicit framework or feels that it would not be germane to this particular proposed rule, TIA suggests that the Agency work with industry stakeholders to develop industry best practices. Industry best practices should address the best practices for carriers, drivers, and shippers for: (1) the loading, transit, and storage of commodities; (2) receiving and delivering goods; and (3) investigating and collecting evidence in the event of a breach.

Additionally, TIA suggests that the Agency establish strict penalties for stolen and/or food loads held hostage. Produce and food has become the number one stolen item in the transportation industry, and with the ever increasing threat of bioterrorism and food contamination, the Agency should build upon its bio-terrorism rules by strengthening the penalties.

SMALL COMPANY EXEMPTION CONCERN

The proposed rule contains an exemption for any shipper, receiver, or carrier engaged in food transportation operations that does less than $500,000 in total annual sales. This exemption is a major concern, because 90.5 percent of licensed motor carriers operate six or fewer trucks[1], and might, therefore, not be subject to these requirements.

[1] American Trucking Associations 2013 Trends Report.

Under the proposed rule, small motor carriers would not be "subject" to the requirements, yet shippers and receivers must only use compliant motor carriers to haul their products. This will create a situation where shippers will require small carriers to adhere to the proposed regulations or face being put out of business. If food safety is the main concern, what does the size of the company matter in ensuring that the specific product reaches its end user in a sanitary and unadulterated state? There are many misnomers circulating around the industry, about how modern technology typically utilized by the larger motor carriers somehow improves safety and the integrity of the product, but we do not believe that strong enough evidence exist to make that correlation. The entire motor carrier industry should continue to work together on improving the quality of service it provides to the shipping public. By discriminating against those small motor carriers operating at less than $500,000 annual revenue, though, the Agency would cripple the motor carrier industry, not improve it. We recommend removing the exemption for the betterment of the industry. Additionally, an updated cost benefit analysis should be promulgated to the public, properly reflecting the real cost to industry.

INCREASE IN CARGO CLAIMS CONCERN

Under current law, before liability can be imposed on the motor carrier, the burden is on the claimant to prove the cargo was damaged during transit. Most courts have held that a suspicion or unproven belief that damage has occurred does not meet the requirement necessary to establish proof of damage. This rule making is problematic, because it directly links failure to adhere to shipper-defined standards with adulteration/damage. No longer is the claimant required to prove that the cargo is actually damaged. They would only be required to prove a shipment was not maintained relative to a specified standard.

Proposed section 1.902 (a) states, "The criteria and definitions of this subpart apply in determining whether food is adulterated within the meaning of section 402(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 342(i)) in that the food has been transported or offered for transport by a shipper, carrier by motor vehicle or rail vehicle, or receiver engaged in

transportation operations under conditions that are not in compliance with this subpart." The proposed rule clearly states that the shipper is to establish the standard of care with which the motor carrier must comply in transporting the shipper's goods. Under the proposed definition of adulteration, if the motor carrier has not transported the shipment within the shipper-outlined specifications, the food should be classified as adulterated.

Here is an example of how this will likely play out under the proposed rule:

> Example: A shipper provides instructions to the motor carrier for a full truckload of strawberries that requires the temperature to be 33 degrees Fahrenheit in transit. The truckload arrives at the consignee, and the strawberries' temperature is taken from multiple places within the load. A few readings indicate that the strawberries' temperature is 33.5-35 degrees Fahrenheit.
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> Result: Currently, the burden of proof to prove damage falls on the claimant, and this scenario is unlikely to result in a full claim for the entire load worth approximately $45,000. It is our understanding that under the draft Sanitary Transportation of Food rule, if the shipment described above indicated temperature readings above the 33 degrees Fahrenheit threshold as instructed by the shipper, the entire load would be declared adulterated, irrespective of whether any damage in the form of spoilage, etc., had occurred.

It is imperative that FDA clearly define and articulate in the proposed rule, how this rule impacts freight cargo claims concerning loads that deviate from shipper instructions. Does this rule change the burden of proof from the claimant to demonstrate in a cargo claim that damage has occurred to the product? Does this rule shift the burden of proof to the motor carrier to prove that damage did not occur if the instructed temperature was exceeded?

If the FDA does not clarify how cargo claims are impacted, and it leaves in place the provision that the shipper effectively establishes the standard of care, and that anything that deviates from that standard of care could be considered adulterated, the cost of cargo claims will climb dramatically. Companies would not be willing to risk the liability of offering product that in any way could be defined as adulterated by the FDA under this proposed rule. Currently cargo claims in temperature controlled freight average just above 1 percent of all shipments. We foresee a doubling or tripling of the number of cargo claims if this proposed rule shifts the burden of proof of damage from the claimant to the motor carrier, with a corresponding rise in the cost of insurance that will ultimately be passed on to the consumer.

We encourage the FDA to assign a cost to the economic impact of this rule on cargo claims within the freight transportation industry. The value of the California grape, strawberry, lettuce, and tomato crop is estimated to be worth approximately $9 billion and just a 5 percent increase in claims could dwarf the estimated total cost impact of this rule of $149 million. In addition, we encourage the FDA to consider the economic impact of any increase in the amount of food destroyed and wasted due to concerns regarding potential adulteration as defined by this rule.

CONCLUSION

TIA is well aware that this is the first time that Congress has provided the FDA with jurisdiction over the transportation industry. Additionally, we are aware, through meetings with FDA officials that the FDA strongly believes that the majority of the transportation industry is doing an outstanding job in safely and sanitarily transporting food products throughout the United States. We applaud the Agency for their desire to hear from industry stakeholders, through public listening sessions or industry-specific meetings. We appreciate your time and dedication to ensuring the sanitary movement of human and animal food, and your consideration of our comments.

Respectfully Submitted,

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President & CEO

TIA