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# Life After CSA and an update on the Driver Coercion rule

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# Speaker Bios



## Mike Regan, Chief of Relationship Development, TranzAct Technologies, Inc.



Mr. Regan is extremely well known and active within the logistics industry. He serves on the Boards of numerous industry groups such as the American Society of Transportation & Logistics, where he is a Distinguished Logistics Professional (DLP), National Industrial Transportation League (NITL), the National Shippers Strategic Transportation Council (NASSTRAC), where he is the Chairman of the Advocacy Committee, and the Transportation Intermediaries Association, where he served as Chairman of the TIA Foundation.

He is also very active in several key industry organizations, such as the Council of Supply Chain Management Professionals (CSCMP). Mr. Regan is also the Chairman of the Board for Supply Chain Edge.

Prior to starting TranzAct, Mr. Regan worked for the Bank of America, PriceWaterhouse, and the Union Pacific Corporation. Mr. Regan is a licensed CPA and has a BSBA from the University of Illinois at Champaign-Urbana.

## John M. Cutler, Jr., General Counsel, NASSTRAC



John Cutler has been General Counsel of NASSTRAC since 1999. After graduating from Georgetown University Law Center in 1976, Mr. Cutler became a specialist in transportation law, representing shippers before the ICC and STB, in federal and state courts, and in legislative proceedings. Mr. Cutler was active in defending shippers during the undercharge epidemic, and assists clients with contract, bill of lading, claims, classification, hazmat and other transportation law issues. He represents shippers by truck, rail, air and water. In recent years, Mr. Cutler has monitored developments relating to transportation and cargo security, filing comments with a number of federal agencies that have jurisdiction over security issues. He is a frequent speaker and writer on transportation issues, and is the author of several articles, columns and books, including "Rules of the Game: Legal and Regulatory Issues Facing the Supply Chain Manager," published in 2006 by CSCMP.

Mr. Cutler served as a U.S. Air Force officer between college and law school. He is a member of the District of Columbia Bar.

# Speaker Bios



## Chris Burroughs, Sr. Government Affairs Manager, TIA



A graduate of Shepherd University with a degree in Political Science, Chris joined the TIA team in 2011. Prior to joining TIA, Chris worked on Capitol Hill for the House Transportation and Infrastructure Committee and the Natural Resources Committee. After his time on the Hill, Chris joined the Twenty-First Century Group as their Director Government Affairs and lobbied on behalf of ten clients, including TIA. Chris has over eight years of Congressional experience and an invaluable knowledge of the legislative process.

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## Nathaniel Saylor, Partner, Scopelitis, Garvin, Light, Hanson & Feary



Nathaniel Saylor represents various types of carriers and logistics providers with issues ranging across various modes including motor, air, ocean, and rail. Prior to joining the firm, Mr. Saylor spent two years working as a legal intern for the U.S. Customs and Border Protection Agent. A graduate of Ball State University, B.A., Kelley School of Business, M.B.A. and Indiana University Robert H. McKinney School of Law, J.D.

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# The FAST Act

- The “Fixing America’s Surface Transportation Act” of FAST Act was signed into law on December 4, 2015 by President Obama.
- The FAST Act contains major overhauls and reforms of the FMCSA’s Compliance, Safety, Accountability (CSA) initiative.

# Driver Coercion: Transportation Intermediary and Shipper Operations



Presented by:

Nathaniel G. Saylor • Partner



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# Overview

- FMCSA Final Rule
  - Takes effect January 29, 2016
  - Applies to “Transportation Intermediaries” and Shippers in addition to motor carriers

# Prohibited Conduct

- The rule prohibits coercing *a driver* to operate a commercial motor vehicle (“CMV”) where the driver has objected that such operation would require the driver to violate regulations of the FMCSA, including the Federal Motor Carrier Safety Regulations (“FMCSR”).
  - The rule applies to direct coercion of the driver.
  - A decision to withhold business from a motor carrier is not covered by the rule (but could be a violation if the “driver is the carrier”).

# Underlying Regulations



- Among the regulations that the driver cannot be coerced into violating are:
  - Hours of service regulations;
  - Equipment inspection, repair and maintenance regulations;
  - Intermodal roadability regulations; and
  - Regulations regarding load securement.



# How is Coercion Defined?



- Broadly. The definition includes:
  - withholding of business;
  - withholding employment or work opportunities; or
  - taking or permitting any adverse employment action against the driver.

# Do I have to ask?

- There is no duty to ask the driver whether or not he or she can complete the requested services without running afoul of regulations.

# The Driver must Object



- A claim of coercion requires the driver to object and to at least generally identify the regulation that would be violated. Examples of the agency:
  - objecting to a particular trip because of an HOS problem (“they told me to keep driving even when I hit 11 hours”);
  - a maintenance problem (“the last inspection certificate was 3 years old”); or
  - an equipment issue (“there was no tread on the front tires; I could see the ply in a couple of places”)

# The Driver Need Not Accept the Load



- Any action taken with respect to a driver that has raised an objection and that could be perceived as negative could form the basis of a coercion complaint *regardless of whether the driver accepted the load giving rise to the objection.*
  - A coercion complaint can be made if the driver refuses the load and is then arguably punished for the refusal.

# Examples of Potential Coercion



- Direct threats against the driver, including:
  - Refusal to work with the driver in the future; or
  - threatening to make a negative report about the driver to the driver's carrier.

# Minimizing Exposure

- The simplest step to avoiding coercion is avoiding direct communications with the driver.
  - Provide training to personnel
  - When possible, deal with carrier dispatch.
  - If the carrier is a solo owner-operator, make sure there is a business entity (e.g., LLC or Corporation).
    - Sign contracts with the business entity;
    - remit payment to the business entity;
    - Do not assess penalties or chargebacks against the driver.

# Responding to Objections



- If a driver voices an objection directly to the broker:
  - Instruct the driver to work with its dispatch directly;
  - Prohibit the driver from transporting the load and begin locating another option.

# Documenting Objections and Responses



- Objections and responses need to be documented in the load file.
  - Ideally, the records will show the actual response given to the driver (e.g., a recording of the conversation, or a copy of an electronic communication sent to the driver).
  - If not available, then personnel should at least document the discussion in the “notes” section of TMS.



# Life After CSA

Presented by:

Chris Burroughs, Senior Government Affairs  
Manager, TIA



# Fixing CSA

- FAST Act requires:
  - National Research Council of the National Academics to conduct study on several areas within the CSA initiative.
  - After study is completed, Agency has 120 days to develop corrective action plan.
  - After corrective plan is submitted, DOT IG must review and ensure plan addresses all issues.
  - If approved, FMCSA must immediately begin implementing those changes.

# Scope of the Study

- Accuracy of BASICs
  - Identify high-risk carriers; and
  - Predict or are correlated with future crash risk, crash severity, or other safety indicators for motor carriers.
- Methodology used to calculate BASIC percentiles
- The relative value of inspection information and roadside enforcement data
- Any data collection gaps or data sufficiencies

# CSA Public View

- Until the corrective actions are taken and implemented, all CSA data related to alerts and the “relative” percentage rankings will be removed from the public view and cannot be allowed to be used in determining a motor carrier’s safety fitness.

# CSA Public View

While FMCSA is not prohibited from displaying all data, they have currently removed all information from public view while they make changes. Crash data and violations are already back online.

# Accident Review

- Not later than one year after the certification, the Agency shall task the MCSAC with reviewing the treatment of preventable crashes under SMS.
- “Preventable defined: *“If a driver, who exercises normal judgment and foresight could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable.”* (49 CFR Part 385, Appendix B to Part 385)

# Beyond Compliance

Additionally, the FAST Act requires FMCSA to implement within 18 months a beyond compliance program within CSA that gives recognition, including credit or an improved SMS percentile, for a motor carrier that:

- Installs advanced safety equipment;
- Uses enhanced driver fitness measures;
- Adopts fleet safety management tools, technologies, and programs; or
- Satisfies other standards determined appropriate by the Administrator.

# Carrier Selection?

- It has been and will remain TIA's position that a motor carrier's safety rating is the sole determination of whether or not a motor carrier is safe to operate or not.
- There is no clear evidence that exists to support the view that a motor carrier's BASICs scores will or could indicate, whether a particular carrier is more or less likely than any other carrier to be involved in a crash.



# CSA & Carrier Selection



- Negligent Selection Lawsuits – National Hiring Standard.
- CSA scores and rankings still available to motor carriers and law enforcement.

# SFD Rulemaking

- Cleared OMB early December 2015.
- Red light – Green light system.
- Absolute Measures vs. Relative Measure (CSA).

# Future Rulemakings

Presented by:

John Cutler, General Counsel, NASSTRAC



# Other Key Regulations



- New Rulemaking Requirements. For years, FMCSA has ignored Congressional deadlines and has often avoided formal rulemakings, making decisions that couldn't be appealed. No judicial review means no umpire when regulation goes too far.
- Under the FAST Act, FMCSA must consider alternatives and use the best science in rulemakings. FMCSA guidance must be published and added to regulations every 5 years.
- Petitions may be filed challenging rules as too burdensome or inconsistent with operational realities in the trucking industry
- Ideally, we'll get regulations that promote a growing trucking industry able to safely meet increasing demand. We'll see.

# Other Key Regulations



- ELD Mandate. Final rule issued by FMCSA on 12/10/2015 requires most motor carriers to replace paper logs with automatic data recorders for engine hours, miles driven, vehicle movement, location information by December 2017. An appeal was promptly filed by OOIDA on behalf of owner-operators and smaller trucking companies concerned about costs and harassment. Implementation is likely, which could result in more HOS compliance, and savings due to less paperwork, according to FMCSA.
- Speed Limiters. No proceeding yet, but FMCSA should soon seek public comments on 65 mph speed limit for CMVs. Speed limiters are supported by ATA and large trucking companies, many of which already use speed governors.
- Sleep Apnea. This and other driver health issues may come up, but it's an area that's probably best left to truckers and drivers to cover.

# Other Key Regulations



- Loading and Unloading Delays. Concerned that drivers waiting hours to load or unload may seek to make up lost time on the highways, FMCSA wants to look at delay issues. Congress gave DOT's IG one year to investigate delay issues, including impacts on safety, driver pay, and efficiency. A year later, DOT must have regulations in place for data collection as to delays. How long is too long for drivers to have to wait?
- Insurance. FMCSA has questioned whether trucking companies carry adequate insurance. The FAST Act says that in any rulemaking on this issue, FMCSA must make findings, including whether current insurance adequately covers medical costs and compensation, whether the insurance industry can provide more carrier insurance, and impacts on safety and the trucking industry.

# Other Key Regulations



- New Driver Training Rules. FMCSA may soon propose new driver training rules, including at least 30 hours of behind the wheel training for a Class A CDL, and coverage of other issues such as driver health and substance abuse standards. ATA has already criticized the 30 hour requirement as unreasonable.
- Uniform Registration System. Phase I involves consolidating 4 registration systems for carriers, brokers, forwarders and others, with new IT, updated information and registration fees. DOT numbers are replacing MC numbers. FMCSA just extended the compliance deadline 1 year. URS II should clarify licensing requirements, including the need for an officer with 3 years experience or equivalent knowledge for new brokers and forwarders.

# Questions?

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