

# THE TRANSPORTATION BRIEF®

A quarterly newsletter of legal news for the clients and friends of Scopelitis, Garvin, Light, Hanson & Feary

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## FCPA COMPLIANCE DELAY – WHAT’S THE RISK?

Risk management is an integral part of the international logistics business. The Foreign Corrupt Practices Act (FCPA) presents a potential risk for every U.S. person or entity engaging in the movement of goods internationally, including Mexican and Canadian cross border movements. Foreign persons or entities also have an FCPA risk under certain circumstances - the scope of which is seldom fully appreciated.

The FCPA prohibits corrupt payments (e.g., bribes) to foreign officials. The officials include all foreign government employees (for example, customs inspectors, border guards, tax officials, and more senior officials) and all employees of foreign government owned businesses (in certain jurisdictions, doctors, teachers, scientists, energy workers, etc.). The rank of the official is irrelevant, and the prohibited payments can take the form of promises (rather than actual payments) and can be anything of value, including cash, gifts, travel or entertainment expenses. Likewise, the FCPA applies to payments of any amount, and even a series of small payments for preferential or expedited treatment can create a problem. Liability can be triggered by the actions of third party agents anywhere.

It is not unusual for the legal costs of an FCPA investigation to reach several million U.S.

Dollars. Insurance coverage for such costs is usually negligible or non-existent. It is common for executives to be prosecuted criminally. Most companies are aware of the FCPA but many only have a generic anti-bribery policy in place and do not actively monitor compliance with that policy. The U.S. Department of Justice’s *Evaluation of Corporate Compliance Programs* gives an indication of the close scrutiny such programs may face. That guidance is available at [www.justice.gov/criminal-fraud/page/file/937501/download](http://www.justice.gov/criminal-fraud/page/file/937501/download).

Many companies incorrectly believe they are too small to attract attention or they are not responsible for the acts of their agents. FCPA enforcement continues to be active under the current administration. It is estimated that there are at least 200 corporate FCPA investigations currently underway. Whistleblowers and foreign law enforcement tips are frequent investigation triggers.

As a result, it is important for individuals and entities engaged in international business operations to actively review and monitor their FCPA policy and make sure the business and agents are fully compliant — the risk warrants the effort.

**John Hove, Tulsa**  
**Jake Fisher, Philadelphia**  
**Christopher Heery, Chicago**



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# BRIEFLY

## **NEW FDA Rule – Are Your Documents in Order?**

Now that the FDA's Sanitary Transportation of Human and Animal Food Rule (Rule) is in effect, transportation service providers working with covered food (i.e. food that is not fully packaged or food that requires refrigeration for safety) need to update their bill of lading, tariffs, terms and conditions, rate confirmation sheets and contracts to address the new Rule. Carriers, brokers and warehousemen in this segment of the transportation process have likely received contract updates or addendums from food shippers or the carriers and brokers they work with. Many of these contracts attempt to broaden the categories of food covered by the Rule or include more favorable terms for the shipper/service providers transporting food. Contracts should be reviewed by those most knowledgeable about the Rule. Having a system in place for the regular review of food contracts may lead to better recognition of narrowly tailored contracts and overreaching agreements that may expose companies to significant additional regulatory liability and cargo damages.

**Craig J. Helmreich,**  
Indianapolis

## **Graves Amendment Shields Lessor From Liability**

Owners of intermodal containers and chassis recently received protection from the Graves Amendment (49 U.S.C. § 30106) in a New York appellate case. In *Eisenberg v. Cope Bestway Exp., Inc.*, the court held that the intermodal chassis lessor was not liable for the Plaintiff's injuries. In reaching this decision, the court determined: (1) the lessor was a bona fide commercial lessor of motor vehicles; (2) a chassis qualifies as a motor vehicle under the Graves Amendment; and (3) there was no allegation that the

accident was the result of any negligence on the lessor's part. The plaintiffs' bar continues to pursue equipment owners in injury litigation as an additional source of liability and damage recovery. The Graves Amendment continues to be a vital defense against such attacks.

**Michael B. Langford,**  
Indianapolis

## **Ninth Circuit Nixes Sleeper Berth Claims**

Former drivers for a motor carrier sued the company claiming they had not been paid for the time they spent in orientation and the time they spent in the sleeper berth of a moving truck. The trial court found in favor of the motor carrier on both claims. The Ninth Circuit affirmed. The court concluded that the orientation was an application process because not all participants were hired upon completion. The court also agreed with the motor carrier that sleeper berth time was not compensable based on a federal regulation clarifying that truck drivers or assistants are not working when riding in a truck if they are "permitted to sleep in adequate facilities furnished by the employer."

**Adam C Smedstad,**  
Chicago

## **Uber's Recent Federal Trade Commission (FTC) Settlement Could Provide Lessons for Lease/Purchase Programs in Trucking**

In January, Uber agreed to pay \$20 million to settle FTC charges it misled prospective drivers with exaggerated earning claims when promoting its Vehicle Solutions Program (VSP) – advertised as providing financing for prospective drivers to obtain Uber-qualified vehicles. FTC's complaint alleged Uber misrepresented drivers' annual median income and hourly earnings in various job listings. It was also alleged Uber falsely touted the

VSP as providing the "best financing options available" and leases with unlimited mileage (though leases actually included mileage limits).

Lease/purchase programs offered by trucking and equipment leasing companies to prospective owner-operators may draw comparisons to Uber's VSP. Uber's FTC issues, coupled with ongoing court cases involving trucking and leasing companies alleging such things as fraudulent inducement and violations of state business franchise laws, highlight the importance of monitoring lease/purchase programs carefully – specifically the manner in which the programs are being structured and ultimately advertised.

**Jeffrey S. Jackson,**  
Indianapolis

# MILEPOSTS

## **Spotlight on Legislative Services**

In order to prepare for potential risks and strategic opportunities, businesses of all sizes must stay informed regarding regulatory and legislative change. As the political climate in the U.S. shifts, we remind our clients of our continued commitment to responsiveness during periods of rapid transformation at both the state and federal level.

Shannon Cohen joined the Firm in 2002. Cohen monitors and provides input regarding forthcoming and active legislation and regulation pertaining to issues affecting motor carriers, with an emphasis on the independent contractor status of owner-operators. She has an extensive background with and familiarity of owner-operator programs and issues attendant to the design of a successful owner-operator model.

After nearly 40 years of serving clients in the transportation industry, the Scopelitis Firm identified a need

## ON THE ROAD

### *Mileposts, continued*

among clients for customized, well-rounded, proactive legislative advice. Thus, in 2006 Cohen worked alongside Scopelitis President & Managing Partner Greg Feary to launch the Firm's Legislative Services practice area.

"Our legislative services are founded on decades of knowledge in the transportation industry. Our attorneys have the depth necessary to effectively push forward legislative initiatives regardless of the political climate," said Feary.

Along with Shannon Cohen and Greg Feary, the Legislative Services practice area is led by Prasad Sharma in the Firm's Washington, D.C. office. Sharma joined the Firm in 2015 and focuses his practice on advocacy before state and federal legislative and regulatory bodies and advises on a wide array of regulatory compliance issues. Prior to joining the Firm, Sharma served fifteen years as in-house counsel at the American Trucking Associations, where he spent his last four years as Senior Vice President and General Counsel, as well as Executive Vice President and General Counsel to the ATA Litigation Center.

As the legislative team works to monitor issues in 2017, they have identified several noteworthy trends affecting transportation in Congress or within state legislatures.

- National Carrier Hiring Standards
- Regulatory Reform
- Class Action Reform
- FY 2018 Presidential Budget
- Infrastructure Funding
- Wage and Hour issues
- Labor and Employment issues
- Safety issues
- Business and Contractual issues
- Emerging Technologies issues

In response to these and other issues on the horizon for the coming months and years, Scopelitis' Legislative Services include the following customizable options:

- Issue Reports
- Board Reports
- Legislative Digest
- Strategic Legislative and Regulatory Action
- Responsive Advice

Don Vogel and Shannon Cohen attended the Transportation Lawyers Association Annual Conference, April 25-29, in **Santa Fe, New Mexico**.

Fritz Damm attended the Michigan Trucking Association's ELD Conference presented by Dave Osiecki of Scopelitis Transportation Consulting, May 3, in **Lansing, Michigan**.

Allie Feary served on an "Ask the Experts" panel regarding Independent Contractors issues at the Customized Logistics and Delivery Association's 29<sup>th</sup> Annual Meeting & Exposition, May 5, in **Orlando, Florida**.

Greg Feary attended the American Trucking Associations Leadership Meeting, May 7-8, in **San Antonio**.

Annette Sandberg presented "Transportation Trends and Industry Insights" at the TransPlace Shipper Symposium, May 9, in **San Antonio**. John Greene also participated as part of a panel related to "Real-Time Visibility Solutions in the Supply Chain".

Brandon Wiseman and Jerad Childress attended the Federal Motor Carrier Safety Administration's Listening Session on ELD Technical Specifications, May 9, in **Washington, D.C.**

Fritz Damm will attend the North American Transportation Employee Relations Association Board of Directors Meeting, May 15-16, in **Salt Lake City**.

Youngki Sohn will attend the Women's International Shipping & Trading Association and Annual General Meeting & Conference: "The Future of Shipping: Innovation, Technology, and the Changing Face of the Maritime Workforce", May 17-19, in **Long Beach, California**.

Fritz Damm will attend the DRI Trucking Law Steering Committee and Seminar, May 23-24, in **Chicago**.

Nathaniel Saylor will participate in a panel on legal issues at AirCargo 2017, June 4-6, in **Orlando, Florida**. Braden Core and Jake Fisher will also attend.

Kathleen Jeffries will serve as the Chair for the Conference of Freight Counsel's Summer 2017 Meeting, June 10-12, in **Jupiter, Florida**. Fritz Damm will also attend.

Fritz Damm will attend the Transportation Lawyers Association Executive Committee Summer Retreat, June 30 – July 1, in **Pittsburg, Pennsylvania**.

Braden Core will present "Owner Operator and Independent Contract Issues" at The Expedite Association of North America's Annual Conference, July 8, in **Chicago**.

Greg Feary, Shannon Cohen, Braden Core and Jeff Jackson will participate in the Independent Contractor Status in 2017 panel at the American Trucking Associations Forum for Motor Carrier General Counsel, July 16-19, in **Beaver Creek, Colorado**. Allison Smith and Fritz Damm will also attend.

## FOR THE RECORD

We are pleased to announce that Andrew Brehm has joined the Firm's Milwaukee office. Andrew joins the Personal Injury, Property Damage, and Cargo Claims practice group and focuses on a broad range of legal issues for clients in the transportation, hospitality, tourism, and recreations industries.

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### News from STC

Scopelitis Transportation Consulting, LLC (STC) is a business consulting venture launched by Scopelitis Law Firm in the fall of 2016. STC began by providing consulting services to clients in the areas of electronic logging devices, independent contractor issues, driver coercion matters, and transportation equipment consulting.

Recently, STC announced the expansion of its services to include Air Cargo Security Consulting, Compliance and Training. STC President and CEO Dave Osiecki is teaming up with Senior Consultant Doug Brittin of Brittin Aviation Services on the expansion.

Brittin began his career in transportation in 1977 and retired from his position as secretary general at The International Air Cargo Association (TIACA) in 2016. Prior to TIACA he served as a senior executive service division director in the U.S. Department of Homeland Security's Transportation Security Administration's (TSA) Air Cargo Office.

With the addition of Brittin, STC now offers clients air-cargo operations consulting services across a wide range of areas, including security compliance and operational best practices. STC is also positioned to assist clients navigating TSA investigations, where the development and implementation of corrective actions can mitigate costly civil penalties.

"As the air cargo industry continues to grow, the safety and security of air cargo moving throughout our aviation and surface transportation system will continue to be a significant issue for transportation businesses and government entities," said STC President and CEO Dave Osiecki. "We're thrilled to work with Brittin to provide our clients with strategic advice and support as they navigate the evolving air cargo security environment."



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