

## Memorandum

### **ISSUES REQUIRING ATTENTION BY MEXICAN MOTOR CARRIERS OPERATING IN THE UNITED STATES**

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The U.S. Department of Transportation (“U.S.DOT”) has announced the initiation of a pilot project to allow Mexican-based motor carriers of property (“Mexican carriers”) to enter and operate in the United States beyond its border commercial zones. Mexican carriers applying for participation in the pilot program must file a completed OP-1MX application (along with two other forms and evidence of permanent insurance) with U.S.DOT’s Federal Motor Carrier Safety Administration (“FMCSA”) and must meet certain safety requirements. Successful applicants’ operating authority will be limited to international (cross-border) traffic not involving hazardous materials.

For those Mexican carriers that participate in the pilot project or may be later able to obtain U.S. operating authority, the FMCSA application requirements will be only a small part of the hurdles that they must overcome to operate successfully in the U.S. The following are a list of concerns that Mexican carriers seeking to have successful U.S. operations should review, and on which they should seek the assistance and advice of U.S. counsel:

- 1. Registration Process.** As noted above, FMCSA has adopted rules governing applications by Mexican carriers. FMCSA has developed two application forms for this purpose. The first is for Mexican carriers seeking to operate in the commercial zones adjacent to the U.S./Mexico border. Even those Mexican carriers already registered with FMCSA to conduct these operations must file the new form and provide the additional information required. The other form is for Mexican carriers that seek to operate to and from points in the U.S. beyond the commercial zones.

The information required on both forms is quite extensive. Mexican carriers must provide information about their past operations, their safety and maintenance programs, their ability to comply with U.S. laws and regulations, and other matters as well. The rules require written descriptions of their safety and compliance programs, and written certifications that the applicant is and will be in compliance with applicable U.S. laws and regulations.

So far, over half of the applications filed with FMCSA by Mexican carriers have been rejected because they were not correctly completed. Mexican carriers applying to operate in the U.S. should seek the assistance of someone who understands U.S.DOT/FMCSA requirements to explain the provisions and execute the applications.

2. **Insurance.** Mexican carriers registering to operate under NAFTA in the U.S. will be required to obtain permanent insurance, both for bodily and property damage and for cargo loss and damage. There are specific requirements in U.S. law and FMCSA regulations as to the level of insurance that a carrier is required to maintain, depending on the types of cargo it will be transporting. Further, the insurance company must meet certain requirements and file specific forms and endorsements. If the carrier and the insurance company do not comply with all the regulations, or make even minor mistakes on the forms, the carrier's registration will be delayed, denied or suspended.
3. **Domestic Operations.** U.S. law prohibits a Mexican carrier from operating in the domestic U. S. market. However, the law no longer prohibits a Mexican national from owning or "controlling" a U.S.-domiciled motor carrier with domestic U.S. operations. It will be important for Mexican carriers to understand the legal differences between "international traffic" and "domestic traffic" (as discussed next) before entering into partnerships with U.S. companies or creating U.S. subsidiaries.
4. **Immigration/Customs Requirements.**
  - **Cabotage.** The handling of U.S. "domestic traffic" by a foreign carrier is known as "cabotage." The U.S. has different definitions of "domestic traffic" for purposes of equipment, drivers and carrier licensing. FMCSA enforces the licensing restrictions against domestic traffic, while the Bureau of Immigration and Customs Enforcement ("ICE") within the U.S. Department of Homeland Security regulates both the operation of foreign-based equipment and the use of foreign drivers and other workers in the U.S. However, the same physical operation that may be legal for Mexican-based equipment may be illegal for Mexican drivers.
  - **Cabotage Penalties.** An operation by a carrier, a vehicle, or a driver that violates FMCSA or ICE cabotage rules can have serious consequences. Depending on the agency involved, it can result in suspension of your U.S.DOT registration, confiscation of your equipment, jailing, deportation and/or banning of your driver, and/or substantial fines (as much as US\$ 50,000.00 per incident). It is therefore important for a carrier to understand the definitions applied by each agency, and exactly how its equipment and employees can be used.

- **In-bond and other Customs rules.** Since many of the Mexican carriers that will now be operating into the U.S. will not be the same ones that traditionally have been conducting the cross-border drayage operations, these carriers will have to familiarize themselves and their drivers with all applicable U.S. Customs and export control rules and regulations. They must become familiar with all entry requirements, in-bond rules, our Cuban economic sanctions, and other matters.
5. **Drug and alcohol testing.** All carriers operating in the United States are subject to drug and alcohol testing rules. The U.S.DOT has just recently revised its rules. FMCSA has its own rules that supplement the U.S.DOT rules. All motor carrier employees that are involved in safety sensitive functions are subject to four types of drug and alcohol testing procedures: pre-employment, random, post-accident, and reasonable cause. The regulations governing this testing process are over 100 pages long. They govern who must conduct each step of the testing process, what records must be kept, how the test is done, who may evaluate the sample, etc.
6. **Drivers**
- **Qualifications.** FMCSA has specific rules governing the qualification of drivers and the maintenance of driver records. Drivers are required to pass a physical examination every two years and drivers with certain physical ailments (e.g. epilepsy, vision in only one eye, or untreated diabetes) may not be permitted to operate a commercial vehicle in the U.S. without prior FMCSA approval.
  - **Hours of service.** One of the hottest issues in the industry today concerns permissible hours of service for motor carrier drivers. While in the United States, Mexican drivers are subject to these rules and the carrier and driver must maintain proper records. Since the rules govern how many hours of on-duty and off-duty time a driver may have during any seven day period, the driver and carrier may have to maintain records of the driver's hours prior to the driver entering the U.S.
7. **Equipment safety.** U.S. DOT also has specific safety regulations governing commercial motor vehicles. There are two agencies at U.S.DOT that regulate this area.
- **Manufacturing.** The National Highway Traffic Safety Administration ("NHTSA") regulates new equipment. This includes the type of brakes required on a vehicle, the lighting of a vehicle, the need for reflective tape on trailers, and other matters involved in the construction of commercial motor vehicles.

- **Maintenance and operations.** FMCSA regulates the maintenance and operation of the commercial motor vehicle. Carriers are required to make daily and periodic inspections of their equipment. Brakes must be inspected and maintained only by certified personnel. Specific records of operations and maintenance must be maintained.
8. **Size and weight.** Both federal and state governments have laws and regulations about the permissible size and weight of commercial vehicles. These laws not only limit the gross size and weight but also govern how much weight a vehicle may carry on each axle. Federal size and weight laws apply only to the interstate highway system and a network of designated highways. State size and weight laws apply on all other roads, and some states have route restrictions based on the type of vehicle or the nature of the cargo.
  9. **Fees and taxes.** Motor carriers are subject to a complex network of fees and taxes imposed by the federal and state governments. These include heavy vehicle use tax, fuel taxes, state vehicle registration fees, Uniform Carrier Registration Plan, sales taxes, hazardous materials registration fees, and ton-mile taxes, to name just a few.
  10. **Cargo liability.** Carriers in the United States are liable for the full value of the cargo they transport. While there are ways for a carrier to limit its liability, there is no consistency in the application and interpretation of these rules in federal or state courts.
  11. **Labor laws.** The federal and state governments in the U.S. have labor laws covering just about anything that an employee does or that happens to him/her. Mexican carriers should try to obtain a general knowledge of these laws, and have ready access to experts in the United States able to advise them on such matters. Not all these laws will apply to Mexican carriers operating in the U.S., and it is important for Mexican carriers to seek sound advice on which laws apply and under what circumstances.
  12. **Other federal regulations.** Administrative agencies and departments in the U.S. federal government are constantly proposing new or revised rules and regulations. These rules are sometimes generated by acts of Congress; other times they may be generated by the agency or department on its own or in response to a petition filed by an individual, company or association. These administrative rules may have a more dramatic effect on companies and persons doing business in the United States than does an act of Congress. As Mexican carriers prepare to operate in the U.S., and even more so once they are operating in the U.S., they need to be aware of both proposed and final rules and regulations.
  13. **Contracts.** Mexican carriers should seek advice from experts knowledgeable in U.S. law and logistics when negotiating transportation contracts, leases, and

other agreements relating to their operations in the U.S. This may be the most important area in which Mexican carriers should ensure that they have expert U.S. counsel to provide assistance. The proper drafting and interpretation of contract terms involving cargo liability, extension of credit, service requirements and guarantees, customs responsibility, and other contract provisions are essential to a successful operation.

- 14 General Corporate Matters.** Mexican carriers operating in the United States will also need advice on general corporate matters such as taxes, real estate, and environmental law, as well as assistance with matters such as accident litigation and collection of freight charges.

Strasburger attorneys are available to assist Mexican-based motor carriers of property in all of these areas.