



Memorandum

ISSUES REQUIRING ATTENTION BY MEXICAN LOGISTICS COMPANIES OPERATING IN THE UNITED STATES

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Although the U.S.A. has not yet fulfilled its commitment under NAFTA to allow Mexican-based motor carriers of property ("Mexican carriers") to enter and operate in this country beyond its border commercial zones, it is a little-known fact that Mexican-based providers of logistics services ("Mexican logistics companies") can obtain licenses for certain operations in the U.S.A. **under the same rules that apply to all other logistics companies.** Those licenses are issued by the Federal Motor Carrier Safety Administration ("FMCSA"), which is a part of the U.S. Department of Transportation ("U.S.DOT"). Applicants must disclose past and present affiliations with other transportation companies regulated by FMCSA, and must meet certain requirements relating to financial responsibility.

For Mexican logistics companies, however, FMCSA application requirements will be only a small part of the hurdles that they must overcome to operate successfully in the U.S.A. The following are a list of some of the main concerns that should be reviewed by Mexican logistics companies seeking to operate successfully in this country, and on which they should seek the assistance and advice of counsel here:

- 1. First Question: Transportation Broker, Freight Forwarder, or Both?**
Logistics providers in the U.S.A. are regulated in different ways depending on the exact types of services they offer. A *transportation broker* has been described as a "travel agent for freight." It tries to find loads for a motor carrier, and/or tries to find trucks for a shipper of freight, but it does not assume legal responsibility for cargo loss, cargo damage or delivery delays. A transportation broker should not be confused with a customs broker, although some logistics companies are licensed for both of these services. A *surface freight forwarder* does assume legal responsibility for the cargo, but subcontracts the physical transportation to motor carriers and/or railroads. Many logistics providers hold multiple licenses allowing them to offer a "menu" of services including customs brokerage,

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transportation brokerage, surface freight forwarding, air freight and/or ocean freight. A general term for companies of this type is “third-party logistics provider” or “3PL.”

- 2. Registration (Licensing) Process.** As noted above, FMCSA has adopted rules governing applications by logistics companies based in the U.S.A, Mexico and elsewhere. FMCSA has developed two application forms for this purpose, one for transportation brokers and the other for surface freight forwarders. (Customs brokers and ocean freight providers are licensed by U.S. Customs and Border Protection and by the Federal Maritime Commission, respectively. Air freight forwarders must maintain approved cargo security plans on file with the Transportation Security Administration. Customs brokers and air freight forwarders, unlike other logistics providers, are subject to certain U.S.A. citizenship requirements.)

Although the FMCSA licensing procedures for transportation brokers and surface freight forwarders are relatively simple, the related requirements for filing bonds and certain other documents are quite exacting. Mexican logistics companies applying to operate in the U.S.A. should seek the assistance of someone who understands U.S.DOT/FMCSA requirements to explain the provisions and take care of the necessary filings.

- 3. Domestic Operations.** As mentioned previously, Mexican logistics companies generally are not subject to the restrictions on U.S.A. operations that apply to motor carriers. Unlike Mexican carriers, Mexican logistics companies can operate (as brokers or forwarders) into the interior of the U.S.A., and they also can conduct such operations on domestic traffic between two points in the U.S.A. In addition, the law no longer prohibits a Mexican national from owning or “controlling” a U.S.A.-based motor carrier with operations into the interior of the U.S.A., even on domestic traffic. Mexican logistics companies, however, must be aware of the restrictions on Mexican carriers in determining which motor carriers they will use within this country. It also will be important for Mexican logistics companies to understand the legal differences between “international traffic” and “domestic traffic” (as discussed in paragraph 4 below) before entering into partnerships with companies in the U.S.A. or creating subsidiary companies in this country.

One area in which Mexican logistics companies do face the same restrictions as Mexican carriers is local pickup and delivery service. Although surface freight forwarders based in the U.S.A. can make pickups and deliveries in their own trucks, Mexican logistics companies cannot do this except in border commercial zones or except in trucks operated by a U.S.A.-based subsidiary company.

4. Immigration/Customs Requirements.

- **Cabotage.** The handling of U.S.A. “domestic traffic” by a foreign motor carrier is known as “cabotage.” This country 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.A. However, the same physical operation that may be legal for Mexican-based equipment may be illegal for Mexican drivers unless they obtain an appropriate visa (itself a difficult process as long as domestic drivers are available for the work).
- **Cabotage Penalties.** An operation by a motor 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 the motor carrier’s U.S.DOT registration, confiscation of its equipment, jailing, deportation and/or banning of a driver, and/or substantial fines (as much as US\$ 50,000.00 per incident). It is therefore important for a Mexican logistics provider to understand the definitions applied by each agency, and exactly how equipment and employees can be used by a motor carrier it uses.
- **General immigration concerns.** In addition to the “cabotage” rules restricting U.S.A. domestic operations by Mexican drivers, Mexican nationals who expect to perform management or other business services in the U.S.A. for any company – even one they own – must have proper visas and other travel documents.
- **In-bond and other import/export rules.** Mexican logistics providers 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. It is quite common for U.S.A. authorities to seek to penalize freight forwarders for “aiding and abetting” customs and export violations by their customers. Guidelines are available on-line from the U.S. Department of Commerce for assistance in spotting suspicious cross-border transactions.

5. **Drug and alcohol testing.** In selecting motor carriers for operations in the U.S.A., Mexican logistics companies should be aware that all such carriers are subject to drug and alcohol testing rules. The U.S.DOT frequently revises its rules, and 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.** Mexican logistics companies also need to be aware that the motor carriers they use in the U.S.A. must meet strict safety requirements relating to their 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.A. 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. Generally speaking, all motor carriers in the U.S.A. are subject to these rules and the carrier and driver must maintain proper time records. The rules govern how many hours of on-duty and off-duty time a driver may have during any 24-hour, seven-day or eight-day period.
7. **Equipment safety.** U.S. DOT also has specific safety regulations governing commercial motor vehicles, including the trucks operated by any motor carrier engaged by a logistics company. 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.** When planning cargo movements in the U.S.A., a logistics company needs to be aware that both federal and state governments in this country 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, including those used by logistics companies, 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 (“UCRP”), sales taxes, hazardous materials registration fees, and ton-mile taxes, to name just a few. Furthermore, any FMCSA licensed broker or freight forwarder also must pay annual UCRP fees to a “base state” in the U.S.A.
10. **Cargo liability.** Motor carriers and surface freight forwarders in the U.S.A. are liable for the full value of the cargo they transport. While there are ways to limit this liability, there is little consistency in the application and interpretation of these rules in federal or state courts. Brokers also may face cargo liability if they are found to have been negligent in selecting the motor carrier, and/or if the evidence shows that they led customers to believe they were motor carriers.
11. **Increasing risk of accident liability.** In addition, there is a growing trend in the U.S.A. to sue transportation brokers and/or surface freight forwarders for personal injuries or fatalities resulting from truck accidents. Brokers or forwarders can be held liable for such injuries or fatalities if they selected the involved motor carrier, and if the evidence shows they should have known the carrier was likely to commit the motor carrier safety violations that caused the accident. Therefore, logistics providers need to be sure that they have established *and actually follow* adequate procedures to ensure that the carriers they select are safe, reliable and maintain all required insurance coverages.
12. **Liability for freight charges.** Most courts in the U.S.A. have found shippers, and sometimes even consignees, to be liable to motor carriers for freight charges even if such charges previously had been paid to a logistics company acting as either a transportation broker or a freight forwarder. Shippers are becoming highly sensitive to this issue and are looking for protections both in their own contracts with logistics companies and in those companies’ contracts with motor carriers.
13. **Labor laws.** The federal and state governments in the U.S.A. have labor laws covering just about anything that an employee does or that happens to him/her. Mexican logistics companies should try to obtain a general knowledge of these laws, and have ready access to experts in the U.S.A. able to advise them on such matters. Not all these laws will apply to Mexican logistics providers operating here, but they definitely will apply to the motor carriers they use in the

U.S.A. Thus it is important for Mexican logistics providers to seek sound advice on which laws apply and under what circumstances.

14. **Other federal regulations.** Administrative agencies and departments in the federal government of the U.S.A. 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 U.S.A. than does an act of Congress. As Mexican logistics companies prepare to operate here, and even more so once such an operation begins, they need to be aware of both proposed and final rules and regulations.
15. **Contracts.** Mexican logistics companies should seek advice from experts knowledgeable in U.S.A. law and logistics when negotiating transportation contracts, leases, and other agreements relating to their operations in this country, whether the agreements are with customers or with the motor carriers they use. **This may be the most important area in which Mexican logistics companies should ensure that they have expert U.S.A. counsel to provide assistance.** The proper drafting and interpretation of contract terms involving cargo liability, freight charge liability, extension of credit, service requirements and guarantees, customs responsibility, and other contract provisions are essential to a successful operation.
16. **General Corporate Matters.** Virtually all of the matters discussed above will apply to Mexican logistics companies operating in the U.S.A., whether they conduct those operations directly or through a separate subsidiary company. The choice of whether to operate in this country through a branch office or a subsidiary, and the choice of whether to set up any subsidiary as a corporation, partnership or limited liability company, should be carefully made with liability limitations and international tax considerations in mind. A Mexican logistics company also will need advice on general corporate matters such as financial matters, real estate and compliance with environmental laws, as well as on accident litigation defense and the collection of freight charges.

Strasburger attorneys are available to assist Mexican logistics companies in all of these areas.