

# Welcome to **TT Talk**

No. 116 in the series



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We are delighted to dedicate TT Talk Edition 116 entirely to important new US regulations on Intermodal Equipment (chassis). A more varied choice of items will be presented in Edition 117, which will follow shortly.

### 1. USA: Federal roadability regulations

On the significant US 'Requirements for Intermodal Equipment Providers and for Motor Carriers and Drivers Operating Intermodal Equipment', Erich Wise and Thomas Jorgensen of Flynn, Delich & Wise LLP (Long Beach, CA) have written the following article for TT Talk:

**'TT Club members who own, lease, use, or interchange intermodal semi-trailer chassis in the United States need to determine whether and to what extent they are required to comply with these regulations. They will also need to implement programs to comply with the regulations where applicable and to be aware of and plan for the additional liability risks created by the regulations.'**

The effective date of the regulations is **June 17, 2009**.

The Federal Motor Carrier Safety Administration ('FMCSA') published its final roadability regulations on December 17, 2008 in the U.S. Federal Register, 73 F.R. 76794. The new regulations, designated as 49 C.F.R. Parts 385, 386, 390, 392, 393, and 396, and the FMCSA's comments on them, can be found at [www.fmcsa.dot.gov](http://www.fmcsa.dot.gov) under 'Rules and Regulations', then go to 'Final Rules'.

### COMPLIANCE

The roadability regulations impose extensive obligations on 'intermodal equipment providers' ('IEPs'). The general requirements are set forth in 49 C.F.R. § 390.40. The regulations require IEPs to register with the Federal Motor Carrier Safety Administration, mark the chassis according to federal requirements, 'systematically inspect, maintain and repair' the chassis, and ensure that the equipment is 'in safe and proper operating condition'. They also require IEPs to

(i) maintain systems of driver inspection reports and of inspection, repair and maintenance records for the equipment;

(ii) periodically inspect the equipment;

(iii) have procedures in place and provide sufficient space at facilities where the equipment is interchanged for the inspection of the equipment by truck drivers to whom the equipment is interchanged;

(iv) develop and implement procedures to repair damage to or defects in equipment identified by drivers; and

(v) refrain from placing equipment on the highways if it poses an 'imminent hazard'.

Specifically:

#### 1. IEP Registration.

Companies that are IEPs must register as such with the Federal Motor Carrier Safety Administration on or before December 17, 2009. This registration is done by filing FMCSA Form MCS-150C with the FMCSA. 49 C.F.R. §390.19. We understand that the form is being developed by the FMCSA and will be available from the FMCSA website at [www.fmcsa.dot.gov](http://www.fmcsa.dot.gov) [Keyword 'MCS-150C'] or under the phone number 1-800-832-5660. The IEP will then be assigned a federal Department of Transportation ('DOT') number. After its initial filing, the IEP must periodically update or renew its registration according to the schedule set forth at § 390.19(b), generally every two years. As discussed below, **Members will need to determine whether they or any of their related companies are IEPs within the meaning of the regulations.**

#### 2. Marking of Chassis.

Each chassis 'interchanged or offered for interchange to a motor carrier by an intermodal equipment provider' (...) must identify the intermodal equipment provider by name and by the IEP's DOT number. 49 CFR § 390.21. This marking can be done by way of a physical mark on the chassis; a label; on a document affixed to the chassis in a 'weathertight compartment'; or 'on the interchange agreement' accompanying the driver. 49 CFR § 390.21(g)(4). The FMCSA's discussion contemplates re-marking the chassis upon interchange to other IEPs, perhaps multiple times per year. (73 F.R. 76769.) **The deadline for marking chassis is December 17, 2010.**

#### 3. Inspection, Maintenance, and Repair.

IEPs must 'systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, in a manner consistent with §396.3(a)(1) all intermodal equipment intended for interchange with a motor carrier' and 'ensure that intermodal equipment intended for interchange with motor carriers is in safe and proper operating condition'. 49 CFR § 390.40(c), (d), (g). Section 396.3(a)(1) provides that each motor carrier and IEP must 'systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles and intermodal equipment subject to its control'. The timing and scope of the required inspections are not spelled out in the regulations on issues such as frequency, the meaning of 'control', or the items to be inspected.

Subsections 396.17 (b) and (c) require a detailed annual inspection of the chassis by the IEP according to Appendix G to the regulations. Appendix G is the list previously adopted for the required annual Federal highway Administration ('FHWA') inspection, with which the TT Club equipment provider members should already be familiar, but **the new regulations adopt one amendment to the Appendix that requires inspection, maintenance and repair of 'all devices used to secure an intermodal container to a chassis'**.

Motor carriers and drivers are required to conduct a visual and auditory inspection of specified chassis components during their pre-trip inspection, and to report any deficiencies to the IEP. 49 CFR §§ 390.42, 392.7, and 396.11. The inspection list includes most of the items now listed on Exhibit A to the Uniform Intermodal Interchange and Facilities Agreement, but omits a number of items not directly related to safety of highway transport. These include landing legs, sand shoes, crank handles, mud flaps, rear underride guard, license plate, hazardous materials placards, and displayed FHWA stickers. The new rules also require IEPs to adopt procedures for the driver's pre-trip inspections, to provide sufficient space to allow for those inspections, 49 CFR §390.40(h), and, most importantly, to **'develop and implement procedures to repair any equipment damage, defects, or deficiencies' identified by the driver or to replace any equipment that cannot be repaired before the driver leaves the interchange facility.**

#### 4. Record Keeping.

IEPs are required to keep various inspections, maintenance, and repair records. 49 CFR § 390.40(e), (f). These include the vehicle inspection reports that drivers are required to submit to the IEPs for each piece of equipment used and records of all the inspections, repairs and maintenance required by the regulations. See §§396.11 and 396.21. **It is recommended that all inspection, maintenance, and repair records, including driver reports and periodic inspection reports be kept for at least five years in some form (e.g. electronically).** This is because, depending on the statute of limitations applicable in the relevant state, Members may not be sued, or, if sued, not

served with the complaint, for a substantial period of time after the incident and records of these inspections will be critical to any defense of the claim.

NB: There are a number of other administrative requirements and features of the new regulations, but the foregoing outline sets forth the most important elements of the regulations for purposes of provider compliance.

## UNRESOLVED ISSUES

The regulations are ambiguous in certain important respects and it remains to be seen how the federal government and, potentially, the courts will resolve those ambiguities. The sources of authority that the government or courts may look to for guidance include, in order of significance:

(i) 49 U.S.C. § 31151, the statute that gave the Federal Motor Carrier Safety Administration ('FMCSA') authority to promulgate the regulations;

(ii) the new regulations;

(iii) the FMCSA discussion in the Federal Register about the regulations;

(iv) prior law; and

(v) industry custom and practice.

Those issues are:

### 1. Compliance limited to Chassis and Trailers, Excluding Containers and Semi-Tractor.

Although the enabling statute and the regulations use the potentially broad term 'intermodal equipment', they limit this term to intermodal chassis and trailers by defining them as 'trailing equipment that is used in the intermodal transportation of containers over public highways in interstate commerce, including trailers and chassis'. 49 United States Code ['USC'] § 31151(f)(1); 49 C.F.R. § 390.5. The Federal Register discussion notes that 'In theory [the statute] also applies to flatbed trailers which are occasionally used to transport containers, but i[t] is very unlikely [that intermodal equipment providers] would interchange such equipment to motor carriers (...)' 73 F.R. 76795, n. 1.) **The regulations that impose specific inspection duties on the IEPs relate only to chassis and trailers and limit the duties of IEPs to intermodal chassis and trailers and not to containers or semi-tractors not within the control of the IEP. See 49 CFR §§ 392.7(b), 396.11(a) and 396.17(b).**

### 2. Who is or may be an Intermodal Equipment Provider?

The new statute broadly defines an IEP as 'any person that interchanges intermodal equipment with a motor carrier pursuant to a written interchange agreement or has a contractual responsibility for the maintenance of the intermodal equipment'; the definition in the regulations is similar. (49 USC § 31151(f)(3); 49 C.F.R. § 390.5.) The Federal Register discussion adopts a narrow interpretation of the term. 73 F.R. 76797 - 98. Whether a particular entity is an IEP and whether there can be more than one IEP with respect to a given equipment interchange is not self-evident from this definition. The various entities potentially within the scope of this term include:

#### 2.1. Chassis Owners.

**A chassis owner that has long-term-leased chassis** to another entity and cannot be characterized as having interchanged chassis to a motor carrier or a contractual responsibility to maintain the chassis **is outside the express language of the statutory and regulation definitions**. It should not, therefore, be deemed an IEP. **A chassis owner characterized as interchanging chassis to motor carriers** (e.g., ocean carrier members with respect to chassis owned by them) directly or by way of terminals or chassis pools, however, **may be deemed an IEP**.

#### 2.2. Chassis Lessees.

Based on the definitions, a long-term chassis lessee characterized as interchanging chassis to motor

carriers (e.g., ocean carrier members with respect to long-term-leased chassis) directly or by way of terminals acting or chassis pools may be deemed an IEP.

### 2.3. Chassis Pools.

Although an ocean or rail carrier using another ocean or rail carriers' chassis by way of a chassis pool may fall within a literal interpretation of the definition of an IEP, the Federal Register discussion states: 'When the owner of [intermodal equipment] places its equipment in a pool and relinquishes its control to a pool operator that is contractually obligated to maintain the equipment, the pool operator would be considered the IEP'. 73 F.R. 76798. The meaning of this statement and its application to a particular pool or pool participant will depend on the precise details of the pool arrangements and operations.

### 2.4. Intermodal Terminals/Facilities.

An intermodal terminal or facility at which chassis are stored, maintained, and interchanged to motor carriers would appear to be within the express language of the statutory and regulation definitions. The Federal Register discussion about this, however, may reflect a contrary view in somewhat contradictory statements as follows: 'FMCSA agrees (...) that the IEP is the party responsible for ensuring performance of systematic inspection, repair, and maintenance rather than a [maintenance/repair] vendor or [intermodal facility] operator who is performing local services on behalf of an IEP'; 'FMCSA also agrees (...) that the party with direct physical control over the [intermodal] facility where the equipment is staged and made available to motor carriers would be in the best position to comply'; 'that is not necessarily the final answer, however'. 73 F.R. 76798; see also pp. 76814 and 76815, implying that those contemplated to be IEPs are limited to 'Steamship Lines', 'Railroads', 'Common Pool Operators', and 'Motor Carriers' with no mention of facility operators.

### 2.5. Inspection/Maintenance/Repair Contractors.

The statutory and regulation definitions expressly include 'any person that (...) has a contractual responsibility for the maintenance of the intermodal equipment'. (49 USC § 31151(f)(3); 49 § CFR 390.5.) The Federal Register discussion, however, states that only a maintenance vendor that interchanges chassis and provides for systematic chassis inspection, repair, and maintenance services may be an IEP. (FR vol. 73, no. 243, p. 76798.)

### 2.6. Motor Carriers.

If a motor carrier interchanges a chassis to another motor carrier, is it an IEP with respect to the subsequent motor carrier? It would appear to be within the statutory and regulation definitions. The Federal Register discussion also reflects that motor carriers are contemplated to be IEPs under certain circumstances. (FR vol. 73, no. 243, p. 76814 showing those contemplated as being 'IEPs' to include 'Motor Carriers'.)

### 2.7. Single IEP?

Under the above definitions and depending on the circumstances, multiple entities simultaneously could be deemed IEPs with respect to a particular chassis (e.g. an ocean carrier owner of a chassis and the marine terminal that performs the interchange and generally inspects/maintains/repairs it, or perhaps an ocean carrier and a rail carrier with respect to an ocean carrier's chassis that is at the rail carrier's terminal). The Federal Register discussion about the regulations, however, appears to contemplate that only one entity will be the IEP with respect to each interchange.

This limitation to a single IEP is reflected, in part, by the IEP registration and marking requirements. The Federal Register discussion on this issue is an extended one and concludes with this statement at 73 F.R. 76797 - 98: 'The intent of this final rule is to ensure that each intermodal chassis is systematically maintained by **the** entity that offers it for transportation in interstate commerce' [emphasis added]. 73 F.R. 76797 - 98. This view is consistent with the statute which states that the regulations must include 'a requirement that **an** intermodal equipment provider identified under subparagraph (A) [i.e., a registering IEP with an assigned DOT number] systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, intermodal equipment (...) intended for interchange with a motor carrier'. (49 USC § 3115(a)(1)(C), emphasis added.)

Given the way that the regulations define and impose obligations on the IEP, **whether a particular**

**entity is an IEP with respect to a particular interchange depends significantly on the circumstances of the interchange. An entity identifying itself as an IEP with respect to a particular chassis will, in effect, be accepting responsibility for its condition.** There is also the prospect of multiple member entities being deemed IEPs. It will thus be important to make sure that the correct entities are identified as IEPs for chassis and that each such entity is a party to or indemnitee under the UIIFAA.

## LIABILITY CONSIDERATIONS FOR TT CLUB MEMBERS

**The duties imposed on IEPs by the regulations may result in increased risk of liability for TT Club members.** Although, chassis owners and lessees have always faced potential liability for chassis defects that contribute to an accident, the regulations will provide a simple and clear basis for the liability of an intermodal equipment provider where the defect can be shown to have contributed to an accident. In the past, attorneys for claimants have often argued that the federal inspection, maintenance and regulations applicable to Motor Carriers also apply to equipment providers in order to support contentions that non-compliance with those regulations, without more, established the negligence of the provider with respect to the condition at issue. Although these arguments have ultimately failed because the previous regulations did not, as a matter of law, apply to providers, the argument that a specific federal regulation has been violated is a powerful tool of persuasion before a jury. **Under the new regulations, any defect in the equipment that contributes to the accident will likely represent a violation of the regulations, subject to exceptions where the driver has not reported them, thereby enhancing the claimant's case against the provider.**

On the other hand, the regulations specifically impose certain inspection and reporting duties on drivers with respect to intermodal equipment. The driver's failure to inspect, discover or report a deficiency that is within the scope of these requirements may, depending on the circumstances, give the provider a clear and persuasive defense to a claim of negligence and strengthen its case against the Motor Carrier under the indemnity provisions of the UIIA and general tort law principles. More than ever, therefore, **it is extremely important that the TT Club Members who are equipment providers exercise strict control over the interchange, inspection, maintenance and repair procedures and record keeping** as adopted and implemented by their chassis pools, terminals and maintenance vendors.

The inspection and reporting duties imposed on the motor carriers and drivers by the regulations and the FMCSA comments thereon may limit IEP liability where the drivers certify the good condition of the chassis or fail to report defects. The Federal Register discussion at 73 F.R. 76802 states that 'the Agency agrees (...) that IEPs should not be held responsible for citations on equipment a motor carrier has certified as passing the pre-trip inspection' and that 'a driver's failure to report a defect establishes a presumption that items on the inspection list were in good working order when the [chassis] departed the facility'. The courts may adopt this comment to apply an evidentiary presumption of good working order in a lawsuit against the IEP by an injured party.

**The statute and federal regulations do not address the contractual apportionment of responsibilities between motor carriers/drivers and equipment providers, so they do not directly affect members' defense and indemnity rights under the UIIFAA.** Since the list of items to be checked by the driver on Exhibit A to the UIIFAA is similar to the list in the regulations, the scope of members' defense and indemnity rights under the current version of the UIIFAA in general should not substantially change. If a chassis defect is within the items the regulations require the driver to inspect and report, the regulation will strengthen a defense/ indemnity claim against the driver/motor carrier. As stated in 49 § CFR 392.7(b), 'Drivers who operate the [chassis] over the road shall be deemed to have confirmed the [listed] components were in good working order when the driver accepted the equipment (...)'.  
'

Section F.6.a of the UIIFAA limits the insurance coverage required to cover the equipment providers under the UIIFAA to the scope of the defense and indemnity provisions of the Agreement. The regulations do not, therefore, directly affect the insurance requirements of the UIIFAA.

Claims against members' inspection/maintenance/repair contractors and their insurers will continue to be primarily determined by the relevant contracts and insurance policies. **It will be important for TT Club Members to make sure that such contractors are specifically required to comply with the roadability regulations so there is a complete delegation of these duties to bring them clearly within the scope of what the contractors are required to do, with concomitant defense/ indemnity/ hold harmless and insurance rights inuring to the benefit of the providers.'**

## 2. Conclusion

We hope that you will have found the above items interesting. If you would like to have further information about any of them, or have any comments you would like to make, please email the editor at [tt.talk@ttclub.com](mailto:tt.talk@ttclub.com). We look forward to hearing from you.

Peter Stockli  
Editor for the TT Club

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