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FOOD SAFETY MODERNIZATION ACT (FSMA)

Do you insure any business that is involved in shipping, transporting or receiving food? If so, do you and your insureds know about the Food Safety Modernization Act (FSMA)? Food includes any non-packaged food for human or animal consumption – food requiring temperature control, fresh as well as frozen.

Who promulgated the Act? The Food and Drug Administration (FDA) did and their objective is to make sure “contaminated” foods are not in the supply chain.

My father was involved in the transportation of food. He had a business rule not to haul watermelons. Why? – Because if he did not get them delivered on July 3rd, they were not the same value to the receiver on July 5th so the receiver would “reject” the load. His thought process was the watermelons are like a lot of food, driven by market value at place of delivery. If the market value of the items he was transporting had gone down during transportation, the receiver might not want/need so will reject the load and use any reason that they can think of. The question is, will the Act give the receiver grounds to reject? If so, what can a motor carrier do? How will the cargo insurance being provided to the motor carrier address/react to a claim because of the FSMA?

If you are providing insurance to any business that will be affected by the Act, you need to talk to your insureds to make sure they are aware of the Act and are developing procedures to comply with the Act. There have been a number of articles written about the Act and the articles provided the following information:

“With the April compliance date ... approaching, regulators are preparing to clamp down on bad actors in the food chain”

“Several industry experts agreed that many businesses have been slow to prepare”

“Transportation industry remains pretty clueless about the rule which will force shippers and carriers to have heart to heart conversations leading to new controls”

“The comfortable relationship between shippers and transportation companies is about to become a bit strained”

“The 283 page rule places the primary burden on shippers to ensure that the proper written procedures and data collection are in place to keep food properly cooled and trailers cleaned”

“Shippers are using the rule to add requirements in carrier contracts that the new regulations may not actually address”

“Carriers must be knowledgeable about the rules so they can avoid taking on greater liability”

If you provide insurance to motor carriers that haul food products, you need to understand the new rule, see if your insureds are prepared and see if they have signed new contracts that place additional responsibility on them for the care of cargo during the transportation and if the contract gives the shipper/receiver rights of salvage.

As an agent, you have insurance considerations as well. Talk to your insurance carriers about how their policy will address a claim when the load gets rejected because of a violation of the Act but no “direct damage” to the cargo. How will coverage address the total load being rejected? Does the carrier shipper contract or bill of lading give the shipper/receiver control of salvage so even the “undamaged” part has to be destroyed? Does the cargo policy you are providing have a duty to defend in case of a dispute/court case? How does the policy address spoilage/contamination/mechanical breakdown and what are the duties if any for the insured to meet the requirements of the coverage?

Let’s review a few provisions of the FDA Food Safety Modernization Act (FSMA) rule on Sanitary Transportation of Human and Animal Food. The Act is now final, advancing the FDA’s efforts to protect foods from farm to table by keeping them safe from contamination and spoilage during transportation. The rule establishes requirements for shippers, loaders, carriers by motor or rail vehicle, and receivers involved in transporting human and animal food to use sanitary and temperature control practices to ensure the safety of that food. With some exceptions, the final rule applies to shippers, receivers, loaders and carriers that transport food in the United States. Specifically, the FSMA rule establishes requirements for the transportation company vehicles and

transportation equipment, transportation operations, records and training. The provision states the following:

Vehicles and transportation equipment: The design and maintenance of vehicles and transportation equipment to ensure that it does not cause the food that it transports to become unsafe. For example, they must be suitable and adequately cleanable for their intended use and capable of maintaining temperatures necessary for the safe transport of food

Transportation operations: The measures taken during transportation to ensure food safety, such as adequate temperature controls, preventing contamination of ready to eat food from touching raw food, protection of food from contamination by non-food items in the same load or previous load, and protection of food from cross-contact, i.e., the unintentional incorporation of a food allergen

Training: Training of carrier personnel in sanitary transportation practices and documentation of the training. This training is required when the carrier and shipper agree that the carrier is responsible for sanitary conditions during transport

Records: Maintenance of records of written procedures, agreements and training (required of carriers). The required retention time for these records depends upon the type of record and when the covered activity occurred but does not exceed 12 months

There are some businesses that are not subject to the Act. The definition of “transportation operations” does not include: Transport of foods completely enclosed by a container (except for food that requires temperature control), all transportation activities performed by a farm, transport of human food byproducts for use as animal food without further processing, i.e., those sold directly for farmers to be fed to livestock (these do not include byproducts that are transported to facilities to be manufactured into feed or pet food, and transport of live food animals, except for molluscan shellfish (such as oysters, clams, mussels and scallops).

Do you insure business that are responsible for loading or unloading food goods? – Could be the transportation company or a company the transportation company uses commonly called a lumper. Some additional provisions of FSMA would apply:

“Loaders” have been added as a covered party. A loader is a person who physically loads food onto a motor or rail vehicle. Before loading a

food not completely enclosed by a container, the loader must determine that the transportation equipment is in appropriate sanitary condition

Before loading a food requiring temperature control, the loader must determine that each mechanically refrigerated cold storage compartment is adequately prepared for refrigerated transportation including precooling if necessary

The final rule clarifies that the intended use of the vehicle or equipment (e.g., transporting animal feed versus human food) and the production stage of the food being transported (e.g., raw materials versus finished products) are relevant in determining the applicable sanitary transportation requirements. Some have described the difference between being “shelf” ready – In other words, in a “package” versus in an open bin. The Act does not place responsibility of “use by date” on packages. Requirements for the use of a temperature indicating or recording device during transport have been replaced with a more flexible approach. The shipper and carrier can agree to a temperature monitoring mechanism for foods that require temperature control for safety.

Primary responsibility for determining appropriate transportation operations now rests with the shipper who may rely on contractual agreements to assign some of these responsibilities to other parties. The Act requires that shippers must develop and implement written procedures to ensure that equipment and vehicles are in appropriate sanitary condition. Shippers of food transported in bulk must develop and implement written procedures to ensure that previous cargo does not make the food unsafe. Any shippers of food that require temperature control for safety must also develop and implement written procedures to ensure that food is transported under adequate temperature control.

Possible unsafe food must not be sold until found safe by FDA inspector. The Act states that if a covered person or company at any point in the transportation chain becomes aware of a possible failure of temperature control or any other condition that may render a food unsafe, that food must not be sold or distributed until a determination of safety is made.

Key FSMA requirements that apply to truckers: Require downloadable temperature monitoring, provides that if a shipment may have been contaminated, it must be inspected before it can be returned to the supply chain, the rules contemplate that drivers will have formal food safety training and carriers can be required to have formal recordkeeping duties.

If a load is rejected, there must be a call for an inspection by a FDA inspector to determine if the food has salvage. The motor carrier needs to consider what to do with the cargo while waiting for the inspector to arrive. Once the inspection report is available, it will reflect that the load is okay to sell, that part of the load is not safe to sell so part can be salvaged or the total load is rejected, then no salvage.

Small businesses are not currently subject to the Act (motor carriers engaged in food transportation that have less than \$500,000 in average annual revenue. Based on industry standards, an interstate motor carrier operating over 300 miles should average \$185,000-\$220,000 a year in revenue so a motor carrier that has three or less trucks would not be subject to the Act.) But remember, the shipper could require the smaller motor carrier to sign a contract that would make them subject to the Act.

FSMA is only one of the many “government” imposed regulations that affect our insureds that are motor carriers. These and other government rules and regulations have an effect on the motor carrier’s operations and in a lot of cases their insurance needs. FSMA has an effect on cargo coverage that the insurance industry provides to motor carriers. If you not familiar with cargo coverage, you might not be aware that there is no standard cargo form so when providing cargo insurance you must be aware of the form your insurance carrier is providing. You must make sure the form meets your insured’s needs and covers their exposure. FSMA is one of the exposures.