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VOLVO AGREES TO $1.5 MILLION LATE DEFECT REPORTING PENALTY. LARGER PENALTIES ON THE HORIZON.

by Richard A. Wilhelm

NHTSA's safety defect reporting regulations require manufacturers of motor vehicles and motor vehicle equipment to report safety-related defects and noncompliance with safety standards within 5 working days of determining that such a defect or noncompliance exists. On July 3, 2012 Volvo agreed to pay a $1.5 million civil penalty for late reporting of safety defects.

Volvo's transgressions involved the timing of 7 different defect notifications (six from 2010 and one in 2012). Under Volvo's process for evaluating potential safety defects, it would identify product issues as "potentially critical" based on information from suppliers, factory information, warranty claims and field reports. In the subject recalls, the time between Volvo's determination that the issues were potentially critical and the actual decision to conduct recalls varied from 1 to 5 months. In one instance, Volvo waited 2 months after it had received notice from its supplier that the supplier had filed its own defect report with NHTSA. What is not clear is the extent of the analysis involved in Volvo's recall decisions.

This civil penalty comes on the heels of BMW's $3 million penalty earlier this year. BMW did not have a timing issue with the filing of defect reports. Its sin was filing incomplete reports which were not updated for prolonged periods of time.

NHTSA has increased its policing of the timeliness of defect reporting. So, manufacturers have to take steps to expeditiously analyze potential safety defects and report them in a timely manner. This will be even more of a concern next year because the recently enacted Transportation Bill will increase the maximum civil penalty from $17.35 million to $35 million.

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LOGISTICS, FREIGHT BROKERS AND SHIPPING AGREEMENTS: HELPFUL TIPS TO AVOID CLAIMS AND LITIGATION

by John E. Anderson, Sr. and Rodney D. Butler

Use of freight brokers has become increasingly common in recent years. These third party companies can provide valuable services to assist you in finding cost effective alternatives for your shipping needs. Thus, the question seems to arise as to "How does one find a reputable broker or freight forwarder?" This article will provide some insight into the areas to examine when searching for a reputable freight broker as well as some general comments regarding transportation agreements.

There are three categories which stand out above all others when evaluating whether to retain a broker. These qualities include: (i) its history or reputation in the industry; (ii) corporate financial stability; and (iii) appropriate and adequate insurance.

First, a reliable and reputable broker can be vetted by reviewing historical information such as the broker's D&B PAYDEX score, and by obtaining a list of references and a list of customers. The D&B PAYDEX score is a score that is based upon information reflective of a company's reputation and prior relationships with motor carriers. Specifically, it is

an indicator of the timeliness of the payment of its debt. Additionally, reputable brokers should not hesitate to provide you with a client list and list of references. Any hesitation to provide this information to you should serve as a warning sign.

Second, with respect to corporate financial stability, there are several resources available which include reports from Dunn and Bradstreet, credit reporting agencies such as Experian or Equifax, Uniform Commercial Code (UCC) filings, and court filed liens and lawsuits. Again, the PAYDEX score can be a valuable piece of information in this area.

Third, but certainly not the least important criterion for evaluating a broker, is whether the broker has adequate insurance coverage. A registered broker is mandated by the FMCSA to post a bond or establish a trust fund in a minimum amount of $10,000 to pay shippers or motor carriers should the broker fail to complete its end of the contract. However, there is no prohibition on brokers preventing them from buying supplemental insurance or posting a higher bond amount. Additionally, a broker should have a general commercial liability policy of at least $1 million. Finally, the broker should have contingent cargo insurance. Contingent cargo insurance provides coverage in a situation where the primary cargo insurance carrier denies coverage or becomes insolvent.

Finally, remember to review all contracts or shipping agreements. This is important for all shippers regardless of the goods being shipped or the handling requirements. Typically, shipping agreements are drafted in a cookie cutter or one size fits all mentality which is quick, simple and cost effective. As a precaution, you should approach this from the perspective of anticipating a breach of contract by a broker or motor carrier. Thus, should the broker or motor carrier fail to deliver the goods, or damage or destroy the goods, do the terms of the shipping agreement provide you with adequate protection for this breach? You should make sure there are terms in the shipping contract stating that damage will be presumed to have occurred when certain circumstances have taken place, and spell those out or define the terms with specificity. Many of these terms will be industry specific, shipper specific, or load specific. Due diligence prior to shipping may save you from costly litigation and claims.

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CONFLICT MINERALS UPDATE

By J. Bryan Williams

As we commented on last year, the Dodd-Frank Act (the "Act") was signed into law on July 21, 2010. Section 1502 of the Act was included to help curb violence and other human rights violations in the Democratic Republic of Congo (the "DRC") and neighboring countries (Angola, Burundi, Central African Republic, Congo Republic, Rwanda, Sudan, Tanzania, Uganda, and Zambia) (collectively the "DRC countries").

Under Section 1502 of the Act, a public company that manufactures products using conflict minerals must disclose the source(s) of its conflict minerals on its website and in annual reports filed with the SEC. The term "conflict mineral" is defined in the Act to include the following: (A) columbite-tantalite, also known as coltan (the metal ore from which tantalum is extracted); cassiterite (the metal ore from which tin is extracted); gold; wolframite (the metal ore from which tungsten in extracted); or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State, who is also required to produce a map of mineral-rich zones, trade routes, and areas under the control of armed groups in the DRC countries.

Current Status of SEC Rule

The SEC issued a proposed rule to implement Section 1502 on December 23, 2010. The public comment period for this rule was extended from January 31, 2011 to March 2, 2011. The SEC received over 500 written comments with respect to the proposed rule and a final rule was expected to be promulgated by the end of 2011. On June 22, 2012, fifty-eight members of Congress demanded by letter that the SEC either vote on formal rules to implement the Dodd-Frank Act requirements regarding conflict minerals or, at the very least, set a definitive date for a vote. In response to the letter from Congressmen, on July 2, 2012 the SEC said it would meet on August 22, 2012 to publicly vote on the rule. The text of the rule will not be available in advance; it will be published either the day of or the day after the meeting.

Any annual reports relating to fiscal years ending on or after one year from the date of the rule's final publication will have to include the new disclosures required by the rule. Notably, only companies that file reports with the SEC pursuant to Sections 13(a) or 15(d) of the Exchange Act ("public issuers") are subject to Section 1502 and the proposed SEC rule. Private and non-U.S. companies are exempt.

The SEC has proposed a three-step test for the Conflict Minerals Provision:

1. A public issuer is subject to the Conflict Minerals Provision only if it is one for which "conflict minerals are necessary to the functionality or production of a product manufactured by such [issuer]." If an issuer does not satisfy this criterion, the issuer would not be required to take any action, make any disclosures,

or submit any reports. An issuer that does satisfy this criterion moves on to the second step.

2. The issuer must determine, after a reasonable due diligence inquiry of country-of-origin, whether its conflict minerals originated in the DRC countries. If the issuer determines that its conflict minerals did not originate in the DRC countries, the issuer would disclose this determination, along with the country-of-origin inquiry it used in reaching this determination, in the body of its annual report and on its website. If, however, the issuer determines that its conflict minerals did originate in the DRC countries, or if it is unable to conclude that its conflict minerals did not originate in the DRC countries, the issuer would disclose this conclusion, along with the results of its country-of-origin inquiry, in its annual report and on its website. The issuer would also need to satisfy the requirements of the third step.

3. An issuer with conflict minerals that originated in the DRC countries, or an issuer that is unable to conclude that its conflict minerals did not originate in the DRC countries, must furnish a Conflict Minerals Report (the "Report") to the SEC. In the Report, the issuer would be required to provide, among other information, a description of any of its products that contain conflict minerals that it is unable to determine did not "directly or indirectly finance or benefit armed groups" in the DRC countries.

All issuers furnishing a Report must certify that they obtained an independent private sector audit of the Report and must furnish as part of the Report the audit report of the independent private sector auditor.

Issuers using recycled or scrap conflict minerals must still furnish a Conflict Minerals Report subject to special rules that allow for the omission of some otherwise required information. However, issuers that obtain conflict minerals from a recycled or scrap source may consider those conflict minerals to the "DRC conflict free."

Implications For Automotive Companies

The SEC expects public issuers to perform due diligence on the sources and supply chain of conflict minerals, although the SEC has declined to-date to provide any specific standards or guidance regarding the nature of the due diligence to be performed. However, the SEC did note two possible sources of due diligence standards, the Organisation for Economic Cooperation and Development and the United Nations Group of Experts for the DRC.

Conflict-Free Smelter (CFS) Assessment Programs

Although the due diligence investigation and reporting requirements apply only to publicly-traded companies registered with the SEC, we fully expect that the requirements will rapidly flow through the entire supply chain in a manner similar to many other material and chemical requirements applicable to the automotive industry.

Trade associations have developed programs to assist companies in performing due diligence inquiries. In particular, the Electronic Industry Citizenship Coalition (EICC) (www.eicc.info/) and the Global e-Sustainability Initiative (GeSI) have developed a Conflict-Free Smelter (CFS) voluntary assessment program that will identify and publish a list of certified conflict-free smelters of tin as well as tantalum, tungsten, and gold. Also, the Automotive Industry Action Group (www.aiag.org/) is formally collaborating with the EICC and GeSI in the CFS program to ensure robust application across electronics and other manufacturing applications.

United States Government Accountability Office ("GAO")

The GAO has issued a report to Congress dated July 2012 in which it comments on the current status of the SEC's steps in developing and implementing a conflict minerals disclosure rule and also initiatives undertaken by various stakeholders that are intended to assist covered companies comply with the SEC rule. The report is available for review on the GAO website (www.gao.gov/).

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