The Sanitary Transportation of Human and Animal Food regulations, found at 21 C.F.R. § 1.900 *et seq.*, which implements the Food Safety Modernization Act of 2011, collectively ("STF Rules") create new requirements relating to the transportation of human and animal food by motor and rail vehicles within the United States. With a few exceptions, shippers, rail and motor carriers, loaders, receivers and brokers (considered to be shippers and thus subject to the same requirements) involved in the transportation of covered food are subject to the STF Rules. The STF Rules address the design and maintenance of transportation equipment, avoidance of adulteration, and operational measures to be taken to prevent food from becoming unsafe during transportation. Responsibilities can be assigned contractually between covered entities.

The TIA and other industry groups worked extensively with the U.S. Federal Drug Administration ("FDA") to develop workable food safety regulations for those involved with transporting food. Nonetheless, there exists some confusion among entities covered by the STF Rules as to their respective obligations and overreach in agreements and during contract negotiations. Consequently, TIA members could be at risk in assuming obligations that are beyond what the STF Rules require or cannot be operationally met. Below are a few key points for consideration and discussion with shipper customers and, in turn motor carriers, when negotiating food transportation contractual provisions.

1. **Scope of Application**. Some shippers may seek to apply the STF Rules to all shipments, regardless of whether the commodity being shipped is actually covered by the STF Rules. The STF Rules generally only apply to food that is not completely enclosed in a container or food that requires refrigeration for safety. Brokers should limit their STF Rules obligations to only those shipments actually subject to the STF Rules and not assume additional responsibility for non-covered foods.

2. **Temperature Control**. The STF Rules are expressly limited to regulating food safety and not food quality. If brokers accept shippers' instructions that include quality control temperature set points, as opposed to food safety set points, then brokers (and the carriers with which they contract) could potentially be held liable to shippers for food shipments considered by shippers to be "adulterated" simply because the shippers' quality control temperatures were not maintained, regardless of whether the failure creates any food safety risk. Motor carriers and their insurers could reject claims by shippers (or brokers on their behalf) to recover for food rejected at destination merely for quality and not safety reasons, particularly without any evidence of actual physical damage to the food product.

   For instance, if a broker agrees to the application of the STF Rules to include non-covered commodities and the shipper to designate quality temperatures as opposed to safety related temperatures, a load of bagged baby carrots, which could be considered exempt from the STF Rules (as completely enclosed by a "container" but not requiring refrigeration for "safety") that was transported at 35 degrees as opposed to the 34 degrees, as designated by the shipper, could be deemed "adulterated" and, therefore, outright rejected in its

entirety by the shipper. Without being able to demonstrate any physical damage to the carrots, most carriers and their insurers would reject a claim to recover for the value of the rejected shipments.

3. **Seals**. Shippers may propose including language in transportation contracts that allows the outright rejection of food shipments deemed by the shipper, at its sole discretion, to be adulterated due to a broken or missing seal or seal irregularity. For instance, shippers could propose the following language: "If Shipper's or a vendor's instructions require a cargo seal, the lack of a seal or seal irregularities shall be sufficient to consider the shipment unsafe and a total loss." However, the STF Rules do not require or otherwise regulate seals. In the FDA's official comments to the STF Rules, the FDA stated that a broken seal, alone, does not mean that a load has been adulterated. Instead, a broken seal should prompt the parties to investigate the surrounding facts to determine if there is evidence that adulteration or tampering has occurred. Agreeing that shippers may reject and assert claims for loads due to a seal issue, alone, provides brokers with additional liability exposure not contemplated by the STF Rules. Since motor carriers and their insurers generally reject claims arising from broken seals without any evidence of actual physical damage to the food product, shippers will likely look to brokers to pay these claims.[1]

4. **Shipper contracts.** Brokers will receive requests from shipper customers that the broker take responsibility for some of the customer's own requirements under the STF Rules. In other words, the customer will try to re-assign its responsibilities as a shipper to the broker, *e.g.*, the development of written procedures for maintaining temperatures of food or the determination of requirements for sanitarily transporting food products. These requests should be carefully reviewed and rejected whenever possible. Brokers should try to reduce their role to merely being a messenger for their shipper customers in providing the customer's instructions on the sanitary transportation of food to the carriers with which the broker contracts. To the extent that the broker assumes responsibilities from their shipper customers, they should pass them along to the contract carriers whenever possible, taking into consideration the concerns in paragraph 5, below.

   Similarly, some shippers may attempt to have brokers accept certain obligations that only motor carriers are in a position operationally to meet. Brokers should not take on the responsibility of a carrier or ensure that the carrier will abide by these requirements. Brokers do not have any control over the equipment being provided by contract carriers to transport their customers' foods products. Brokers should only agree to require their contract carriers

[1] The same is true for late arrival food shipments. Brokers should watch out for language such as, "Carrier agrees that when transporting food for human consumption, late delivery, *i.e.* delivery after the deadline indicated on the transportation documents, alone shall be sufficient to reject a shipment and consider the cargo a total loss." Instead, shippers should be required to mitigate their damages and an adulteration determination should be made by an agreed upon qualified expert and not based on the shipper's sole determination.

to comply with motor carrier requirements under the STF Rules or abide by shipper customer requirements.

5. **Carrier contracts**. One approach taken by brokers is to simply push unreasonable shipper requirements down onto the carrier. This is can be a perilous strategy. Most carriers used by brokers depend on insurers to pay claims- they simply do not have the ability to pay claims out of pocket. As mentioned above in section four regarding seals, claims unrelated to the actual damage of products will most often be rejected by insurance companies. This puts brokers in a position where they are potentially paying claims to customers that they can't recover from the transporting motor carrier. For instance, many standard cargo liability insurance policies designed to cover damage due to adulterated food product shipments or a broken seal (to the extent that there is seal coverage) require the determination of adulteration to be made by the FDA, the insurer or the insurer's agent, and require that the product be salvaged when possible. Thus, if a broker were to agree with a shipper that a determination of adulteration or the salvageability of food product is left to the sole discretion of the shipper, there would likely be no coverage under a motor carrier's standard cargo insurance policy or the broker's contingent cargo liability policy. Brokers should discuss this coverage concern with shippers when negotiating shipper/broker contracts, avoid shipper "sole discretion" or "sole determination" language and insist on the mitigation of damages whenever possible.

6. **More Stringent Requirements than the STF Rules Require.** Brokers should discuss with shipper customers alternatives and not agree that the shipper customers, consignees or receivers may unilaterally deem food shipments "adulterated", *e.g.*, without an inspection, based upon the mere possibility that the goods have become contaminated or when the shipper's instructions are not followed. For instance, a shipper may propose language stating:

    - Broker agrees and will ensure that Qualified Carriers agree that food shipments that have been transported, pursuant to this Agreement, under conditions that are not in compliance with the written food safety related instructions or requirements set forth in the Shipping Document, including any seal, temperature, quality control standards and delivery date requirements, will be considered "adulterated" within the meaning of the Food Drug & Cosmetic Act (21 U.S.C. §§ 342(a)(i)(4), 342(i)). Broker and Qualified Carriers understand that adulterated shipments may be refused by the Shipper, consignee or receiver upon their tender for delivery at destination, with or without inspection.

    - Broker will assume or ensure that its Qualified Carriers assume liability for loss or damage to cargo resulting from the breach of any of the foregoing requirements specified in this Section. Broker agrees that Shipper is not responsible for and shall in no way be held liable to Broker for Broker's or any Shipper's consignee's, receiver's or loader's obligations or their failure to adhere to their respective obligations under the

laws and regulations governing the safe and sanitary transport of food for human consumption, including the STF Rules referenced above.

Brokers should reject the aforementioned language whenever possible or, in the least, propose modification of it. The adulteration determination should be made by a joint inspection conducted by an agreed upon qualified expert (and not simply a shipper's quality assurance representative). Shippers should not be permitted to push additional liability onto brokers, particularly that which goes beyond what the STF Rules require or should remain with the Shipper and any entities with which it contracts.