THOMPSON HINE

Transportation Update

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Transportation M&A Risks and Strategies: Why Specialized Transportation Counsel Matters

When an acquisition, divestment, or merger involves freight carriers, brokers, third-party logistics providers, or any company with transportation assets or operations, the deal becomes far more complex. Regulatory approvals, safety compliance, and a maze of state licensing and operational rules can disrupt timelines, erode value, and expose buyers to liability and commercial risks that outlive closing. Engaging experienced transportation counsel in the diligence process is critical to managing these risks.

Our Transportation practice advises on trucking, rail, maritime, and air logistics, along with hazardous materials transportation, and can help buyers and sellers navigate the many issues that arise in transactions involving transportation operations.

What's at stake in transportation M&A?

Even sophisticated deal teams are often surprised by the distinct regulatory requirements governing transportation operations. Areas of regulatory risk include:

- *Regulatory approvals, licenses, and registrations*. The U.S. Department of Transportation (DOT) and its modal agencies (such as the Federal Motor Carrier Safety Administration (FMCSA), Federal Railroad Administration (FRA), and Pipeline and Hazardous Materials Safety Administration (PHMSA)), as well as the Federal Maritime Commission (FMC) require transportation providers to have certain operating authorities and registrations. Also, many companies that ship hazardous materials do so under special approvals and permits. States also may require certain licenses or authorities when the operations involve intrastate transportation movements. In some cases, the federal and state authorities may be transferred to the buyer, but completing the transfer can involve a lengthy process. Failing to account for transferability can delay closing or cause operational shutdowns.
- *Approval of rail transactions*. The Surface Transportation Board (STB) must approve acquisitions of railroads and transactions involving certain rail infrastructure and operations. Failure to obtain these approvals, or an exemption from them, can risk the unwinding of a transaction.
- *Safety compliance and operational standards*. Companies engaged in transportation for hire need to be cognizant of far-reaching federal safety requirements, including those involving employee training; drug and alcohol testing programs; and inspection protocols for track, bridges, trucks, locomotives, and rail cars. Additionally, truck transportation providers must maintain certain safety-fitness ratings, keep comprehensive driver-qualification files, and comply with other safety requirements. Noncompliance with these and other operational rules can result in downgraded safety ratings, increased liability, and potential suspension or revocation of operating authority.
- *Truth-in-leasing rules*. Federal rules impose contractual requirements on motor vehicle leasing and the use of owner-operators. Reviewing these contractual arrangements is important to prevent unanticipated post-closing liability.
- *National security concerns*. Federal regulations under the jurisdiction of the Committee on Foreign Investment in the U.S. govern certain transactions involving transportation infrastructure when foreign entities are involved.
- *Hazardous materials regulations*. Strict federal hazardous materials rules apply not only to carriers

transporting such products, but also to companies that tender hazardous materials to carriers. We advise on compliance programs and policies regarding the classification, packaging, and labeling of hazardous goods, as well as employee training. Overlooking these obligations can trigger severe fines and operational shutdowns.

- *State legal and tax obligations*. States may impose certain other compliance and tax requirements on companies with transportation operations. Failure to comply can result in loss of authority to operate in key jurisdictions, unexpected tax liabilities, and delays in transaction closing. State-level fuel taxes, apportioned registrations, and intrastate authorities often surface in diligence.

These and other risks may change based on the mode of transportation and type of transportation operations. For example, brokers and third-party logistics providers face potential negligent-selection claims if they fail to properly vet carriers. Ocean freight forwarders and non-vessel operating common carriers are governed by special rules promulgated by the FMC. Carrier liability for cargo loss, damage, or delay claims can vary by transportation mode, and contractual limitations on this liability may be ineffective unless carriers comply with certain mode-specific requirements under the Carmack Amendment or Carriage of Goods by Sea Act.

Failure to detect and address these complex issues can trigger financial penalties, criminal liability, license revocation, a regulator order to cease operations, or loss of investor confidence, which no indemnity can fully cure.

How specialized transportation due diligence protects buyers and enhances value

Our Transportation practice helps clients navigate the complex regulatory and commercial environment involving transportation operations and can help protect and enhance deal value.

Focused Diligence, Faster Results

Our team provides comprehensive counsel on the federal and state laws that govern trucking, rail, maritime, and air transportation; hazardous materials transportation; and related logistics services, such as warehousing, freight forwarding, and customs brokerage. We can identify red-flag exposures early, focus diligence requests, and keep the diligence workstream on schedule. We also develop specialized representations and warranties in purchase agreements.

Regulatory Strategy and Approvals

Our team can help secure mandatory agency approvals, develop compliance roadmaps, and engage with regulators (including FMCSA, FRA, STB, FMC, PHMSA, DOT, FAA, CBP and TSA) to avoid closing delays and post-closing surprises.

Contractual Risk Mitigation

From owner-operator agreements to carrier-shipper contracts, we can help craft provisions and indemnities that allocate risk to the proper party, align liabilities with insurance coverage, account for regulatory compliance, and withstand post-closing scrutiny.

Integration and Post-Closing Compliance

We provide effective guidance on policies and compliance mechanisms to help the acquired business maintain operating authority and reduce compliance and commercial risks post-closing.

Transaction Timing and Change-of-Control Planning

Transportation approvals and registrations often follow different timelines than corporate approvals. Coordinating closing mechanics, change-of-control notifications, and post-closing updates reduces the risk of operational disruptions.

Closing the deal with fewer surprises

In transportation M&A, engaging transportation counsel early helps preserve enterprise value and keep the deal on schedule. Our team can translate complex transportation rules into clear, actionable steps across diligence, approvals, contracts, and integration.

FOR MORE INFORMATION

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