

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

Registration and Financial Security Requirements for Brokers of Property and Freight Forwarders; Small Business in Transportation Coalition (SBTC) Exemption Application

Notice; Request for Public Comment
Docket No. FMCSA-2020-07539

COMMENTS

SUBMITTED BY THE

TRANSPORTATION INTERMEDIARIES ASSOCIATION (TIA)



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The Transportation Intermediaries Association (TIA) submits these comments in response to the Federal Motor Carrier Safety Administration's (FMCSA) April 10, 2020 notice of application for exemption by the Small Business in Transportation Coalition (SBTC). The Agency is requesting public comments on the application for exemption by SBTC from the \$75,000 bond requirement, which was included within the "Moving Ahead for Progress in the 21st Century Act" or MAP-21 (P.L. 112-141).

TIA commends the FMCSA's primary mission of promoting and maintaining the highest level of safety on our nation's roads and highways. TIA will continue to work with FMCSA to further advance this goal. TIA fully supports Congress' actions to increase the financial responsibility for brokers and forwarders, which will play an integral role in achieving this joint goal.

For reasons set forth in more detail below, TIA strongly opposes the application for exemption by the SBTC. The bond increase will not only improve safety but will also address serious industry concerns of fraudulent entities operating in the marketplace.

IDENTITY AND INTEREST OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION

TIA is the professional organization of the \$214 billion third-party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all disciplines doing business in domestic and international commerce. TIA is the voice of transportation intermediaries for shippers, carriers, government officials, and international organizations.

TIA members include approximately 1,800 property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and non-vessel-operating common carriers), air forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers. TIA members represent approximately 70 percent of the industry by value. TIA members range in size from start-up to publicly traded companies.

TIA is also the U.S. member of the International Federation of Freight Forwarders Associations (FIATA), the worldwide trade association of transportation intermediaries representing more than 40,000 companies in every trading country.

Transportation intermediaries or third-party logistics professionals act as the "travel agents" for freight. They serve tens of thousands of shippers and carriers, bringing together the transportation needs of the cargo interests with the corresponding capacity and special equipment offered by rail, motor, air, and ocean carriers.

Transportation intermediaries are primarily non-asset-based companies whose expertise is providing mode and carrier neutral transportation arrangements for shippers with the underlying asset owning and operating carriers. They get to know the details of a shipper's business, then tailor a package of transportation services, sometimes by various modes of transportation, to meet those needs. Transportation intermediaries bring expertise to meet the shippers' transportation needs.

EXEMPTION AUTHORITY WITHIN FMCSA PURVIEW

TIA believes the Agency is authorized to consider SBTC's exemption request. The request is premised on the statutory authority provided to the Secretary of Transportation by 49 USC 13541. MAP-21's financial security requirements (49 USC 13906(b)-(c)) are contained in Title 49, Subtitle IV, Part B and are covered by section 13541. The Secretary's authority to issue these exemptions has been delegated to the Agency by 49 CFR 1.87(a)(3).

TIA believes that action to exempt brokers and forwarders from the increased financial security requirements established by an act of Congress is misguided. In H.R. 4348, the "Moving Ahead for Progress in the 21st Century Act" (MAP-21) signed into law on July 6, 2012, Congress, through deliberate act, raised the minimum financial security requirement for FMCSA licensed property brokers and freight forwarders to \$75,000. The Secretary was instructed to review the level every four years to determine if it should be raised, not lowered or exempted. In doing this, Congress, which sets the National Transportation Policy, made two important determinations about the Policy. Congress decided (1) to increase the financial security for entities that handle motor carriers' money,

and (2) to harmonize the regulations and financial security requirements for FMCSA licensed third-party logistics companies with those of Federal Maritime Commission (FMC) licensed third-party logistics companies. TIA, for the reasons outlined within this submission, supports this lawful exercise of Congress's legislative functions and believes the requested exemption would frustrate Congress' intent to protect payments to motor carriers and prevent unauthorized brokering.

BACKGROUND OF BROKER FINANCIAL REQUIREMENTS INCREASE

During the negotiations leading up to passage of MAP-21, there were several groups that opposed the increase in the broker and forwarder bonding requirements, but ultimately Congress rejected that position with the enactment of MAP-21. Section 32916 of MAP-21 increases the financial responsibility for brokers and forwarders from \$10,000 to \$75,000. Section 32916 also clarifies what constitutes brokerage, increases the licensing requirements for brokers and, for the first time, forwarders, and establishes performance standards and requirements for those entities that issue broker bonds and trusts.

Like many policy debates, there was much thrusting and parrying over the issues surrounding the regulation of brokers and forwarders. Following battles during the last several Congresses, TIA and the Owner-Operator Independent Drivers Association (OOIDA) opened a dialogue at the suggestion of Congressional leaders. What TIA and OOIDA found when we sat down together, was a common interest in finding solutions to shared problems: problems, not fully broker or carrier, but related to general marketplace fraud which had crept into the marketplace since the deregulation enacted in the ICC Termination Act of 1995 (P.L. 104-88). From that dialog, we agreed to attempt to find a legislative solution to address our common concerns. TIA and OOIDA recognized that the members of both organizations needed each other to survive and grow successful family businesses. The American Trucking Associations (ATA) shared many of the same concerns about fraud in the marketplace as TIA and OOIDA, and the three leading organizations began working out compromises, which were later presented to Congress. One of those compromises was an increase in the financial responsibility requirements for brokers and forwarders to \$75,000. Congress carefully considered the position of these three groups when it passed MAP-21.

WHY INCREASE BROKER FINANCIAL RESPONSIBILITY?

Prior to the increase in MAP-21, the broker bond requirement had not been increased since the mid-1980s. Market data shows that brokers are typically paying carriers within 30-days while data also indicates that shippers are paying brokers in 45-days or frequently a lot longer than that. It is our belief that the \$75,000 broker bond is a small price to pay to show that a brokerage company is prepared to cover this gap and meet these market-based realities. This is perfectly demonstrated through the fact that on average nearly 86 cents of every dollar a broker or forwarder handles will be paid to motor carriers. Congress rejected the argument that a company capable of handling hundreds of thousands of dollars of carrier money need not be able to qualify for a \$75,000 bond from a Treasury licensed surety, or an equivalent amount to be held in trust by a financial institution.

The elimination of the bond is not acceptable to carriers. Both OOIDA and ATA have separately petitioned DOT to increase the bond requirement to as high as \$500,000. In January of 2004, OOIDA petitioned FMCSA to open a rulemaking to increase the surety bond or trust fund amount to at least \$300,000 and as high as \$500,000 (FMCSA-2004-17008). In April of 2005, ATA weighed in supporting the OOIDA petition. In April 2009, ATA once again wrote FMCSA asking the agency to move on a bond rulemaking. In the 2009 letter, ATA cited a study they conducted indicating that only 13 percent of carriers' claims against brokers were satisfied by the \$10,000 bond.

If the broker and forwarder financial responsibility requirements were eliminated as SBTC wants, the victims of this scenario will be the hard-working motor carriers, who will have no recourse to go against a bond or trust. Apart from the devastating effect this would have on carriers that are already struggling to stay in business during these very difficult times, to make up these losses some may be tempted to skimp on proper upkeep and maintenance of their tractor-trailers, thus creating a public safety hazard.

Congress also was very clear that broker and forwarder trust companies (BMC-85) must collect the full amount of the trust in readily available, liquid assets not pledged receivables or installments, and that FMCSA should adopt rules to provide motor carriers with transparency into these funds.

Nearly eight years after enactment of MAP-21, and several petitions by TIA, OOIDA, and ATA later, the Agency has held one public hearing and issued one Advance Notice of Proposed Rulemaking, but has taken no formal action to issue regulations carrying out these congressionally mandated liquid asset transparency requirements. Yet now it is being asked to consider (or more precisely, reconsider) a petition to *exempt* brokers from those very same requirements.

1. Sliding Scale

Arguments have been made for a sliding scale bond and, while this may sound reasonable, it is unworkable. A sliding scale would put more responsibility on FMCSA for enforcement and require brokers to report their income to DOT; something that TIA has always opposed. A sliding scale bond could also lead to increased litigation against brokers with carriers or carriers' interests suing brokers arguing that their bond should have been higher. Congress recognized that by enacting a straightforward method of clarifying what constitutes brokerage, extending the requirements to freight forwarders, and putting the onus on those entities that issue broker bonds and trusts, that the private sector would become the enforcement mechanism leaving the Agency to focus its efforts on motor carrier safety.

2. Small Businesses

The increase in the bond amount was never intended to pit small business against big business as some have stated, rather it is an issue of funded versus underfunded operations. As previously stated, 86 cents of every dollar collected by a broker or forwarder belongs to motor carriers. According to TransCredit, a company that collects data from brokers about their receivables from shippers, the average number of days it takes a shipper to pay the broker is 45-90. Yet, TransCredit reports that the average number of days for a broker to pay a carrier is 28. The difference between paying money out in 28 days and receiving reimbursement in 45-90 means that brokers and forwarders must float at least 17 days' worth of payables. Assuming a company does five loads a day, at an average of \$1,500 per load, then that broker or forwarder needs at least \$127,500 in working capital, provided nothing goes wrong. Congress raised the financial security amount for brokers and forwarders precisely because companies entering the market and handling carrier money should have the wherewithal to support timely payment to the carrier, even if the broker has not yet been paid by the shipper.

It is ironic that those making the argument to eliminate the bond increase because some brokers and forwarders cannot afford it, actually make the policy case for the higher bond stronger. Congress determined that companies should not handle other people's money if they cannot afford to protect it. Broker and forwarder bonds are readily available in the marketplace. And, with thousands of licenses issued since MAP-21, there does not appear to be a marketplace problem with the higher bond level.

EFFECTS ON THE INDUSTRY

Shortly after MAP-21 was signed into law, a report indicated that the FMCSA has revoked the operating authority of almost 10,000 brokers who did not procure the newly required \$75,000 bond by the deadline. Unfortunately, many in the industry incorrectly concluded that this meant thousands of businesses across the country shut their doors. The reports of the death of the brokerage industry were greatly exaggerated, grossly misleading, and factually inaccurate. The FMCSA's database was badly in need of updating to remove authorities that had not been active in years. Both TIA and FMCSA participate on the Board of the Unified Carrier Registration Agreement (UCRA). As such, both TIA and FMCSA knew how out-of-date the FMCSA database had become.

Indeed, some revoked authorities belonged to casual brokers doing less than three to five loads a day and cannot justify the costs of staying in the industry as an independent company. These companies, however, may continue operating as motor carriers or agents for other brokers. According to FMCSA's database, from 2014-2019 there were more than 7,000 newly licensed property brokers entering the marketplace. The current number currently sits at more than 24,000 licensed property brokers and continues to increase every month. Clearly, the SBTC petition is a solution in search of a problem.

One of the main reasons Congress decided to increase the financial responsibility of licensed brokers and forwarders was to harmonize the requirements across all modes of transportation. Congress recognized this integrated logistics system when it harmonized the regulation of domestic

3PLs (property brokers and freight forwarders licensed by the FMCSA) with the regulation of Ocean Transportation Intermediaries (OTIs). Specifically, Congress raised the financial security requirement for domestic 3PLs to equal the minimum financial security required by NVOCCs (from \$10,000 to \$75,000). FMC licensed Ocean Freight Forwarders are required to post a \$50,000 bond, and many companies have both authorities and are required to post both bonds.

Congress also adopted other FMC-related licensing requirements, like the requirement to have an experienced qualifying individual in management, as part of its harmonization between Agencies.¹ The marketplace for FMC licensed third-party logistics companies remains robust. These stricter requirements have been in effect in ocean freight forwarding industry for decades. According to the FMC website, there are currently 4,899 licensed NVOCCs and since 2008 there have been at least 450 new entrants every year in the marketplace. Many of these companies have obtained at least \$125,000 in financial responsibility, with at least one-third of the companies having \$150,000 in place.

DISPATCH SERVICES

SBTC makes the case that since MAP-21 was implemented and the financial responsibility was increased from \$10,000 to \$75,000, “formerly licensed brokers have continued to operate unlawfully without a license and bond by simply calling themselves “dispatchers” or “dispatch services” with impunity.” While TIA agrees that fraudulent activity is occurring in the marketplace in terms of dispatch services and action needs to be taken as soon as possible, eliminating the bonding requirements, which would increase fraudulent activities is not the answer and misguided.

These dispatch services operate under the definition in 49 CFR §371.2:

§ 371.2 Definitions. (b) Bona fide agents are persons who are part of the normal organization of a motor carrier and perform duties under the

¹ FMCSA has yet to promulgate rules related to requiring a qualified individual to receive a broker or forwarder license nearly eight years after Congress required the Agency to do so. Clearly, the Agency should spend its time implementing the will of Congress instead of entertaining petitions to suborn the will of Congress.

carrier's directions pursuant to a preexisting agreement which provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others.

When examining the definition, the immediate question to us is whether, a company/person could be an agent for multiple motor carriers. TIA spoke with two separate DOT officials about this matter recently, and they both agreed that there is nothing in the regulations that bars a company from representing multiple carriers, but the intention is to only represent one. Another DOT regional representative went further and said in their opinion and the consensus amongst DOT officials is that it is brokering when you are representing more than one carrier. He mentioned that the Agency looks at these situations on a case-by-case basis.

The dispatch services that are doing business as a dispatch service are doing nothing illegal, if they do not accept payment on behalf of the motor carriers. Essentially, the broker bills the shipper; the carrier bills the broker; broker pays the carrier; and the carrier pays the dispatch service.

TIA strongly recommends FMCSA issue guidance on this point clarifying the role of “dispatch services”, which will drastically reduce the number of fraudulent entities operating in the marketplace and clear up a lot of confusion and conflicting opinions among DOT staff.

CONCLUSION

TIA applauds the FMCSA on its continued efforts to increase safety on our nation’s highways and roads. The proper implementation of the MAP-21 financial requirements for brokers and forwarders will play a vital role in the Agency’s mission. TIA is a strong advocate for the FMCSA, and looks forward to working with the Agency on several important initiatives including: the effort to raise the safety bar to enter the industry, requiring operators to maintain high safety and ethical standards to remain in the industry, and allowing FMCSA to remove high-risk and fraudulent operators from our nation’s roads and highways.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Robert A. Voltmann", followed by a long horizontal line and a small dash.

Robert A. Voltmann

President & CEO

TIA