Before the Federal Motor Carrier Safety Administration

SBTC & OOIDA Petitions to Strengthen 49 CFR 371.3 Broker Transparency

Docket No. FMCSA-2020-0150

Property Broker Listening Session

TIA Petition for Rulemaking to Repeal 49 CFR 371.3(c) and to Address "Dispatch Services"

Docket No. FMCSA-2020-0190

SECOND SUPPLEMENTAL COMMENTS

SUBMITTED BY THE

SMALL BUSINESS IN TRANSPORTATION COALITION

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Now that FMCSA held the October 28th, 2020 property Broker Listening Session, the SBTC would like to file its opening statement with FMCSA and offer additional comments in response to TIA's statement and formal comments to the docket filed this week to dispel the three myths espoused by the TIA.

SBTC'S PROPERTY BROKER LISTENING SESSION OPENING STATEMENT:

Thank you for having the SBTC as a participant today, for extending the comment period on our Petition for rulemaking to you, and for releasing the TIA Petition to Repeal 49 CFR 371.3c. We have reviewed the TIA Petition in its entirety and the latest TIA Comments on the SBTC and OOIDA docket filed yesterday and we feel we need to respond by saying the SBTC is not asking FMCSA for any new regulations as the TIA purports.

In fact, what concerns us here is that the TIA is arrogantly acting like 371.3c doesn't already exist, hasn't been in place for 40 years, isn't grounded in 70 plus years of Congressional and regulatory wisdom dating back to the 1940's and the onset of regulation of brokers by the ICC, and is now, for the first time on the table to be considered.

Whether the TIA and their members like it or not Transparency is already a rule and that rule has been in place for four decades for a reason. That rule states

> *(c) Each party to a brokered transaction has the right to review the record of the transaction required to be kept by these rules.*

We have offered you in our comments, the historical context for this rule and the reservations the ICC had in 1980 about relaxing the original 1949 rules. In at least three instances, each time they considered whether to relax the rules on brokers, they pointed to their new rule what we call 371.3c as the safeguard that would balance

Earlier this year, it became apparent that big brokers were engaged in either price gouging, price fixing or both. And so we reached out to the Dept of Justice on that matter. As we understand it, their investigation is still on going. Now that the light was shined on big brokers' practice of making carriers and truckers waive their rights to see transactional records, the ball is now in the FMCSA's court to review the history of the rule and enforce the rule. An action the TIA calls ion you to do every other time except when they are governed by a rule.

We have outlined for you that you have the authority to engage in this rulemaking under 49 U.S. Code § 14906.Evasion of regulation of carriers and brokers.

You already know you are authorized to enforce this statute because you last changed the penalty in 2019 for violation of Section 14906 from $2,133 to $2,187.

We ask you to merely clarify the rule to make it clear that waiving a right under a rule is essential evasion of that rule and is not allowable under the law. By clarifying the language of the rule and adding our proposed language you will put brokers on notice that they do not have the authority to deregulate themselves by virtue of a contract provision by holding freight carriers are fit willing and able to haul, hostage.

TIA MYTH NUMBER ONE: BROKER'S CAN'T COMPLY WITH 371.3C BECAUSE SHIPPERS REQUIRE CONFIDENTIALITY...

SBTC wishes to point out that the TIA has published on its website a model Broker-Carrier Contract for years. It will be attached to this comment and is publicly available for download from the TIA website www.tianet.org. Unlike some alternate contracts used by TIA's big broker members, there is no explicit reference to the carrier waiving its rights under 49 CFR 317.3c in this model contract. It would appear that TIA makes this model contract available to its smaller members that do not have in-house legal departments. There is, however, a confidentiality clause that binds the carrier in terms of the broker's financial information and the financial information of the broker's customer, namely, the shipper:

CONFIDENTIALITY:

(i) In addition to Confidential Information protected by law, statutory or otherwise, the Parties agree that all of their financial information and that of their customers, including but not limited to freight and brokerage rates, amounts received for brokerage services, amounts of freight charges collected, freight volume requirements, as well as personal customer information, customer shipping or other logistics requirements shared or learned between the Parties and their customers, shall be treated as Confidential, and shall not be disclosed or used for any reason without prior written consent.

Similarly, we point to the TIA model Shipper-Broker Contract. It will be attached to this comment and is publicly available for download from the TIA website www.tianet.org. This contract also bears the logo of the National Industrial Transportation League (NITL), a 100+ year old trade group which represents shippers. As we understand it, both NITL and TIA endorse the use of this contract. There is no reference to the shipper requiring the broker to make the carrier waive 371.3c in the broker's contract with its carrier. And there is a confidentiality clause in this contract as well:

CONFIDENTIALITY. ***Other than as required to comply with law or legal process requiring disclosure,*** *the Parties agree to the following:*

A. BROKER shall not utilize SHIPPER's name or identity in any advertising or promotional communications without written confirmation of SHIPPER's

consent and the Parties shall not publish, use or disclose the contents or existence of this Agreement except as necessary to conduct their operations pursuant to this Agreement. BROKER will require its carriers and/or other brokers to comply with this confidentiality clause.

B. In addition to Confidential Information protected by law, statutory or otherwise, the Parties agree that all of their financial information and that of their customers, including but not limited to freight and brokerage rates, amounts received for brokerage services, amounts of freight charges collected, freight volume requirements, as well as personal customer information, customer shipping or other logistics requirements shared or learned between the Parties and their customers, shall be treated as Confidential, and shall not be disclosed or used for any reason without prior written consent.

C. In the event of violation of this Confidentiality paragraph, the Parties agree that the remedy at law, including monetary damages, may be inadequate and that the Parties shall be entitled, in addition to any other remedy they may have, to an injunction restraining the violating Party from further violation of this Agreement in which case the non-prevailing Party shall be liable for all costs and expenses incurred, including but not limited to reasonable attorney's fees (emphasis added).

It would appear then, after negotiations between the two trade groups, one representing brokers, TIA, and the other representing shippers, NITL, that both groups agreed to confidentiality with the specific qualifying condition "**Other than as required to comply with law or legal process requiring disclosure…"**

Ergo, since 371.3c is a duly-promulgated regulation, said rule constitutes "law or legal process requiring disclosure." So, assuming the three entities use the two TIA model contracts, under the model Shipper-Broker Contract, if a carrier exercises his regulatory rights under 371.3c to see shipper-related broker transaction information, he is permitted to do so since he has not explicitly waived his right to do under the model Broker-Carrier Contract; and the shipper has no basis to suggest the broker has done anything in breach of their contract because the shipper accepted this qualifying language. The carrier is bound not to release any information he receives and that should satisfy the shipper's concerns and desire for confidentiality. But to suggest what is good for the broker goose is not good for the carrier gander as if the carrier cannot be trusted to not breach its contract with the broker is not only misguided but downright insulting.

Yet, TIA would have you believe…

"Shippers do not want their proprietary rate and transportation costs to be made available to their competitors, either directly or through leakage of information through third parties..."

… as if there were not already contractual confidentiality provisions in place to safeguard against this.

If these are the “model contracts,” then they should be deemed as the industry standard, much like the standard bill of lading that has been used for decades is. If the TIA is now arguing that it wishes to repeal 371.3c for the benefit of just a few of its biggest high dues-paying brokers who wish to reject the industry standard and seek to circumvent the trade groups’ best practices recommendations in contracting, then then the agency should conclude this is really a sham and have nothing to do with TIA’s unreasonable and unscrupulous request.

TIA’s suggestion that the sky is falling and that we must repeal 371.3c because SBTC wants to “reregulate the industry, limit broker margins and make proprietary information public” by holding TIA members accountable to the existing rule and evasion statute is therefore complete and utter nonsense.

The SBTC did not write and endorse these contracts. The TIA did. Quite frankly, we do not understand what the TIA is now trying to pull here in its petition for repeal of 371.3c and through its comments against our petition to clarify 371.3c. since it encourages shippers to sign contracts that include the provision “**Other than as required to comply with law or legal process requiring disclosure…”**

Since a broker is required to comply with 371.3c as a matter of law, specifically the evasion of regulation statute…

> ***§14906. Evasion of regulation of carriers and brokers***
>
> *A person, or an officer, employee, or agent of that person, that by any means tries to evade regulation provided under this part for carriers or brokers is liable to the United States for a civil penalty of $200 for the first violation and at least $250 for a subsequent violation.*

… there is no breach of contract by the broker when the broker chooses not to evade the regulation and complies with the carrier’s lawful request under 49 CFR 371.3c.

We therefore do not understand why TIA would maintain the position that brokers must make carriers waive their rights under 49 CFR 371.3c in order to satisfy their own confidentiality requirement with their shipper client when they require their carrier vendors to agree to these confidentiality clauses.

TIA MYTH NUMBER TWO: 371.3c SHOULD BE REPEALED IN 2020 BECAUSE ICC SAID IN 1980 IT WANTED TO "REMOVE ALL UNNECESSARY RESTRICTIONS WHICH MIGHT IMPEDE THE FREE OPERATION OF THE MARKET PLACE."

Here, TIA takes the ICC quote out of context; that is, when ICC stated in its 1980 rulemaking notice…

> *"Our goal in regulating transaction between brokers, carriers, and shippers is to remove all unnecessary restrictions which might impede the free operation of the marketplace…"*

…they were talking about the then-existing regulations that had been in place since 1949. By removing unnecessary restrictions, they were not talking about 371.3c, because that was the very regulation, they were adding that would allow them to ensure new safeguards existed as they relaxed the 1949 rules on brokers in the spirit of deregulation.

As we previously pointed out in our October 13th comments…

Indeed, the original 1949 broker rule, codified as the time as 167.3 stated:

> *167.3 Records to be kept by brokers. Each broker shall keep and retain for a period of three years an exact record of each transaction in which he participates, which record shall show for each transaction: (a) Name and address of the consignor. (b) Name, address, and the lead or principal docket number of the originating motor carrier. (c) Bill of lading or freight bill number. (d) Description of commodity or commodities, weight, rate, and tariff reference. (e) Date of shipment. (f) Origin and destination of shipment. (g) Amount of compensation received by the broker for brokerage service furnished and from whom it was received. (h) Description of any non-brokerage service performed in connection with each particular shipment or otherwise, amount of compensation received for such service, and from whom such compensation was received. (i) If freight charges are collected by the broker, the record shall show, for each shipment, the amount collected and the date of payment to the carrier.*

Additional relevant rules included:

> *§ 167.5 Charges for brokerage service. (a) Each broker shall maintain and keep open for public inspection at each place of business which he maintains, a schedule stating his maximum charge for each brokerage service which he holds out to perform, and (b) No broker shall charge or collect any more for any brokerage service than his maximum charge therefor as contained in his schedules maintained pursuant to paragraph (a) of this section.*

…which reveals the ICC originally intended for brokers to have to publicly publish their maximum charges.

Additionally, the original 167.10 provision entitled "Duties and obligations of brokers" held, in part:

(c) No broker shall charge or accept compensation from both a shipper and a motor carrier in connection with the same shipment, whether for brokerage or non-brokerage service, without first advising both parties of the amount and basis for the charge or payment by the other.

(d) A broker shall exercise due diligence to carry out any undertaking to arrange for desired transportation, to carry out the terms of its arrangements with any shipper or motor carrier, and to pay promptly any monies received by him for such shipper or motor carrier.

(e) Any freight charges collected by a broker shall be paid in full to the carrier or carriers employed by him, without deduction for any amount due to him from such carrier or carriers.

Then, on May 12, 1980, the ICC announced specific rulemaking on brokers, stating its intent in the summary as:

The Commission proposes to revise its rules governing the operational practices of property brokers. Our goal is to improve the way in which we regulate property broker practices by eliminating regulations which are unnecessary and modifying those regulations which are unnecessarily restrictive. We are also attempting to simplify and clarify the language used in the regulations and to incorporate changes resulting from the codification of the Interstate Commerce Act.

In the discussion section, ICC advised:

§ 1045.3 Records to be kept by brokers. The Property Brokers Association of America, Inc. (PBAA) contends that some of our recordkeeping requirements may be unnecessary. We agree. For example, it should not be necessary to record the address and lead docket number of the originating motor carrier and consignor for every shipment. It would probably be sufficient for brokers to keep a master list containing this information. We propose to eliminate subsections (d), (e), and (f) of the present rule, since they relate to information which can be obtained from carrier records. We request that parties apprise us of any other reporting requirements which might be eliminated. The primary purpose of our record-keeping requirements is to ascertain whether improper rebating activities are taking place. Since we are proposing revisions in our rebating rules to reflect what we believe is a more realistic appraisal of rebating dangers, it may be that there is further action which we can take to reduce recordkeeping requirements. We recognize that our recordkeeping requirements may pose a greater burden on brokers of transportation of less truckload freight than on others. However, there does not appear to be a practical way to condense or summarize the information needed to detect improper activities. We would like to receive suggestions as to how the recordkeeping burden might be reduced for brokers of less-truckload traffic. ***We have added one recordkeeping requirement: any party to a brokered transaction shall have a right to review the record of the***

transaction required to be kept under this section. This addition enables us to eliminate more complex rules found in sections 1045.5,1045.6, and 1045.10 (emphasis added).

In justifying the relaxation of regulations on brokers, the ICC further suggested:

> *§ § 1045.5 and 1045,6 Charges for brokerage services and Charges for nonbrokerage services. We propose to eliminate these two sections. The broker is now given broad discretion in its ability to charge fees for brokerage and non-brokerage services. In effect, there is no limitation, on the size of the fees under the present rules since a broker can, by careful statement of the fee maxima and minima, render these sections meaningless. The situation has not caused any problems, and, as a result, we do not believe that eliminating these two sections will have any practical effect. We believe that the suspected evils against which these rules were designed to guard' (see discussion in Practices, supra, at M.C.C. 314-320) were extremely hypothetical.* ***Therefore, we are proposing to eliminate these two sections and to replace them with the new requirement in section 1045.3 that the affected parties have the right to look at the description of the charges contained in the record of the transaction. This will enable them to determine what portion of their bill is related to the broker's services (emphasis added).***

This came up yet again in their discussion on duties of brokers:

> *§1045.10 Duties and obligations of brokers. We propose to delete subsections (a), (b) and (c) of the present rule and to combine sections (d) and (e). Most of sections (a) and (b) contain standards of conduct which reflect what the proper role of the broker should be. We do not believe that these sections are necessary. There are not penalties for violations of the standards set forth in them, and enforcement of the standards can only come from the interactions of the marketplace and healthy competition.* ***Subsection (c) would be replaced by the new provision which we propose to add to section 1045.3 to give any party to a brokered transaction the right to review the record of the transaction (emphasis added).*** *Present subsection (c) requires that brokers not accept or charge compensation for a shipment from both a shipper and a carrier without first advising both parties of the charge or, payment of the other. This requirement does not appear necessary and could hinder all parties since proper notification might delay service. The present rule is especially apt to be burdensome when a broker is attempting to marry freight on an expedited basis or trying to arrange transportation for a large number of small shipments. We propose to combine subsections (d) and (e) to require that a broker not disrupt the normal billing and payment procedures between shippers and carriers. The present regulation's admonition to "pay promptly any monies" is vague and unenforceable. The proposed rule also would allow brokers to simplify their billing practices.*

In fact, most of the 1980 relaxation of the original 1949 broker regulations hinged upon the very fact that ICC would be implementing what we today call 49 CFR 371.3(c), the very regulation that the TIA members have been evading and TIA now seeks to help its members repeal.

To suggest now that we should apply the ICC's 1980 rational --which was actually the very impetus for creating what we now call 371.3c… to remove the rule in 2020, truly defies reason and is absolutely absurd. It is intentional misrepresentation by TIA of the ICC's true intent. It is an insult to the historical record and the agency's intelligence.

TIA MYTH NUMBER THREE: THE LAW ALLOWS BROKERS TO WAIVE 371.3C BECAUSE BROKERS ARE REALLY SHIPPERS

Here, the TIA argues that brokers are entitled under the law to waive 49 CFR 371.3c by resting on the Interstate Commerce Commission Termination Act of 1995 (ICC Termination Act)**,** specifically 49 CFR 14101b, which deals with shippers and carriers but not brokers, and the general Defend Trade Secrets Act of 2016 (DTSA,) which falls outside the realm of Title 49, and is codified at 18 U.S.C. § 1836. TIA is clearly reaching here as there are three problems with their theory.

First, the FMCSA would have to conclude that whereas the law is clear as to the definition of what a broker is, a third-party intermediary broker is really a shipper. In the context of shipper-broker-carrier, this is akin to saying when we look at a dog, a cat and a mouse, a cat is really a dog. Or that the sky we were all taught is blue, is actually green. You should not buy what TIA is trying to sell you here.

Nothing in the law and nothing in the regulations suggests that a broker is a shipper.

As you know, 49 U.S. Code § 13102 defines a "Broker" as follows:

> *The term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.*

Similarly, the regulatory definition of broker is set forth in 49 CFR 371. Part 371 in fact makes a distinction between a broker and a shipper as two distinctly different entities at:

> § 371.2 Definitions.
>
> (a) Broker means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange

> the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.
>
> (b) Bona fide agents are persons who are part of the normal organization of a motor carrier and perform duties under the 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.
>
> (c) Brokerage or brokerage service is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, **consignor, or consignee.**
>
> (d) Non-brokerage service is all other service performed by a broker on behalf of a motor carrier, consignor, or consignee.

And again, the regulations distinguish a broker from a shipper here:

> § 371.9 Rebating and compensation.
>
> (a) A broker shall not charge or receive compensation from a motor carrier for brokerage service where:
>
> (1) The broker owns or has a material beneficial interest in the shipment or
>
> (2) The broker is able to exercise control over the shipment because the broker owns the shipper, the shipper owns the broker, or there is common ownership of the two.
>
> (b) A broker shall not give or offer to give anything of value to any shipper, consignor or consignee (or their officers or employees) except inexpensive advertising items given for promotional purposes.

But under the TIA's theory, the broker is the shipper. Notwithstanding this new TIA concept of double shippering, if that were to be deemed the case by FMCSA, then FMCSA would have to conclude that there is no longer a need for brokers to be licensed and bonded because there is no bonding requirement in place for shippers. Here, the TIA clearly is trying to have its cake and eat it, too, as it tries to wiggle out of 371.3c. In the same breath as it petitions you to remove 49 CFR 371.3c, it also asks you to issue guidance on unlicensed brokers calling themselves "dispatch services" because those entities are not duly-licensed and bonded brokers unfairly competing with their broker members who are, um, duly-licensed and bonded. Or wait, shippers!

This is a point SBTC has made in its recent reincarnation of the previous AIPBA intermediary bond exemption application. That is, we agree with TIA that either all third-party intermediaries being paid to arrange transportation are brokers and need to be bonded or none should. Or maybe we should say TIA finally agrees with us.

We remind you that 371.3 also applies to shippers' right to learn what brokers are paying carriers and determine if they are being price gouged like we believe happened this past Spring. When big brokers price gouge, shippers pay more and that translates to consumers paying more. And America was already suffering this year during the shutdowns with high unemployment. They did not need the added insult to injury and to absorb increased transportation costs because greedy big brokers decided to exploit the pandemic and price gouge.

We note Bob Voltmann, former TIA CEO, commented to the agency on May 9th 2007 (https://www.regulations.gov/document?D=FMCSA-2004-17008-0033):

> "If the Agency believes bonds to be an effective regulatory tool, it should apply it to all entities involved including carriers… Bonds serve only to cost legitimate companies necessary working capital. A bond requirement for brokers is a throw back to an earlier time of heavy regulation that is no longer necessary. A bond requirement only for brokers also presumes that the brokers are not fiscally fit to meet obligations while motor carriers are fiscally fit. This is discrimination at its best, and does not reflect the reality of today's marketplace."

Does this mean everyone should have a bond including shippers? This, of course, was stated long before Voltmann flip-flopped after TIA began selling optional $100,000 bonds and then wanted all brokers to have to buy them. This also sounds very much like what TIA would now have you believe in 2020. You know, that 371.3c is a throwback to an earlier time, is no longer needed, and does not reflect the reality of today's marketplace. They continue to ring the same old bell but nothing could be further from the truth.

So, what does Congress actually have to say about all this? Well, Congress in the 2012 Moving Ahead for Progress in the 21st Century Act (MAP 21) --which was essentially drafted by TIA and incorporated into MAP-21 after they unsuccessfully peddled it to the House and Senate as the "Fighting Fraud in Transportation Act," --affirmed the broker registration requirement for brokers, required separate broker registration for carriers acting beyond bona fide interlining as brokers, and raised the bond for brokers from $10,000 to $75,000. In order to uphold MAP-21, FMCSA must conclude, here, that brokers are **not** shippers but are separate third-party intermediaries as has always been stated in the law since 1935 with separate licensing and financial responsibility obligations to both bona fide consignee shippers and motor carriers.

Plus, one only has to look at the name of the trade group petitioning you to conclude that TIA does not actually believe that their members are shippers as they now purport to you. Were that the case, they would change their name from Transportation Intermediaries Association to Transportation Shippers Association. But they won't, because they hold themselves out to you, other trade groups, and the public as "the voice of transportation intermediaries to shippers, carriers, government officials, and international organizations."

In making its argument to you, TIA relies on 49 USC 14101(b), which applies to shippers and carrier but not third-party intermediaries, and an old 1982 ICC ruling, which, as TIA states, clearly held:

> *"The term 'shipper' means the person who controls the transportation and refers to the actual shipper rather than an intermediary."*

The fact that the ICC mentioned as an aside "we believe that these brokers **could** qualify as contract shippers" does not mean the ICC made such a definitive finding. The use of the word "could" is speculative and does not replace a more definitive word like "does," no matter how much TIA wishes that to be the case. As TIA points out, ICC clearly chose to hypothetically use words like "could" and "would" in the Dixie Midwest Express ruling, thereby pulling the rug out from under TIA's position. Rather, ICC kicked the can down the road, suggesting that notion was a matter to be decided for another day, just like FMCSA did when raising the household goods broker bond before MAP-21 was passed to $25,000, suggesting it would consider raising the property broker bond beyond $10,000 at a later date… after which, TIA went to Congress to overrule FMCSA.

As for the DTSA, that statute set up a private cause of action to allow an owner of a "trade secret" to sue in federal court when its trade secrets have been misappropriated. While we note --as should you --that TIA and their big broker members once again will do anything and everything to bully carriers into not exercising their rights to review broker records that reveal brokers' margins under your existing transparency rule, including threaten a frivolous DTSA action, a trade secret is defined under the law as:

> *"…all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if— (A) the owner thereof has taken reasonable measures to keep such information secret;* ***and*** *(B) the information derives independent economic value, actual or potential, from not being generally known to,* ***and*** *not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information ("emphasis added").*

We ask you note that in order to be a bona fide "trade secret," though, the information in question has to satisfy both A and B above, as evidenced by the use of the word "and" in the statue we have emphasized twice. As long as 49 CFR 371.3c remains in effect as a duly-promulgated regulation, there can be no showing of "the information… *not being readily ascertainable through proper means"* and any such action brought by either TIA or a TIA member would fail to survive a motion for dismissal for failure to state a claim; that is, a carrier obtaining a broker's financial records through 49 CFR 371.3c clearly is doing so **through proper means.** So, they are **not** trade secrets as TIA now purports.

Second, Congress specifically wrote into the ICC Termination Act, as we previously pointed out to you in our October 26th comment, Section 204 (the "Saving Provisions"). We now offer said section in detail to show you that the Congress specifically intended 49 CFR Part 371 to carry over when the ICC Sunset legislation took effect in 1996.

> *SEC. 204. <<NOTE: 49 USC 701 note.>> SAVING PROVISIONS.*
>
> *(a) Legal Documents.--All orders, determinations, rules, regulations, permits, grants, loans, contracts, agreements, certificates, licenses, and privileges--*
> *(1) that have been issued, made, granted, or allowed to become effective by the Interstate Commerce Commission, any officer or employee of the Interstate Commerce Commission, or any other Government official, or by a court of competent jurisdiction, in the performance of any function that is transferred by this Act or the amendments made by this Act; and*
> *(2) that are in effect on the effective date of such transfer (or become effective after such date pursuant to their terms as in effect on such effective date),*
> *shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the Board, any other authorized official, a court of competent jurisdiction, or operation of law. The Board shall promptly rescind all regulations established by the Interstate Commerce Commission that are based on provisions of law repealed and not substantively reenacted by this Act.*
> *(b) Proceedings.--(1) The provisions of this Act shall not affect any proceedings or any application for any license pending before the*

Interstate Commerce Commission at the time this Act takes effect, insofar as those functions are retained and transferred by this Act; but such proceedings and applications, to the extent that they relate to functions so transferred, shall be continued. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by a duly authorized official, by a court of competent jurisdiction, or by operation of law. Nothing in this subsection shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this Act had not been enacted.

(2) The Board and the Secretary are authorized to provide for the orderly transfer of pending proceedings from the Interstate Commerce Commission.

(3)(A) Except as provided in subparagraphs (B) and (C), in the case of a proceeding under a provision of law repeal, and not reenacted, by this Act such proceeding shall be terminated.

(B) Any proceeding involving a pipeline carrier under subtitle IV of title 49, United States Code, shall be continued to be heard by the Board under such subtitle, as in effect on the day before the effective date of this section, until completion of such proceeding.

(C) Any proceeding involving the merger of a motor carrier property under subtitle IV of title 49, United States Code, shall continue to be heard by the Board under such subtitle, as in effect on the day before the effective date of this section, until completion of such proceeding.

(4) Any proceeding with respect to any tariff, rate charge, classification, rule, regulation, or service that was pending under the Intercoastal Shipping Act, 1933 or the Shipping Act, 1916 before the Federal Maritime Commission on November 1, 1995, shall continue to be heard until completion or issuance of a final order thereon under all applicable laws in effect as of November 1, 1995.

(c) Suits.--(1) This Act shall not affect suits commenced before the date of the enactment of this Act, except as provided in paragraphs (2) and (3). In all such suits, proceeding shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if this Act had not been enacted.

(2) Any suit by or against the Interstate Commerce Commission begun before the effective date of this Act shall be continued, insofar as it involves a function retained and transferred under this Act, with the Board (to the extent the suit involves functions transferred to the Board under this Act) or the Secretary (to the extent the suit involves functions transferred to the Secretary under this Act) substituted for the Commission.

(3) If the court in a suit described in paragraph (1) remands a case to the Board or the Secretary, subsequent proceedings related to such case shall proceed in accordance with applicable law and regulations as in effect at the time of such subsequent proceedings.

(d) Continuance of Actions Against Officers.--No suit, action, or other proceeding commenced by or against any officer in his official capacity as an officer of the Interstate Commerce Commission shall abate by reason of the enactment of this Act. No cause of action by or against the Interstate Commerce Commission, or by or against any officer thereof in his official capacity, shall abate by reason of enactment of this

Act.

(e) Exercise of Authorities.--Except as otherwise provided by law, an officer or employee of the Board may, for purposes of performing a function transferred by this Act or the amendments made by this Act, exercise all authorities under any other provision of law that were available with respect to the performance of that function to the official responsible for the performance of the function immediately before the effective date of the transfer of the function under this Act or the amendments made by this Act.

Third, although TIA does not disclose this to you, Congress has actually specifically spoken on the matter of unauthorized disclosure of shipper information within Title 49. They have already made it illegal under statute for carriers to share route-related shipment information with outside parties. So, in effect… shippers are actually already **doubly-protected** both as a matter of statute and as a matter of broker-carrier confidentiality clauses, including the one TIA recommends to its members by virtue of their "Model Contract."

See:

49 U.S. Code § 14908. Unlawful disclosure of information

(a) Disclosure of Shipment and Routing Information.—

(1) Violations.—

A carrier or broker providing transportation subject to jurisdiction under subchapter I, II, or III of chapter 135 or an officer, receiver, trustee, lessee, or employee of that carrier or broker, or another person authorized by that carrier or broker to receive information from that carrier or broker may not disclose to another person, except the shipper or consignee, and a person may not solicit, or receive, information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that carrier or broker for transportation provided under this part without the consent of the shipper or consignee if that information may be used to the detriment of the shipper or consignee or may disclose improperly to a competitor the business transactions of the shipper or consignee.

In closing, after the submission of now three formal comments to the record, the SBTC hereby requests that you please approve its petition to commence rulemaking to clarify the existing 371.3c transparency rule to ensure big brokers are placed on notice that they may not force carriers to waive their rights under 371.3c with impunity; approve the OOIDA request insofar as you should clarify brokers must send records via email upon request to the requesting party and not impose burdensome public inspection requirements to appear in person; and deny TIA's petition to repeal 371.3c which is grounded in 70+ years of regulatory wisdom.