



Owner-Operator Independent Drivers Association

National Headquarters: 1 NW OOIDA Drive, Grain Valley, MO 64029

Tel: (816) 229-5791 Fax: (816) 427-4468

Washington Office: 1100 New Jersey Ave. SE, Washington, DC 20003

Tel: (202) 347-2007 Fax: (202) 347-2008

December 18, 2023

The Honorable Robin Hutcheson
Administrator
Federal Motor Carrier Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, D.C. 20590

Re: Docket # FMCSA-2016-0102, Petition for Reconsideration on Broker and Freight Forwarder Financial Responsibility Final Rule

Dear Administrator Hutcheson,

The Owner-Operator Independent Drivers Association (OOIDA) is the largest trade association representing the views of small-business truckers and professional truck drivers. OOIDA has approximately 150,000 members located in all fifty states that collectively own and operate more than 240,000 individual heavy-duty trucks. OOIDA's mission is to promote and protect the interests of its members on any issues that might impact their economic well-being, working conditions, and the safe operation of commercial motor vehicles (CMVs) on our nation's highways.

OOIDA is generally supportive of the Federal Motor Carrier Safety Administration's (FMCSA) publication of a Final Rule updating broker security regulations as required by the Moving Ahead for Progress in the 21st Century Act (MAP-21), Public Law 112-141. The Final Rulemaking improves upon the Notice of Proposed Rulemaking (NPRM) released in January 2023 to better ensure that FMCSA, along with industry stakeholders, can readily identify when "available financial security" falls below \$75,000.

However, the Final Rule can be supplemented to further alleviate the concern of broker non-payment of claims. We believe various modifications can improve the economic health of the broker/motor carrier component of the transportation industry. Additionally, small-business motor carriers who rely upon brokers will be spared financial loss from both brokers and ineffective bonds or trusts under these suggested amendments. This will result in safe, experienced motor carriers staying in business along with a more transparent process for both industry stakeholders and general consumers. OOIDA urges the agency to adopt the following changes that would serve the public interest.

Assets Readily Available. FMCSA modified this final rule to provide an explicit list of acceptable asset types, rather than the list of prohibited assets included in the NPRM. This list of acceptable assets will provide clarity to brokers, freight forwarders, surety providers, and financial institutions about the specific assets that meet the criteria set by Congress in MAP-21, as they are both stable and able to be made liquid within 7 calendar days.

OOIDA concurs with the agency's list of acceptable asset types. In addition to meeting these requirements, brokers and freight forwarders should adhere to MAP-21 experience and certification provisions. Sections 32916 and 32917 of MAP-21 specify conditions for the registration and recertification of brokers/freight forwarders. The legislation requires that brokers/freight forwarders must have sufficient experience to qualify to act as a broker/freight forwarder. Furthermore, each shall employ, as an officer, an individual who: 1) has at least 3 years of relevant experience; and 2) provides satisfactory evidence of the individual's knowledge of related rules, regulations, and industry practices. Any registration is then supposed to be renewed every 5 years.¹

Currently, the agency is not ensuring these criteria are met before granting broker or freight forwarder authority. The implementation and enforcement of these requirements under MAP-21 would prevent instances of broker fraud where illegitimate entities are popping up and disappearing from the industry.

Immediate Suspension of Broker/Freight Forwarder Operating Authority. A broker or freight forwarder's operating authority will be suspended when their available financial security falls below \$75,000 and the broker or freight forwarder fails to replenish funds within 7 calendar days. This final rule outlines information about the triggers and roles of surety or financial institutions and FMCSA, including how surety providers issuing a BMC-84 form or financial institutions issuing a BMC-85 Form, must notify FMCSA when a broker's financial responsibility falls below the required minimum and is not replenished in a timely manner.

The Final Rule provides more specific timeframes for parties to sufficiently respond to valid claims. These processes can improve the broken system that currently permits brokers to stay in business after stealing motor carrier services. We seek further clarification on two provisions of the Final Rule.

First, the agency, "does not prescribe a timeframe for the surety provider or financial institution to investigate and make a determination on the validity of the claim." We disagree with this decision and recommend the agency stipulate a 7-day period for the surety provider or financial institution to investigate and determine the validity of the claim. This precise period will ensure a timely claims process as intended by the Final Rule and offset attempts at prolonging payments to motor carriers.

FMCSA must also disclose further details about how the industry and the public will be able to know when a broker/freight forwarder's financial responsibility falls below \$75,000. FMCSA

¹ Pub. L. 112-141, Jul. 6 2012, 126 Stat. 820-822. <https://www.congress.gov/bill/112th-congress/house-bill/4348/text>

states they intend to use its' forthcoming Unified Registration System (URS) platform to receive information from surety providers, trustees, brokers, and freight forwarders, and to administer the agency's responsibilities regarding immediate suspension of operating authority registration. However, it's unclear if the information received through the URS system will be transparent. At this time, the URS system remains a work in progress and there have been numerous problems with URS rollout historically. According to the Fall 2023 Unified Regulatory Agenda, an NPRM related to the URS is projected to publish in May 2024. We are skeptical that this will provide enough time to complete the URS rulemaking process before the January 2025 compliance date for the Immediate Suspension of Broker/Freight Forwarder Operating Authority provision.

FMCSA must detail how the information received through URS will be made accessible for industry stakeholders. Given previous technology issues associated with URS implementation, the agency must present an alternative method to administer the agency's responsibilities regarding immediate suspension of operating authority registration if the URS experiences further problems or delays after January 16, 2025.

More broadly, the agency must account for 49 CFR 370 regulations as part of the Final Rule. The regulation outlines the applicability of regulations, filing, acknowledgment, investigation, disposition, and processing of claims. Some brokers simply ignore these rules with no intention of ever paying motor carriers in full. They use false claims with no proof or documentation to reduce a carrier's settlements to zero or, in many cases, a negative balance.

Further, a bond company should pay out per the regulations rather than abiding by broker carrier contracts that conflict with regulations. For example, accessorial fees (detention pay, layover, stop-off, etc.) are not allowed to be filed on a bond, so they should not be allowed to reduce a carrier filing (late fees, early fees, lumper, redelivery fees, etc.). FMCSA must take enforcement action against brokers that are knowingly violating these regulations when there are documented cases of broker abuse.

Surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency. FMCSA defines the terms financial failure and insolvency as any payment made or other default pursuant to § 387.307(e)(1) not cured in accordance with § 387.307(e)(5) or (6) but does not include, in and of itself, a broker filing for bankruptcy protection pursuant to Title 11 of the United States Code. This final rule outlines the procedures and responsibilities for a surety company or financial institution and for FMCSA once the company or financial institution has become aware that a broker or freight forwarder has experienced financial failure or insolvency.

We reiterate the FMCSA Register is not an ideal location to publish any notice of financial failure or insolvency. The FMCSA Register documents are not searchable or intuitively accessible. These notices should also be posted on FMCSA's SAFER page for the broker/freight forwarder and also on the Licensing and Insurance page for the broker bond in question. We believe this information should be posted in an evident manner so motor carriers can make more informed decisions about conducting business with legitimate brokers.

Enforcement Authority. FMCSA implements the MAP-21 requirement for suspension of a surety provider's authority and to add penalties in 49 CFR part 386, appendix B, for violations of the new requirements. This final rule includes a new paragraph (g)(24) which specifies the monetary penalty for which a surety company or financial institution found to be in violation of 49 U.S.C. 13906 or § 387.307 will be liable, as well as the mandatory 3-year ineligibility period for providing broker financial security. This final rule does not remove any of the authority that FMCSA or other Federal entities already have in place to enforce compliance from brokers, sureties, and financial institutions.

Dubious and fraudulent brokers are able to register, conduct transactions, and stay in business without fear of any recourse against their criminal activity. We acknowledge FMCSA's assertion that they refer incidents of criminal conduct to appropriate authorities and that Criminal enforcement is handled by the Office of Inspector General and the Department of Justice. However, we seek further information on the extent FMCSA is referring these incidents to other authorities.

Recent estimates show that freight fraud is costing the industry as much as \$500-700 million annually, while other experts put the total at \$800 million.^{2,3} While the Final Rule is a major step towards implementing the MAP-21 policies, we would like to see a more detailed account of how FMCSA is handling criminal activity. Congress has clearly given FMCSA authority to regulate these areas of the broker industry and take bolder action than simply be a conduit between other agencies. In 1999, Congress gave FMCSA jurisdiction over broker regulation.⁴ In 2006, FMCSA, in summarizing its present-day regulatory authority over brokers, quoted the U.S. Senate to acknowledge that broker regulations are necessary in order to "protect the public from unscrupulous brokers."⁵

At a minimum, FMCSA should publish an annual report detailing their efforts to combat broker fraud. Moving forward, OOIDA supports a more formal collaborative process between federal regulators, law enforcement personnel, and industry stakeholders to identify, penalize, and protect against this fraudulent activity.

Entities Eligible To Provide Trust Funds for BMC-85 Filings. FMCSA removes the provision allowing loan and finance companies to serve as BMC-85 trustees.

OOIDA is supportive of removing the provision allowing loan and finance companies to serve as BMC-85 trustees.

² <https://www.wsj.com/articles/growing-freight-fraud-is-peeling-millions-from-the-u-s-shipping-market-8a6cfb90>

³ <https://www.tianet.org/news/transportation-intermediaries-association-testifies-before-congress-on-overcoming-supply-chain-challenges/>

⁴ Motor Carrier Safety Improvement Act of 1999 ("MCSIA"), Pub. L. 106-159

⁵ FMCSA Notice of Determination, 71 Fed. Reg. 50115-02, 50116 (Aug. 24, 2006) (explaining that Interstate Commerce Commission Termination Act retained broker regulations and that the FMCSA has and exercises that authority to further that objective).

OOIDA supports FMCSA finalizing the Broker and Freight Forwarder Financial Responsibility Rule, but believes the agency can further address problems with the broker bond claims process. The Final Rule should be enhanced to ensure transparency when a broker/freight forwarder's financial responsibility falls below \$75,000. The agency should also stipulate a 7-day period for the surety provider or financial institution to investigate and determine the validity of the claim. These and other modifications will promote a fair working environment between brokers/freight forwarders and motor carriers that will best serve the public interest.

Thank you,

A handwritten signature in black ink, appearing to read "Todd Spencer". The signature is written in a cursive, flowing style.

Todd Spencer
President & CEO
Owner-Operator Independent Drivers Association