

SEP 12 2019



September 10, 2019

Via Express U.S. Mail & Email
Attachments by Hardcopy Only

The Honorable Raymond Martinez, Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Docket No. FMCSA-2013-0513; RESUBMISSION OF TRANSPORTATION INTERMEDIARY BOND EXEMPTION APPLICATION PURSUANT TO 49 U.S. Code § 31315(b)(3) & 49 CFR 381.317; REQUIRED TO BE PUBLISHED IN THE FEDERAL REGISTER "UPON RECEIPT" PURSUANT TO 49 U.S. CODE § 31315

Dear Mr. Martinez,

Pursuant to 49 U.S. Code § 31315(b)(3) and 49 CFR 381.317, the Small Business in Transportation Coalition ("SBTC") hereby resubmits to you --pursuant to your authority delegated by the Secretary of Transportation --the Association of Independent Property Brokers & Agents' ("AIPBA") Broker Bond Exemption Application¹ in the matter of Docket No. FMCSA-2013-0513. We offer this letter, which we contend "reasonably address(es) the reasons for denial." We hereby request reconsideration of said denial.

Background

The AIPBA submitted its Exemption Application on August 14, 2013 incorporated here by reference (Exhibit A)². FMCSA denied said application through a late decision³

¹ The AIPBA small broker group merged with the broader SBTC small carrier, trucker and broker group in 2016.

² We note here FMCSA did not hold AIPBA accountable for compliance with 49 CFR 381.310 on this class exemption application as it did SBTC on the ELD class exemption application (Docket No. FMCSA-2018-0180) and accepted the application without the carrier-specific details required by 49 CFR 381.310.

³ Although FMCSA is required by Federal Law to rule on exemption applications within 180 days, which, in this case, was mid-February of 2014, FMCSA issued the decision more than one year late at the end of March 2015 despite there being a mere 81 comments in the docket to review: "49 U.S. Code § 31315(b)((7)Applications to be dealt with promptly.— The Secretary shall grant or deny an exemption request after a thorough review of its safety implications, but in no case later than 180 days after the filing date of such request."

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10/10/1991

Dear Mr. [Name],

I am pleased to inform you that your application for [position] has been successful. We have decided to offer you the position of [position] starting on [date].

The salary for this position is \$[amount] per year, plus a [benefit] plan. We also offer a [benefit] plan and a [benefit] plan. We are excited to have you join our team.

Please contact [Name] at [phone number] if you have any questions.

We look forward to your arrival on [date]. Please bring your [documents] and [documents] to the office. We will provide you with a [document] and [document] upon your arrival.

Sincerely,
[Name]

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published in the Federal Register on March 31, 2015 (Exhibit B) stating: (1) "49 U.S.C.13541 does not give FMCSA the authority to essentially nullify a statutory provision by exempting the entire class of persons subject to the provision;" and (2) even if it did have the lawful authority:

"AIPBA's exemption application does not meet the factors provided in section 13541 because (1) the new \$75,000 bond requirement is necessary to carry out the National Transportation Policy at 49 U.S.C.13101, (2) there has been no showing that the \$75,000 requirement "is not needed to protect shippers from the abuse of market power" and (3) the requested exemption is not in the public interest."

Congress raised the broker bond through the Moving Ahead for Progress in the 21st Century Act ("MAP-21") from \$10,000 to \$75,000, which forced 40% of the industry at the time out-of-business in December of 2013 and directed FMCSA to report to Congress every four years on the impact of that new \$75,000 bond by assessing the "appropriateness" of this bond amount.

Twice now in 2014⁴ and again in 2018⁵, the agency has skirted this issue in its reports to Congress, suggesting the agency's understanding is that no one in the industry really cares about the broker bond anymore and that somehow alleviates their responsibility to comply with a Congressional mandate and report on the appropriateness of the \$75,000 amount. Here is the exact provision FMCSA is unlawfully disregarding:

"SEC. 32104. FINANCIAL RESPONSIBILITY REQUIREMENTS. Not later than 6 months after the date of enactment of this Act, and every 4 years thereafter, the Secretary shall— (1) issue a report on the appropriateness of— (A) the current minimum financial responsibility requirements under sections 31138 and 31139 of title 49, United States Code; and (B) the current bond and insurance requirements under sections 13904(f), 13903, and 13906 of title 49, United States Code; and (2) submit the report issued under

⁴ <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Financial-Responsibility-Requirements-Report-Enclosure-FINAL-April%202014.pdf>

⁵ <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/mission/policy/397671/financial-responsibilityreport-final-march-2018.pdf>

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paragraph (1) to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives."

As pointed out by AIPBA, we note here that during previous 2010 household goods broker bond rulemaking, the agency concluded bonds over \$25,000 would have "anti-competitive" effects that would adversely affect small businesses.⁶

Since the broker bond was raised to \$75,000 in December of 2013, formally licensed brokers have continued to operate unlawfully without a license and bond by simply calling themselves "dispatchers" or "dispatch services" with impunity.

SBTC therefore petitioned FMCSA on October 4, 2018 (Exhibit C) to change the regulatory definition of broker in the hopes FMCSA will enforce unlawful property brokerage activities. FMCSA has indicated it plans to entertain our request but has undertaken taken no such rulemaking to date.⁷

SBTC believes this clarification is necessary before it can engage in private causes of action against unlicensed entities that are unlawfully arranging for motor carrier transportation, which are authorized by MAP-21.

Federal Lawsuit

SBTC filed a Federal Lawsuit SMALL BUSINESS IN TRANSPORTATION COALITION v. U.S. DEPARTMENT OF TRANSPORTATION et al in District of Columbia District Court (1:2019cv01311) on May 6, 2019 seeking the Court to compel agency action on two other exemption applications. This third SBTC exemption application relates to this

⁶ Docket No. FMCSA-2004-17008; <https://www.federalregister.gov/documents/2010/11/29/2010-29813/brokers-of-household-goods-transportation-by-motor-vehicle>

⁷ It is well established that a failure to act on a petition for rulemaking is a discrete agency action subject to judicial review if unreasonably delayed. See, e.g., *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (holding that agency was obliged by the APA to respond to regulatory petitions, even for a discretionary action, within a reasonable time); see generally Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking: Final Report to the Administrative Conference of the United States* 15-17 (Nov. 5, 2014), <https://www.acus.gov/report/petitions-rulemaking-final-report> ("[C]ourts have nearly unanimously found that agency responses (or lack thereof) to petitions for rulemakings are reviewable under the APA.") (citing 5 U.S.C. §§ 701-706).

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lawsuit insofar as SBTC has already experienced three unlawful delays in the publication of its exemption applications in the Federal Register during the past two years.

SBTC's Interest in the AIPBA Application for Exemption On behalf of its small broker members:

Under the current regulatory climate, unlicensed entities, including motor carriers and dispatch services, are permitted to engage in unfair competition because FMCSA has not enforced the broker licensing requirement and has allowed unlicensed entities arranging for transportation to operate with impunity. FMCSA promised to crack down on unlawful operations through a "comprehensive enforcement program" on September 5, 2013⁸, six years ago as of last week but has failed to make good on this promise.

We are therefore now asking for all small property brokers and freight forwarders as defined by the SBA for freight transportation arrangement (NAICS code 488510⁹) with revenues under \$15 million be made exempt for 5 years to give FMCSA more time to develop its "comprehensive enforcement program" to enforce the licensing and bonding requirement.

On behalf of its small carrier and owner-operator members:

During the Great Recession of 2007-2009, many of SBTC's small carriers and owner-operator members survived this difficult time by securing a broker license and brokering freight to themselves and outsource to other carriers. This enabled them to 'cut out the middle man.' The raising of the property broker bond to \$75,000 effectively eliminated this revenue-enhancement mechanism and forced small carriers and owner-operators to work with the large brokers represented by the Transportation Intermediaries Association (TIA).¹⁰

⁸

https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Federal_Register_Notice_Registration_and_Financial_Security_Requirements_for_Brokers_of_Property_and_Freight_Forwardres_508CLN.pdf

⁹ https://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

¹⁰ Talk of "consolidating" the brokerage industry dates back to 2011. TIA effectively lobbied for the higher bond which had the effect of smaller brokers having to become agents of larger brokers. AIPBA complained to FTC and DOJ (<https://www.linkedin.com/pulse/20140818121952-21695323-the-aipba-collusion-complaint>) about TIA's lobbying on antitrust grounds, citing the sham exemption to the Noerr-Pennington Doctrine (i.e. raising the bond

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With fears of yet another recession on the horizon, now is the time for FMCSA to grant this exemption as it is in the public interest to ensure an uninterrupted supply chain.

Despite arguments made by other trucker-only and carrier-only trade groups which refuse to look at the big picture and think outside the box, we made a pitch for lowering the bond to our small carrier and owner operator members (Exhibit D) so they are not reliant on –and at the mercy of– big brokers. Rather than have no choice but to secure loads from large brokers, SBTC believes that small carriers should have the right to add small brokerage components to their existing operations. The current bond level impedes this.

Comes Now, SBTC to 'Reasonably Address the Reasons for Denial'

FMCSA Claim One: "49 U.S.C.13541 does not give FMCSA the authority to essentially nullify a statutory provision by exempting the entire class of persons subject to the provision;

SBTC Response to FMCSA Claim One:

We understand the agency's position on this matter. In reconciling one statute MAP-21, against another, 49 U.S.C. 13541, we understand FMCSA adopted the position that MAP-21 prevents FMCSA from approving a **blanket** class exemption application for all brokers and forwarders under the theory "The Constitution does not authorize members of the executive branch to enact, amend, or repeal statutes." {citing Terran v. Secretary of Health and Human Services, 195 F.3d 1302, 1312 (Fed. Cir. 1999)}.

But we ask the agency to acknowledge the fact that Congress has passed enabling legislation to grant not only individual exemptions, but specifically, **class** exemptions in non-blanket instances.

*(a) In General.—In any matter subject to jurisdiction under this part, the Secretary or the Board, as applicable, shall exempt a person, **class of persons**, or a transaction or service from the application, in whole or in part, of a provision of this part, or use this exemption authority to modify the application of a*

was not about fighting fraud as TIA suddenly purported, but in furtherance of the consolidation scheme to create an oligopoly and fight competition. FTC passed on pursuing the matter and DOJ began a "review." FMCSA then maliciously asked FTC to make a case against the undersigned's private business activity, who was then-President of AIPBA, in retaliation for two lawsuits AIPBA brought against FMCSA over the \$75,000 bond requirement.

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provision of this part as it applies to such person, class, transaction, or service, when the Secretary or Board finds that the application of that provision—

- (1) is not necessary to carry out the transportation policy of section 13101;*
- (2) is not needed to protect shippers from the abuse of market power or that the transaction or service is of limited scope; and*
- (3) is in the public interest (emphasis added).*

In looking at the MAP-21 statute, we note Congress does not expressly remove said exemption authority on the matter of the broker/forwarder bond. Had Congress intended to restrict the agency from issuing class exemptions from the \$75,000 intermediary bond, it would have added specific language to that effect to the law. But it did not. MAP-21 states with respect to property brokers:

Minimum financial security.--Each broker subject to the requirements of this section shall provide financial security of \$75,000 for purposes of this subsection, regardless of the number of branch offices or sales agents of the broker.

And with respect to freight forwarders:

Minimum financial security.--Each freight forwarder subject to the requirements of this section shall provide financial security of \$75,000, regardless of the number of branch offices or sales agents of the freight forwarder.

So, we are left with the fact that Congress does afford the agency the flexibility to grant class exemptions to some extent.

The only actual restriction in place deals with insurance and bonds are not insurance. AIPBA articulated this in its original application and addresses this again in our conclusion.

SBTC contends the whole purpose of having regulatory agency engage in rulemaking and be given discretion by Congress to grant such exemptions from its rules is to rely on an agency's specialized knowledge, insight and expertise in a given field like transportation. Again, FMCSA showed it possesses such specialized knowledge, insight

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and expertise when it suggested that bonds over \$25,000 would have anti-competitive effects that would adversely affect small businesses in 2010.

SBTC has therefore showed that Congress has in fact passed enabling legislation allowing agencies to grant waivers and exemptions, including class exemptions and FMCSA has class exemption authority to address the current request.

Furthermore, since FMCSA denied this exemption, the Administrative Conference of the United States ("ACUS"), an independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure, has issued the following guidelines on how an agency should address requests for exemptions.¹¹

ACUS Recommendation 2017-7 adopted on December 15, 2017, states:

Individuals and entities regulated by federal agencies must adhere to program-specific requirements prescribed by statute or regulation. Sometimes, however, agencies prospectively excuse individuals or entities from statutory or regulatory requirements through waivers or exemptions.[1] The authority to waive or exempt regulated parties from specific legal requirements affords agencies much-needed flexibility to respond to situations in which generally applicable laws are a poor fit for a given situation.[2] Emergencies or other unforeseen circumstances may also render compliance with statutory or regulatory requirements impossible or impracticable.[3] In such instances, requiring strict adherence to legal requirements may not be desirable.[4] This is particularly true when the recipient of a waiver or exemption demonstrates that it intends to engage in conduct that will otherwise further the agency's legitimate goals.

Yet, waiving or exempting a regulated party from a statutory or regulatory requirement also raises important questions about predictability, fairness, and protection of the public. For instance, when an agency decides to waive legal requirements for some but not all regulated parties, the decision to grant a waiver or exemption may create the appearance—or perhaps even reality—of irregularity, bias, or unfairness. Waiving or exempting a regulated party from a legal requirement, therefore, demands that agencies simultaneously consider regulatory flexibility, on the one hand, and consistent, non-arbitrary administration of the law, on the other.

¹¹ <https://www.acus.gov/recommendation/regulatory-waivers-and-exemptions>

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Agencies' authority to waive or exempt regulated parties from legal requirements may also intersect with other principles of administrative law. When agencies frequently issue waivers or exemptions because a regulation is outdated or ineffective, for example, amending or rescinding the regulation may be more appropriate in some circumstances, despite the necessary resource costs.^[5] Such revisions can enhance efficiency and transparency. The requisite notice-and-comment procedures can also foster public participation and informed decision making.

The following recommendations offer best practices and factors for agencies to consider regarding their waiver and exemption practices and procedures. They are not intended to disturb or otherwise limit agencies' broad discretion to elect how to best use their limited resources.

RECOMMENDATION

Scope of Waiver and Exemption Authority

- 1. When permitted by law, agencies should consider creating mechanisms that would allow regulated parties to apply for waivers or exemptions by demonstrating conduct that will achieve the same purpose as full compliance with the relevant statutory or regulatory requirement.*
- 2. When consistent with the statutory scheme, agencies should endeavor to draft regulations so that waivers and exemptions will not be routinely necessary. When an agency has approved a large number of similar waivers or exemptions, the agency should consider revising the regulation accordingly. If eliminating the need for waivers or exemptions requires statutory reform, Congress should consider appropriate legislation.*

Exercising Waiver or Exemption Authority

- 3. Agencies should endeavor, to the extent practicable, to establish standards and procedures for seeking and approving waivers and exemptions.*
- 4. Agencies should apply the same treatment to similarly situated parties when approving waivers and exemptions, absent extenuating circumstances.*
- 5. Agencies should clearly announce the duration, even if indefinite, over which a waiver or exemption extends.*

Transparency and Public Input in Seeking and Approving Waivers and Exemptions

- 6. Agencies should consider soliciting public comments before establishing standards and procedures for seeking and approving waivers and exemptions.*

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7. Agencies should endeavor, to the extent practicable, to make standards and procedures for seeking and approving waivers and exemptions available to the public.

8. Agencies should consider soliciting public comments before approving waivers or exemptions.

9. Agencies should provide written explanations for individual waiver or exemption decisions and make them publicly available to the extent practicable and consistent with legal or policy concerns, such as privacy. Further, agencies should consider providing written explanations of representative instances to help illustrate the types of activities likely to qualify for a waiver or exemption.

[1] Agencies may also retrospectively decline to bring an enforcement action once a legal violation has already occurred. This recommendation, however, is confined to the agency practice of prospectively waiving or exempting regulated parties from legal requirements.

[2] The terms "waiver" and "exemption" carry various meanings in agency practice. For the purposes of this recommendation, when Congress has expressly authorized an agency to excuse a regulated party from a legal requirement, the term "waiver" is used. If an agency is implicitly authorized by Congress to excuse a regulated party from a legal requirement, "exemption" is used. These definitions stem from the report underlying this recommendation. See Aaron L. Nielson, *Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices* (Nov. 1, 2017) (report to the Admin. Conf. of the U.S.), <https://acus.gov/report/regulatory-waivers-and-exemptions-final-report>. Some agencies may also derive authority to grant waivers or exemptions from presidential delegations under Article II of the Constitution. That category of waivers and exemptions is outside the scope of this recommendation.

[3] See, for example, the Stafford Act, 42 U.S.C. § 5141, authorizing any federal agency charged with the administration of a federal assistance program in a presidentially declared major disaster to modify or waive administrative conditions for assistance if requested to do so by state or local authorities.

[4] Of course, agencies cannot issue waivers or exemptions unless authorized by law, and even when authorized by law, agencies must not issue them in an arbitrary fashion.

[5] See Admin. Conf. of the U.S., Recommendation 2014-5, Retrospective Review of Agency Rules, ¶ 5, 79 Fed. Reg. 75,114, 75,116 (Dec. 17, 2014) (identifying petitions from stakeholder groups and members of the public and poor compliance rates as factors to consider in identifying regulations that may benefit from amendment or rescission).

Citation: Admin. Conf. of the U.S., Recommendation 2017-7, Regulatory Waivers and Exemptions, 82 Fed. Reg. 61,728, 61,742 (Dec. 29, 2017).

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Here, we suggest that given a regulatory climate in which: (1) FMCSA has failed since 2013 to report on the appropriateness of the bonding requirement as directed by Congress so that Congress might act to lower the bond; (2) FMCSA has failed since 2013 to proceed with its promises to commence a "comprehensive enforcement program" to deal with illegal intermediaries; and (3) FMCSA has failed to commence rulemaking since our 2018 request to codify past ICC rulings that make it clear that unlicensed "dispatch services" are, in effect, unfairly competing by operating as illegal intermediaries without a bond at all, small brokers and forwarders trying to operate lawfully and small carriers and independent owner-operators wishing to add brokerage components to their existing businesses are at a distinct and unfair disadvantage when having to post \$75,000 in financial security.

We believe ACUS would suggest, here, that an exemption is appropriate along the lines of "much-needed flexibility to respond to situations in which generally applicable laws are a poor fit for a given situation" ... and that the climate we cite constitutes "...unforeseen circumstances (that) may also render compliance with statutory or regulatory requirements impossible or impracticable..." and that "requiring strict adherence to legal requirements may not be desirable."

SBTC believes no small transportation intermediary entity should have to be bonded until and unless all small intermediary entities are required to be bonded; that the requirement to be bonded be clearly defined by FMCSA as a matter of a proper definition of the term "broker;" and that the bonding requirement be enforced against all intermediaries in a fair and even fashion. Until FMCSA levels the playing field, enforcement against some transportation intermediaries --but not others --constitutes an unlawfully arbitrary and capricious regulatory scheme.

Whereas AIPBA sought for the FMCSA to "permanently exempt all property brokers and freight forwarders from the \$75,000 broker bond provision of MAP-21. . . .", comes now, the SBTC to request a temporary 5 year exemption from the bonding requirement, one that is limited to small business brokers and forwarders with annual revenues under \$15.010 million¹², which, again, is the small business threshold set by the Small

¹² As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenue.

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Business Administration for entities involved with "Freight Transportation Arrangement" (NAICS Code 488510).¹³

SBTC contends that by narrowing the class to small business entities, it is requesting a bona fide, lawful exemption from the bonding statute as opposed to asking for the nullification of an act of Congress. As large intermediaries would still be required to comply with the bonding requirement, this revised application for exemption cannot be now reasonably construed as asking FMCSA to nullify an act of Congress outright and we have reasonably addressed the FMCSA's concern.

Like AIPBA in its original application, SBTC again points to how FMCSA previously expressed concern about the anti-competitive impact of bonds over \$25,000 on small entities back in November 2010. Specifically, FMCSA at the time stated:

"commenters that favored increasing the amount of the surety bond or trust fund did not provide adequate justification for an increase above \$25,000, especially in light of the number of small business household goods brokers and the potential impact of significantly increasing the amount of financial responsibility beyond a level adjusted for inflation."

This is now FMCSA's chance to utilize its regulatory expertise and exemption authority duly granted by Congress to press the pause button and address a bona fide grievance the licensed small business intermediary community has and reverse anti-competitive effects FMCSA knows the \$75,000 bond has caused, but has just not revealed to Congress yet.

FMCSA Claim Two: "AIPBA's exemption application does not meet the factors provided in section 13541 because (1) the new \$75,000 bond requirement is necessary to carry out the National Transportation Policy at 49 U.S.C.13101, (2) there has been no showing that the \$75,000 requirement "is not needed to protect shippers from the abuse of market power" and (3) the requested exemption is not in the public interest."

¹³ https://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

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SBTC Response to FMCSA Claim Two:

Here, the agency addresses the three statutory factors, but does so in an arbitrary and capricious manner. It appears the agency wanted to deny the application, presumably, because it has been captured by big business interests, and it determined the only way it could do so is if it published a statement that says: (1) the new \$75,000 bond requirement is necessary to carry out the National Transportation Policy at 49 U.S.C.13101, (2) there has been no showing that the \$75,000 requirement "is not needed to protect shippers from the abuse of market power" and (3) the requested exemption is not in the public interest.

But the agency does not offer any rationale or explanation besides these mere statements to indicate why the new \$75,000 bond requirement is necessary to carry out the National Transportation Policy at 49 U.S.C.13101; or why it believes there has been no showing that the \$75,000 requirement "is not needed to protect shippers from the abuse of market power" when AIPBA clearly showed the bond, in practice, essentially exists to guarantee payment to carriers, not shippers, and how more competition—not less—actually protects shippers from abuse of market power; or how exactly the requested exemption is not in the public interest.

In fact, it has made no showing to these effects whatsoever. Perhaps it did not do so as this comment was an aside to the main reason of denial it offered, namely, that FMCSA did not have the authority to nullify an act of Congress.

Absent such a showing, the law actually requires FMCSA to issue the exemption given the word "shall" in the enabling statute. As you have made no showing to the contrary, we contend you must now issue the exemption as a matter of law in accordance with the original showing made by AIPBA in the original application which we affirm here.

Resubmission Process

FMCSA has promulgated a rule which affords an applicant the right to resubmit an exemption application if denied:

*§ 381.317 May I resubmit my application for exemption if it is denied?
If the Administrator denies your application for exemption and you can reasonably address the reasons for denial, you may resubmit your application following the procedures in § 381.310.*

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This rule essentially restarts the application process as per the reference to § 381.310, which then invokes, § 381.315(a).

§ 381.315 What will the FMCSA do after the agency receives my application for an exemption?

(a) The Federal Motor Carrier Safety Administration will review your application and prepare, for the Administrator's signature, a Federal Register notice requesting public comment on your application for an exemption. The notice will give the public an opportunity to review your request and your safety assessment or analysis (required by § 381.310) and any other relevant information known to the agency.

This rule therefore requires FMCSA to now republish this application in the Federal Register and again open this matter up for public notice and comment.

Furthermore, Federal Law codified at 49 U.S. Code § 31315(b)(6) also requires FMCSA to now publish the application in the Federal Register "upon receipt."

(6) Notice and comment.—

(A) Upon receipt of a request.—

***Upon receipt** of an exemption request, the Secretary **shall** publish in the Federal Register (or, in the case of a request for an exemption from the physical qualification standards for commercial motor vehicle drivers, post on a web site established by the Secretary to implement the requirements of section 31149) a notice explaining the request that has been filed and shall give the public an opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request. This subparagraph does not require the release of information protected by law from public disclosure (emphases added).*

And, the statute requires FMCSA to rule on the application within 180 days:

49 U.S. Code § 31315(b)((7) Applications to be dealt with promptly.—

*The Secretary shall grant or deny an exemption request after a thorough review of its safety implications, **but in no case later than 180 days** after the filing date of such request (emphasis added).*

SBTC therefore requests that FMCSA process this resubmitted application in accordance with the law.

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Court Supervision

As FMCSA has a history and pattern of failing to publish the SBTC's applications for exemptions in the Federal Register "upon receipt" as is required by Federal Law on three prior occasions, and the SBTC is currently suing FMCSA in Federal Court over FMCSA's failure to comply with the aforementioned statute, SBTC intends to request court supervision over this process to ensure FMCSA complies with procedural requirements of the aforementioned statute.

Conclusion

Finally, FMCSA needs to address the fact that 10,000 small business intermediaries, including members of the minority brokerage community, were revoked in the first two weeks of December of 2013 and there are anti-competitive obstacles to entry currently in place due to a bond obviously set too high for over 40% of the brokerage industry to handle in 2013. FMCSA has never reported this to Congress. It is now time to do so.

By FMCSA's own admission in its denial of the AIPBA application, whereas AIPBA offered that 9,800 intermediaries were revoked in the first two weeks of December 2013

as a direct result of enforcement of a \$75,000 minimum bond, FMCSA acknowledges in your decision that 8,962 intermediaries were indeed lost during the entire month of December 2013, the difference representing a relatively small amount of intermediaries that were reinstated in the last two weeks of that month and other new non-small business broker applicants MAP-21 sparked as indicated below.

While FMCSA points to a small increase over the year that followed, it neglects to acknowledge that a significant part of that increase is due to the fact that MAP-21 reinforced the need for large carriers to obtain broker licenses when they arrange transportation (formerly asserted to be unregulated as a matter of "interlining") when the carrier does not take possession of the property at least at some point in the shipment. The current broker census therefore cannot be fairly attributed to a return of these small business brokers that were utterly decimated in December 2013... many of whom continue to operate unlicensed with no bond under the guise of being "dispatchers."

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The agency properly notes in the denial that the statute states as follows:

Section 13541(a) of title 49 of the United States Code (49 U.S.C. 13541) requires the Secretary of Transportation (Secretary) to exempt a person, **CLASS OF PERSONS**, or a transaction or service from the application, in whole or in part, of a provision of 49 U.S.C., Subtitle IV, Part B (Chapters 131-149), or to use the exemption authority to modify the application of a provision of 49 U.S.C. Chapters 131-149 as it applies to such person, **CLASS**, transaction, or service when the Secretary finds that the application of the provision (emphases added):

- Is not necessary to carry out the transportation policy of 49 U.S.C. 13101
- Is not needed to protect shippers from the abuse of market power or that the transaction or service is of limited scope; and
- Is in the public interest.

And while the Agency states:

"The exemption authority provided by section 13541 "may not be used to relieve a person from the application of, and compliance with, any law, rule, regulation, standard, or order pertaining to cargo loss and damage [or] insurance... ." 49 U.S.C. 13541(e)(1)."

... it would appear FMCSA has danced around this issue in your decision. If you were to proclaim bonds are insurance as a matter of law, then this would give rise to the issue of how financial institutions can continue to issue non-insurance BMC-85 trust fund instruments without being duly licensed insurance providers.

We note you spoke to this point in a footnote within you April 2014 Report to Congress

(<http://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Financial-Responsibility-Requirements-Report-Enclosure-FINAL-April%202014.pdf>)

EXEMPTION APPLICATION REQUIRED TO BE PUBLISHED IN THE FEDERAL REGISTER "UPON RECEIPT" PURSUANT TO 49 U.S. CODE § 31315

The Honorable Raymond Martinez

September 10, 2019

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... when you stated:

"The term "financial responsibility" used here refers to insurance. More specifically, it means liability coverage for bodily injury or property damage in the case of freight and passenger motor carriers as well as freight forwarders. When it comes to brokers and freight forwarders, insurance also means coverage for claims against unpaid freight charges. The terms "financial responsibility" and "insurance" are used interchangeably throughout this report."

Nonetheless, as AIPBA pointed out in its application, Congress makes the proper distinction where FMCSA does not.

SBTC is proud to zealously defend the interests of its small business broker and forwarder members in this matter. We believe we make a good case for why the exemption should now be granted by FMCSA and that the three statutory factors have been addressed to support exemption. And we contend our argument is in line with FMCSA's own rationale and concern about anti-competitive impact of raising the bond beyond \$25,000 during bona fide household goods broker rulemaking between 2007 and 2010. We further believe completion is good for everyone involved including our carrier members, shippers and the consumer public. We therefore believe there is now no rational basis for FMCSA to deny this exemption application and we look forward to your timely approval of this request.

Sincerely,


/s/JAMES LAMB, President
Small Business in Transportation Coalition ("SBTC")

EXHIBIT A



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August 14, 2013

The Honorable Anthony R. Foxx, Secretary
U.S. Department of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

RE: MAP 21 and Property Broker Exemption

Dear Secretary Foxx:

I have the privilege of representing the Association of Independent Property Brokers & Agents ("AIPBA"). As you know, AIPBA has commenced an action to challenge the constitutionality of the \$75,000 minimum financial security for property brokers ("the \$75,000 broker bond") provision of the Moving Ahead for Progress in the 21st Century Act ("Map 21"), as it relates to both property brokers and surface freight forwarders. The AIPBA action, case number 5:13-CV-00342-WTH-PRL, was filed in the United States District Court in the Middle District of Florida on July 16, 2013.

This is an application pursuant to 49 U.S.C. §13541 (b) to request that you permanently exempt all property brokers and freight forwarders from the \$75,000 broker bond provision of MAP-21 that the Federal Motor Carrier Safety Administration ("FMCSA") has indicated will otherwise go into effect on October 1, 2013. See 49 U.S.C. §13541 (b) (2012) ("The Secretary or Board, as applicable, may, where appropriate, begin a proceeding under this section...on application by an interested party"). Under 49 U.S.C. §13541 (a), the Secretary of Transportation has the authority to exempt "a person" or "a class of persons" from the application of a provision of Title 49, Part B, which would include the \$75,000 broker bond. See 49 U.S.C. §13906 (b) (2013). If the Secretary determines that a provision of law under Title 49, Part B, "is not necessary to carry out the transportation policy of section 13101," "is not needed to protect shippers from the abuse of market power or that the transaction or service is of limited scope," and that such an exemption "is in the public interest," then the Secretary shall issue the exemption. Although there are certain regulations from which you, as Secretary, cannot issue exemptions, the broker bond does not fall into one of the listed categories. Specifically, the bond is a financial security rather than a type of required insurance, a distinction emphasized in 49 U.S.C. §13906 by the choice of a bond or insurance as well as MAP-21's proposed amendment to 49 U.S.C. §13906, which still requires the broker bond but deletes all reference to insurance. As set forth in more detail below, AIPBA, as an interested party, requests an exemption from the \$75,000 broker bond because AIPBA believes that the \$75,000 broker bond provision fits the three statutory criteria.

The Honorable Anthony R. Foxx

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As you are undoubtedly aware, the Secretary of Transportation delegated the authority to regulate property brokers to FMCSA through the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") and the Motor Carrier Safety Improvement Act of 1999 ("MCSIA"). ICCTA gave the Secretary of Transportation jurisdiction over the procurement of interstate motor carrier transportation. See 49 U.S.C. §13501 (2012). MCSIA, in establishing FMCSA, granted to FMCSA regulatory oversight of the property broker regulations. See 49 U.S.C. §113 (2012).

The Interstate Commerce Commission ("ICC") originally established the broker surety bond amount at \$5,000 in 1936. The broker surety bond amount was increased to \$10,000 in 1979, and is the current bond amount for property brokers except household goods property brokers, who must have a \$25,000 bond. See 49 CFR §387.307 (a) (2013). Each property broker must file evidence of an appropriate value surety bond with the FMCSA using "FMCSA's prescribed Form BMC 84...The surety bond or the trust fund shall ensure the financial responsibility of the broker by providing for payments to shippers or motor carriers if the broker fails to carry out its contracts, agreements, or arrangements for the supplying of transportation by authorized motor carriers." See 49 CFR §387.307 (b) (2013).

The Owner-Operator Independent Drivers Association ("OOIDA") petitioned FMCSA in 2003 to raise the property broker surety bond amount into the range of \$300,000 to \$500,000. FMCSA ignored this request, presumably due to the same lack of basis and anti-competitive effects FMCSA referenced during 2010 rulemaking, discussed below. Soon thereafter, Transportation Intermediaries Association ("TIA") President Bob Voltmann wrote in Transport Topics on May 13, 2004 "[f]raud exists in both the brokerage and the motor carrier industries, and increasing the bond will have no effect on fraudulent operators." See Bob Voltmann, *Opinion: Higher Bonds Are Not the Answer*, Transport Topics (May 13, 2004). TIA then began selling optional \$100,000 bonds, which became a significant revenue stream for them.

In November 2010, when FMCSA was engaged in rulemaking related to property brokers, FMCSA stated that increasing the broker surety bond amount from \$10,000 to \$25,000 to adjust for inflation was likely adequate, and it had not heard any justification for a higher amount. Specifically, FMCSA stated, "commenters that favored increasing the amount of the surety bond or trust fund did not provide adequate justification for an increase above \$25,000, especially in light of the number of small business household goods brokers and the potential impact of significantly increasing the amount of financial responsibility beyond a level adjusted for inflation." See 75 FR 72987 (2011). Although FMCSA did promulgate regulations requiring brokers of household goods to obtain a broker surety bond for \$25,000, the general property broker surety bond amount was unchanged.

In 2011, at the behest of OOIDA and TIA, primarily, a statutory amendment requiring a \$100,000 broker surety bond amount was added to a variety of legislations. In March 2012, the "Reid Amendment" to the Senate version of Map 21 added the \$100,000 broker surety bond amount language to the statute before it passed the Senate. In June 2012, after a number of groups, including AIPBA, petitioned the Highway Bill Conference Committee to lower the \$100,000 broker surety bond amount, it was changed to \$75,000. Notwithstanding FMCSA's statutory obligation to engage in rulemaking related to property broker regulation, FMCSA has stated that the new \$75,000 broker surety bond requirement is currently "scheduled" to go into effect on October 1, 2013.

- I. The \$75,000 broker surety bond amount is not necessary to carry out the transportation policy of section 13101.

As indicated in its lawsuit, it is the position of the AIPBA that the \$75,000 broker bond requirement is unconstitutional because it is arbitrary, a result of collusion by other trade groups, and has the same anti-competitive effects FMCSA was concerned about during recent rulemaking. There is no evidence that a \$75,000 broker bond requirement would fight fraud as proponents suggest or that it is necessary to carry out the transportation policy of section 13101. To the contrary, such a provision would be in direct conflict with the transportation policy.

Specifically, the new \$75,000.00 bond requirement violates the transportation policy to "encourage fair competition, and reasonable rates for transportation by motor carriers of property... [and] (D) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public." 49 U.S.C. § 13101 (a) (2) (2013). The AIPBA predicts that the \$75,000 broker surety bond will likely result in a loss of tens of thousands of jobs and higher consumer prices as a matter of supply and demand. According to current financial security providers, up to 75% of the currently operating property brokers will not be able to afford to collateralize the \$75,000 bond with cash or otherwise qualify. Per an FMCSA FOIA response dated January 8, 2013, there are currently 21,795 property brokers in operation. Statistically, over 16,000 of these property brokers will have to shut down on October 1, 2013. In addition, per Kevin Reid of the National Association for Minority Truckers, the anti-competitive effects of the new broker bond requirement will detrimentally affect the participation of minorities in the motor carrier system, which is another violation of the transportation policy.

- II. The \$75,000 broker surety bond amount is not necessary to protect shippers from the abuse of market power.

As set forth above, the intent and the effect of the \$75,000 broker bond requirement is to increase the market power of certain large size property brokers. Exemption from the increased broker bond amount will protect shippers from an abuse of market power. The unnecessarily high \$75,000 broker bond requirement will cause the majority of property brokers to leave the marketplace, which will expose shippers to abuses of market power by the few large property brokers able to stay in business.

- III. The \$75,000 broker surety bond amount is not in the public interest.

As set forth above, the anti-competitive impact of the \$75,000 broker bond will cause a significant increase in consumer prices once the supply of property brokers is drastically reduced. The lack of competition will require shippers to pay more for transportation. In addition, the high amount of the broker bond will not only cause existing small and mid-size property brokers to leave the marketplace, but will also serve as a barrier to entry by other property brokers. Therefore, any negative impacts to the public will likely remain so long as the bond amount remains the same.

Although AIPBA has filed suit to prevent application of the \$75,000 broker bond, AIPBA also requests an exemption from the statutory amount due to the public interest in acting within the statutory time constraint. An overwhelming majority of small broker respondents to a recent AIPBA poll indicate they have not yet secured a \$75,000 bond, either because they have not been able to do so due to the cash collateralization or stringent financials required to secure the same, or because of the lack of availability of such instruments in the market. Under 49 U.S.C. §13906,

The Honorable Anthony R. Foxx

August 14, 2013

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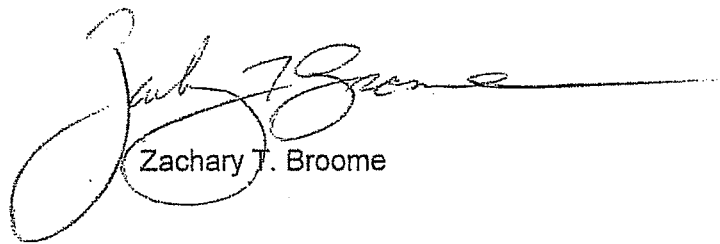
as amended, the Secretary of Transportation is required to revoke currently held broker licenses unless evidence of compliance with the new \$75,000 bond threshold is filed by broker's respective financial security suppliers by October 1, 2013. Therefore, even if AIPBA was eventually successful on AIPBA's lawsuit, the pending termination of existing property broker licenses in the interim will cause the feared exodus of property brokers from the marketplace. Although MAP-21 included the provision for a "group bond," there has been no indication thus far as to what constitutes a "group bond" for the purposes of MAP-21 and whether such an option is to be authorized.

Currently, the only notice FMCSA has given the property broker industry of the October 1, 2013 bond implementation date is an obscure notation on the FMCSA website. FMCSA representatives have orally made public statements that it intends to announce an "interim final rule" on September 1, 2013 that will go into effect on October 1, 2013. However, because this information has not been widely disseminated through bona fide "public notice and comment" rulemaking, many property brokers are not aware of the new requirement. The statutory loss of broker licenses on October 1, without further warning, will cause chaos in the trucking and shipping industry, and will cause thousands of brokers to lose their livelihood on October 1, 2013, a date now less than 60 days away. This will result in an immediate loss of jobs for these brokers and the agents they employ. It will also cause significant supply chain disruptions. Such a scenario is not in the public interest.

Therefore, because an exemption from the \$75,000 broker bond requirement set forth in 49 U.S.C. §13906 (b), as amended, complies with the elements of 49 USC §13541 (a), AIPBA respectfully requests that you please commence an exemption proceeding pursuant to 49 USC §13541 (b) and grant AIPBA's request for a categorical exemption from the \$75,000 bond requirement for all property broker and forwarders, so that property brokers and forwarders can continue to do business under the existing bond regulations.

Please do not hesitate to contact me regarding this matter. Thank you for your time and consideration.

Sincerely,



Zachary T. Broome

cc: Anne S. Ferro, FMCSA Administrator
Federal Motor Carrier Safety Administration
United States Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

EXHIBIT B

LEGAL STATUS

This site displays a prototype of a "Web 2.0" version of the daily Federal Register. It is not an official legal edition of the Federal Register, and does not replace the official print version or the official electronic version on GPO's govinfo.gov.

The documents posted on this site are XML renditions of published Federal Register documents. Each document posted on the site includes a link to the corresponding official PDF file on govinfo.gov. This prototype edition of the daily Federal Register on FederalRegister.gov will remain an unofficial informational resource until the Administrative Committee of the Federal Register (ACFR) issues a regulation granting it official legal status. For complete information about, and access to, our official publications and services, go to About the Federal Register on NARA's archives.gov.

The OFR/GPO partnership is committed to presenting accurate and reliable regulatory information on FederalRegister.gov with the objective of establishing the XML-based Federal Register as an ACFR-sanctioned publication in the future. While every effort has been made to ensure that the material on FederalRegister.gov is accurately displayed, consistent with the official SGML-based PDF version on govinfo.gov, those relying on it for legal research should verify their results against an official edition of the Federal Register. Until the ACFR grants it official status, the XML rendition of the daily Federal Register on FederalRegister.gov does not provide legal notice to the public or judicial notice to the courts.

LEGAL STATUS

Registration and Financial Security Requirements for Brokers of Property and Freight Forwarders; Association of Independent Property Brokers and Agents' Exemption Application

A Notice by the Federal Motor Carrier Safety Administration on 03/31/2015

DOCUMENT DETAILS

Printed version:

PDF (<https://www.govinfo.gov/content/pkg/FR-2015-03-31/pdf/2015-07353.pdf>)

Publication Date:

03/31/2015 (/documents/2015/03/31)

Agencies:

Federal Motor Carrier Safety Administration (<https://www.federalregister.gov/agencies/federal-motor-carrier-safety-administration>)

Dates:

This decision is effective March 31, 2015.

Effective Date:

03/31/2015

Document Type:

Notice

Document Citation:

80 FR 17142

Page:

17142-17147 (6 pages)

Agency/Docket Number:

FMCSA-2013-0513

Document Number:

2015-07353

DOCUMENT STATISTICS

Page views:

538

as of 09/01/2019 at 8:15 am EDT

DOCUMENT STATISTICS

ENHANCED CONTENT



Docket Number:

FMCSA-2013-0513 (<https://www.regulations.gov/docket?D=FMCSA-2013-0513>)

ENHANCED CONTENT

PUBLISHED DOCUMENT

AGENCY:

Federal Motor Carrier Safety Administration (FMCSA).

ACTION:

Notice of denial of application for exemption.

SUMMARY:

FMCSA denies an application from the Association of Independent Property Brokers and Agents (AIPBA) for an exemption for all property brokers and freight forwarders from the \$75,000 bond provision included in section 32918 of the Moving Ahead for Progress in the 21st Century Act (MAP-21), now codified in 49 U.S.C. 13906 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13906&type=usc&link-type=html>). AIPBA filed its request pursuant to 49 U.S.C. 13541 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html>) on August 14, 2013. On December 26, 2013, FMCSA published a notice in the **Federal Register** requesting comments from all interested parties on AIPBA's exemption application. After reviewing the public comments, the Agency has concluded that the exemption should be denied on the basis that 49 U.S.C.13541 does not give FMCSA the authority to essentially nullify a statutory provision by exempting the entire class of persons subject to the provision. Furthermore, even if the Agency had the authority to issue such a blanket exemption, AIPBA's exemption application does not meet the factors provided in section 13541 because (1) the new \$75,000 bond requirement is necessary to carry out the National Transportation Policy at 49 U.S.C.13101, (2) there has been no showing that the \$75,000 requirement "is not needed to protect shippers from the abuse of market power" and (3) the requested exemption is not in the public interest.

DATES:

This decision is effective March 31, 2015.

FOR FURTHER INFORMATION CONTACT:

FMCSA-190912-001

<https://www.federalregister.gov/documents/2015/03/31/2015-07353/registration-and-financial-security-requirements-for-brokers-of-property-and-freig...>

Mr. Thomas Yager, Chief of Driver and Carrier Operations, (202) 366-4001 or thomas.yager@dot.gov (<mailto:thomas.yager@dot.gov>), FMCSA, Department of Transportation, 1200 New Jersey Ave. SE., Washington, DC 20590.

ADDRESSES:

For access to the docket to read background documents, including those referenced in this document, or to read comments received, go to:

- Regulations.gov, <http://www.regulations.gov> (<http://www.regulations.gov>), at any time and insert FMCSA-2013-0513 in the “Keyword” box, and then click “Search.”
- Docket Management Facility, Room W12-140, DOT Building, 1200 New Jersey Ave. SE., Washington, DC 20590. You may view the docket online by visiting the facility between 9 a.m. and 5 p.m., Monday through Friday except Federal holidays.

Viewing Comments and Documents

AIPBA's exemption application and all public comments are available in the public docket. To view comments filed in this docket, go to <http://www.regulations.gov> (<http://www.regulations.gov>) and click on the “Read Comments” box in the upper right hand side of the screen. Then, in the “Keyword” box, insert “FMCSA-2013-0513” and click “Search.” Next, click “Open Docket Folder” in the “Actions” column. Finally, in the “Title” column, click on the document you would like to review. If you do not have access to the Internet, you may view the docket by visiting the Docket Management Facility at the address above.

Privacy Act

In accordance with 5 U.S.C. 553 (<https://api.fdsys.gov/link?collection=uscode&title=5&year=mostrecent§ion=553&type=usc&link-type=html>)(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov (<http://www.regulations.gov>), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy (<http://www.dot.gov/privacy>).

SUPPLEMENTARY INFORMATION:

Legal Basis for the Exemption Application and Proceeding

Section 13541(a) of title 49 of the United States Code (49 U.S.C. 13541 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html>)) requires the Secretary of Transportation (Secretary) to exempt a person, class of persons, or a transaction or service from the application, in whole or in part, of a provision of 49 U.S.C., Subtitle IV, Part B (Chapters 131-149), or to use the exemption authority to modify the application of a provision of 49 U.S.C. Chapters 131-149 as it applies to such person, class, transaction, or service when the Secretary finds that the application of the provision:

- Is not necessary to carry out the transportation policy of 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>)

Start Printed Page 17143

- Is not needed to protect shippers from the abuse of market power or that the transaction or service is of limited scope; and
- Is in the public interest.

The exemption authority provided by section 13541 “may not be used to relieve a person from the application of, and compliance with, any law, rule, regulation, standard, or order pertaining to cargo loss and damage [or] insurance . . .” 49 U.S.C. 13541 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html>)(e)(1).

AIPBA seeks an exemption from the \$75,000 financial security requirements for brokers and freight forwarders at 49 U.S.C. 13906 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13906&type=usc&link-type=html>) (b) & (c). Section 13906 is located in 49 U.S.C. Subtitle IV Part B (chapter 139) and therefore may be considered within the general scope of the exemption authority provided by section 13541. The Secretary may begin a section 13541 exemption proceeding on the application of an interested party. 49 U.S.C. 13541 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html>)(b). *See, e.g., Motor Carrier Financial Information Reporting Requirements-Request for Public Comments*, 68 FR 48987 (/citation/68-FR-48987) (Aug. 15, 2003). The Secretary may “specify the period of time during which an exemption” is effective and may revoke the exemption “to the extent specified, on finding that application of a provision of [49 U.S.C. Chapters 131-149] to the person, class, or transportation is necessary to carry out the transportation policy of [49 U.S.C.] section 13101.” 49 U.S.C. 13541 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html>)(c), (d).

The Administrator of FMCSA has been delegated authority under 49 CFR 1.87 (/select-citation/2015/03/31/49-CFR-1.87) to carry out the functions vested in the Secretary by 49 U.S.C. 13541 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html>).

Background

On July 6, 2012, the President signed MAP-21 into law, which included a number of mandatory, non-discretionary changes to FMCSA programs. Some of these changes amended the financial security requirements applicable to property brokers and freight forwarders operating under FMCSA's jurisdiction. Pub.L. 112-141, § 32918, 126 Stat. 405 (codified at 49 U.S.C. 13906 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13906&type=usc&link-type=html>)(b) & (c)). More specifically, 49 U.S.C. 13906 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13906&type=usc&link-type=html>)(b) and (c) requires brokers and freight forwarders to provide evidence of minimum financial security in the amount of \$75,000.

On September 5, 2013, FMCSA published guidance (78 FR 54720 (/citation/78-FR-54720)) “concerning the implementation of certain provisions of . . . (MAP-21) concerning persons acting as a broker or a freight forwarder.” On October 1, 2013, FMCSA issued regulations requiring brokers and freight forwarders to have a \$75,000 surety bond or trust fund in effect. 49 CFR 387.307 (/select-citation/2015/03/31/49-CFR-387.307)(a), 387.403(c); 78 FR 60226 (/citation/78-FR-60226), 60233.

On November 14, 2013, after initially filing a complaint and then voluntarily dismissing the case in district court, AIPBA filed a petition for review in the U.S. Court of Appeals for the Eleventh Circuit. *Association of Independent Property Brokers and Agents, Inc. v. Foxx*, No. 13-15238-D (11th Cir.). The petition alleges that the Agency's October 1, 2013 final rule was improperly issued without notice and comment. The court, upon AIPBA's request, has stayed the case pending the resolution of this exemption proceeding.

On January 23, 2015, AIPBA instituted another proceeding in the United States District Court for the Middle District of Florida, seeking to invalidate the \$75,000 bond requirement from 49 U.S.C. 13906 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13906&type=usc&link-type=html>). *Association of Independent Property Brokers and Agents, Inc. v. Focx et al*, No. 5:15-cv-00038-JSM-PRL (M.D. Fla.). No additional briefs or rulings have been filed in the district court case.

AIPBA Exemption Application

In an August 14, 2013 letter to the Secretary, AIPBA, through its counsel, requested that the Department “permanently exempt all property brokers and freight forwarders from the \$75,000 broker bond provision of MAP-21. . . .” AIPBA argues that the “\$75,000 broker surety bond amount is not necessary to carry out the transportation policy of section 13101, [or] . . . to protect shippers from the abuse of market power . . . and . . . is not in the public interest.” AIPBA seeks a categorical exemption “so that property brokers and forwarders can continue to do business under the existing bond regulations.” A copy of the exemption application is included in the docket referenced at the beginning of this notice.

First, AIPBA believes that the \$75,000 bond requirement is contrary to the transportation policy of 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>) because it violates the federal government's policy to “encourage fair competition, and reasonable rates for transportation by motor carriers of property” and to “allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public,” citing 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>)(a) (2)(A),(D).

AIPBA also argues that the \$75,000 broker bond requirement “is not necessary to protect shippers from the abuse of market power.” According to AIPBA, “[t]he unnecessarily high \$75,000 broker bond requirement will cause the majority of property brokers to leave the marketplace, which will expose shippers to abuses of market power by the few large property brokers able to stay in business.”

With regard to the public interest, AIPBA believes that the new bond requirement will “cause a significant increase in consumer prices once the supply of property brokers is drastically reduced.” AIPBA indicated that a lack of competition will require shippers to pay more for transportation services. In addition to predicting that small and mid-sized brokers will be forced out of the marketplace due to the new higher bond requirement, AIPBA believes the new requirement will serve as a barrier to entry into the marketplace for other property brokers.

Finally, while AIPBA acknowledges that “there are certain regulations from which [the Secretary] cannot issue exemptions,” it believes that:

“. . . the broker bond does not fall into one of the listed categories. Specifically, the bond is a financial security rather than a type of required insurance, a distinction emphasized in 49 U.S.C 13906 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13906&type=usc&link-type=html>) by the choice of a bond or insurance as well as MAP-21's proposed amendment to 49 U.S.C. 13906 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13906&type=usc&link-type=html>), which still requires the broker bond but deletes all reference to insurance.”

On December 26, 2013, FMCSA requested public comment on the AIPBA exemption application (78 FR 78472 (/citation/78-FR-78472)). Specifically, FMCSA requested comments on whether the Agency should grant or deny AIPBA's application, in whole or in part. The Agency also requested comments on how it should apply 49 U.S.C. 13541 ([\(https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html\)](https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html))(a)(1-3) to AIPBA's request.

Discussion of Public Comments

General Discussion

FMCSA received 80 responses to the December 26, 2013, notice, 23 of which were anonymous. Most of the commenters (52, including 16 of the anonymous commenters) supported the AIPBA application for an exemption and 26 (including 7 of the anonymous commenters) opposed the request. The named commenters are: Micah Applebee; AIPBA; Dave Britton; William Cohen; Gerard Coyle; Sue Cuthbertson; Raymond Donahue; Rodney Falkenstein; Christine Friend; Philip Fulmer; Kelley Gabor; Ray Gerdes; Kathy Harris; David Hoke; Scott Housely; Matt Kloss; James Lamb (2 responses); Deborah J. Larson; Lew Levy; Stuart Looney (LineHaul Logistics, Inc.); Angela Maccombs; Michael Majerek; Mike Manzella; Aaron Menice; Deborah McCoy; Jenny Merkey; Michael Millard (2 responses); John Miller; Gaetono P. Monteleone □ (Transport Management Service Corporation); Ronald Morales; Hugh Nolan; Chris Olson; Charles Onsum; the Owner-Operator Independent Drivers Association (OOIDA); M. Peters; James Powers; Roger's Freight, LLC; James Randolph; Kevin Reidy; Paul Rosenweig, Jr.; Bev Smith; Michael Stanley (SMS Transportation); Robert Schwartz; Tracey Spence; the Surety & Fidelity Association of America (SFAA); Kelly Swickard; John Thomas; The Transportation Intermediaries Association (TIA); Veles Logistics, Inc.; Patrick Walsh; Werner Enterprises, Inc.; and, Gregory Williamson (Williamson's Enterprises). One commenter provided only his first name, Larry, and one hand-written comment (from Mike) included an illegible last name.

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Many of the commenters who wrote in support of AIPBA's application believe the increased bond requirement has resulted in a significant decrease in the number of freight forwarders and brokers with the requisite authority from FMCSA. Some of these commenters argue that the increased bond requirement has resulted in the loss of jobs and an adverse impact on consumer prices. A number of the commenters who identified themselves as brokers argued the new requirement is intended to reduce competition by eliminating small businesses rather than to reduce fraud. Several commenters also argue that implementation of the \$75,000 bond requirement is inconsistent with the transportation policy in 49 U.S.C. 13101 ([\(https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html\)](https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html)).

Commenters writing in opposition to AIPBA's application argue that the previous \$10,000 bond requirement was originally set in 1979 and that small trucking companies, especially owner operators, will be better protected and have better business opportunities with the \$75,000 bond. A number of these commenters include brokers who state that obtaining the higher bond amount was relatively easy. And some state that the previous \$10,000 bond was insufficient and resulted in transportation service providers being left unpaid after the broker went out of business.

Specific Issues Raised by AIPBA and Supporters of AIPBA's Application

UNINTENDED CONSEQUENCES

A number of the commenters writing in support of AIPBA's application believe the increased bond requirement has resulted in unintended consequences such as brokers and freight forwarders being forced out of the industry, a loss of jobs and decreased rates for trucking companies. AIPBA indicated in its comments that the total number of property brokers on October 1, 2013, was 21,565 and that 8,218 broker operating authority registrations have been revoked since December 1, 2013. AIPBA indicated that the total number of freight forwarders on October 1, 2013, was 2,212 with 1,583 freight forwarder operating authority registrations revoked since December 1, 2013.^[1] AIPBA believes there will be a secondary wave of revocations when bonding companies that rushed to acquire market share adjust their rates after the financial security market settles.

AIPBA also argues the increase in the bond requirements has resulted in the loss of jobs and an adverse impact on consumer prices. AIPBA believes the increase in bonds has had an adverse impact on rates for truckers as well.

INCREMENTAL INCREASE IN BOND REQUIREMENT

Matt Kloss supports the AIPBA exemption in part and believes FMCSA should consider an incremental increase in the bond limit rather than leaving the limit at \$75,000. He states that he has been in the brokerage business for 12 years and he has never had a successful filing against his bond. He explains that he is not in the business to steal money from trucking companies. He argues that “[e]stablished companies with good histories should have been required to increase the bond to \$20,000 this year, with future increases that are manageable.”

An anonymous commenter believes that the bond requirement “. . . should be initially lowered to a more reasonable amount of \$25,000.” This commenter also argued that the rules should require a \$25,000 fee per agent for large brokers.

COSTS OF THE \$75,000 BOND WILL DRIVE BROKERS OUT OF THE INDUSTRY

Sue Cuthbertson discusses the premiums that she had to pay to comply with the \$75,000 bond requirement. She explains that she used to pay \$900 per year for her broker bond and she now has to pay \$3,500 per year for the \$75,000 bond. She says that she could barely stay in business paying the \$900.

An anonymous commenter writing in support of the AIPBA application describes a similar experience with premiums for the \$75,000 bond. The commenter explains that initially the premium quoted was \$3,500. However, after the commenter shopped around for better rates, the same company quoted the commenter a more favorable premium of \$1,300.

Specific Comments by Opponents of AIPBA's Application

PROTECTION OF THE GENERAL PUBLIC'S, SHIPPERS' AND CARRIERS' FINANCIAL INTERESTS

OOIDA believes that the \$75,000 bond requirement helps to increase carriers' comfort in dealing with brokers they do not know and as such helps promote efficiency in the marketplace. According to OOIDA:

“Many of OOIDA's members are small business men and women who operate under their own federal operating authority and rely upon brokers to find freight to meet their business goals. Part of the efficiency of the current transportation marketplace is that brokers match motor carriers available to haul freight and shippers needing to move freight—parties who do not have an ongoing relationship, but who might make mutually beneficial connections on a load by load basis. This efficiency in the marketplace is increased greatly when motor carriers feel comfortable taking loads from brokers who they do [not] know (*apparent*

omission in original). By securing the debts of brokers to the motor carrier, the federal broker bond or trust is intended to give motor carriers confidence that they will be paid when they are doing business with a broker they do not know.”

OOIDA also argues that “raising the bond or trust amount to \$75,000 is intended to reduce harm caused by undercapitalized brokers who steal transportation service from motor carriers—the protected parties under the broker bond or trust statute . . . The \$10,000 bond or trust was simply not sufficient to serve its intended purpose—to protect the motor carriers from non-payment by brokers.” OOIDA also comments on the connection between the new \$75,000 financial responsibility requirement and the National Transportation Policy (NTP) at 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>). According to OOIDA, “[b]y this statute, Congress burnished the national transportation goals of encouraging ‘sound economic conditions in transportation, including sound economic conditions among carriers;’ 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>)(a)(1)(C), and acted to promote efficient transportation and to enable efficient and well-managed carriers to . . . maintain fair wages and working conditions. Sections 13101(a)(2)(B)&(F).”

Stuart Looney states:

“The purpose for requiring the posting of a bond is well established as furthering protection to the general public. The public is well served with this requirement as freight brokering is an easy entry undertaking and is fraught with many thinly capitalized and reasonably unprofessional participants.”

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The Surety & Fidelity Association of America (SFAA) believes a bond requirement of less than \$75,000 would deprive shippers and carriers of the additional protection that Congress thought was necessary. According to SFAA “the intent of the bond is to protect shippers and motor carriers . . . There are a number of cases in which the \$10,000 bond was not sufficient to pay all claims in the full amount. . . .” SFAA cited multiple cases for its proposition.

SFAA also argues that the surety bond:

“. . . protects the public interest by ensuring that FMCSA licenses are provided to qualified, well-capitalized brokers and freight forwarders . . . While claims handling is a critical function of the surety, another equally critical function is the surety’s prequalification of a principal before the surety will write a bond. A surety will review the capabilities and financial strength of bonds applicants and provide bonds only to those entities that the surety has determined are capable of performing the underlying obligation . . . The bond provides financial protection to shippers and carriers, which serves to reduce costs in the long run by eliminating the need for a carrier or shipper to include the risk of nonpayment in its pricing.”

The Transportation Intermediaries Association (TIA) indicates that eliminating the bond requirement is “not acceptable” to shippers or carriers. According to TIA, 2 major trucking organizations, the American Trucking Associations (ATA) and OOIDA have supported increasing the bond well above the new \$75,000 amount. According to TIA, in a 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.” According to TIA, in recent years, its members have seen shippers demand \$100,000 bonds to exclusively protect one shipper.

Werner Enterprises, Inc. (Werner) argues that “[t]he eroded value of the bond since it was last adjusted to \$10,000 in 1977” means “there is essentially no real security for broker misconduct.”

Veles Logistics Inc. (Veles), which describes itself as a “small group of owner-operators,” believes the \$75,000 bond will help to get rid of “unstable unsafe financially weak and fraudulent brokers.” Veles also believes the new bond requirement will increase the prices of loads by eliminating “third and fourth and fifth resellers out of the freight moving chain.”

Scott Housely argues:

“The brokerage limit as it stand[s] at \$75,000.00 addresses a larger problem of unethical brokers who have not invested in the industry and don't intend to. Carriers in the past had little recourse in collecting bad debt from brokers or the shippers that they worked for due to the transient nature of many brokers. The limit as it stands does not [impede] any good brokers and enhances the relationship with the asset based carriers who are the backbone of the entire system. Please keep the current rule in place.”

GRANTING THE EXEMPTION WOULD ELIMINATE THE BOND REQUIREMENT

OOIDA expresses concern that if FMCSA granted AIPBA's request, the Agency would not have the discretion to return to the \$10,000 bond limit; the Agency would have to allow brokers to operate without having a bond. OOIDA argues:

“The application would have the effect of permitting all brokers to operate without a broker bond or trust of *any* amount. When Congress enacted a \$75,000 bond or trust statute, it repealed the \$10,000 bond or trust statute. AIPBA's requested exemption would not reenact the \$10,000 bond or trust requirement; it would exempt all property brokers from the requirement to carry *any* bond or trust. The statute found at 49 U.S.C. 13541 (<https://api.fdsys.gov/link?collection=usc&title=49&year=mostrecent§ion=13541&type=usc&link-type=html>) only permits FMCSA to grant exemptions from certain statutory requirements. It does not permit FMCSA to amend or revise applicable statutes. FMCSA has no power to institute a bond or trust requirement of any amount other than the statutorily set \$75,000 amount. The goal of AIPBA's application, the creation of a broker industry with no bond or trust protecting the motor carrier industry, would completely subvert congressional intent.”

COSTS OF THE BOND ARE REASONABLE

Werner states:

“The bond cost is a problem for some brokers for good reason. A bond such as this which is designed to guaranty the integrity and ability of a party to respond for their failures to another party is priced not only upon the total exposure of the company writing the bond but also upon the financial strength of the party being bonded. Our experience was that the cost of our \$10,000 bond was \$77 per year which increased to \$338 for a \$75,000 bond. The cost increase is not significant. Companies that are experiencing higher costs may be the companies for whom the shippers and motor carriers need protection.”

TIA states:

It is ironic that those making the argument to eliminate the bond increase because some brokers and forwarders cannot afford it, actually make the case for the higher bond. Congress determined that companies should not handle other people's money if they cannot afford to protect it. Broker and forwarder bonds are available in the marketplace today for less than \$6,000 per year.

TIA argues that when the cost for the bond is spread over an average of 5 loads per day, the bond premium works out to be less than \$5.00 per load.

FMCSA Decision

FMCSA has considered AIPBA's exemption request and all of the comments received, including AIPBA's subsequent comments, and FMCSA denies the request. FMCSA does not have the authority to disregard Congress's directive in the revised statutory provision by exempting all property brokers and freight forwarders from the bond requirement. Essentially, AIPBA's opposition to the increase in the bond amount is a challenge to Congress's judgment that the increase is necessary and appropriate, indeed in the public interest.

Furthermore, even if the Agency had the authority to grant AIPBA's exemption application, AIPBA's request does not meet the three part statutory test in 49 U.S.C. 13541 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html>). Specifically, FMCSA finds that the \$75,000 bond requirement at 49 U.S.C. 13906 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13906&type=usc&link-type=html>)(b)-(c) is necessary to carry out the transportation policy of section 13101, and is needed to protect shippers from the abuse of market power. . . .”^[2] Moreover, and most critically, an industry-wide exemption for brokers and freight forwarders from the \$75,000 bond requirement is not in the public interest.

The Scope of FMCSA's Exemption Authority

In Section 32918 of MAP-21, Congress expressly mandated that all FMCSA regulated brokers and freight forwarders have a minimum of \$75,000 in financial security. 49 U.S.C. 13906 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13906&type=usc&link-type=html>)(b),(c). AIPBA asks the Agency to permanently exempt all property brokers and freight forwarders subject to section 32918's \$75,000 bond requirement. FMCSA is denying AIPBA's exemption application because the Agency lacks the authority to issue the kind of blanket exemption that AIPBA seeks.

While section 13541 gives the Agency broad authority to exempt certain persons or transactions, FMCSA does not have the authority to effectively nullify a statute by exempting the entire class of persons subject to the bond requirement, as AIPBA requests. 49 U.S.C. 13541 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html>)(a); *Terran ex rel. Terran v. Secretary of Health and Human Services*, 195 F.3d 1302, 1312 (Fed. Cir. 1999) (“The Constitution does not authorize members of the executive branch to enact, amend, or repeal statutes.”). AIPBA's request would amount to a usurpation of a congressional mandate. Therefore, because the Agency lacks the authority to grant AIPBA's blanket exemption, the Agency is denying AIPBA's exemption application.

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Public Interest

Even if FMCSA had the authority to grant AIPBA's exemption application, a blanket exemption covering all brokers and freight forwarders is not in the public interest. “Congress is presumed to legislate in the public interest.” *Time Warner Entertainment Co. L.P. v. F.C.C.*, 810 F.Supp. 1302, 1304 n.6 (D.D.C. 1992). As discussed above, granting an exemption to all brokers and freight forwarders would flout a clear and recent congressional directive and statement of the public interest. Further, numerous commenters have persuaded FMCSA that such an exemption is not in the public interest.

First, FMCSA finds that granting AIPBA's request would undermine the purpose of the bond requirement—the protection of shippers and motor carriers that utilize brokers and freight forwarders as third party intermediaries. FMCSA's predecessor, the Interstate Commerce Commission (ICC), very clearly stated that “[t]he legislative history . . . clearly reveals that the primary purpose of Congress in regulating motor transportation brokers is to protect carriers and the traveling and shipping public against dishonest and financially unstable middlemen in the transportation industry.” *Clarification of Insurance Regulation*, 3 I.C.C.2d 689, 692 (1987)(quoting *Carla Ticket Service, Inc., Broker Application*, 94 M.C.C. 579, 580 (1964)).

According to OOIDA, “[t]he \$10,000 bond or trust was simply not sufficient to serve its intended purpose—to protect the motor carriers from non-payment by brokers.” And, as SFAA notes, “the intent of the bond is to protect shippers and motor carriers. A bond in a lesser amount would deprive shippers and carriers of the additional protection that Congress thought was necessary. There are a number of cases in which the \$10,000 bond was not sufficient to pay all claims in the full amount. . . .” Moreover, according to TIA, in 2009, “ATA cited a study they conducted indicating that only 13 percent of carriers' claims against brokers were satisfied by the \$10,000 bond.” This unanimity of input from members of the three industries most affected by the \$75,000 requirement (transportation intermediaries, motor carriers and the surety bond industry) is noteworthy. Given that the purpose of the financial security requirement is to protect shippers and motor carriers, and the widespread view that the previous \$10,000 requirement^[3] was deficient in performing that function, it would not serve the public interest to grant AIPBA's requested exemption. FMCSA will not perpetuate, through the grant of an exemption, the pre-MAP-21 status quo of shippers and motor carriers not being able to collect from financially insolvent brokers. Neither AIPBA nor any of the commenters that supported its request have shown how the public interest in protecting shippers and motor carriers would be served by granting the requested exemption.

On the other hand, in its exemption application, AIPBA argues that the \$75,000 broker surety bond amount is “not in the public interest.” AIPBA argues that the \$75,000 broker bond would:

. . . cause a significant increase in consumer prices once the supply of property brokers is drastically reduced . . . In addition, the high amount of the broker bond will not only cause existing small and mid-size property brokers to leave the marketplace, but will also serve as a barrier to entry by other property brokers . . . The statutory loss of broker licenses on October 1, without further warning, will cause chaos in the trucking and shipping industry, and will cause thousands of brokers to lose their livelihood on October 1, 2013, a date now less than 60 days away. This will result in an immediate loss of jobs for these brokers and the agents they employ. It will also cause significant supply chain disruptions. Such a scenario is not in the public interest.

In its January 22, 2014, comments in response to FMCSA's **Federal Register** Notice in this proceeding, AIPBA states “[w]ith regard to the public interest . . . a lack of competition will require shippers to pay more for transportation services.” AIPBA also argues that “it is in the public interest to allow open competition, as the public benefits from lower consumer prices and increased employment. A larger pool of property brokers provides more competition and better access to brokers for shippers, which reduces the overall prices of products to consumers.”

FMCSA acknowledges that the number of FMCSA-registered brokers and freight forwarders declined after the \$75,000 bond requirement went into effect on October 1, 2013. Between September 2013 and December 2013, the number of freight forwarders with active authority dropped from 2,351 to 925. The number of freight forwarders then increased to 1,208 by December 2014. During this same period, the number of active

brokers dropped from 21,375 to 13,839, and then increased to 15,471 in December 2014. However, AIPBA has provided no proof of a causal connection between the broker license revocations and an adverse impact on consumer prices or an adverse impact on rates for truckers.^[4]

Moreover, even if AIPBA had shown that the \$75,000 requirement caused all of the consequences it alleges, it has not focused on the key public interest implicated in the broker bond—the protection of motor carriers and shippers. It has not provided, nor have we discerned, any evidence that shippers or motor carriers would be adequately protected by the pre-MAP-21 bond requirement.

Abuse of Market Power

In its exemption application, AIPBA asserts that “[t]he \$75,000 broker surety bond amount is not necessary to protect shippers from the abuse of market power.” To the contrary, AIPBA asserts that “[e]xemption from the increased broker amount will protect shippers from an abuse of market power. The unnecessarily high \$75,000 broker bond requirement will cause the majority of property brokers to leave the marketplace, which will expose shippers to abuses of market power by the few large property brokers able to stay in business.” In its subsequent comments, AIPBA reiterates its assertion that the new “minimum financial security is not necessary to protect shippers from abuse of market power.” AIPBA argues that “the new minimum security amount is the direct result of collusion to abuse market power. The exemption would help stop the loss of property brokers and provide more options for shippers, which would protect shippers.” Other commenters did not address the abuse of market power.

Based on the record before it, FMCSA cannot find that application of the \$75,000 broker/freight forwarder bond requirement under 49 U.S.C. 13906 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13906&type=usc&link-type=html>)(b),(c) “is not needed to protect shippers from the abuse of market power. . . .” 49 U.S.C. 13541 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html>)(a)(2). While AIPBA hypothesizes that a smaller brokerage industry will abuse its market power with regard to shippers, it provides no evidence outlining such abuse. Moreover, it provides no evidence that the new \$75,000 bond requirement is not required to protect against such abuse of market power. Without any evidence, FMCSA will not exempt an entire industry from a clearly articulated congressional directive to raise the broker and freight forwarder financial responsibility requirements.

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National Transportation Policy (NTP)

Finally, in its application, AIPBA argues that the \$75,000 bond requirement is contrary to the transportation policy of 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>), because it violates the federal government's policy to “encourage fair competition, and reasonable rates for transportation by motor carriers of property” and to “allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public. . . .” 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>)(a)(2)(A), (D). AIPBA argues that the new broker bond amount “will likely result in a loss of tens of thousands of jobs and higher consumer prices as a matter of supply and demand.” Further, according to AIPBA, “per Kevin Reid of the National Association for Minority Truckers, the anti-competitive effects of the new broker bond requirement will detrimentally affect the participation of minorities in the motor carrier system, which is another violation of the transportation policy.”

In its docket comments in this proceeding, AIPBA argues that “a \$75,000 bond to protect carriers is not necessary to implement the national transportation policy because there is no shipper bond to protect carriers when they receive loads without the involvement of an intermediary.” Further, AIPBA argues that “enforcement of the new financial security minimum is contrary to the national transportation policy of 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>) because it restricts opportunity, competition and reasonable rates.”

On the other hand, with regard to the National Transportation Policy (NTP), OOIDA argues that Congress's new \$75,000 requirement “burnished the national transportation goals of encouraging ‘sound economic conditions in transportation, including sound economic conditions among carriers;’ 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>)(a)(1)(C), and acted to promote efficient transportation and to enable efficient and well-managed carriers to . . . maintain fair wages and working conditions. Sections 13101(a)(2)(B)&(F).” OOIDA's point is well taken.

While AIPBA is correct that the NTP provides that the policy of the United States Government is to “encourage fair competition, and reasonable rates for transportation by motor carriers of property,” “allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public”, 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>)(a)(2)(A), (D), and “promote greater participation by minorities in the motor carrier system,” 49 U.S.C. 3101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=3101&type=usc&link-type=html>)(a)(2)(J), these are not the only elements of the NTP. Among other goals, the NTP provides that federal transportation policy includes “promot[ing] efficiency in the motor carrier transportation system . . . ,” 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>)(a)(2)(B), meeting the needs of shippers, 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>)(a)(2)(C), and “enabl[ing] efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions. . . .” 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>)(a)(2)(F).

FMCSA finds that application of the \$75,000 broker and freight forwarder financial responsibility requirements under 49 U.S.C. 13906 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13906&type=usc&link-type=html>)(b), (c) is “necessary to carry out the transportation policy of section 13101. . . .” 49 U.S.C. 13541 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html>)(a)(1). First, Congress set that amount as the minimum requirement and in so doing, must be presumed to have acted in a manner consistent with the NTP. Second, as OOIDA, TIA and SFAA have shown, the previous \$10,000 bond was inadequate in the event of broker financial problems. In such instances, both shippers and motor carriers faced losses. Accordingly, applying the new \$75,000 bond amount is necessary to meet the “needs of shippers,” 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>)(a)(2)(C), and to allow motor carriers to “earn adequate profits [and] attract capital,” 49 U.S.C. 13101 (<https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html>)(a)(2)(F), as directed by the NTP.

Moreover, AIPBA has not shown why applying the new \$75,000 requirement is not necessary to carry out those provisions of the NTP. FMCSA does not believe that AIPBA has provided evidence that there has been a decrease in motor carrier competition or an increase in shipping rates due to the implementation of the \$75,000 bond requirement. Indeed at p. 5 of their docket comments, AIPBA admits that rates have actually decreased. Further, aside from an unsubstantiated projection, AIPBA makes no showing that the new \$75,000 requirement will undermine the NTP's goal of "promot[ing] greater participation by minorities in the motor carrier system. . . ." 49 U.S.C. 13101 ([\(https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html\)](https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13101&type=usc&link-type=html))(a)(2)(J).

FMCSA does not find that the \$75,000 financial responsibility requirement for brokers/freight forwarders is "not necessary to carry out the transportation policy of section 13101. . . ." 49 U.S.C. 13541 ([\(https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html\)](https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html))(a)(1). Nor does FMCSA find that continued regulation under section 13906(b), (c) "is not needed to protect shippers from the abuse of market power" or that the transaction or service at issue is of "limited scope. . . ." 49 U.S.C. 13541 ([\(https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html\)](https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html))(a)(2). Finally, granting the exemption requested by AIPBA is not in the public interest. 49 U.S.C. 13541 ([\(https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html\)](https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html))(a)(3). Accordingly, AIBPA's request is denied.

Issued on: March 25, 2015.

T.F. Scott Darling, III,

Chief Counsel.

Footnotes

1. *AIPBA's comments were dated January 22, 2014.*

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2. *AIPBA does not argue that "the transaction or service is of limited scope," 49 U.S.C. 13541*

([\(https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html\)](https://api.fdsys.gov/link?collection=uscode&title=49&year=mostrecent§ion=13541&type=usc&link-type=html))(a)(2), nor do other commenters.

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3. *FMCSA, by regulation, raised the bond requirement to \$25,000 for household goods (HHG) brokers in 2010. 49 CFR 387.307 (/select-citation/2015/03/31/49-CFR-387.307) (2012). Pursuant to regulation, as of October 1, 2013, all FMCSA regulated brokers and freight forwarders (HHG and non-HHG) are required to have \$75,000 in financial security. 49 CFR 387.307 (/select-citation/2015/03/31/49-CFR-387.307)(a) (brokers); 49 CFR 387.403 (/select-citation/2015/03/31/49-CFR-387.403)(c)(freight forwarders).*

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4. *In late-filed comments, James P. Lamb, AIPBA's president, alleged that the broker bond increase in MAP-21 "caused 9,800 intermediaries to lose their licenses, first time jobless claims then shot up, consumer prices are on the increase, and truckers' rates are down for all equipment types. . . ."*

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[FR Doc. 2015-07353 (/a/2015-07353) Filed 3-30-15; 8:45 am]

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EXHIBIT C



October 4, 2018

The Honorable Raymond P. Martinez, Administrator
Federal Motor Carrier Safety Administration (FMCSA)
1200 New Jersey Ave., SE.,
Washington, DC 20590-0001

Dear Mr. Martinez:

This is a *Petition for Rulemaking* submitted pursuant to 49 C.F.R. § 389.31.

As you know, the Small Business in Transportation Coalition ("SBTC") recently informally asked the Federal Motor Carrier Safety Administration ("FMCSA") to address the issue of entities calling themselves "dispatch services," that unlawfully operate as property brokers without a license and bond. We have not received a response to this request.

By way of background, on September 5, 2013, the FMCSA issued this Guidance (<https://www.fmcsa.dot.gov/mission/policy/federal-register-notice-registration-and-financial-security-requirements-brokers>) advising it would be developing a "comprehensive enforcement program" with respect to unlicensed brokers and invited industry groups to report unlicensed brokerage activity via this online complaint portal: <https://nccdb.fmcsa.dot.gov/nccdb/home.aspx>.

FMCSA stated:

FMCSA acknowledges there are motor carriers that occasionally broker loads that have not previously been required to obtain operating authority registration from FMCSA as brokers. However, FMCSA is unable to determine at this time how many motor carriers may be engaged in some brokering activities, making implementation of a comprehensive enforcement program difficult. Therefore, FMCSA will phase in its enforcement of the broker registration requirements for motor carriers that also broker loads. During the first phase-in period, FMCSA will accept complaints regarding unregistered brokerage activities of motor carriers through our National Consumer Complaint Database (see <http://nccdb.fmcsa.dot.gov/>).

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FMCSA will work with industry groups to use this complaint information and other data to ascertain the extent of the unlicensed broker population subset within the motor carrier industry. The agency will then work toward developing a comprehensive enforcement program. FMCSA strongly encourages all motor carriers not to accept loads from unregistered brokers or freight forwarders, as these entities might not have the financial security mandated by MAP-21. FMCSA also notes that motor carriers brokering loads without properly registering with FMCSA as brokers may be subject to private civil actions pursuant to 49 U.S.C. 14707.

On January 13, 2015, during an FMCSA session at the annual Transportation Research Board conference in Washington, D.C., the Association of Independent Property Brokers & Agents ("AIPBA," a trade group I founded for brokers in 2010 that later merged with the SBTC in 2016, asked FMCSA Associate Administrator for Field Operations Anne L. Collins what the status of this enforcement program was. She advised she was unaware and indicated the agency would have to get back to AIPBA. AIPBA then escalated this matter to then-Acting FMCSA Administrator Scott Darling's attention. AIPBA did not receive a response.

Thereafter, AIPBA filed a formal complaint with FMCSA against an unlicensed broker under FMCSA's complaint number 100086655.

Under Docket No. FMCSA-2014-0211, AIPBA thereafter advised FMCSA that it was investigating unlicensed brokerage activity including but not limited to the activities of entities referring to themselves as "dispatch services," which operate as non-exclusive agents of motor carriers. AIPBA believed such business activity clearly falls within the definition of regulated brokerage as defined in 49 CFR 371 and an old Interstate Commerce Commission ("the Commission") decision (again, we note the AIPBA thereafter merged with the SBTC in 2016 and was dissolved as a separate entity.)

In *Practices of Property Brokers*, the Commission considered the distinction between agents of carriers and brokers and concluded that one who was in a position to allocate shipments between competing principals was a broker, who required a license. On the other hand, an agent who devotes his service exclusively to a single carrier, is part of that carrier's organization and does not require a license.

As AIPBA did in 2015, SBTC now formally calls on FMCSA to proceed with its "comprehensive enforcement program" to detect and enforce its rules against those who engage in unfair competition with duly licensed property broker members of the SBTC by evading and unlawfully circumventing the \$75,000 bond and the requirement to obtain a broker license.

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While, like AIPBA before it, the SBTC maintains that the \$75,000 bond amount is an unreasonable barrier to entry/overly burdensome to maintain, we do not believe that unlicensed brokers should be allowed to operate without a bond with impunity.

We therefore ask that FMCSA enforce the license and bond requirement by declaring "dispatch services" that service more than one carrier unlawful property brokers and begin charging such illegal entities with violation of the FMCSA's regulations and the applicable statute requiring licensing of property brokers.

Comes now, the SBTC, offering this petition for rulemaking to formally request an amendment to the regulatory definition of property broker.

Currently, 49 CFR 371.2 states:

§ 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.

We now request an amendment to this rule to reflect long-standing precedent carried over under the Interstate Commerce Commission Termination Act of 1995.

We offer the following version for your review and action. We have underlined our proposed changes to the rule to incorporate the Commission's prior findings.

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(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. An agent who devotes his service exclusively to a single carrier, is part of that carrier's organization and does not require a broker license.

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(d) Non-brokerage service is all other service performed by a broker on behalf of a motor carrier, consignor, or consignee.

Lastly, we again ask FMCSA to please report to Congress on the fact that the \$75,000 bond requirement in MAP-21 caused FMCSA to revoke 9,802 intermediaries in 2013, which represented approximately 40% of the surface transportation intermediary industry at that time, and on the appropriateness of the \$75,000 amount pursuant to its MAP-21 mandate. In doing so, we remind you it was FMCSA's position during household goods broker bond rulemaking (which concluded right before MAP-21 was enacted) that bonds over \$25,000 have "anti-competitive effects."

Thank you for your consideration.

Sincerely,

/s/JAMES P. LAMB,
SBTC President
<http://www.Truckers.com>

cc: The Bopp Law Firm
Laurence Socci, Esq.

EXHIBIT D



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Here's Why Small Motor Carriers and Independent Owner-Operators Should Push to Lower the Freight Broker Bond

Published on May 13, 2018 | [Edit article](#) | [View stats](#)



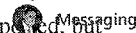
James Lamb
President, Small Business in Transportation
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187 articles

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Eight years ago, I blew the whistle on how the Transportation Intermediaries Association (“TIA”) and Owner-Operator Independent Driver Association (“OOIDA”) had struck a backroom deal grounded in OOIDA wanting TIA members to accept what many in the industry felt was substandard commercial trucking insurance. I suggested that they were on the wrong track pursuing an increase in the original \$10,000 broker bond to a new proposed \$100,000 financial security amount. I wrote an article that was published as an opinion piece in “Transport Topics” which launched a campaign that addressed how TIA and OOIDA tried to sell the industry and Congress on how the bond needed to suddenly go up ten-fold to “fight fraud,” despite TIA President Bob Voltmann's prior suggestion circa 2004 that raising the bond would not fight fraud at all. The reason for the TIA flip-flop? By 2010, TIA was selling optional \$100,000 broker bonds and it was in their own self-interest to make all brokers have to buy them. When I called Voltmann out publicly and spotlighted various TIA members over ethics issues, boy did I cause a ruckus in the industry. And I pissed a lot of powerful and influential people off by exposing the facts and the truth.

On July 4, 2010, a former TIA member myself, I publicly declared independence from TIA on behalf of a group of small disgruntled brokers. We founded a trade group for small brokers called Association of Independent Property Brokers & Agents (“AIPBA”) to address the TIA's abandonment of the small brokers and fight the \$100,000 bond, arguing the TIA was fighting not fraud (this is the real solution to fraud), as they suddenly purported, but





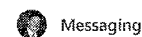
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fighting competition and transparency on behalf of their biggest broker members while using dues paid by their smaller broker members to lobby to put the little guys out of business. I pointed to how FMCSA itself suggested a \$25,000 bond was appropriate to adjust the \$10,000 for inflation. I noted how FMCSA raised the moving broker bond to \$25,000, other state jurisdictions had \$25,000 broker bond requirements, and how FMCSA left the door open on the property broker bond implying that was coming next in due time. However, TIA and OOIDA refused to wait and they took the fight to Congress to overrule FMCSA's conventional regulatory wisdom over anti-competitive effects of bonds too high.

As we fought the good fight on the Hill, OOIDA and some trucking publications catering to truckers spewed an anti-broker mentality and made the issue 'carrier versus broker.' We defeated TIA and OOIDA multiple times when they lobbied to introduce stand-alone legislation that failed in both the House and the Senate. That is, until TIA got the measure snuck into the 2012 MAP-21 highway bill by Harry Reid. We sued twice as AIPBA over the bond and lost both suits. But we ultimately beat the TIA & OOIDA's \$100,000 bond thanks to multiple groups' lobbying efforts yet the bond was set by MAP-21 at \$75,000 for brokers and --for the first time --surface freight forwarders as well. As I had predicted for years, when the higher bond was eventually implemented in December 2013, 9,800 forwarders, small business brokerages and small carriers' brokerage operations were shut down during a two-week enforcement period, which was 40% of the intermediary industry.

In 2014, I began phasing in a new trade group to widen the net called Small Business in Transportation Coalition ("SBTC") as a spin off, which has since replaced the AIPBA and now represents all of the small players in the transportation industry including company drivers. We have 14,000 dues-paying members and we have been actively fighting the ELD rule. We have filed an ELD exemption application, which FMCSA recently advised us they have finally agreed to publish in the Federal Register after six months (Federal Law requires they publish it "upon receipt). We also have tackled safe truck parking among other issues and have stuck up for truckers' gun rights in response to 500 murders of drivers on the job and other workers in interstate transportation over the last decade; that is, we have proposed two versions of Federal legislation intended to give drivers the right to carry loaded, readily accessible firearms in every state to defend themselves from attack. And, we founded the www.TruckerLivesMatter.com movement to bring awareness to the issue. Last year, I appeared on NRA-TV to pitch our legislation (you can watch the interview at <http://Truckers.com>).

As many of you know, immediately after the AIPBA lost the second law suit against FMCSA and just as I began volunteering as a fundraiser for a Republican Presidential Candidate in 2015, my personal carrier registration business was unethically targeted by the Federal Trade Commission ("FTC") for investigation at the request-- at the admission of the FTC-- of the FMCSA in which FTC alleged deceptive business practices. Ironically, this happened not too long after I asked the FTC to investigate what I believed were violations of Federal Anti-Trust Law by the TIA and OOIDA. But rather than investigate that matter, they corruptly targeted me instead. Of course, TIA and OOIDA were quick to regurgitate the FTC press release which tried to spin my established fifteen year old business as a fraudulent government-impersonating scam (despite obvious, good-faith homepage disclaimers to the





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contrary). The first thing my attorney, who couldn't believe how overzealous the FTC had acted over a mere "adequacy of disclaimer case," said to me was: "Who did you piss off?"


And after a year and half of intensive litigation, it took a *former* FTC attorney, who, by then had jumped the government's ship and was serving on the legal defense team, pointing out how he knew we were running legitimate businesses, how the FTC knew it, and how obviously the court knew it, to finally wrap up the bogus suit and spark settlement discussions.

If you have been following me over the past decade, then you know the FTC lawsuit was obviously in retaliation for the two Federal lawsuits that I had brought against USDOT/FMCSA on behalf of the small brokerage industry as the AIPBA trade group president over the \$75,000 broker bond, and my public defense of the little guys in the industry, generally. Notwithstanding abusive tactics employed by the FTC in September of 2016 to trick a Federal District Court into freezing my personal and business assets and place my businesses in receivership without a hearing, which were immediately reversed by the Federal District Judge after a hearing 10 days later, I have asked Congressional oversight committees to investigate FMCSA's abuse of governmental power to harass an industry leader and retaliate for the exercise of free commercial and industry speech. In my eyes, this is akin to the 'IRS unethically targeting Republicans' scandal.

During the course of this FTC fiasco, I personally filed a lawsuit against the state of New York for additional regulatory overreach and violation of my First Amendment Rights, which appears to have been, in part, encouraged by the FTC and remains pending. I also filed a motion for leave to counter sue the FTC for defamation and sued them in an unrelated matter for violating the Freedom of Information Act by concealing 200+ pages of documents which they refused to release to me. Apparently, a number of people conspiring to take me out thought I was going to roll over and give up. They thought wrong.

At my direction, the SBTC then filed a lawsuit against the UCR Board of Directors for repeatedly violating the Federal open meetings law over a decade, and secured a temporary injunction against the Board. Essentially every meeting they ever held had been in violation of Federal Law to some extent. Next, we sued the state of Indiana for illegally collecting approximately one billion dollars in carrier registration fees over the same ten year period in violation of Indiana state law. When we win this class action, small carriers and independent truckers can expect at least a \$500 estimated refund check (you're welcome).

In my defense, I re-released 2015 pre-FTC suit podcasts showing me as an industry expert as opposed to an evil government imposter-- doing the exact opposite of what the FTC speciously alleged I did helping carriers understand the break down of actual state UCR fees and what their filing options were... and documents showing how rather than take advantage of carriers as FMCSA and FTC maliciously purported, through fraud, scam or at least "aggressive marketing" (whatever that is), I actually investigated, discovered, and reported state governments to the UCR Board for overcharging carriers on their UCR payments and that resulted in tens of thousands of dollars in carrier reimbursements from one such state for collecting double payments from truckers. But I was the bad guy, right? At least that's what they tried to make you think. Despite this elaborate attempt at character assassination,

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members of the industry didn't buy it as SBAC received more paid memberships and I personally got more friend requests, endorsements, and encouraging supporting messages than ever while this lame charade went on.

I recently settled the matter with the FTC rather than continue to pay legal fees indefinitely, in which the FTC --facing an imminent ruling on my pending motion to dismiss for lack of jurisdiction and summary judgment rejecting their "net impressions" argument (they came up with this to argue a homepage disclaimer that said we were "not the Department of Transportation" was inadequate to prevent deception)-- agreed that I would pay zero dollars in civil penalties, restitution and disgorgement (they did however shakedown a female immigrant co-defendant who paid them to go away). They deceptively accused me of "taking in" tens of millions, conveniently neglecting to mention that we were collecting, handling, and properly remitting state money to the 41 participating states. And I paid zero to FTC in the end. That says it all.

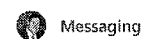
In essence, this FMCSA et al-sponsored political hit job failed miserably. I am sure after the last 10 years, you can imagine who "et al" might be. If you can't... no worries, we intend to release more information along those lines very soon, so stay tuned...

In the end, although dealing with a Federal civil case was quite a nuisance, it is now over. I am still in private business... still publishing disclaimers and disclosures in the interest of transparency as I always have. And I have agreed to refrain from violating laws that I of course never violated in the first place. But, I am now more outspoken than ever and more committed to the defense of small business interests and fighting government and industry abuse, fraud, waste, misconduct and corruption. To the satisfaction of some, I was distracted for a while. But now, I am back. Did you miss me, Bob? I've got some very powerful people too on my side.

And so we now in 2018 have come full circle. We are returning our focus to that dastardly broker bond which is where we began, working toward getting it lowered...

MAP-21 requires FMCSA to report to Congress every four years on the adequacy of the \$75,000 bond amount. And while FMCSA issued an initial report in 2014 on motor carrier financial security, it skirted the intermediary bond issue. They have not addressed the matter over the past four years that followed as mandated by Congress so they are now in violation of the reporting obligation twice. In this March 2018 report they skirt the issue yet again on page 42:

"In addition to directing FMCSA to assess motor carrier financial responsibility, Congress, in section 32104 of MAP-21, directed FMCSA to consider the appropriateness of the current bond and insurance requirements for brokers and freight forwarders. While the Agency has not formally studied whether \$75,000 is the appropriate level of financial responsibility for property brokers and freight forwarders, it is not aware of any formal efforts by stakeholders seeking modification of the financial responsibility amount."





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We didn't study the appropriateness of the \$75,000 broker bond is apparently all that have to report.

The SBTC has brought this to the attention of FMCSA and the Congressional oversight committees and we expect the issue to return to the spotlight shortly (we could use your help trucking media). The fact is, FMCSA has never told Congress that the result of the \$75,000 bond was that 9,800 licenses were immediately and suddenly revoked. Now, TIA tried to explain that away --because they couldn't ever admit I was right all along--as a cleaning of the FMCSA database but the indisputable fact is that if these licenses were revoked that means they were active, and if they were active, that means the license holders were paying to keep their original \$10,000 bond in place. So TIA's 'no harm, no foul' assertion is absolute nonsense and I am more than happy to point that out again.

So who held those 9,800 licenses? Well, we can't be sure for certain, but I can tell you as a motor carrier consultant these past 20 years that besides all those mom and pop brokerages and forwarders that TIA helped put out of business -- you know, to free up more business for their megabroker members, many were actually small carriers and independent owner-operators who had been trying to cut out the middle man. One of the ways I helped many one-man carriers survive the Great Recession in my private business was to get them a broker's license so they could get more freight from shippers direct and broker the loads to themselves. These were the real targets of TIA. Truckers. And Small Carriers. And OOIDA went along with it.

*And that is why you will now see the SBTC,
which fosters teamwork, cooperation, and
partnerships rather than pit truckers against
brokers, and represents all of the small players
in the industry, fight for a lower broker bond:
so that owner-operators can, once again,
afford to get a broker's license on the side to
grab more business.*

As some folks in the broker bond and trust fund supplier business have quite adeptly pointed out, when you have an actual fraudulent broker bonded at \$75,000 without cash collateralization, instead of \$10,000 or a reasonable \$25,000, all you have done is let him steal more from his insurance company or financial institution before he is ultimately shut down. If you really want to stop fraud, you should care if others are victimized besides you.

Now, were any of those 9,800 bad brokers who deserved to be put out of business? Probably. Did the new \$75,000 bond actually shut them down? Absolutely not. They just changed their title from Licensed Property (Freight) Broker to Unlicensed "Dispatch Service." Not sure what the difference is? Neither are we because there is no such thing as a "Dispatch Service." That's just a euphemism for unlicensed broker.





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And that's worse because these people have no bond at all. They went from being loaded at \$10,000 to going rogue and nobody is stopping them. See:

<https://www.linkedin.com/pulse/20140919143620-21695323-brokerage-versus-dispatch-service/>

...and a more detailed analysis here:

<https://www.facebook.com/TheSBTC/posts/2109572682611774>

The problem here, is you can't be a bona fide agent of two competing motor carriers as that violates the agent's 'fiduciary responsibility to principal' under agency law; that is, when you have one load and you chose to give it to one of the two carriers you claim to be an agent for, you are leaving one holding the bag. You can only be the agent for one carrier at a time.

See: <https://www.linkedin.com/pulse/beware-big-business-safety-advocate-complex-james-lamb/>

We reported the problem of unlicensed brokers to FMCSA and in response all we got back was... crickets.

See: <https://www.linkedin.com/pulse/aipba-asks-fmcsa-crack-down-unlicensed-brokers-james-lamb/>

And the other trade groups ATA, TIA & OOIDA have done nothing to stop the rise of unlicensed brokers despite my inviting them all to do so.

This is on our agenda to take up with Congress and pick up where the AIPBA left off. Although we don't like the \$75,000 bond, the law is the law and it has to be respected and enforced until and unless it is changed.

So, if you're an independent trucker who has been brainwashed by the powers that be and bamboozled into believing I am the cause of fraud in the industry, the broker bond should be as high as possible, and freight brokers are all bad, you might just ignore all that silly, divisive, anti-broker rhetoric, change your tune, and team up with us at SBTC, as there is nothing better than getting your own broker license and keeping the whole pie to yourself. Of course, aside from the SBTC, I teach freight broker training classes at Houston Community College once a semester and help new brokers get licensed in my private business (see www.freightbrokertrainingclass.com) so I am happy to show you how to do just that.

Report this

Published by



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Elvis R Gomez

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1y ...

Negative! Leave the \$75K bond intact!!! Leave little room for brokers to screw carriers up the way some of them were doing years ago!

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Forrest Franks · 1st

Independent Business Owner at Happy Trails Transport llc

1y ...

Elvis, I understand your position to a certain extent. But there are issues with this current situation that need to be addressed. If the government was doing it's job, the fly by nite broker problem wouldn't have existed from the beginning. Or would have been nipped at the bud eventually.

Like Reply 1 Like

James Lamb · You

President, Small Business in Transportation Coalition James(at)Truckers.com @RealJamesLamb

1y ...

We will be pushing for fines to be issued against unlicensed brokers https://www.linkedin.com/pulse/operating-dispatch-service-without-brokers-license-got-james-lamb/?published=t

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James Lamb

President, Small Business in Transportation Coalition James(at)Truckers.com @RealJamesLamb

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Dear 'The Trucker:' Due Process Matters. Love, SBTC

James Lamb on LinkedIn

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SBTC resubmits ELD Exemption Application labeling FMCSA's handling of original application "one big misleading sham" and "absolutely corrupt."

James Lamb on LinkedIn

SBTC to NITL: Time to Treat Truckers with Dignity, Decency, and Respect. Stop Putting Drivers in "Cages."

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