Owner-Operator Independent Drivers Association

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March 9, 2023

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

Re: Docket # FMCSA-2016-0102, "Broker and Freight Forwarder Financial Responsibility Notice of Proposed Rulemaking"

Dear Administrator Hutcheson,

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

OOIDA welcomes FMCSA's publication of a Notice of Proposed Rulemaking (NPRM) that would update its broker security regulations to implement changes required by the Moving Ahead for Progress in the 21st Century Act (MAP-21), Public Law 112-141. The most important aspect of this rulemaking is the implementation of the statutory requirement that FMCSA immediately suspend the registration of a broker if the available financial security of that broker falls below the currently required $75,000. The MAP-21 legislation increased the amount of the broker bond to a minimum $75,000, but raising the bond to this amount did not stop brokers from continuing to steal transportation services in excess of the bond amount. When making a claim against a bond, motor carriers have often only collected cents on the dollar for what they should have been paid. This all but eviscerates the effectiveness of the broker bond as security for the broker's liabilities.

However, the processes outlined in the NPRM that could help mitigate the need to initiate interpleader proceedings and alleviate the concern of broker non-payment of claims are not satisfactory to accomplish those objectives. The Final Rule must be strengthened to ensure that FMCSA along with industry stakeholders can readily identify when "available financial security" falls below $75,000. The NPRM falls short of providing the necessary transparency and accountability from brokers and freight forwarders to absolutely know if and when there has been a drawdown on the bond below $75,000.

Without these changes, the current fiction that allows a bond to still be in effect until a claim is actually *paid* on the bond will persist. Under this unofficial policy, even if legitimate claims aggregating in excess of the bond amount have been presented to the surety and as long as the surety has not yet paid a single claim, the bond is still good and the broker can stay in business. Any Final Rule must finally end this practice.

Various aspects of the NPRM empower FMCSA's enforcement authority to suspend unscrupulous brokers and freight forwarders. We acknowledge these overdue provisions were enacted by Congress more than a decade ago, but once again the Final Rule must address their shortcomings. FMCSA has implemented a number of statutes since the passage of MAP-21 in 2012, most notably an unwarranted electronic logging device mandate that has shown absolutely no safety benefits and burdened small-business truckers with costs in the billions. We are cautiously optimistic that this rulemaking will encourage the agency to execute proper oversight of broker regulations. However, we urge FMCSA to amend this section of the proposal to better serve motor carriers who continue to be victimized by unscrupulous or fraudulent brokers and financial entities. We would also like to see the agency further detail how they will allocate resources to prioritize intervening against these types of brokers.

OOIDA submits the following responses to the five areas discussed within the NPRM.

Assets Readily Available. The NPRM proposes allowing brokers or freight forwarders to meet the MAP-21 requirement to have "assets readily available" by maintaining trusts that meet certain criteria, including that the assets can be liquidated within 7 calendar days of the event that triggers a payment from the trust, and that do not contain certain assets as specified in this NPRM.

OOIDA concurs with the agency's list of assets that should not be included as "readily available." FMCSA should also specify that the only sufficient trust/surety funding sources are cash and an unconditional FDIC insured letter of credit for trust collateral. In our interpretation, MAP-21 intended for brokers to have a direct financial risk if they fail to honor their payment obligations to carriers. Thus, any unregulated or unknown sources cannot be considered "readily available to pay claims" and therefore do not satisfy MAP-21. The use of unknown, hybrid, and possibly unenforceable internal debt instruments in lieu of cash or FDIC insured letters of credit violates the fiduciary responsibilities of BMC-85 trustees, and undermines the objective of ensuring that brokers can ***personally*** meet the statutory financial requirements.

Immediate Suspension of Broker/Freight Forwarder Operating Authority. The NPRM proposes that "available financial security" falls below $75,000 when there is a drawdown on the broker or freight forwarder's surety bond or trust fund. This would happen when a broker or freight forwarder consents to a drawdown, or if the broker or freight forwarder does not respond to a valid notice of claim from the surety or trust provider, causing the provider to pay the claim, or if the claim against the broker or freight forwarder is converted to a judgment and the surety or trust provider pays the claim. FMCSA also proposes that, if a broker or freight forwarder does not replenish funds within 7 business days after notice by FMCSA, the agency will issue a notification of suspension of operating authority to the broker or freight forwarder.

As proposed, this process will not effectively address the problems that OOIDA members experience when attempting to recover claims in a timely manner. These provisions do not establish a mandatory

deadline for a surety to give the broker notice of a claim (and no definition of "adequate notice") or for a broker to respond to a surety's notice of a claim. They do not set a standard for what a broker can say in response to a surety's notice of claim for the surety to deny the claim. There is no mandatory deadline for the surety to pay a claim after one of the conditions outlined by FMCSA requiring payment of the claim is met, and there is no deadline for the surety to give FMCSA notice that the bond has been reduced such that FMCSA should suspend the broker's registration.

Without any attention to these issues, sureties will continue to be able to gather claims with no time limitations or accept any statement by the broker to deny a claim. This will allow the broker to stay in business stealing motor carriers' services for weeks or months. Even if the surety has not made a payment drawing down the bond amount, if it has one claim to pay, the amount of the "available" security is effectively below the amount required by law. And yet the problem is that sureties wait until it has accumulated claims whose total value exceeds the bond before making any payment on it – allowing bad brokers to stay in business long after the surety knows the broker has stopped paying carriers. To fix this, the surety must pay on the claim either (1) as soon as the broker acknowledges it did not pay the carrier and has no claim from a shipper, (2) after a broker fails to respond within a mandatory period of time after receiving notice of a claim, or (3) when a carrier presents the surety with a notice of judgment on the claim.

The agency should be aware that because the motor carrier's cost of bringing litigation against a broker would easily exceed the amount of an unpaid load, the likelihood of a motor carrier obtaining judgment against a broker to present to the surety is very small, if non-existent.

We also question FMCSA's reasoning for not proposing a specific timeframe for brokers to respond to claims made to surety providers or trustees in the NPRM. Without a mandatory response time, sureties and brokers will take weeks or months to resolve motor carrier claims and will maintain the status quo. FMCSA should give brokers between 5 and 10 calendar days to respond to a surety's notice of claim in a defined, meaningful way.

The NPRM further misses the mark by only proposing to suspend a broker's authority in the event of a "drawdown" on the bond. FMCSA misses an opportunity here to quickly suspend a broker's authority when the broker has no lawful reason for not paying the carrier—a situation that is likely harming other carriers at the same time and should be stopped when that activity is known to the surety, before the broker can accumulate claims that exceed the bond amount.

In previous comments, OOIDA submitted a regulatory proposal based on the belief that the only potentially valid reason that the broker has not paid the carrier is because there is a shipper/receiver claim on the load under 49 CFR §370.3 that might be the carrier's fault (late, damaged, incomplete, etc.), and that the incidences of broker non-payment of carriers in total amounts that exceed the amount of the bond is not caused by claims on the underlying loads. The only legitimate broker response to a surety's notice of a carrier claim on the bond would be proof of such a claim. This requirement would relieve FMCSA of adjudicating such claims.

We proposed to define when a broker's response would relieve the surety of paying the claim. That would be a notarized sworn statement from the broker that it had received a claim on the load that may be the carrier's fault and attached to the notarized statement was a copy of the claim. Only claims that

meet the requirements of 49 CFR §370.3 will be valid. Sureties are already known to require carriers to complete similarly burdensome proofs of claim on the bond—so why should the broker not be required to bear the same kind of burden? It is OOIDA members' experience that the vast majority of broker non-payment to motor carriers resulting in broker bond claims do not involve cargo claims. They are simply instances of non-payment by the broker. Therefore, the burden to brokers of what OOIDA is proposing will apply to only a very small number of bond claims, and the rule would otherwise function to quickly suspend the operating authority of brokers in the vast majority of bond claims.

Unless a surety received such a response from the broker within a certain number of days, the surety would be required to pay the claim and give notice to FMCSA to suspend the broker's authority. If the broker did provide such a timely response, the surety would not pay the claim, and it would be up to the carrier and broker to resolve the dispute. Under these rules, FMCSA would only suspend a broker's authority for failing the comply with these response requirements. Additionally, FMCSA should also be able to suspend the broker's authority for making false statements during this procedure. But this enforcement should be limited solely to the question of whether it was true that there was a claim on the load—not to how that underlying claim should be resolved.

We urge FMCSA to review OOIDA's proposal and adopt these and other aspects of the regulatory language to ensure that the broker bond functions more efficiently and as intended – to ensure that a broker only operates and incurs debt to motor carriers when it has the amount of security required by statute.

Surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency. FMCSA proposes to define "financial failure or insolvency" as bankruptcy filing or State insolvency filing. This proposal also requires that if the surety/trustee is notified of any insolvency of the broker or freight forwarder, it must notify FMCSA and initiate cancelation of the financial responsibility. In addition, FMCSA proposes to publish a notice of failure in the FMCSA Register immediately.

If the broker is not considered insolvent upon evidence that it has stopped paying motor carriers, what is the purpose of the statutory provision? Waiting until a broker initiates such a filing does nothing to cut the broker off from stealing transportation services before the point. This is an interpretation of the statute that does nothing to further the purpose of the bond or trust requirements. This proposal simply leaves in place the status quo.

Furthermore, the brokers who steal the most trucking services from carriers are the least likely to file a bankruptcy or state insolvency notice. They are most often the brokers who close-up shop and disappear. The FMCSA Register is not an ideal location to publish any notice of financial failure or insolvency. The FMCSA Register documents are not searchable or inherently accessible. If a carrier wants to see the status of a broker or its bond, how is it to know what daily issue of the FMCSA Register to look for a surety's notice? At the very least, the notices should be posted on FMCSA's SAFER page for the broker and also on the Licensing and Insurance page for the broker bond in question. FMCSA should also change its Licensing and Insurance page to provide a link, submitted by the surety or trustee, to the surety's webpage indicating how many unresolved claims have been submitted against the bond. This would be the number of claims filed by motor carriers on the bond, but before the motor carrier has had

an opportunity to respond to those claims, and outside of a current period of suspension if already noticed on the FMCSA's L&I webpage for the broker.

This notice would be similar to FMCSA's publication of motor carrier inspection and accident data on MCMIS and PSP reports to potential employers, shippers, and insurance companies, even though the motor carrier has not been given due process to defend itself against such allegations.

Enforcement Authority. FMCSA proposes that to implement MAP-21's requirement for suspension of a surety provider's authority, the agency would first provide notice of the suspension to the surety/trust fund provider, followed by 30 calendar days for the surety or trust fund provider to respond before a final Agency decision is issued. The agency also proposes to add penalties in 49 CFR part 386, appendix B, for violations of the new requirements.

OOIDA members have been frustrated that dubious and fraudulent brokers are able to register, conduct transactions, and stay in business without fear of any recourse against their criminal activity. We believe that Congress put these financial security rules under FMCSA's authority, and demonstrated the continued importance of these rules by legislating changes to them in MAP-21. These are necessary provisions for the smooth function and safety of the motor carrier industry to which FMCSA has been given specific authority and duties. If administered properly, OOIDA believes that these rules will eliminate the opportunities for persons or entities with little financial backing or intention of paying carriers from becoming brokers.

Since the rules were enacted in 2012, we have been waiting for FMCSA to enforce them. While this NPRM is a major step towards implementing the MAP-21 policies, we would like to see a more detailed plan of how FMCSA will take enforcement action. Generally, we have been disappointed by FMCSA's reluctance about taking a proactive role in suspending broker authority and enforcing broker regulations. Congress has clearly given the agency authority to regulate these areas of the broker industry and take bolder action than simply be a custodian of the remnants of broker regulations left over from the termination of the Interstate Commerce Commission.

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

OOIDA is supportive of removing the rule allowing loan and finance companies to serve as BMC-85 trustees. In our experience, these trusts have been least likely to pay claims as they would exceed the 10% fee they were charging for the trust. All the broker had to do was challenge the charge and the trustees would make the decision on whether it was a valid claim, and often just drag out the whole procedure. These trustees often demand arbitration before deciding if a claim was legitimate, essentially waiting out the owner-operator.

"Loan or finance" companies should not be treated as "financial institutions" because such a label does not ensure states monitor BMC-85 providers' ability to pay claims from trust. Further, the National Insurance Producers Registry (NIPR) would not be of value when adjudicating the financial worthiness, fiduciary duty performance, or claim responsiveness of trustees.

Additional Actions

FMCSA can take additional actions beyond implementing the recommendations we have described above. Small-business truckers have long expressed frustration that regulations designed to provide transparency are routinely evaded by brokers or simply not enforced by FMCSA and the need for better broker transparency remains urgent. Federal regulators must act expeditiously to enhance and enforce current broker regulations listed in § 371.3. OOIDA strongly encourages FMCSA to promulgate rules that will require brokers to automatically provide transaction records within 48 hours after the contractual service has been completed and prohibit brokers from including provisions in their contracts that force a carrier to waive their rights to access the transaction records. These changes will foster a transparent and fair working environment between brokers and motor carriers. Granting OOIDA's petition would also give motor carriers better protections when there are claims or disagreements with brokers.

OOIDA supports FMCSA moving forward with the Financial Responsibility rulemaking process, but the current proposal will not be enough to fully address problems with the broker blond claims process. The Final Rule must produce clear and effective steps to comply with the statutory mandate that it promptly suspend a broker's authority once a valid motor carrier claim has been made against a bond or trust, reducing the available protection to the public. FMCSA must end the myth that when a surety has received a good claim against the bond, that if it keeps the claim in its desk drawer, for any amount of time without paying on it, then the amount of available public protection continues to be the full amount of the bond – allowing the broker who stopped paying motor carriers to stay in business. Only through prompt action by the surety and FMCSA would there be any chance that a broker's business be suspended before it can accumulate claims that exceed the amount of the bond.

If broker transparency regulations can be improved in conjunction with implementing an effective Broker and Freight Forwarder Financial Responsibility Final Rulemaking, then disputes between motor carriers and sureties will be reduced, there will be less need for litigation, less need for FMCSA intervention, and the economic health of the broker/motor carrier component of the transportation industry will be stronger. Most importantly, the small-business motor carriers who rely upon brokers will be spared from such financial loss from both brokers and ineffective bonds or trusts.

Thank you,

Todd Spencer
President & CEO
Owner-Operator Independent Drivers Association, Inc.

OOIDA has also submitted two attachments in addition to these comments.

- *Attachment 1 - A list of broker bond interpleaders filed in federal court that we have found showing the total amounts of the claims in each case to be far in excess of the bond amount*

- *Attachment 2 – OOIDA Regulatory Framework*