Owner-Operator Independent Drivers Association

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October 13, 2020

The Honorable Wiley Deck
Deputy Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, SE
Washington, D.C. 20590

Re: Docket # FMCSA-2020-0150, "Petitions for Rulemaking; Transparency in Broker Transactions"

Dear Deputy Administrator Deck:

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 over 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.

In the wake of historically low freight rates earlier this year, OOIDA petitioned the Federal Motor Carrier Safety Administration (FMCSA) to improve broker transparency. For years, small-business truckers have expressed frustration that regulations designed to provide transparency are routinely evaded by brokers or simply not enforced by FMCSA. While freight rates have started to rebound since the initial weeks of the COVID-19 pandemic, the need for better broker transparency remains urgent. Federal regulators must act expeditiously to enhance and enforce current broker regulations. We support the agency's efforts to gather and evaluate public comment on the issues raised in our petition and believe regulatory action is warranted.

OOIDA submits the following feedback to the questions raised in the agency's request for public comments:

1. In light of the significant statutory changes reducing the scope of regulatory authority over commercial transportation that have occurred since 1980, what statutory provisions, if any, would be carried out by the regulatory changes requested by the petitioners? In particular, how would a rule restricting the rights of private parties from including certain terms in their agreements align with the Agency's statutory authority?

While there has been a near elimination of the federal regulation of the routes, rates, and services for motor carriers since 1980, broker regulations were distinctly not part of deregulatory efforts. It is important to recognize that all broker regulations since the beginning of deregulation have focused on commercial issues. From the requirements of registration, broker bond, and information transparency, the rules have always focused on protecting motor carriers and the public from the unscrupulous actions of brokers in their commercial activities and on creating rules that hold brokers accountable.

When Congress terminated the Interstate Commerce Commission (ICC) in 1995, it preserved and continued federal regulation of brokers.[1] The Senate Report to that legislation affirmed that rules were "needed to protect the public from unscrupulous brokers."[2] In 1999, Congress gave FMCSA jurisdiction over broker regulation.[3] And as recently as 2006, FMCSA, in summarizing its present-day regulatory authority over brokers, quoted the Senate Report to acknowledge that broker regulations are necessary in order to "protect the public from unscrupulous brokers."[4] Any comments claiming that broker rules are an out-of-date vestige of the ICC have no support in the law.

Record keeping and transparency requirements have been a central component of broker regulations since their inception,[5] and were written to serve the greater public interest, not merely the interests of the protected parties. Ever since Congress first called for broker regulations 85 years ago, the objective has been to protect the public's interest in an "adequate, economical, and efficient" motor carrier transportation system free from the "unjust discriminations" and "destructive competitive practices" of unscrupulous middlemen.[6] As one federal court recognized, the "primary purpose of Congress in regulating motor transportation brokers is to protect carriers and the traveling and the shipping public against dishonest and financially unstable middlemen in the transportation industry."[7] The ICC reaffirmed that public policy interest when broker regulations were first meaningfully revised 45 years later.[8] Specifically, the need for record keeping and disclosure requirements was described by the ICC when it proposed the rule that is now codified at § 371.3.[9] Nothing has occurred in the last 40 years to mitigate the need for broker regulation. In fact, the proliferation of the number of brokers from dozens in the early 1980's to tens-of-thousands today shows the need for broker regulation has only grown.

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[1] Interstate Commerce Commission Termination Act ("ICCTA"), P.L. 104-88, 109 Stat. 905 at §§ 13101(a)(1)–(2), 13904, 14122 (Dec. 29, 1997).

[2] S. Rep. 104–176, p. 12 (Nov. 21, 1995)

[3] Motor Carrier Safety Improvement Act of 1999 ("MCSIA"), Pub. L. 106–159

[4] FMCSA Notice of Determination, 71 Fed. Reg. 50115-02, 50116 (Aug. 24, 2006) (explaining that ICCTA retained broker regulations and that the FMCSA has and exercises that authority to further that objective).

[5] 14 Fed. Reg. 2833, 2834 (May 28, 1949) (establishing broker requirements under Section 167.1–.12).

[6] Motor Carrier Act of 1935, P. L. 74-255, 49 Stat. 543 at §§ 202, 204(4) (identifying the purpose of the Motor Carrier Act).

[7] *Gray Line Nat. Tours Corp. v. United States*, 380 F. Supp. 263, 266 (S.D.N.Y. 1974). See also Jeffrey Kinsler, Motor Fright Brokers: A Tale of Federal Regulatory Pandemonium, 14 Nw. J. of Int. L. & Business 289, 300 (1994) (citing *P. D. Copes Broker Application*, 27 M.C.C. 153 (1940)).

[8] *See* 45 Fed. Reg. 68941 (Oct. 17, 1980) (adopting the broker regulations still in effect today consistent with the Motor Carrier Act of 1980).

[9] 45 Fed. Reg. 31140, 31140–41 (May 12, 1980)

This history shows that Congressional interest in a secure transportation system underlies the statutes and regulations that require broker transparency. Although compliance with these rules can occur on a transactional level from the broker to the motor carrier, this characteristic of the rule does not transform it to solely a matter of private contracting. Broker contracts designed to help brokers avoid compliance with the disclosure requirements under § 371.3 undermine the explicit public policy objectives passed by Congress and since implemented by various agencies. Noncompliance undermines the goals of a secure transportation system. Therefore, it is part of the agency's mandate to ensure that brokers do not avoid their legal responsibilities by contract or by imposing unreasonably burdensome disclosure conditions.

2. How would a rulemaking expanding FMCSA's role in enforcement of the requirement mandating that brokers automatically disclose financial details about each transaction to the respective motor carrier transporting the load, as requested in the OOIDA and SBTC petitions, align with the statutes identified above? What measures could FMCSA take to ensure that regulatory action in this area is an appropriate exercise of the Agency's authority?

FMCSA would not experience any new burdens by adopting the rules requested by OOIDA. These new provisions of the law would simply facilitate compliance with the current rules. FMCSA's authority to promulgate rules governing brokers for the protection of motor carriers, such as those proposed by OOIDA, and to enforce those rules is unequivocally established by statute. Congress requires the Secretary to regulate brokers to protect motor carriers[10] and, separately, to require brokers to have a bond to protect motor carriers. 49 U.S.C. § 13904(e) & (f) state:

> (e) Regulation to protect motor carriers and shippers. --Regulations of the Secretary applicable to brokers registered under this section ***shall provide for the protection of motor carriers*** and shippers by motor vehicle.
>
> (f) Bond and insurance. --The Secretary may impose on brokers for motor carriers of passengers such requirements for bonds or insurance or both as the Secretary determines are needed to protect passengers and carriers dealing with such brokers.

These statutory commands, in support of a secure transportation system, make FMCSA regulatory action to improve broker transparency both appropriate and imperative.

With regard to recordkeeping, Congress specifically gives the Secretary of Transportation the power to "prescribe the form of records required to be prepared or compiled under this subchapter by carriers and brokers including records related to movement of traffic ***and receipts and expenditures of money***."[11] FMCSA has authority to obtain documents from brokers, "information the Secretary decides is necessary to carry out this part."[12] Additionally, the Secretary has subpoena power for documents and witnesses to enforce this authority. Id. at (c).

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[10] 49 U.S.C. § 13904(e)
[11] 49 U.S.C. § 14122 (a)(emphasis added).
[12] 49 U.S.C. § 13301(b)

These statutes demonstrate that FMCSA's authority with regard to broker documentation is not isolated to § 371.3

FMCSA has general authority to investigate a violation of the rules under its jurisdiction, including the broker rules; and private persons have the right to file a complaint with the agency concerning such violations.[13] FMCSA has the authority to suspend, amend, or revoke authority of a broker who willfully fails to comply with an applicable regulation.[14] FMCSA may also bring a civil action to enforce a regulation when violated by a broker.[15]

A person who does not comply with the broker recordkeeping statute is liable for at least $1,000 for each violation.[16] A person who tries to evade a broker regulation is liable for a civil penalty of at least $2,000 to $5,000 and possible criminal penalties.[17] FMCSA's authority to investigate violations of its rules, including § 371.3, is clearly laid out by statute, and FMCSA has promulgated the rules for such enforcement action.[18]

These statutes, and the implementing rules, are part of a thorough, up-to-date, regulatory scheme that Congress enacted and retained beyond the ICC's termination. Amending current rules, as OOIDA has proposed, to more clearly instruct and ensure broker compliance with duties that already exist in § 371.3, is but one action FMCSA could take to secure broker compliance with the rules. Through our petition, we are not asking FMCSA to exercise any of its other plenary authority over brokers, except to amend an existing rule. Nor would OOIDA's proposed rule expand FMCSA's current responsibility to enforce its rules.

3. Are the transparency issues raised by OOIDA and SBTC limited to small brokers or large brokers (e.g., brokers with revenues above a certain threshold, brokers with a certain number of transactions, etc.) or are they more widespread such that the rulemaking should cover all brokers, regardless of size?

The issues raised in the OOIDA petition are not limited or dependent on the size or revenue of the broker. There should absolutely be no threshold for who must comply with these rules. Becoming a broker entails taking on a certain level of responsibility and public trust. No entity that would find difficulty complying with these simple and non-burdensome electronic disclosure rules should be allowed to be a broker. Additionally, there are no broker size qualifications in the current rules, which already require compliance consistent with OOIDA's petition.

[13] 49 U.S.C. § 14701
[14] 49 U.S.C. § 13905(d)(2)(A)
[15] 49 U.S.C. § 14702.
[16] 49 U.S.C. § 14901
[17] 49 U.S.C. § 14906
[18] 49 C.F.R. Part 386

4. If the transparency issues are primarily associated with large brokers, what revenue threshold should the FMCSA consider for the applicability of any new requirements, and how would the Agency obtain accurate information about brokers' revenues?

Again, there should not be an applicable revenue threshold for brokers to provide transparency. If needed, FMCSA could obtain accurate information from brokers through registration forms, tax filings, and other financial documents.

5. The OOIDA petition requested that brokers provide information to motor carriers automatically and electronically. The Agency requests commenters to provide their views on the most efficient and effective means of accomplishing this request. Should each broker have, for example, a stand-alone system with motor carriers receiving an email from the broker after the contractual service has been completed, or should brokers be allowed to satisfy the request with partnerships or networks through which registered brokers would upload transaction information which would then be automatically transmitted via the network to the registered carrier associated with the transaction?

The current regulations must be updated so that brokers are required to automatically share their transaction records electronically after the contractual service has been completed. There are too many brokers preventing truckers from accessing information by only providing transaction records at their office location during normal business hours. Brokers know requirements like these make it nearly impossible for truckers to view the information they have a right to see. Because much of the brokering process is already being conducted digitally, electronic records of transactions should also be provided electronically within 48 hours of a load being delivered.

We believe brokers could provide information to motor carriers automatically and electronically using a variety of methods. This requirement would simply ask a broker to use the standard forms of communication used by brokers today to interact with shippers and motor carriers. This could include email, digital photos or scans, smart phone apps, and other methods. Setting up a different system or partnership with others to comply with these disclosure obligations would seem unnecessary. However, OOIDA has no objection to the concept as long as it provided timely compliance and brokers cannot hide behind such entities to avoid responsibility with the rules.

6. The OOIDA petition request that FMCSA require brokers to provide transaction information automatically within 48 hours of the completion of the contractual services would likely require information technology (IT) resources that are currently not in use. FMCSA requests that commenters provide cost estimates for implementing an IT solution to accomplish OOIDA's request, either through stand-alone systems run by individual brokers, or systems operated by groups of brokers notifying the individual carriers utilizing any of the brokers within the group.

We disagree with the notion that providing transaction information automatically within 48 hours would require significant IT resources that are not currently in use. Typically, the required information already exists at the time the load is arranged – well before 48 hours after the delivery of a load. It is doubtful that modern brokers do not already create electronic documents,

conduct electronic transactions, and transmit data to and from shippers and carriers for every load they arrange. For the purpose of conducting a cost analysis of OOIDA's proposed rules, FMCSA should assume brokers are now in compliance with the current rules using such systems. The cost analysis of OOIDA's proposed amendments must not include the cost to a broker of finally coming into compliance with the current rule. FMCSA should only account for the cost of changing the timeframe to 48 hours within which the broker must comply.

In some instances, minor IT infrastructure and compatibility upgrades might be needed to assist in automatically disclosing the records. However, major investments in IT infrastructure would not be needed for compliance.

7. Please provide a quantitative estimate of the economic benefits that would likely be achieved by motor carriers if FMCSA adopted the rules OOIDA and SBTC requests. How much additional revenue might motor carriers receive on a per-transaction basis?

If rules are promulgated to improve broker transparency and current regulations are better enforced by the agency, then motor carriers would achieve economic benefits in various ways. Certainly, motor carriers would save time and money by receiving the required information in a timely and convenient manner via electronic transmission instead of being forced to visit the broker's physical office location. This would also prevent brokers from selectively retaliating against carriers that request this information. In other words, brokers would not be able to put carriers on a "Do Not Use" list for simply exercising their rights. Furthermore, if all brokers are barred from requiring a carrier to waive their rights to access transaction records, then this would create more opportunities for motor carriers who are unwilling to haul for brokers that implement these unfair and prohibitive policies.

Improving and enforcing broker transparency would also help motor carriers make better informed decisions about which loads they choose to haul and which brokers they choose to haul for. Too often, motor carriers have to rely on the word of brokers informing them of rates and percentages and motor carriers end up getting shortchanged.

Additionally, better broker transparency would result in less instances of motor carriers being unfairly billed by brokers after transactions are completed. There are cases when upon delivery, everything appears fine regarding compensation. Then, days or weeks later, a carrier will have wages automatically deducted or receive a bill saying there was a claim on the load without any proof from the broker. Giving carriers the ability to access records within 48 hours of the transaction would help eliminate this practice.

If FMCSA implements the proposals outlined in our petition, then brokers will be held accountable in fairly compensating motor carriers for their services. Depending on the individual transaction, this would result in net gains ranging from tens to thousands of dollars for motor carriers.

8. Please provide a quantitative estimate of the economic costs to brokers or others if FMCSA adopted the rules OOIDA and SBTC request. How much profit reduction on a per-transaction basis would brokers experience, and what percentage of the costs would be passed through to shippers or motor carriers?

Several brokers have provided the same exact cost estimate of "$2,500 to $10,000" per carrier to comply with the proposed rule. However, they offer no support for those figures. They do not explain why the cost to transmit a single document to carriers within a new timeframe of 48 hours will cost $2,500 to $10,000 per carrier. These brokers describe their cost estimates as necessary for "EDI or API integration." This description implies that their current compliance with § 371.3 is not yet integrated into their EDI or API systems. If those brokers have already invested in and use systems that employ EDI or API, why have they not adopted them yet to comply with the current rules? It is highly unlikely, that with these systems already in-house, they have chosen to comply with § 371.3 by having employees create hard copies of documents to transmit through fax machines or the U.S. Postal Service. If they are using such methods of business communication, then their conversion to comply with OOIDA's proposed electronic transmission, using their efficient and time-saving electronic systems, would save them money in the long term. It is more likely though, that they have not been complying with the current rule by choice and any perceived technological investment is largely inflated.

If OOIDA's proposals are adopted, the industry and the free market will also reward brokers that comply with transparency regulations. Brokers who are proven to be reputable through providing electronic transactions would be able to gain a greater market share from motor carriers, which might overcome any revenue reduction per a single transaction.

In addition to modernizing and enforcing broker regulations, FMCSA can enhance transparency in some other ways. FMCSA must levy and enforce a structured fine system that would penalize noncompliance with broker regulations. The agency should suspend or revoke the authority of unscrupulous brokers that exhibit a pattern of noncompliance. We believe this would improve transparency between brokers and carriers as intended by § 371.3. FMCSA should also make an effort to upgrade the administration of the National Consumer Complaint Database (NCCDB). The NCCDB's online portal is used by drivers to report and help identify brokers, who are reported to have engaged in violations of the § 371.3 regulations. OOIDA members have found the NCCDB to be an inadequate outlet to report violations or other unfair business practices because drivers do not receive a satisfactory response level. Additionally, there is insufficient follow-up with drivers after filing a complaint. Along with improving upon current regulations, these changes would help produce more transparency between brokers and motor carriers.

OOIDA has long pushed for greater transparency in transactions with brokers and supports FMCSA's initiative to bring much needed improvements to broker regulations. When rates are on the decline, many truckers are concerned they're the only ones feeling the pain – or at least feeling a disproportionate share of the pain. This will not change until federal regulators enhance and enforce the broker transparency 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.

Thank you for your consideration of our comments.

Sincerely,

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