UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

Financial Responsibility for Motor Carriers, Freight Forwarders, and Brokers

Notice; Request for Public Comment
Docket No. FMCSA-2014-0211

COMMENTS

SUBMITTED BY THE

TRANSPORTATION INTERMEDIARIES ASSOCIATION

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The Transportation Intermediaries Association (TIA) submits these comments in response to the Federal Motor Carrier Safety Administration's (FMCSA) November 28, 2014 advanced notice of proposed rulemaking (ANPRM). This ANPRM requests public comments on considering a rulemaking that would increase the minimum levels of financial responsibility for motor carriers, including liability coverage for bodily injury or property damage; establish financial responsibility requirements for passenger carrier brokers; implement financial responsibility requirements for brokers and freight forwarders, and revise existing rules concerning self-insurance and trip insurance.

For reasons set forth in more detail below, TIA will provide general comments on the contemplation of increasing the financial responsibility for motor carriers, including liability coverage for bodily injury or property damage, and implementation of financial responsibility requirements for brokers and freight forwarders.

IDENTITY AND INTEREST OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION

TIA is the professional organization of the $162 billion third-party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all disciplines doing business in domestic and international commerce. TIA is the voice of transportation intermediaries to shippers, carriers, government officials, and international organizations.

TIA members include approximately 1,400 motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and non-vessel-operating common carriers), air forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers.

TIA is also the U.S. member of the International Federation of Freight Forwarders Associations (FIATA), the worldwide trade association of transportation intermediaries representing more than 40,000 companies in virtually every trading country.

Transportation intermediaries or third party logistics professionals act as the "travel agents" for freight. They serve tens of thousands of shippers and carriers, bringing together the transportation needs of the cargo interests with the corresponding capacity and special equipment offered by rail, motor, air, and ocean carriers.

Transportation intermediaries are primarily non-asset based companies whose expertise is providing mode and carrier neutral transportation arrangements for shippers with the underlying asset owning and operating carriers. They get to know the details of a shipper's business, then tailor a package of transportation services, sometimes by various modes of transportation, to meet those needs. Transportation intermediaries bring a targeted expertise to meet the shippers' transportation needs.

INCREASING THE FINANCIAL RESPONSIBILITY REQUIREMENTS FOR MOTOR CARRIERS

TIA applauds the Agency for publishing this advanced notice of proposed rulemaking (ANPRM) and doing their due diligence by seeking industry feedback. TIA encourages the Agency to use the information it gathers to reach a measured decision that takes into account the costs of increasing insurance minimums on the supply chain, rather than arbitrarily releasing a specific dollar amount. Though TIA has grave concerns that increasing the minimum financial responsibility requirements will have a significant impact on small carriers and owner-operators, TIA will remain neutral on the proposed financial responsibility requirements for motor carriers until a specific amount is released. The following comments from TIA reflect the feedback and concerns provided by our membership in response to the Agency's ANPRM.

Our membership has concerns that a significant increase in insurance coverage will force many small carriers (1-6 trucks) out of business due to higher insurance premium costs. Small carriers do not have pricing power to get a better rate from shippers and brokers in sufficient time to cover their potential additional cost, and as a result will suffer disproportionately from rapid increases in costs. If the insurance requirements are increased, a gradual implementation

process should be considered. This will allow time for the market to adjust to the higher rates needed for the small carriers to pay their increased insurance premium cost. At the same time, it would help ensure that the increase does not disrupt an already constricted market for truck capacity.

A sudden, large increase in minimum insurance requirements may force small motor carriers to choose between going out of business, and staying in business by cutting back on important operational costs such as truck and tire maintenance. This could potentially have significant negative impacts on the overall safety of the trucking industry. Our nation's commercial motor vehicle truck drivers, and particularly the independent owner-operator, are the backbone of the American economy, and have made major strides in improving safer highways over the past decades. The FMCSA and industry stakeholders must work together in building policies that ensure that small commercial motor carrier businesses can continue to operate efficiently and safely throughout the United States.

According to data provided to the Agency by OOIDA, over 96% of OOIDA members already insure at or above the $750,000 legal minimum. According to information provided by the ATA to the Agency, based on data from two of the ten largest trucking insurers, 6.5% of policies written by those insurers were written at limits under $1 million, 83% of policies in the data set were written at $1 million, and 10.5% were written for above $1 million. This data points out that not only are large motor carriers operating with higher rates than the currently required minimums, but a majority of owner-operators are too. This is important for the Agency to note and examine, when calculating the cost impacts that raising minimum insurance levels will have on motor carriers, the supply chain, and safety.

As FMCSA awaits public comments and data from the ANPRM process and considers indexing the minimums according to historic increases in prices, it should also recognize the infrequency with which catastrophic crashes occur. The January 2013 FMCSA report on insurance minimums notes that more than 99% of crashes involving commercial motor vehicles are

settled at below the current insurance minimum. Just as importantly, from that same report, 98% of crashes where the commercial motor vehicle is at fault are settled at below the current liability limits, and as few as 0.17% of all accidents caused by commercial motor vehicles result in settlements above the minimum liability limits. The average cost per crash is estimated at less than $12,000. It is important that motor carriers continue to operate safely, and that unsafe parties be held responsible for their actions. However, barring new facts and statistics from the ANPRM solicitation, the Agency should recognize that the current financial responsibility minimums are largely sufficient to meet the practical demand.

TIA notes that the Agency, in 2010 found that the marketplace was the appropriate arbiter of cargo insurance coverage (FMCSA-2010-0189). TIA urges that the Agency take the same action with regard to liability insurance. The Agency notes in the June 22, 2010 Final Rule published in the Federal Register that, "the Agency noted that motor carriers typically have cargo insurance well in excess of the regulatory requirements, in part because many shippers require such insurance as a condition of doing business." The situation is exactly the same in regard to liability insurance. The marketplace has dictated that motor carriers carry at a minimum at least $1 million in public liability coverage. TIA members confirm that within their carrier base, at least 80% of carriers maintain at least $1 million in public liability coverage.

IMPLEMENTATION OF FINANCIAL RESPONSIBILITY REQUIREMENTS FOR BROKERS AND FREIGHT FORWARDERS

As the Agency is aware, TIA filed a petition for rulemaking on May 9, 2014 on a variety of MAP-21 implementation provisions including those addressed in questions 20 through 22 of the ANPRM and is still awaiting a response from the Agency.

In response to Questions 20 and 21:

MAP-21 contained a number of provisions that addressed the growing concern of fraud in multiple aspects of the transportation industry. One provision requires FMCSA to establish

specific performance standards for broker bond and trust companies. The requirements include that the broker or forwarder can only file a BMC-84 bond issued by a surety provider registered and in good standing with the United States Department of Treasury or a BMC-85 trust or other security acceptable to the Administrator. Section 32918 requires that the surety amount must consist of assets readily available to pay claims, without resort to personal guarantees or collection of pledged accounts receivable. The law makes the bond issuer, trust, or other security holder ultimately responsible for failure to make required payments, specifies procedures for notification of cancellation, and specifies procedures for addressing claims. The Treasury Department does an excellent job of policing BMC-84 providers. A bond company that does not meet the Department's standards can be barred from issuing any bond required by a Federal agency. TIA is concerned, however, about BMC-85 trust providers, and urges the Agency to leverage the private sector for enforcement.

Specifically, TIA requests that the Agency require all BMC-85 trust providers to (A) provide timely notice of the financial failure of one of their clients and (B) to make information regarding claims paid publicly available.

(A) **Timely Notice for Claims:** There is already a requirement in Undertaking Number 8 of the BMC-85 Trust Fund Agreement for trust issuers to immediately give written notice to the Agency of all lawsuits filed, judgments rendered, and payments made under the agreement; and of any failure by the licensee to replenish the trust fund. **TIA seeks further clarification of the regulation to provide that such notice be made by public posting on the trust issuer's website; and that such posting would constitute legal notice under the statute.**

(B) FMCSA should stipulate what is meant by "assets readily available to pay claims" as stipulated in MAP-21, Section 32918. No trust fund provider that offers a "no deposit required" trust and then claims to have funds readily

available by using a non-bank "letter of credit", issued in lieu of cash, can pay claims reliably. Trusts should literally be holding the money in trust and have cash or cash equivalents such that the ***Total Amount Held = $75,000 x # of Trust Participants (i.e. active BMC-85s issued)***. If the sums being held are not totally in cash, they should at least be in presently valued US Treasury instruments or possibly irrevocable letters of credit issued by FDIC insured banks. One unsecured letter of credit in the amount of $75,000 should not be backing more than one, let alone potentially 500, or thousands, of BMC-85s.

(C) **Public Notice of Payments:** TIA has concerns that some current BMC-85 trust fund providers are either underfunded or insolvent. Allowing underfunded or insolvent trust fund providers to guarantee payments to motor carriers defeats the purpose of the security required by MAP-21. Such trust fund providers, if not required to show that they pay claims, tarnish the brokerage industry and disadvantage those operating legally, enable irresponsible brokers to continue operating without adequate security, and cheat motor carriers and thereby lessen the safety of the transportation industry. The TIA 3PL Market Report indicates that freight charges on the average truckload shipment are $1,693 with 86% of that money going to the motor carrier. When an owner-operator does not get paid, they have to find ways to cut their costs, possibly by cutting safety and maintenance investments.

TIA is aware that the Agency has concerns about how to enforce the financial solvency requirements of BMC-85 trust fund operators, and encourages the Agency to allow the private sector to be an important part of the enforcement mechanism. **TIA urges the Agency to require that all BMC-85 trust operators publish, on their websites, the schedule of carrier payments**

from a broker or forwarder trust. Such payment publication should be organized by the broker or forwarder MC or DOT number and list the amount paid to each carrier MC or DOT number. This way, the carriers will be able to quickly review whether claimants were paid, seek clarification from the BMC-85 trust operator as to why a claim was not paid, or seek judicial review under MAP-21 provisions making trust operators ultimately responsible for the trusts they issue.

In response to Question 22:

On September 5, 2013, the Federal Motor Carrier Safety Administration (FMCSA) published in the Federal Register a notice on the implementation of certain provisions of MAP-21 concerning persons acting as a broker or a freight forwarder. This was done pursuant to sections 32915 and 32918 of MAP-21. In the guidance, the Agency stated that a broker and freight forwarder would only be required to have one $75,000 bond or trust as long as the legal entity holding the authorities is the same. Additionally, the guidance stated that the company would need to file separate BMC-84/85 forms for the broker and freight forwarder operations, if they had different names. However, the underlying bond or trust fund can be the same for both operations.

TIA seeks clarification from the Agency about managing the claims process, because the Agency's guidance raises many questions. For example, is the total amount of the joint bond/trust $75,000? Is that $75,000 divided equally in half with $37,500 to guarantee the payments of the forwarder division and $37,500 for that of the brokerage division? What if claims against the brokerage were for $80,000 and those against the forwarder division only $5,000, how is the bond/trust company to pro-rate claims? Should the bond/trust company pay $1.00 for each dollar claimed against the forwarder division, leaving a balance of $32,500 unclaimed and .46 cents for each dollar claimed against the brokerage division? Alternatively, is the bond/trust company to aggregate and pro-rate all claims paying .88 cents for each dollar

claimed? **TIA seeks clarification so that bond/trust companies can rely on the Agency's interpretation so as not to face $150,000 in liability if taken to court.**

TIA also urges the Agency to reverse its September guidance, and require that each authority maintain a separate $75,000 bond or trust, each independently filed with the Agency. TIA believes this interpretation most comports with the intention of Congress to establish a simple process to administer bond/trust requirements. TIA also believes this interpretation will provide the most protection to motor carriers. Finally, this interpretation will be the easiest for the Agency and the bond/trust industry to administer. The legislation was also supposed to make sure that the entities involved in the arrangement or movement of freight have their proper authority noted on the bill of lading. The requirement of separate authority numbers and separate bonds/trusts per number, clearly comports with the spirit of the law, will be the easiest to implement, and administer.

Additionally, settlement of claims would be simplified if FMCSA would provide clarity on the statutory provisions relating to financial failure or insolvency in section 32918. As FMCSA is likely aware, brokers and forwarders will often continue to operate for a period of time when they are failing financially. If the principal has not experienced what is specifically defined as "Financial Failure or Insolvency," then the statute requires that in order for a surety or trust to pay, the broker/forwarder must 1) consent to the payment, 2) not respond to the payment, or 3) have a judgment entered against them. If however the principal has experienced a financial failure or insolvency, then the bond can be canceled, the surety or trust can advertise for 60 days, and pay within 30 days. Under an explicit reading of the current law, it is a much more efficient process for all involved if the principal simply fails. However, if FMCSA defines the statutory language of "financial failure or insolvency" broadly enough to include not only a bankruptcy or total disappearance of the principal, but also to include a clear pattern of unresolved claims in a sufficient volume to constitute a constructive financial failure, claims could be resolved much more quickly and fairly, and the principal would not be able to continue

to incur claims until all of the disputed payments are resolved in court.

CONCLUSION

The action urged by TIA will not significantly increase the Agency's workload. The proposed action will take a diminutive amount of Federal resources, and will accomplish much of the needed enforcement through private sector oversight and rights of action.

TIA applauds the FMCSA on its continued efforts to increase safety on our nation's highways and roads while improving the integrity of the transportation industry. A strong economy relies on safe individuals operating on our nation's roads and highways under a comprehensive and comprehensible framework of Agency rules and regulations. TIA is a strong advocate for the FMCSA, and looks forward to a continued partnership in order to achieve our mutual beneficial goals.

Respectfully Submitted,

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TIA