



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

49 CFR Part 387

[Docket No. FMCSA-2016-0102]

RIN 2126-AC10

Broker and Freight Forwarder Financial Responsibility

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM); request for comments.

SUMMARY: FMCSA announces that it is initiating rulemaking action pertaining to the implementation of the Moving Ahead for Progress in the 21st Century Act (MAP-21).

MAP-21 raised the financial security amount for brokers to \$75,000 and, for the first time, established financial security requirements for freight forwarders. In this ANPRM, the Agency is considering eight separate areas: group surety bonds/trust funds, assets readily available, immediate suspension of broker/freight forwarder operating authority, surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency, enforcement authority, entities eligible to provide trust funds for form BMC-85 trust fund filings, Form BMC-84 and BMC-85 trust fund revisions, and household goods (HHG). The Agency seeks comments and data in response to this ANPRM.

DATES: Comments on this document must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments bearing the Federal Docket Management System Docket ID (FMCSA-2016-0102) using any of the following methods:

Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, West Building Ground Floor, Room W12-140, Washington, DC 20590.

Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

Fax: 1-202-493-2251.

Confidential Business Information (CBI): Submissions containing CBI and marked in accordance with 49 CFR 389.9 must be sent to Mr. Brian Dahlin, Chief, Regulatory Evaluation Division, 1200 New Jersey Avenue, SE, Washington, DC 20590.

Each submission must include the Agency name and the docket number for this document. Note that DOT posts all comments received without change, except those marked in accordance with 49 CFR 389.9, to www.regulations.gov, including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to www.regulations.gov at any time or visit Room W12-140 on the ground level of the West Building, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The online Federal document management system is available 24 hours each day, 365 days each year. If you would like acknowledgment that the Agency

received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

Privacy Act: In accordance with 5 U.S.C. 553(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, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: For information concerning this ANPRM, contact Mr. Jeff Secrist, Office of Registration and Safety Information, at (202) 385-2367, or by e-mail at jeff.secrist@dot.gov, or Mr. Kenneth Riddle, Office of Registration and Safety Information, at (202)-366-9616 or by e-mail at kenneth.riddle@dot.gov.

If you have questions on viewing or submitting material to the docket, contact Docket Services at 202-366-9826.

SUPPLEMENTARY INFORMATION:

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I. Public Participation and Request for Comments

A. Submitting Comments

If you submit a comment, please include the docket number for this document (FMCSA-2016-0102), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these methods. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov> and put the docket number, "FMCSA-2016-0102" in the "Keyword" box, and click "Search." When the new screen appears, click on the "Comment Now!" button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments

by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is customarily not made available to the general public by the submitter. Under the Freedom of Information Act, CBI is eligible for protection from public disclosure. If you have CBI that is relevant or responsive to this document, it is important that you clearly designate the submitted comments as CBI. Accordingly, please mark each page of your submission as “confidential” or “CBI.” Submissions designated as CBI and meeting the definition noted above will not be placed in the public docket of this document.

Submissions containing CBI should be sent to Mr. Brian Dahlin at the address shown above under the heading ADDRESSES. Any commentary that FMCSA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

FMCSA will consider all comments and materials received during the comment period.

B. Viewing Comments and Documents

To view comments, go to <http://www.regulations.gov> and insert the docket number, “FMCSA-2016-0102” in the “Keyword” box and click “Search.” Next, click the “Open Docket Folder” button and choose the document listed to review. If you do not have access to the internet, you may view the docket by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

II. Legal Basis

In 2012, Congress enacted the Moving Ahead for Progress in the 21st Century Act (MAP-21) (Pub. L. 112-141, 126 Stat. 405, 822), specifically, section 32918 which contained requirements for the financial security of brokers and freight forwarders that amended 49 U.S.C. 13906.

III. Background

A. 2013 Omnibus Final Rule Increased Financial Security Amount

Section 32918 raised the financial security amount for brokers to \$75,000 and, for the first time, established financial security requirements for freight forwarders. A “broker” is a “person...that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.” 49 U.S.C. 13102(2); see also 49 CFR 371.2(a)(FMCSA regulatory definition of “Broker”). A “freight forwarder” is defined as “a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business” (1) performs certain services including assembly, break-bulk or distribution services, (2) “assumes responsibility for the transportation from the place of receipt to the place of destination” and (3) “uses for any part of the transportation a carrier” such as a motor carrier. 49 U.S.C. 13102(8); see also 49 CFR 387.401(a)(FMCSA regulatory definition of freight forwarder).

FMCSA implemented those MAP-21 financial responsibility limit requirements in a 2013 Omnibus rulemaking, 78 FR 60226 (Oct. 1, 2013), codified at 49 CFR 387.307(a) (brokers) and 49 CFR 387.403T(c) and 387.405 (freight forwarders). Under

the existing regulations, brokers and freight forwarders must have in effect a surety bond or trust fund in the amount of \$75,000. As a condition to obtain registration, brokers and freight forwarders must provide evidence of the surety bond by filing a form BMC-84 or the trust fund by filing a form BMC-85 with the Agency.

B. Other Broker and Freight Forwarder Requirements

In addition to increasing and extending the minimum financial responsibility requirements, MAP-21 also gave FMCSA the authority to accept a “group surety bond, trust fund, or other financial security” as evidence of financial responsibility (49 U.S.C. 13906(b)(1)(B), (c)(1)(B)). MAP-21 authorized FMCSA to accept trust funds or other financial security only if they consist of “assets readily available to pay claims without resort to personal guarantees or collection of pledged accounts receivable” (49 U.S.C. 13906(b)(1)(C), (c)(1)(D)). The statute also clarified the types of claims that broker and freight forwarder surety bonds/trust funds are designed to cover (49 U.S.C. 13906(b)(2)(A), (c)(2)(A)).

Section 32918 of MAP-21 requires the Agency to “immediately suspend” broker/freight forwarder operating authority registration if the “available financial security” of the broker or freight forwarder falls below \$75,000 (49 U.S.C. 13906(b)(5), (c)(6)), and also established claims payment procedures in the event of broker or freight forwarder “financial failure or insolvency” (49 U.S.C. 13906(b)(6), (c)(7)). Additionally, MAP-21 gave FMCSA the authority to take direct enforcement action against surety providers, through court action, civil penalty proceedings or suspension of providers’ ability to make financial security filings with the Agency (49 U.S.C. 13906(b)(7), (c)(8)). Finally, section 32918 clarified that the form of broker/freight forwarder financial

responsibility and who provides such security must be approved by FMCSA (49 U.S.C. 13906(b)(1)(A), (c)(1)(A)).¹

C. 2014 Advance Notice of Proposed Rulemaking

The Agency moved a step further toward implementation of section 32918 in its 2014 Advance Notice of Proposed Rulemaking (2014 ANPRM) pertaining to Financial Responsibility for Motor Carriers, Freight Forwarders and Brokers. 79 FR 70839 (Nov. 28, 2014).² Although that 2014 ANPRM focused primarily on motor carrier minimum financial responsibility limits, the Agency did ask three questions pertaining to BMC-84/85 filers. Specifically, the Agency sought information pertaining to BMC-85 providers' posting of claims information on their websites, the public notification by BMC-85 providers in the event of broker or freight forwarder financial failure, and the possible need for the BMC-84/85 forms to be adjusted to provide claims handling instructions to the surety or trustee. 79 FR at 70843. The Agency received several comments in response to its request.³ After reviewing all public comments to the

¹ Compare current 49 U.S.C. 13906(b)(1)(A) (“The Secretary may register a person as a broker...only if the person files with the Secretary a surety bond, proof of trust fund...in a form and amount, and from a provider, determined by the Secretary to be adequate to ensure financial responsibility”) with previous 13906(b) (“The Secretary may register a person as a broker under section 13904 only if the person files with the Secretary a bond, insurance policy or other type of security approved by the Secretary to ensure that the transportation for which a broker arranges is provided.”).

² On May 9, 2014, the Transportation Intermediaries Association (TIA) filed with FMCSA a “Petition for Rulemaking: Requirements for BMC-84 Bond and BMC-85 Trust Providers.” In its petition, TIA sought to require that trust fund payments be made public, sought “clarification of BMC-85 trust deposits,” and sought “clarification of when a BMC-84 bond or BMC-85 trust may make payments,” among other issues. The Agency met with TIA to discuss its petition in March 2015, and TIA submitted a March 30, 2015, follow-up letter in response to that meeting. FMCSA believes that the issuance of this ANPRM will allow TIA to raise concerns related to its Petition for Rulemaking in the course of this proceeding and accordingly is denying the TIA petition as moot.

³ See Comments of: M. Thomas Ruke, Jr., Docket No. FMCSA-2014-0211-1668, at 3–4 (Feb. 24, 2015); Avalon Risk Management Insurance Agency, LLC., Docket No. FMCSA-2014-0211-1675, at 4–9 (Feb. 25, 2015); Roanoke Insurance Group, Inc., Docket No. FMCSA-2014-0211-1997, at 1–3 (Mar. 2, 2015); Transportation Intermediaries Association, Docket No. FMCSA-2014-0211-2033, at 5–10 (Mar. 2, 2015); Owner-Operator Independent Drivers Association, Inc. and OOIDA Risk Retention Group, Inc., Docket No. FMCSA-2014-0211-2148, at 51–53 (Mar. 3, 2015).

ANPRM, FMCSA determined that it had insufficient data or information to support moving forward with a rulemaking proposal, and withdrew the 2014 ANPRM on June 5, 2017. *See* 82 FR 25753.

D. 2016 Public Informal Roundtable Discussion

On April 27, 2016, the Agency announced that it would host an informal roundtable discussion pertaining to broker and freight forwarder financial responsibility, 81 FR 24935 (Apr. 27, 2016). In its April 27 meeting notice, FMCSA sought comment on denials of claims by BMC-85 providers, the current and prospective composition of BMC-85 trust fund assets, non-FMCSA regulation of BMC-85 providers, actions that FMCSA could take to ensure that motor carriers and shippers can collect on legitimate claims filed with BMC-85 providers, and issues associated with the financial stability of BMC-85 providers. 81 FR at 24937. The Agency received a total of 29 comments in response to the roundtable discussion notice.

On May 20, 2016, the Agency held the full-day informal roundtable discussion at DOT Headquarters in Washington, DC. Stakeholders from around the country attended the event, along with members of FMCSA's Senior Leadership and staff. Public participants included representatives from the BMC-84 surety bond and BMC-85 trust fund industries, broker and freight forwarder trade associations, and motor carrier trade associations. On October 20, 2016, the Agency placed notes summarizing the public meeting and a list of the meeting attendees in this docket.⁴

⁴ FMCSA-2016-0102-0030 (Oct. 20, 2016).

IV. New MAP-21, Sec. 32918, Advance Notice of Proposed Rulemaking

After careful consideration of the public comments the Agency received in response to the 2014 ANPRM and the April 27, 2016 notice, TIA's 2014 Petition for Rulemaking, and the May 20 Roundtable itself, FMCSA has decided to initiate a second rulemaking pertaining to MAP-21 section 32918.⁵ Accordingly, the Agency is issuing this ANPRM to signal its preliminary intentions in connection with such a rulemaking and to seek additional data or information to support moving forward with a rulemaking proposal. As noted above, this ANPRM will render moot TIA's May 9, 2014 Petition for Rulemaking.

A. Two Key Issues Stakeholders Want Addressed

Discussions at the May 20, 2016, informal roundtable revealed that stakeholders are focused on two key issues pertaining to broker/freight forwarder financial responsibility. First, there was widespread agreement among participants that a significant cause of non-payment of motor carriers by brokers or freight forwarders⁶ is the ability of brokers and freight forwarders to continue to operate for 30 days after the surety or trust fund provider notifies FMCSA that it is cancelling the broker's or freight forwarder's financial responsibility. FMCSA does not revoke the broker or freight forwarder's operating authority registration pursuant to 49 U.S.C. 13905(e) until that 30-day period has lapsed. In contrast, the MAP-21 provisions pertaining to immediate suspension of broker or freight forwarder operating authority when the "available

⁵ This initiative will not pertain to increasing motor carrier minimum financial responsibility limits pursuant to 49 U.S.C. 31138-31139.

⁶ The stakeholders indicated that few freight forwarders still operate in the industry and that the primary issues being addressed pertain to brokers, not freight forwarders. FMCSA records indicate there were 1,499 active freight forwarders as of August 2017.

financial security” falls below \$75,000 (49 U.S.C. 13906(b)(5), (c)(6)), appear to be designed to address this lag between surety/trust fund notice of cancellation and removal of the broker/freight forwarders’ ability to operate lawfully. The Agency is therefore considering adopting a rule to suspend immediately any broker’s/freight forwarder’s operating authority when there is an actual drawdown on the bond/trust fund below the \$75,000 minimum requirement or when the broker/freight forwarder does not respond after the surety/trust fund provider provides notice of a valid claim.

Second, at the roundtable discussion, certain stakeholders made it clear to the Agency that there is concern about the financial wherewithal of BMC-85 trust providers, and the sufficiency of the assets within those funds to pay legitimate claims by motor carriers or shippers. On the other hand, representatives of the BMC-85 trust fund provider community, both at the roundtable discussion and in comments filed after the meeting,⁷ asserted that, with one limited exception,⁸ no evidence has been produced showing that BMC-85 providers have failed to pay legitimate claims made on their trusts. While FMCSA acknowledges the BMC-85 providers’ position, the Agency must implement the express will of Congress as reflected in the requirement at 49 U.S.C. 13906(b)(1)(C), (c)(1)(D) that trust funds consist of “assets readily available to pay claims without resort to personal guarantees or collection of pledged accounts receivable.”

⁷ See Comments of: John B. Gilding, Docket No. FMCSA-2016-0102-0021, at 1 (May 31, 2016); Transport Financial Services, LLC, Docket No. FMCSA-2016-0102-0027, at 2–3 (June 20, 2016); Liberty National Financial Corp., Docket No. FMCSA-2016-0102-0029, at 1 (June 28, 2016).

⁸ According to certain stakeholders, Oasis Capital, Inc. (Oasis), a BMC-85 trust fund provider, failed to pay claims due to criminal activity. FMCSA revoked Oasis’s authorization to file BMC-85 trust funds on behalf of brokers in 2010, and the Agency required those brokers utilizing Oasis BMC-85s as evidence of financial responsibility to file new BMC-84s or BMC-85s or face loss of their operating authority. Bonnie Warren, Oasis’s president, ultimately pled guilty to wire fraud in connection with Oasis’s conduct, and the court imposed a sentence that included home confinement and other sanctions. <https://www.oig.dot.gov/library-item/32968>.

While the Agency always welcomes input on its implementation of statutory mandates, as evidenced by the frank, open, and robust discussions at the May 20, 2016 roundtable, FMCSA's primary mission remains the promotion of motor carrier safety. 49 U.S.C. 113(b). Accordingly, in its implementation of section 32918, FMCSA must avoid unnecessary diversion of scarce resources away from critical safety functions. FMCSA's discussion of approaches in today's ANPRM reflects that statutory and operational reality, and the Agency requests that stakeholders consider such constraints in whatever comments they provide in response to this document.

B. Eight Areas Being Considered

After careful consideration, the Agency has decided to focus on eight core areas in this ANPRM: (1) group surety bonds/trust funds, (2) assets readily available, (3) immediate suspension of broker/freight forwarder operating authority, (4) surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency, (5) enforcement authority, (6) entities eligible to provide trust funds for BMC-85 filings, (7) BMC-84 and BMC-85 revisions and (8) HHG.⁹ The following discussion addresses each of these in turn.

1. Group Surety Bonds/Trust Funds

MAP-21 section 32918 authorizes, but does not require, the Agency to accept group surety bonds or trust funds on behalf of brokers or freight forwarders to meet their

⁹ While HHG broker/freight forwarder financial responsibility falls within the scope of MAP-21 Section 32918's new broker/freight forwarder financial security requirements, the Agency has previously recognized that HHG broker financial security as distinct from other property broker financial security. *See* Brokers of Household Goods Transportation by Motor Vehicle, 75 FR 72987 (Nov. 29, 2010), in which the Agency increased the broker bond/trust fund amount for HHG brokers only, from \$10,000 to \$25,000. Accordingly, in this ANPRM regarding broker/freight forwarder financial responsibility, the Agency announces it is considering changes specific to HHG broker/freight forwarder financial responsibility and seeks related specific information.

financial responsibility requirements. 49 U.S.C. 13906(b)(1)(B) and 13906(c)(1)(B). In Registration and Financial Security Requirements for Brokers of Property and Freight Forwarders, 78 FR 54720 (Sep. 5, 2013), the Agency stated that it would not be accepting group instruments at that time. 78 FR at 54721. The Agency indicated it would re-examine the issue, however.

While the term “group surety bond” does not appear to be commonly used, the Agency has identified and examined a group surety bond provision within the Federal Maritime Commission (FMC) regulations. 46 CFR 515.21. FMC regulates Ocean Transportation Intermediaries (OTIs), consisting of Non-Vessel Operating Common Carriers (NVOCCs) (similar to FMCSA-regulated freight forwarders), and freight forwarders (similar to FMCSA-regulated brokers). These OTIs are required to submit evidence of financial responsibility to FMC and can submit group surety bonds as evidence of such financial responsibility. In a group surety bond arrangement, OTI members pay a fee to belong to a group, which then provides the required surety bond for each member. FMC’s group surety bond provision allows the group to establish financial responsibility in the amount required for each individual member or \$3,000,000 in aggregate, whichever is less.

FMCSA is concerned that monitoring whether group instruments comply with MAP-21 will impose a significant administrative burden on the Agency, potentially to the detriment of safety oversight, without providing a commensurate benefit for motor carriers and shippers, the intended beneficiaries of the surety bonds and trust funds. The benefit to these beneficiaries from group instruments likely would be unchanged, as the same total level of financial protection would still be required.

Further, because FMCSA requires that a trust fund or surety bond cover each broker or freight forwarder for \$75,000, the FMC surety bond requirement, with its \$3 million cap, does not provide an adequate model for the Agency to ensure levels of financial security as contemplated by the statute. In addition, the Agency has been unable to locate any definition for group trust funds. Therefore, with no adequate model for group surety bonds or trusts funds, the Agency is not currently inclined to accept group sureties or trust funds. Before the Agency considers the matter of group surety or trust arrangements further for purposes of developing a notice of proposed rulemaking (NPRM) in this docket, we specifically seek comment on the definition of “group surety bond” or “group trust fund” and how the Agency could administer such a group surety or trust option given its limited resources.

2. Assets Readily Available

As noted above, Congress issued a clear mandate in MAP-21 that broker/freight forwarder trust funds must consist of “assets readily available to pay claims without resort to personal guarantees or collection of pledged accounts receivable.” 49 U.S.C. 13906(b)(1)(C), (c)(1)(D). The Agency is committed to adopting a definition of “assets readily available” that implements the will of Congress and is reasonable for the Agency to administer given its resource constraints.

Stakeholders provided numerous comments on the definition of “assets readily available” at the roundtable discussion and in associated written comments. Avalon Risk Management Insurance Agency LLC (Avalon), an underwriter of BMC-84 bonds, suggested in its pre-roundtable comments that cash or certain irrevocable letters of credit issued by Federal Deposit Insurance Corporation (FDIC)-insured banks would satisfy the

standard.¹⁰ The Surety & Fidelity Association of America (SFAA), also in pre-roundtable comments, looked to other federal law or regulation for a standard.¹¹ In particular, SFAA cited Federal Acquisition Regulation (FAR) 28.204, which, according to SFAA, requires that financial security be provided in the form of United States government bonds or notes, a certified or cashier's check, an irrevocable letter of credit, or other options that are easily convertible into cash. SFAA's post-roundtable comment also recommended that \$75,000 of broker assets need to be in trust funds.¹² In post-roundtable comments, JW Surety Bonds, a company that issues BMC-84 surety bonds, argued for full funding of the trust with non-volatile liquid assets, including cash or an irrevocable letter of credit from an FDIC-insured bank.¹³

While FMCSA has heard from multiple representatives of the BMC-84 industry on an appropriate definition of "assets readily available," it has heard little from the BMC-85 industry. We received only one comment, from the Chief Executive Officer of Pacific Financial Association, Inc. (Pacific Financial), the largest filer of BMC-85s with FMCSA. At the roundtable, Pacific Financial indicated that Congress clearly did not limit the term to cash only. It also suggested that if a trust purchased a bond to cover a \$75,000 guarantee, such an arrangement could be sufficient.¹⁴ Pacific Financial also filed supplemental materials and pointed to their own "internal letter of credit" as a viable alternative.

¹⁰ See Comments of Avalon Risk Management Insurance Agency LLC, Docket No. FMCSA-2016-0102-0014, at 3-4 (May 18, 2016).

¹¹ See Comments of The Surety & Fidelity Association of America, Docket No. FMCSA-2016-0102-0011, at 2 (May 9, 2016).

¹² See Comments of The Surety & Fidelity Association of America, Docket No. FMCSA-2016-0102-0022, at 2-3 (June 7, 2016).

¹³ See Comments of JW Surety Bonds, Docket No. FMCSA-2016-0102-0023, at 5, 8 (June 10, 2016).

¹⁴ See Broker and Freight Forwarder Financial Responsibility Roundtable Discussion Notes, Docket No. FMCSA-2016-0102-0030, at 6 (Oct. 20, 2016).

After a careful analysis and with specific regard for Pacific Financial's comments, the Agency is currently considering proposing a definition of "assets readily available" to include cash or FMCSA-approved letters of credit.¹⁵ FMCSA is considering accepting letters of credit from FDIC-approved banks, but is also open to other options.

The Agency solicits suggestions from the BMC-85 industry and others about how the Agency could accept letters of credit and other instruments that could meet the "assets readily available" standard without requiring significant oversight or evaluation that would divert scarce safety resources. The Agency also specifically seeks comment from the surety bond industry on that industry's capacity to meet the increased market demand if FMCSA were to adopt a cash-only standard for BMC-85 trust funds, which could potentially drive a significant segment of the broker/forwarder industry into surety bond coverage. Additionally, FMCSA seeks comment from the surety bond industry on the cost to brokers and freight forwarders of BMC-84 surety bonds.

3. Immediate Suspension of Operating Authority

MAP-21 section 32918 provides that "[FMCSA] shall immediately suspend the registration of a broker...if the available financial security of that person falls below [\$75,000]." 49 U.S.C. 13906(b)(5); see also 49 U.S.C. 13906(c)(6) (substantively identical language for freight forwarders). Accordingly, to effectively implement these provisions, FMCSA first needs to determine when the "available financial security" of a broker/freight forwarder is below \$75,000. At the roundtable discussion, the Owner-

¹⁵ Before MAP-21, the Agency signaled its view that broker trust funds must consist of cash. In describing a delayed effective date for the increase of the surety bond/trust fund requirement from \$10,000 to \$25,000 for HHG brokers in its 2010 HHG broker rulemaking, the Agency stated "for those household goods brokers using trust fund agreements, this should give sufficient time for these entities to raise the additional \$15,000 of capital to place in escrow with their trust fund managers." Brokers of Household Goods Transportation by Motor Vehicle. 75 FR 72987, 72992 (Nov. 29, 2010).

Operator Independent Drivers Association (OOIDA) indicated that as soon as a surety provides notice to a broker in connection with a claim and the broker does not respond to the notice, the broker's operating authority registration should be suspended.¹⁶ According to the Roanoke Insurance Group (Roanoke), a series of claims should trigger quicker suspension of the broker's operating authority.¹⁷ Roanoke also indicated that quicker suspension should occur where the broker does not respond to communications about the claim.¹⁸ In post-meeting comments, Liberty National Financial Corporation said a broker's failure to respond to a surety contact about a claim in 24 hours would be a reasonable trigger for suspension of the broker's authority.¹⁹

The Agency is considering an approach where it would "immediately suspend" the authority of a broker or freight forwarder in one of two situations. First, it would suspend when it receives notice from the surety or trust fund provider that a drawdown/payout on the bond/trust has occurred, such that the available financial security is less than \$75,000. The second situation would be where: (1) a surety/trust fund provider gives reasonable notice of a claim to the broker/freight forwarder, (2) the broker/freight forwarder does not respond, and (3) the surety/trust fund provider determines that the claim is valid and provides notice of these events to FMCSA. In this situation there often may be reason to conclude that, had the unpaid claim actually been paid, the remaining available financial security would have fallen below \$75,000.

FMCSA seeks comment on the appropriate cushion time for brokers or freight forwarders

¹⁶ See Broker and Freight Forwarder Financial Responsibility Roundtable Discussion Notes, Docket No. FMCSA-2016-0102-0030, at 2 (Oct. 20, 2016).

¹⁷ *Id.* at 7.

¹⁸ *Id.*

¹⁹ See Comments of Liberty National Financial Corp., Docket No. FMCSA-2016-0102-0029, at 2 (June 28, 2016).

to respond to claims made to the guarantors, valid or otherwise. Such a grace period would seem to give firms adequate time to adjudicate claims and settlements internally, as well as price in the costs associated with any claims relating to contract noncompliance.

Suspending broker/freight forwarder operating authority whenever a claim is filed against a broker/freight forwarder or its bond/trust would raise due process concerns, as the Agency would be prohibiting the broker/freight forwarder from lawfully operating, without affording the company a chance to respond. In continuing to develop information to inform an NPRM, the Agency will consider how it can “immediately suspend” broker/freight forwarder operating authority registration in a manner that is consistent with constitutional due process requirements, e.g., by providing an appropriate opportunity for post-deprivation review. FMCSA specifically invites comments responsive to this issue, including documented incidence of actual nonpayment that occurred after problem brokers or freight forwarder were not “immediately” suspended.

4. Surety or Trust Responsibilities in Cases of Broker/Freight Forwarder Financial Failure or Insolvency

Section 32918 requires sureties or trust fund providers to commence action to cancel broker or freight forwarder surety bonds or trust funds in the event of broker/freight forwarder “financial failure” or “insolvency.” 49 U.S.C. 13906(b)(6), (c)(7). Accordingly, to effectively implement this provision, the Agency needs to determine what “financial failure” or “insolvency” means. FMCSA has received public comments on these terms.

In response to the 2014 financial responsibility ANPRM, Avalon indicated “financial failure or insolvency” should mean more than just “bankruptcy or a total

disappearance of the principal, but also include a clear pattern of unresolved claims in a sufficient volume to constitute a constructive financial failure.”²⁰ Avalon reiterated those statements in its pre-roundtable discussion comments and added that “security providers should be allowed to respond in cases where there are three or more claims aggregating in excess of \$25,000 which have remained unresolved for at least 30 days.”²¹ SFAA, in its post-roundtable discussion letter, says a definition similar to Avalon’s position is inadequate, as claims may not need to be paid.²² At the May 20, 2016, roundtable discussion, TIA said perhaps three or more claims aggregating to a certain amount could constitute a financial failure of the broker.²³ The claims would have to remain unresolved for a certain amount of days. Avalon stated at the roundtable that financial failure could be established if “X” number of claims accrue in “Y” number of days.²⁴

The Agency is considering a definition of “financial failure” or “insolvency” that would apply at a pre-bankruptcy stage. In this regard, a Bankruptcy Court case in the District of Delaware found that 49 U.S.C. 13906(b)(6) did not apply to a broker’s bond in a bankruptcy case.²⁵ Consistent with this view, “financial failure or insolvency” under MAP-21 section 32918 would be established where the broker or freight forwarder has claims against its bond/trust, is not responding to notifications from the trust or surety provider within 14 days, and is not in bankruptcy proceedings. FMCSA has suggested

²⁰ Comments of Avalon Risk Management Insurance Agency LLC, Docket No. FMCSA-2014-0211-1675, at 8–9 (Feb. 25, 2015).

²¹ Comments of Avalon Risk Management Insurance Agency LLC, Docket No. FMCSA-2016-0102-0014, at 6-7 (May 18, 2016).

²² See Comments of The Surety & Fidelity Association of America, Docket No. FMCSA-2016-0102-0022, at 4 (June 7, 2016).

²³ See Broker and Freight Forwarder Financial Responsibility Roundtable Discussion Notes, Docket No. FMCSA-2016-0102-0030, at 4 (Oct. 20, 2016).

²⁴ *Id.* at 7.

²⁵ *AWI Delaware, Inc., et al.*, Case No. 14-12092 (KJC) (Bankr. D. Del. Nov. 25, 2014).

these criteria for “financial failure or insolvency” as commenters have suggested that unresolved claims are consistent with a broker’s “financial failure or insolvency.” Moreover, through interaction with stakeholders, FMCSA has learned that a broker’s failure to respond to notices about claims from a surety or trust often indicates that the broker is out of business. At the same time, giving a broker or freight forwarder 14 days to respond to the surety or trust fund provider before a determination of “financial failure” is made would give the broker or freight forwarder an opportunity to respond if their nonresponse was based on a lack of communication or other short term issue, as opposed to a financial failure. In suggesting a definition of “financial failure or insolvency” that applies outside of bankruptcy, FMCSA is also adopting the holding from the referenced *AWI Delaware* case. Moreover, given that Section 13906(b)(6) and (c)(7)’s “financial failure or insolvency” provisions require action by the surety or trust fund provider against the broker or freight forwarder’s surety bond or trust fund, applying these provisions in bankruptcy could run afoul of the automatic stay provisions of bankruptcy law.

Additionally, section 32918 requires that in the event of “financial failure” or “insolvency,” surety providers must “publicly advertise” for claims for 60 days beginning on the date FMCSA publishes the surety’s notice to cancel the surety bond/trust. 49 U.S.C. 13906(b)(6)(B), (c)(7)(B). The Agency is considering a definition of “publicly advertise” that could be satisfied through FMCSA’s posting of the cancellation notice on its website. The Agency is investigating whether it can flag such “financial failure” cancellations with a special code, so that potential claimants reviewing a broker or freight forwarder’s records on the FMCSA website will know that a 60-day period to make a

claim has begun to run. The Agency seeks comments on how “financial failure or insolvency” and “publicly advertise” should be defined.

5. Enforcement Authority

Under 49 U.S.C. 13906(b)(7), (c)(8), FMCSA has been granted expanded enforcement authority over surety providers. FMCSA has new civil penalty authority to suspend non-compliant surety providers from providing broker or freight forwarder financial responsibility for three years, and further authority to sue non-compliant surety providers in Federal court. FMCSA anticipates that it will revise its regulations to incorporate these new civil penalty provisions. It also intends to modify 49 CFR 387.317 (brokers) and 387.415 (freight forwarders) to incorporate the new surety suspension authority. The Agency expects to establish a procedure for such suspensions where it will issue an order to show cause against a non-compliant surety provider, weigh evidence submitted by the provider, and make a final decision. The Agency seeks input on the development of these surety suspension procedures.

6. Eligible BMC-85 Trust Funds

FMCSA has broad authority under MAP-21 to determine who is eligible to provide trust fund services on behalf of brokers or freight forwarders. Under 49 U.S.C. 13906(b)(1)(A), a broker must file a surety bond or trust fund from a provider “determined by the Secretary to be adequate to ensure financial responsibility.” See also 49 U.S.C. 13906(c)(1)(A) for freight forwarders. Under current regulations at 49 CFR 387.307, a “financial institution” may file trust funds. In addition to other types of entities, “loan or finance” companies are considered financial institutions pursuant to 49 CFR 387.307(c)(7).

Commenters have addressed the suitability of the “loan or finance” company category of “financial institution.” Avalon, in pre-roundtable discussion comments, indicated “loan and finance” companies are “far less regulated if at all.”²⁶ It also indicated that “FMCSA’s refusal to deal with the regulatory gaps is an abrogation of its responsibility to state regulators who do nothing and don’t care.”²⁷ Avalon proposed deleting the “loan or finance company” and the “person subject to supervision by any State or Federal bank supervisory authority” categories from the regulation. (49 CFR 387.307(c)(7) and (8)). Avalon asserted that “these entities are not sufficiently regulated by the states to safeguard the public interest and the FMCSA has neither the staff nor the inclination to regulate them.”²⁸ JW Surety, in pre-roundtable discussion comments, stated that BMC-85 providers are “operating unregulated by any government agency.”²⁹ In post-roundtable comments, it agreed with Avalon that § 387.307(c)(7) and (8) should be eliminated.³⁰ SFAA, in its post-roundtable comments, indicated that FMCSA could require that BMC-85 providers be licensed as trust companies by a State regulator.³¹ JW Surety, in post-meeting comments, argued that BMC-85 providers should be licensed trust companies or FDIC-insured banks.³²

FMCSA is considering amending the definition of “loan or finance company” to ensure that BMC-85 providers’ ability to pay claims out of trust funds is adequately monitored. FMCSA is considering defining “loan or finance company” to include only

²⁶ Comments of Avalon Risk Management Insurance Agency LLC, Docket No. FMCSA-2016-0102-0014, at 4 (May 18, 2016).

²⁷ *Id.* at 13.

²⁸ *Id.*

²⁹ Comments of JW Surety Bonds, Docket No. FMCSA-2016-0102-0017, at 1 (May 19, 2016).

³⁰ See Comments of JW Surety Bonds, Docket No. FMCSA-2016-0102-0025, at 9 (June 10, 2016).

³¹ See Comments of The Surety & Fidelity Association of America, Docket No. FMCSA-2016-0102-0022, at 2 (June 7, 2016).

³² See Comments of JW Surety Bonds, Docket No. FMCSA-2016-0102-0025, at 5 (June 10, 2016).

companies regulated by entities that require certain minimum solvency standards.

FMCSA intends to reach out to appropriate State regulators and professional associations as part of the rule development process.

Given the Agency's primary safety focus, and consistent with its motor carrier financial responsibility regulations at 49 CFR 387.315, FMCSA must rely on other agencies to be the primary regulators of those who file financial responsibility instruments with FMCSA. In the case of BMC-84 surety providers, State insurance regulators and the United States Department of Treasury provide such regulatory oversight. The Agency is concerned, however, that 49 CFR 387.307(c)(7) currently allows entities that are not adequately regulated to administer trust funds. For example, the California Department of Business Oversight, which regulates several BMC-85 providers, provides a California Finance Lender license for a person engaged in the business of making consumer or commercial loans. Similarly, the Florida Office of Financial Regulation, which regulates a large BMC-85 provider, provides a Consumer Finance Company license for entities that solicit, make, and collect small loans. BMC-85 providers serve as trustees, not lenders. Accordingly, being regulated as a lender may not provide sufficient oversight for BMC-85 providers.

Moreover, given that BMC-85 providers administer trusts on behalf of brokers or freight forwarders, the Agency is considering whether to require BMC-85 providers to be licensed as trust providers. We expressly invite comments in that regard to inform an NPRM.

7. BMC-84 and BMC-85 Form Revisions

Surety bond providers file BMC-84 surety bonds with FMCSA as evidence of financial responsibility on behalf of brokers and freight forwarders. Trust fund providers similarly file BMC-85 trust funds with FMCSA. The Agency anticipates the need for revisions to the BMC-84 and BMC-85 forms if rulemaking is proposed. FMCSA invites comments to identify recommended changes to the forms. Changes to the BMC-84/85 will be proposed in any NPRM and, as measures effecting an Agency information collection, will be approved through the Office of Management and Budget in accordance with the Paperwork Reduction Act.

8. Household Goods

As part of its mission, FMCSA has jurisdiction over the transportation of household goods (HHG) and the arranging of HHG transportation.³³ HHG transportation is significantly different than general property transportation. This is reflected in FMCSA regulations, such as 49 CFR part 375 (Transportation of Household Goods in Interstate Commerce; Consumer Protection Regulations) and 49 CFR part 371 subpart B (Special Rules for Household Goods Brokers), which treat HHG transportation differently than other types of property transportation. Given those differences, FMCSA seeks information on whether HHG brokers and freight forwarders should be regulated differently than general property brokers and freight forwarders in a rulemaking on broker/freight forwarder financial responsibility. FMCSA notes that we have received

³³ 49 U.S.C. 13501. HHG is a kind of property and is defined at 49 U.S.C. 13102(10). FMCSA has jurisdiction over HHG freight forwarder operations pursuant to 49 U.S.C. 13531.

complaints about HHG brokers,³⁴ and we solicit comments to help determine whether there is a unique market structure that might suggest need for additional fraud protections.

FMCSA is also seeking information on the payment flows among HHG shippers, brokers and motor carriers. The Agency is aware of arrangements where HHG shippers pay HHG brokers a deposit and then pay the remainder of the transportation charges directly to the HHG motor carrier. Under these arrangements, the Agency believes no monies pass directly between the broker and motor carrier. FMCSA seeks information on the prevailing payment models in the HHG broker industry in this ANPRM.

V. Rulemaking Analyses

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

Under E.O. 12866, “Regulatory Planning and Review” (issued September 30, 1993, published October 4 at 58 FR 51735), as supplemented by E.O. 13563 and DOT policies and procedures, if a regulatory action is determined to be “significant,” it is subject to Office of Management and Budget (OMB) review. E.O. 12866 defines “significant regulatory action” as one likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

³⁴ Through its National Consumer Complaint Database (NCCDB), in Fiscal Year 2017, the Agency received 626 valid HHG complaints regarding HHG broker activity, primarily “low ball” estimates, where the broker estimates an artificially low price that the delivering carrier does not honor.

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency.

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof.

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Department has determined this ANPRM is a “significant regulatory action” under E.O. 12866, and significant under DOT regulatory policies and procedures due to significant public interest in the legal and policy issues addressed. Therefore, this document has been reviewed by OMB.

B. E.O. 13771 Reducing Regulation and Controlling Regulatory Costs

E.O. 13771 (82 FR 9339, February 3, 2017), Reducing Regulation and Controlling Regulatory Costs, requires that for “every one new [E.O. 13771 regulatory action] issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.” Implementation guidance for E.O. 13771 issued by the Office of Management and Budget (OMB) (Memorandum M-17-21, April 5, 2017) defines two different types of E.O. 13771 actions: an E.O. 13771 deregulatory action, and an E.O. 13771 regulatory action.

An E.O. 13771 deregulatory action is defined as “an action that has been finalized and has total costs less than zero.”

An E.O. 13771 regulatory action is defined as:

(i) a significant action as defined in Section 3(f) of E.O. 12866 that has been finalized, and that imposes total costs greater than zero; or

(ii) a significant guidance document (e.g., significant interpretive guidance) reviewed by OIRA under the procedures of E.O. 12866 that has been finalized and that imposes total costs greater than zero.

The Agency action, in this case a rulemaking, must meet both the significance and the total cost criteria to be considered an E.O. 13771 regulatory action. As the Department has determined this ANPRM is a “significant regulatory action” under E.O. 12866, and significant under DOT regulatory policies and procedures due to significant public interest in the legal and policy issues addressed, it meets the significance criterion for being an E.O. 13771 regulatory action; however, the requirements of E.O. 13771 do not apply to pre-notice of proposed rulemakings such as ANPRMs.

FMCSA specifically seeks comment on how the Agency should analyze various aspects of a possible NPRM in this proceeding and how the Agency could limit possible burdens on entities.

C. Small Business Regulatory and Enforcement Fairness Act

FMCSA has not yet determined whether an Initial Regulatory Flexibility Analysis (IRFA) will be required for any of the eight enumerated alternatives listed above. However, if an IRFA is required, FMCSA is considering holding one or more Small Business Regulatory Panels. If you are a small business who would like to be included in such a panel, please submit a comment indicating as such. The Agency also seeks comment on the small business impacts of the Agency’s suggested courses of action in this ANPRM.

VI. Comments Sought

The Agency specifically seeks comments and data from the public in response to this ANPRM. We request that commenters address their comments specifically to the enumerated list of issues below, and that commenters number their comments to correspond to each issue. FMCSA anticipates some of the information and data sought may include CBI, and these comments should be filed in accordance with the requirements of 49 CFR 389.9 *Treatment of confidential business information* and the instructions above under the subheading *Confidential Business Information* under the headings ADDRESSES and Public Participation and Request for Comments.

1. FMCSA specifically seeks comment on the definition of “group surety bond” or “group trust fund” and how the Agency could administer such a group surety or trust option given its limited resources.
2. The Agency solicits suggestions from the trust fund industry and others about instruments the Agency could accept that would meet the “assets readily available” standard without requiring significant FMCSA oversight or evaluation that would divert scarce safety oversight resources.
3. The Agency specifically seeks comment from the surety bond industry on that industry’s capacity to meet the increased market demand if FMCSA were to adopt a cash-only standard for BMC-85 trust funds, which could potentially drive a significant segment of the broker/forwarder industry into surety bond coverage.
4. FMCSA seeks comment and data from the surety bond industry on the cost to brokers and freight forwarders of BMC-84 surety bonds.

5. The Agency will consider how it could “immediately suspend” broker/freight forwarder operating authority registration in a manner that is consistent with constitutional due process requirements, e.g., by providing an appropriate opportunity for post-deprivation review. FMCSA invites comments responsive to this issue, including documented incidence of actual nonpayment that occurred after problem brokers or freight forwarder were not “immediately” suspended.
6. FMCSA seeks comment on the appropriate cushion time for brokers or freight forwarders to respond to claims made to the guarantors, valid or otherwise. Such a grace period would seem to give firms adequate time to adjudicate claims and settlements internally, as well as price in the costs associated with any claims relating to contract noncompliance.
7. The Agency seeks comments on the how “financial failure or insolvency” and “publicly advertise” should be defined under MAP-21 Section 32918.
8. The Agency seeks input on the development of surety suspension procedures authorized pursuant to 49 U.S.C. 13906(b)(7) and (c)(8).
9. The Agency requests comments regarding whether FMCSA should require BMC-85 trust fund providers to be licensed as trust providers and how 49 CFR 387.307(c)(7) (loan or finance company) could be amended to ensure that adequate monitoring of BMC-85 providers’ ability to pay claims is taking place.

10. The Agency anticipates the need for revisions to the BMC-84 and BMC-85 forms if rulemaking is proposed. FMCSA requests comments to identify suggested changes to the forms.
11. FMCSA seeks information on whether HHG brokers and freight forwarders should be regulated differently than general property brokers and freight forwarders in a rulemaking on broker/freight forwarder financial responsibility.
12. FMCSA solicits comments to help determine whether there is a unique market structure in the HHG broker market that might suggest the need for additional fraud protections for shippers utilizing HHG brokers.
13. FMCSA seeks information on the prevailing payment models and payment flows among HHG shippers, motor carriers and brokers.
14. While noting the MAP-21 requirements, FMCSA is seeking comment on whether the market is capable of addressing these issues. For example, if a broker/freight forwarder has a history of noncompliance with contracts, would surety/trust firms be less likely to back them or charge a higher premium/trust management fee? Is there a market failure that is preventing these transactions from taking place efficiently?
15. FMCSA specifically seeks comment on how the Agency should analyze various requirements for a possible NPRM to meet the requirements of E.O. 12866 and 13771, and how the Agency could limit possible burdens on regulated entities.

16. FMCSA requests comments on any other aspects of implementing section 32918 that may be necessary and how these areas could be implemented in a way that would not divert scarce safety oversight resources.

17. FMCSA requests comment on the small business impacts of its suggested courses of action in this ANPRM.

Issued under the authority of delegation in 49 CFR 1.87: September 21, 2018

Raymond P. Martinez,
Administrator.

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