



[4910 EX-P]

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2020-0150]

Owner-Operator Independent Drivers Association, Small Business in Transportation Coalition Petitions for Rulemaking; Transparency in Property Broker Transactions

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

ACTION: Notice; request for public comments.

SUMMARY: FMCSA requests public comments on petitions for rulemaking to amend certain requirements for property brokers submitted by the Owner-Operator Independent Drivers Association (OOIDA) and the Small Business in Transportation Coalition (SBTC). OOIDA requests that FMCSA require property brokers to provide an electronic copy of each transaction record automatically within 48 hours after the contractual service has been completed, and prohibit explicitly brokers from including any provision in their contracts that requires a motor carrier to waive its rights to access the transaction records. SBTC requests that FMCSA prohibit brokers from coercing or otherwise requiring parties to brokers' transactions to waive their right to review the record of the transaction as a condition for doing business. SBTC also requests that FMCSA adopt regulatory language indicating that brokers' contracts may not include a stipulation or clause exempting the broker from having to comply with the transparency requirement.

DATES: Comments must be submitted by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by Docket Number FMCSA-2020-0150 using any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Mail: Docket Operations, U.S. Department of Transportation, 1200 New Jersey Avenue, S.E., West Building, Ground Floor, Room W12-140, Washington, D.C. 20590-0001.
- Hand Delivery or Courier: Docket Operations, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Docket Operations.
- Fax: (202) 493-2251.

To avoid duplication, please use only one of these four methods. See the “Submitting Comments” portion of the SUPPLEMENTARY INFORMATION section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. La Tonya Mimms, Chief, Driver and Carrier Operations, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590-0001, by telephone at (202) 366-4001, or by email at MCPSD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Services, (202) 366-9826.

SUPPLEMENTARY INFORMATION:

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA-2020-0150), 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 means. FMCSA recommends that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, put the docket number, FMCSA-2020-0150, 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 on 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.

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

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA, 5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to the notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to the notice, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as “PROPIN” to

indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket for this notice. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief, Regulatory Analysis Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue S.E., Washington D.C. 20590. Any comments FMCSA receives which are not specifically designated as CBI will be placed in the public docket for this notice.

B. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA-2020-0150 in the keyword box, and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Docket Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590-0001, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Docket Operations.

C. 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.transportation.gov/privacy.

I. BACKGROUND

A. Brokers' Records of Transactions; History of Current Requirements

Section 371.3(c) of title 49 of the CFR states that “[e]ach party to a brokered transaction has the right to review the record of the transaction required to be kept by these rules.” The current requirements under 49 CFR 371.3(c) were adopted by the Interstate Commerce Commission (ICC) on October 17, 1980 (45 FR 68941), at 49 CFR 1045.3(c). Prior to 1980, the broker records requirements under 49 CFR 1045.3 did not include a specific provision concerning the rights of parties to a brokered transaction to review the record of the transaction. In its May 12, 1980 (45 FR 31140) notice of proposed rulemaking concerning multiple broker regulations, the ICC explained that the proposed change to section 1045(c) would allow the agency to “. . . eliminate more complex rules found at sections 1045.5, 1045.6, and 1045.10.” Those requirements related to charges for brokerage services, charges for non-brokerage services, and duties and obligations of brokers, respectively.

With the termination of the ICC in 1995, the regulatory oversight of brokers was transferred to the Federal Highway Administration (FHWA) and the requirements under 49 CFR 1045.3 were redesignated, without change, under 49 CFR 371.3 (61 FR 54707; October 21, 1996). Subsequently, with the establishment of FMCSA in 2000, all motor carrier oversight responsibilities and regulations were transferred from FHWA to FMCSA.

B. OOIDA Petition for Rulemaking

OOIDA requested that FMCSA amend 49 CFR 371.3 to require brokers to provide an electronic copy of each transaction record automatically within 48 hours after the contractual service has been completed. OOIDA also requested that the Agency explicitly prohibit

brokers from including any provision in their contracts that requires a carrier to waive their rights to access the transaction records required by section 371.3.

OOIDA explained that with freight rates reaching historic lows, small motor carriers of property are struggling financially. Motor carriers have expressed frustration about the lack of transparency between brokers and motor carriers. OOIDA believes the problem is that the regulations designed to provide transparency are routinely evaded by brokers or simply not enforced by FMCSA. While the current rules require brokers to keep transaction records and permit each party to a brokered transaction to review the records, many brokers implement hurdles they know will prevent a carrier from ever seeing this information. For example, some brokers allow a motor carrier to access records only at the broker's office during normal business hours, and OOIDA argues this makes it virtually impossible for motor carriers to access the records. Given that many business transactions now take place electronically, OOIDA believes that the rules need to be updated to improve transparency and prevent brokers from keeping their transaction records from motor carriers that are not located near the broker. The updated rules would also prevent brokers from retaliating against carriers that request the transaction information. A copy of the OOIDA petition is included in the docket for this notice.

C. SBTC Petition for Rulemaking

The SBTC requested that FMCSA amend 49 CFR 371.3 to prohibit brokers from coercing or otherwise requiring parties to a transaction to waive their right to review the record of the transaction as a condition of doing business. The requested language would also state that "No stipulation or clause in any contract shall exempt any broker from having to comply with this rule, upon demand, by a party to the transaction."

SBTC explained that freight rates have dropped drastically and that motor carriers have reported instances of brokers engaging in “profiteering, price gouging and low-balling tactics.” SBTC claims that in some instances, brokers are receiving commissions of up to 65 percent on loads due to a sudden shortage of freight and over-capacity in the transportation market. SBTC stated that, to evade regulations, some brokers have resorted to requiring carriers, as parties to broker transactions, to waive their rights to obtain documents that show the amount the shipper is paying the broker. SBTC further states that the provisions in 49 CFR 371.3 should be strengthened to stop this abuse, noting:

While the SBTC does not seek to return to economic regulation to limit the amounts or percentages brokers earn and believe this should be left to the free market – much like we wouldn’t want carriers’ revenue to suddenly be limited, transparency is essential in making sure market forces operate ethically and fairly. We believe FMCSA should enforce its rule and act to terminate this abuse by big brokers in the marketplace.

A copy of SBTC’s petition is included in the docket for this notice.

II. REQUEST FOR PUBLIC COMMENTS

Petitions for rulemaking are governed by DOT regulations codified at 49 CFR 5.13 and FMCSA regulations at 49 CFR 389.31 and 389.33. While these regulations do not require FMCSA to publish a notice in the Federal Register seeking public comments, FMCSA believes that taking this action would provide a means of engaging stakeholders in the process for assessing the need for a rulemaking. FMCSA therefore requests public comments on OOIDA’s and SBTC’s petitions for rulemaking. The Agency seeks public feedback concerning its statutory authority to require that brokers disclose certain financial details about transactions to motor carriers, and further seeks comments on whether a regulatory action would provide an effective solution to the problem described. Commenters are encouraged to provide responses to the following questions:

1. FMCSA has authority under 49 U.S.C. 14122(a) to require the form of records to be prepared or compiled by carriers and brokers, the Agency's right of inspection under 49 U.S.C. 14122(b), its authority to prescribe time periods for preservation of records under 49 U.S.C. 14122(c), and its authority to require annual financial reports from motor carriers, freight forwarders and brokers. FMCSA also has discretionary authority to prescribe regulations to carry out the provisions of 49 U.S.C. 13101-14916 that govern the commercial aspects of motor carrier and broker transportation. 49 U.S.C. 13301(a). Section 13301(a) is the statutory successor to former 49 U.S.C. 10321, which the ICC relied on in 1980 in prescribing the regulations later redesignated as part 371. 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?
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?
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?

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?
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?
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.
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?

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?

Issued under authority delegated in 49 CFR 1.87.

Heather Eilers-Bowser,
Chief Counsel.

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