



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Chapter III

[Docket No. FMCSA-2020-0194]

Transportation Intermediaries Association Petition for Rulemaking Concerning Property Broker Transaction Records and Regulatory Guidance Concerning Dispatch Services

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

ACTION: Petition for rulemaking; request for public comments.

SUMMARY: FMCSA requests public comments on the Transportation Intermediaries Association (TIA) petition for rulemaking concerning the rights of parties to a brokered transaction to review the records of the transaction and its request that the Agency issue regulatory guidance concerning dispatch services. TIA believes transparency in broker transactions is provided through other means in today's market place and that the regulatory guidance would ensure that interested parties can distinguish between a dispatch service and an authorized broker.

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-2020-0194 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 “Public Participation and Request for 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 document (Docket No. FMCSA-2020-0194), 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-2020-0194, 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 document. 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 document.

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-2020-0194 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. Petition for Rulemaking

TIA requested that FMCSA rescind 49 CFR 371.3(c) concerning the rights of parties to a brokered transaction to review the records of the transaction. TIA wrote, “The Interstate Commerce Commission’s (ICC) commentary in the Federal Register notice published on May 12, 1980 offers an interesting perspective on the purpose of the broker transaction (emphasis added):

The amount of the broker’s fee is not regulated by the Commission. This means that a broker must engage in a bargaining process with its principals. The amount of commission that a principal agrees to pay will vary according to the benefits it perceives it will gain from the transaction. No party is obligated to deal with a broker or pays its commissions. A party may either choose to do without the brokers’ services or to look for another broker who will offer the service at a lower price. In this regard, we note that the property broker industry is a highly competitive one. Our goal in regulating transactions between brokers, carriers, and shippers is to remove all unnecessary restrictions which might impede the free operation of the marketplace.”

TIA argues that 49 CFR 371.3(c) is in direct conflict with the original intent of the ICC to ensure that “all unnecessary restrictions which might impede the free operation of the marketplace” are removed. TIA stated, “In today’s marketplace brokers are not commissioned sales agents of motor carriers. As noted above brokers pay motor carriers regardless of the rate that the shipper pays the broker. The need to verify commissions no longer exists.”

TIA asserts that motor carrier transportation on the spot market is one of the most transparent market places in the world. Load boards, the internet, and rate quotes in person-to-person communications within the industry provide the rate transparency that was intended by 49 CFR 371.3 when commissions paid by carriers to brokers were common.

Motor carriers have sufficient access to current market rates without inspecting brokers' shipment records to find out what the brokers' gross margins are on a load-by-load basis.

C. TIA Request for Regulatory Guidance Concerning Dispatch Services

TIA believes that some "dispatch services" are essentially unlicensed brokers that handle financial transactions for freight transportation services but do not meet the statutory licensing or financial security requirements applicable to brokers registered with FMCSA. TIA describes dispatch services as entities that provide a service on behalf of a motor carrier, where they assist on booking loads and other services.

TIA believes the Agency should publish regulatory guidance explaining that the legal duties of a dispatch service allow them to be an agent for one motor carrier, and that anything further requires a brokerage license and compliance with the financial responsibility requirements applicable to brokers. TIA believes this is especially necessary when the dispatch service is handling payment from the shipper and then making payment to the motor carrier. According to TIA, this guidance would ultimately enable private legal action to be taken for violations, which would allow the public and the Agency both to enforce the provisions of this regulation. A copy of TIA's letter petitioning the Agency to initiate rulemaking and to issue regulatory guidance is included in the docket for this document.

D. 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 comment on TIA's petition for rulemaking to rescind 49 CFR 371.3 and the association's request that the Agency issue regulatory guidance concerning "dispatch services."

Commenters are encouraged to provide responses to the following questions:

1. To what extent would brokers' disclosure of the records of individual transactions to individual motor carriers under 49 CFR 371.3(c) place brokers and their shipper clients at risk of having proprietary information concerning freight descriptions, transportation rates and routes disclosed to their competitors?
2. For authorized brokers, how often do motor carriers exercise their right under 49 CFR 371.3(c) to review the record of the transaction, and are there motor carriers who make requests on such a frequent basis that they could, if working with other motor carriers, learn certain proprietary information concerning shippers' rates and routes?
3. In the absence of 49 CFR 371.3(c), what information concerning brokered transactions would authorized brokers share with the shippers and for-hire carriers?
4. To what extent do shippers engage in discussions with brokers about the rates the authorized motor carriers will be paid?
5. How often do shippers enter into negotiations about interstate transportation services with an entity that is neither an interstate motor carrier registered with FMCSA nor a broker registered with FMCSA?
6. Would the issuance of regulatory guidance concerning "dispatch services" provide an effective deterrent to unauthorized brokerage services, or would additional actions by FMCSA be required to address the challenges described by TIA?
7. Is there sufficient clarity in the current definitions of "broker," "bona fide agents," and "brokerage or brokerage service" under 49 CFR 371.2 to enable interested parties to identify dispatch services that are actually carrying out the functions of a registered broker and to file a complaint with FMCSA for subsequent investigation?

Issued under authority delegated in 49 CFR 1.87.

Deputy Administrator

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