Before the United States Department of Transportation, Federal Motor Carrier Safety Administration

Comments of the Small Business in Transportation Coalition on Amendments to 49 CFR Part 387 on Broker and Freight Forwarder Financial Responsibility [Docket No. FMCSA–2 016–0102]

By way of background, the *Small Business in Transportation Coalition* ("SBTC") is a network of transportation professionals, associations, and industry suppliers that is on the front lines when it comes to issues that affect transportation professionals operating small businesses. With over 15,000 memberships sold, the SBTC is a watchdog trade organization that seeks to promote and protect the interests of small businesses in the transportation industry. The SBTC encourages ethical business practices and supports teamwork, cooperation, transparency, and partnerships[1] among truckers, carriers, brokers, and shippers who seek to do business with the utmost integrity. Unlike other trade groups that pit one group against another, SBTC is therefore in a unique position and is internally forced to equitably and reasonably reconcile the interests of its small business stakeholder members, including, but not limited to truckers, carriers, brokers and forwarders. Our members look to us as an arbiter to balance these interests.

In response to this *Advanced Notice of Proposed Rulemaking* ("ANPRM"), the SBTC wishes to remind the FMCSA from the onset that nearly five years later after implementing the $75,000 surface transportation intermediary financial security mandated by the Moving Ahead for Progress in the 21st Century Act ("MAP-21"), FMCSA still has yet to report to Congress on:

(1) the fact that the $75,000 bond/trust fund requirement in MAP-21 caused FMCSA to revoke 9,802 intermediaries in December of 2013, which represented approximately 40% of the surface transportation intermediary industry at that time[2];

(2) the appropriateness of the $75,000 amount pursuant to its MAP-21 mandate. In doing so, we remind you it was FMCSA's position during household goods broker bond rulemaking (which concluded right before MAP-21 was enacted) that bonds over $25,000 would have "anti-competitive effects;" and

[1] SBTC operates a "Partnerships" group on Facebook at https://www.facebook.com/groups/TruckingPartnerships/

[2] See: "Driven Out of Business" https://www.nationalreview.com/2014/04/driven-out-business-jillian-kay-melchior/and "Thousands of Freight Brokers Forced Out of Business by Costly New Regs" https://www.newsmax.com/us/freight-brokers-new-regulations/2013/12/30/id/544375/

(3) how the Federal Maritime Commission in 2014 determined it was inappropriate to raise the freight forwarder bond from $50,000 to $75,000.[3]

Like its predecessor group *Association of Independent Property Brokers & Agents* ("AIPBA"), which was formed in 2010 to fight --and successfully defeated-- the enactment of an anti-competitive $100,000 broker bond/trust fund grounded in what we believe was collusion by other trade groups,[4] the SBTC believes the $75,000 bond is too high and serves as an unreasonable barrier to entry. It should be lowered by Congress to the $25,000 amount FMCSA last concluded was appropriate during household goods broker rulemaking[5]. FMCSA can and should play a role in asserting this in its MAP-21 reports to Congress as Congress has specifically directed FMCSA to report on the appropriateness of the $75,000 amount.

In the present ANPRM, the Agency seeks comments and data as it considers eight separate areas: (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 form BMC–85 trust fund filings, (7) Form BMC–84 and BMC–85 trust fund revisions, and (8) household goods (HHG).

1. Group Surety Bonds/Trust Funds

As FMCSA notes, the Federal Maritime Commission ("FMC") allows group financial security for ocean freight forwarders under 46 CFR 515.21:

> *(b)Group financial responsibility. When a group or association of ocean transportation intermediaries accepts liability for an ocean transportation*

[3] FMCSA indicates it has reviewed the FMC group surety rule. It should also note that in 2014 after the implementation of the $75,000 bond pursuant to MAP-21, the FMC dropped its 2013 proposed amendment to 46 CFR 515.21, in which they stated they were going to raise the ocean freight forwarder bond. This information is worthy of Congress' attention and should be included in FMCSA's next report to Congress which is required by MAP-21: https://www.federalregister.gov/articles/2013/05/31/2013-12429/amendments-to-regulations-governing-ocean-transportation-intermediary-licensing-and-financial and https://www.federalregister.gov/articles/2014/10/10/2014-24003/ocean-transportation-intermediary-licensing-and-financial-responsibility-requirements-and-general?utm_content=header&utm_medium=slideshow&utm_source=homepage

[4] AIPBA filed an Anti-Trust Complaint with the United States Department of Justice in 2013. As far as SBTC knows, this complaint is still "under review:" https://www.linkedin.com/pulse/20140818121952-21695323-the-aipba-collusion-complaint/

[5] https://www.federalregister.gov/documents/2007/02/08/E7-2106/brokers-of-household-goods-transportation-by-motor-vehicle

intermediary's financial responsibility for such ocean transportation intermediary's transportation-related activities under the Act, the group or association of ocean transportation intermediaries shall file a group bond form, insurance form or guaranty form, clearly identifying each ocean transportation intermediary covered, before a covered ocean transportation intermediary may provide ocean transportation intermediary services. In such cases, a group or association must establish financial responsibility in an amount equal to the lesser of the amount required by paragraph (a) of this section for each member, or $3,000,000 in aggregate. A group or association of ocean transportation intermediaries may also file an optional bond rider as provided in § 515.25(b).

SBTC recommends FMCSA follow FMC's lead and allow group financial security for surface transportation intermediaries as well so as to minimize the devastating effect of the anti-competitive $75,000 financial security imposed by Congress.

2. Assets Readily Available

In the interest of making broker licenses accessible to start-up businesses and preventing unreasonable obstacles to entry, which is anticompetitive and serve only to create oligopolies by large brokers and BMC-84 bond providers, FMCSA should allow letters of credit.

3. Immediate Suspension of Broker/Freight Forwarder Operating Authority

Here, SBTC points to how the industry is now reacting to the unintended consequence of a larger bond in that $75,000 actually gives truly fraudulent brokers more room to steal than the original $10,000 bond.

As Transportation Intermediaries Association ("TIA") President Bob Voltmann has said in the past:

"While the government is not here to protect businesses from making bad choices, it is here to enforce the laws. Finally, if the answer is to raise the bond, then the bond requirement should be extended to shippers and carriers."[6]

[6] See: "Opinion: Higher Bonds Are Not the Answer" Transport Topics, May 13, 2004 https://www.ttnews.com/articles/opinion-higher-bonds-are-not-answer SBTC acknowledges TIA changed its stance once it started selling $100,000 optional broker bonds and then attempted to make that amount mandatory on the industry through lobbying efforts to sell more $100,000 bonds. We again assert here how a trade group's personal financial interest will be put in front of its membership's interests whenever trade groups are permitted to serve in the dual capacity of representative of the industry in terms of advocacy and lobbying, on the one hand, and the peddler of financial security instruments, on the other. As a matter of ethics, this would include trade groups engaged in selling bodily injury and property damage and cargo insurance.

We would agree with Voltmann that the government is not meant to be a nanny. The principles of laissez-faire should apply here.

We also point to how, as a matter of law, the FMCSA cannot arbitrarily discriminate against brokers in the area of due process and not apply the same procedure to situations in which motor carriers' insurance companies have filed similar notices of cancellation. Therefore, SBTC wishes to raise a ***Fourteenth Amendment*** *"Equal Protection of the Law"* claim here and assert that the government cannot lawfully suspend the authority of brokers and forwarders upon mere notice of cancellation without doing the same for motor carriers. The procedure currently in place was enacted to ensure due process and a reasonable amount of time to respond. In the interest of fairness and ensuring a level-playing field, that amount of time should not be revoked for the goose without simultaneously revoking it for the gander. FMCSA should be advised that the SBTC is prepared to litigate against unconstitutional government overreach.

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

Here, beyond a publicly filed bankruptcy proceeding (FMCSA) could require brokers and forwarders to have to provide notice of the filing of a bankruptcy petition to their surety or trust administrator), it is reasonable to suggest that FMCSA should define financial failure/insolvency in the context of surety/trust responsibility, simply as receipt of notice by the broker or forwarder of its inability to pay its bond/trust fund premium. Anything above and beyond this places the provider of financial security in a position to supervise --if not micromanage-- the operations of the broker or forwarder, which transcends the normal role of a fiduciary in the regulatory scheme.

"Publicly Advertise" should be deemed as submission of a notice to FMCSA in a form and manner duly promulgated and approved by FMCSA, which then publishes the notice in the Federal Register in furtherance of its responsibilities as a regulatory agency.

5. Enforcement Authority

SBTC has no comment on the matter of development of surety suspension procedures at this time and would consider responding to an ANPRM once issued.

However, we do wish to point out along the lines of enforcement of unlawful broker operations that on October 4, 2018, the SBTC petitioned FMCSA to clarify the definition of "broker" to incorporate long-standing Interstate Commerce Commission precedent to address the widespread post $75,000 bond rise of unlicensed third party intermediaries calling themselves "dispatch services". We contend that an

entity that is “a person” who “is paid” to “arrange for transportation” calling itself a dispatch service as opposed to a broker is the equivalent of a person arguing is not a janitor, he is a custodian.[7] Shakespeare would agree: "A rose by any other name would smell as sweet."[8]

Without addressing this problem by clarifying what constitutes a broker and enforcing same, this loophole has the effect of allowing unlicensed entities to circumvent the financial security requirements and operate unchecked with impunity. We have suggested the following underlined edits to 49 CFR 371 to eliminate this unfair competition:

§ 371.2 Definitions.

(a)*Broker* means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport. An entity that is in a position to allocate shipments between competing principals is a broker, who requires a license.

(b)*Bona fide agents* are persons who are part of the normal organization of a motor carrier and perform duties under the carrier's directions pursuant to a preexisting agreement which provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others. An agent who devotes his service exclusively to a single carrier, is part of that carrier’s organization and does not require a broker license.

(c)*Brokerage* or *brokerage service* is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor, or consignee.

(d)*Non-brokerage service* is all other service performed by a broker on behalf of a motor carrier, consignor, or consignee.

6. Entities Eligible to Provide Trust Funds for Form BMC–85 Trust Fund Filings

We believe BMC-85 trust fund agreements should be issued by federally-regulated banks or state-licensed financial institutions and that FMCSA should regulate who may be a broker that receives compensation from such entities for

[7] For an amusing play on this, see the Twix Commercial at https://www.youtube.com/watch?v=KawjY0PK7A8
[8] William Shakespeare, “Romeo & Juliet.”

procuring/producing BMC-85 business much like brokers of insurance products are regulated by the states.

The AIPBA previously filed comments on this matter. SBTC now endorses these comments and incorporates them here by reference[9]. We will highlight from these comments the following section that raises a conflict-of-interest question and goes to the current practice of non-profit entities engaging in the normally for-profit business of selling or the brokering of financial security:

> *"It would therefore appear FMCSA is arbitrarily "picking and choosing" which sections of MAP-21 to implement rather than adhere to all mandates enacted by MAP-21; that is, instead of delving into these legitimate issues and working to fulfill these important MAP-21 mandates of interest to the licensed brokerage industry, it is appears the industry has been asked to gather to engage in furtherance of what we believe is nothing more than a trust fund supplier* ***"witch hunt"*** *asked for by competing BMC-84 bond issuers and/or other entities that represent themselves as bona fide, non-profit trade groups, but are actually for-profit BMC-84 bond peddlers in disguise. We believe their anticompetitive agenda is to unlawfully use the government as a tool to quash their competition so they can form an oligopoly and deny the industry the financial security choices it currently enjoys by disproportionately targeting these BMC-85 trust fund suppliers. We note such activity is subject to review by the US Department of Justice, Antitrust Division, and we are offering a copy of these comments to them through our legal counsel insofar as a September 2013 Antitrust Complaint against other trade groups is concerned, a complaint, we believe, is still "under review."*
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> *Incidentally, given the fact that the MAP-21 language in question…*
>
> > *"PAYMENT OF CLAIMS.—A surety bond, trust fund, or other financial security obtained under paragraph (1) shall be available to pay any claim against a broker arising from its failure to pay freight charges under its contracts, agreements, or arrangements for transportation subject to jurisdiction under chapter 135 if— "(i) subject to the review by the surety provider, the broker consents to the payment..." (Sec 32918 of MAP-21)*
>
> *…was essentially drafted by another broker trade group, and requires a surety company to obtain the approval of their broker client before paying*

[9] https://www.regulations.gov/document?D=FMCSA-2016-0102-0016

*a claim, it would appear that there is an inherent **conflict-of-interest** when a trade group is also essentially the bond supplier; that is, there is a built-in incentive for the trade group bond supplier not to pursue an otherwise good faith belief that a claim should be paid on the merits out of sheer fear that the trade group will lose the membership fees of the broker as a result.*

***We as a trade group therefore believe FMCSA should restrict, via bona fide rulemaking, industry trade groups from selling financial security instruments moving forward as they will always choose to protect their own organizational interests over the interests of their own broker members that they purport to represent, not to mention the interests of other parties protected by regulation** (new emphases added)."*

In fact, just as we launched the SBTC, I saw the writing on the wall and warned the industry of this in August of 2014.[10]

7. Form BMC–84 and BMC–85 Trust Fund Revisions

The SBTC has no comment at this time.

8. Household Goods (HHG)

FMCSA properly notes here that shippers of household goods pay brokers a deposit and then pay the remainder of the balance to the carrier of household goods. Aside from our comment in 2007[11], which indicated we believe if a household goods broker requests deposits for a planned shipment, the household goods broker should disclose the deposit's terms to the shipper, we believe the consumer protection regulations in 49 CFR 375 adequately protect against fraud and no additional measures are needed.

[10] https://www.linkedin.com/pulse/20140824235743-21695323-get-ready-for-an-anticompetitive-attack-on-bmc-85-trust-fund-agreements/

[11] https://www.federalregister.gov/documents/2007/02/08/E7-2106/brokers-of-household-goods-transportation-by-motor-vehicle

On behalf of the SBTC's membership, we thank you for this opportunity to comment.

Sincerely,

/s/JAMES LAMB,

SBTC President