CLIENT ALERTS & INSIGHTS

Fighting Fraud: FMCSA Issues a Final Rule on Broker and Freight Forwarder Financial Responsibility

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In a victory for motor carriers and responsible freight intermediaries, on November 16, 2023, the Federal Motor Carrier Safety Administration ("FMCSA") announced a final rule that will ensure that freight brokers and surface freight forwarders have the financial means to compensate the carriers they utilize. The final rule modifies five regulatory areas relating to broker and freight forwarder financial responsibility: (1) assets readily available; (2) immediate suspension of broker/freight forwarder operating authority; (3) surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency; (4) enforcement authority; and (5) entities eligible to provide trust funds for BMC-85 filings.

The Moving Ahead for Progress in the 21st Century Act ("MAP-21"), which was enacted over a decade ago, required that brokers or freight forwarders have "assets readily available" to pay claims filed by motor carriers. In the final rule, the FMCSA adopted a definition of "assets readily available" as being assets that are stable in value and can be easily liquidated within 7 calendar days of an event that triggers a payment from a BMC-85 trust. The final rule listed acceptable "assets readily available" to be included in a trust fund as cash, irrevocable letters of credit issued by Federally insured depository institutions, and Treasury bonds. **Compliance with this provision will be required on January 16, 2026.**

The final rule also allows for the suspension of the operating authority of a broker or freight forwarder when its available financial security falls below $75,000. This process will occur when there is a drawdown on the surety bond or trust fund. If the broker or freight forwarder does not replenish funds within seven calendar days after notice from FMCSA, the FMCSA will now shut the entity down with a notification of suspension of operating authority. The final rule also outlines the roles of sureties or financial institutions issuing a BMC-84 or BMC-85. This includes the requirement that they must notify the FMCSA when a broker or freight forwarder falls below the minimum level of financial responsibility, and the delta is not replenished in a timely manner**. Compliance with this provision will be required on January 16, 2025.**

This final rule outlined the procedures and responsibilities for a surety company or financial institution once the company or financial institution has become aware that a broker or freight forwarder has experienced "financial failure or insolvency" as defined under 49 CFR § 387.307(e)(1) and is not cured in accordance with § 387.307(e)(5) or (6). The financial institution must notify the FMCSA and start the cancellation of the financial responsibility. **Compliance with this provision will be required on January 16, 2025.**

The FMCSA also added enforcement parameters to implement the MAP-21 requirement for suspension of a surety provider's authority and added penalties in 49 CFR part 386, appendix B, for violations of the new requirements. The FMCSA will first provide notice of the suspension to the surety provider. The surety provider will then have 30 days to respond before a final decision is issued. The FMCSA also added language which specifies the monetary penalty for which a surety company or financial institution found to be in violation of 49 U.S.C. 13906 or § 387.307 will be liable, as well as the mandatory 3-year ineligibility period for providing broker financial security. **Compliance with this provision will be required on January 16, 2025.**

Finally, the FMCSA removed a provision allowing loan and finance companies to serve as BMC-85 trustees. Its reasoning was "because this type of institution is not subject to the rigorous federal regulations applicable to chartered depository institutions or to the state regulations applicable to insurance companies." **Compliance with this provision will be required on January 16, 2026.**

The Transportation Intermediaries Association (TIA), the professional organization of the third-party logistics industry, released a statement on its website praising the rulemaking:

"TIA applauds the agency for moving forward on this long overdue rule. 3PLs and brokers are in the midst of a fraud epidemic, and a significant aspect of that fraudulent activity centers around trust fund providers and fraudulent entities in the marketplace," said TIA President and CEO Anne Reinke. "The FMCSA's efforts to increase the barrier of entry into the brokerage industry through the elimination of fraudulent trust fund providers will make it more challenging for criminals and scammers to establish a presence in the marketplace as easily."

The FMCSA noted that this final rule "aims to reduce fraud by limiting the time brokers can continue to accrue claims while experiencing financial failure or insolvency before their operating authority registration is suspended. These changes adopted in this rule will result in fewer motor carriers accepting loads from brokers who do not intend to pay."

For questions or assistance, please find the contact information below.

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