CLIENT ALERTS & INSIGHTS

Lions and Tigers and Bears - Oh My! New FMCSA Guidance on the Definition of Dispatch Services, Bona Fide Agents, and Brokers

JUNE 16, 2023

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Federal regulators—as well as the marketplace itself—have been scrutinizing the role of certain types of "transportation intermediaries" in the industry. One point of focus has been the role of longstanding models such as bona fide agents of broker services and motor carrier services as well as newer variants such as dispatch services. Today, the Federal Motor Carrier Safety Administration ("FMCSA") took a step toward clarifying agency intent and application of current broker-related regulatory definitions.

The FMCSA published its notification of final regulatory guidance on Friday, June 16, 2023, in response to a mandate in the Infrastructure Investment and Jobs Act ("IIFA") to inform the public and regulated entities about the FMCSA's interpretation of the definitions of "brokers" and "bona fide agents." 88 FR 39368. The FMCSA previously published a notice seeking public comment on the IIJA's mandate on June 9, 2022, and issued interim guidance on November 16, 2022. The FMCSA's final regulatory guidance updates and refines-but does not radically change-the November 16, 2022 interim guidance based on the public comments the FMCSA received.

The FMCSA offered its final guidance on the definitions of brokers and bona fide agents, the role of dispatch services in the transportation industry, the activities of load boards, how to determine when a dispatch service is acting as a broker or bona fide agent, and factors indicating when a dispatcher does and does not require broker authority. In addition, the FMCSA clarified the final penalties for unauthorized brokerage activities. This does not amount to a regulatory change but rather an informative clarification.

Here is a practical summary of the FCMSA's guidance:

1. Definition of a Broker: The FMCSA determined that the definition of "broker" at 49 CFR § 371.2(a) is adequate, but emphasized that an entity handling money exchanged between shippers and motor carriers is one factor that strongly suggests the need for broker authority. The FMCSA also stated that this factor is not an essential requirement for an entity to be considered a broker.

2. Definition of a Bona Fide Agent: The FMCSA also determined that the definition of a "bona fide agent" in 49 CFR § 371.2(b) is adequate, however, the FMCSA clarified that the term "allocating traffic," which appears in the definition of a bona fide agent, means "any exercise of discretion on an agent's part when assigning a load to a motor carrier." If an entity representing more than one motor carrier exercises such discretion, it would generally not satisfy the definition of a "bona fide agent." Nevertheless, the FMCSA noted that a bona fide agent might be able to serve multiple motor carriers

if the agent is providing services in mutually exclusive geographic markets or on behalf of carriers who lack equipment to provide the same service to the market (*i.e.*, a refrigerated carrier who offers no flatbed service and a flatbed carrier who offers no refrigerated service). The FMCSA further stated that a bona fide agent may be either an employee or a contractor of the motor carrier but must perform its duties as specified in a preexisting agreement between the parties. Please note that a "bona fide agent" is one who acts on behalf of a *motor carrier* rather than on behalf of a *broker*, so the FMCSA's guidance does not apply to *brokers* who use an agent model.

3. Role of Load Boards. The FMCSA reiterated its finding from the interim guidance that internet-based load matching services and load boards are not considered brokers, but did add that some commentators have expressed concerns about certain persons using such platforms to commit fraud.

4. Role of Dispatch Services in the Transportation Industry: No statutory or regulatory definition of a "dispatch service" exists, and the FMCSA does not have Congressional authority to regulate dispatch services unless the dispatch service also meets the criteria for registration as a broker, freight forwarder, or motor carrier. The FMCSA did state that in the industry, dispatch services work exclusively for motor carriers (not shippers), sourcing loads for motor carriers, and perform additional services for motor carriers unrelated to sourcing shipments.

5. How to Determine Whether a Dispatch Service is Acting as a Broker or Bona Fide Agent: The FMCSA's final guidance states that dispatch services may be classified as either brokers or bona fide agents based on the nature and scope of their activities. Although no single factor is determinative, the extent of a motor carrier's control is relevant to whether the dispatch service is acting as a broker or bona fide agent. The greater control that a carrier has over a dispatcher's actions, the greater the likelihood that the dispatch service is not required to obtain broker operating authority. In contrast, less motor carrier control over the dispatch service suggests that the dispatcher has more independent discretion in sourcing and allocating loads, which is more consistent with activities traditionally requiring broker operating authority.

6. Factors Indicating When Broker Authority is Not Required: The FMCSA identified the following non-exclusive list of nine (9) factors that generally indicate when an entity would be considered a bona fide agent and would not require broker authority:

- The dispatch service has a written legal contractual relationship with a motor carrier that clearly reflects the motor carrier is appointing the dispatch service as a licensed agent for the motor carrier. This is often a long-term contractual relationship. The written legal contract should specify the insurance and liability responsibilities of the dispatch service and motor carrier.
- The dispatch service complies with all state licensing requirements, if applicable.
- The dispatch service goes through a broker to arrange for the transportation of shipments for the motor carrier and does not seek or solicit shippers for freight.
- The dispatch service does not provide billing or accept compensation from the broker, third-party logistics company, or factoring company, but instead receives compensation from the motor carrier(s) based on the pre-determined written legal contractual agreement.

- The dispatch service is not an intermediary or involved in the financial transaction between a broker and motor carrier.
- The dispatch service is an IRS 1099 recipient from the motor carrier, or a W2 employee of the motor carrier as specified in the legal written contract agreement.
- The dispatch service discloses that they are a dispatch service operating under an agreement with a specific motor carrier, and the shipment is arranged for that motor carrier only.
- The dispatch service does not subsequently assign or arrange for the load to be carried/moved by another motor carrier.
- A dispatch service does not provide their "services" for a motor carrier unless that motor carrier specifically appointed the dispatch service as their agent in accordance with the aforementioned requirements.

7. Factors Indicating When Broker Authority is Required: The FMCSA identified the following non-exclusive list of seven (7) factors that generally indicate when a dispatch service should obtain broker authority:

- The dispatch service interacts with or negotiates any shipment of freight directly with the shipper, or a representative of the shipper.
- The dispatch service accepts or takes compensation for a load from the broker or factoring company or is involved in any part of the monetary transaction between any of those entities.
- The dispatch service arranges for a shipment of freight for a motor carrier and there is no written legal contract with the motor carrier.
- The dispatch service accepts a shipment without a truck/carrier, then attempts to find a truck/carrier to move the shipment.
- The dispatch service engages in allocation of traffic by accepting a shipment that could be transported by more than one carrier with which it has agreements and assigns it to one of those carriers.
- The dispatch service is a named party on the shipping contract.
- The dispatch service is soliciting to the open market of carriers for the purposes of transporting a freight shipment.

8. Financial Penalties: The FMCSA's final guidance clarified that if a dispatch service is deemed to be providing unauthorized brokerage services pursuant to 49 USC § 14916, the service will be subject to applicable penalties. The financial consequences of non-compliance can result in significant civil penalties as well as private civil litigation, and the liability arising under the relevant statute may also be imposed upon a company's officers, directors, and principals in their *personal* capacity.

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