CLIENT ALERTS & INSIGHTS

When “No Comment” Isn’t an Option: FMCSA Publishes Proposed “Broker Transparency” Regulation

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The Federal Motor Carrier Safety Administration (“FMCSA”) issued a Notice of Proposed Rulemaking (“NPRM”) on November 20, 2024,titled Transparency in Property Broker Transactions (89 FR 91648). The NPRM contains a proposed rule that the FMCSA asserts is intended to enhance transparency by providing motor carriers and shippers access to a freight broker’s records related to rates, services, and payment transactions on transportation movements. Public comments are due by January 20, 2025.

Proposed Regulatory Changes

The proposed rule would amend the “Records to be kept by brokers” regulation located at 49 CFR 371.3 with four key changes:

1. Electronic Recordkeeping. Brokers would be required to keep their transaction records for each shipment in an electronic format in order to facilitate more efficient access of the broker’s records by others.
2. Broker Must Keep Detailed Transaction Records. Brokers would be required to maintain comprehensive transaction details for each shipment, including documentation of all charges and payments, descriptions of charges and services, as well as documentation of any claims related to the shipment, including claims for loss or damage to the cargo.
3. Broker Obligated to Provide Records. Brokers would be subject to a “regulatory duty” to respond to requests from motor carriers or shippers for transaction records. Notably, the FMCSA intimates that, by substituting an express “regulatory duty” in place of a “regulatory right,” the new rule exposes brokers to a form of regulatory enforcement action if they continue to negotiate contracts wherein a counter-party purports to waive any rights under 49 CFR 371.3. On the other hand, the proposed rule does not go so far as to include an express and unequivocal prohibition against such contract waivers. If this proposed change is enacted, courts would ultimately have to determine the extent to which such waivers are enforceable under 49 U.S.C. § 14101 or otherwise.
4. Timely Disclosure. Brokers would be required to provide the requested records within 48 hours after a request from a shipper or motor carrier.

Regulatory History from 1980 to Present

The original rule was published following major deregulation of the trucking industry that began with the Motor Carrier Act of 1980 ("MCA"). The MCA was intended to be a sweeping de-regulation of the trucking industry, removing excessive government restrictions and red tape, particularly with respect to economic regulation. In the same year, the Interstate Commerce Commission (predecessor in part to the FMCSA) promulgated rules to address the operational practices of property brokers. The stated purpose of the rules was to eliminate what was seen as unnecessary governmental interference with the business dealings among shippers, brokers, and motor carriers, reduce recordkeeping requirements, and to clarify the language contained in existing rules. At that time, compensation to brokers was referred to consistently as "commissions." The language of the current rule is reflective of the business environment of the time-a broker's compensation was based on the freight charges billed by the motor carriers (*see* 49 CFR § 371.3). This was because most brokers were essentially sales agents for motor carriers.

The business relationship among shippers, brokers, and motor carriers has greatly evolved today from the relationships in 1980. Specifically, brokers are not typically sales agents for motor carriers. More generally, brokerage relationships are far more complex today, and brokers often provide services other than simply selecting a motor carrier and passing the charges on to the shipper inclusive of a broker's fee. The contemporary broker industry often includes value-added service offerings such as: assisting shippers with filing claims against motor carriers; assuming contractual liability for cargo loss, damage, or delay; assuming risk of paying motor carriers without collecting from shippers; arranging for other services such as warehousing; and providing various technological and shipment tracking capabilities to both shippers and carriers.

The transformational changes in a broker's business practices and operations led to the current debate as to the relevance and application of the current version of 49 CFR § 371.3. Over the years, due to the changes in broker's business practices, various industry groups have sought to change or clarify the application of the rule. Some assert that the rule is archaic and no longer necessary. Others assert that the rule is necessary to combat what they claim are unscrupulous practices.

Brokers have consistently argued against any requirement to disclose their financial information and, in practice, frequently expect their customers and motor carriers to waive any applicable disclosure requirement. Moreover, many (if not most) customer contracts provide that a broker must treat the customer's rates and other economic terms as confidential since that information constitutes competitively sensitive, commercial information.

The most recent "broker transparency" effort commenced in May of 2020. The Small Business in Transportation Coalition ("SBTC") and the Owner-Operator Independent Drivers Association ("OOIDA") separately petitioned the FMCSA to initiate a rulemaking session amending 49 CFR 371.3. SBTC's petition proposed that brokers should be expressly prohibited from entering contracts that purport to waive disclosure requirements under 49 CFR § 371.3 as a condition of doing business. OOIDA's petition proposed adding a requirement that brokers provide a copy of the transaction record in an electronic format within 48 hours of the service being completed. In addition, similar to SBTC's petition, OOIDA's petition also proposed prohibiting brokers from including clauses in contracts that waive motor carriers' rights to access the transaction records.

Shortly after the OOIDA and SBTC petitions were filed, the Transportation Intermediaries Association ("TIA") filed a rulemaking petition seeking the elimination of 49 CFR § 371.3(c). The TIA petition argued that the regulation is outdated given the changes in the brokered freight industry since the regulation was introduced in 1980. TIA also pointed out that misconstrued interpretations of the regulation could compromise the confidentiality of important economic relationships among shippers, brokers, and carriers. In November of 2022, the FMCSA agreed to begin developing a NPRM on broker transparency and rejected the TIA's counterpetition to eliminate 49 CFR § 371.3(c) despite TIA's arguments that a so-called "transparency" rule amounts to a form of rate intrusion. Transportation industry stakeholders have since been awaiting FMCSA's draft of the proposed rule.

Next Steps for All Stakeholders

The FMCSA is now accepting comments from the public on its proposed rule for a period of sixty (60) days following the November 20th publication date. Specifically, the FMCSA is seeking comment from the public on the following eight issues:

1. What impact if any would the proposed rule have on freight rates?
2. How common is electronic record keeping among household goods brokers? What burden if any would be imposed if electronic record keeping was required?
3. How much time would a broker spend creating an electronic record from paper documents for the record mandated by Section 371.3? What would be the cost for a broker to create an electronic record per transaction?
4. Do you believe the 48-hour time frame proposed for Section 371.3(c) would create a substantial burden for brokers? Why or why not? If you disagree with the proposed 48-hour time frame what time frame would balance the objectives of transparency while minimizing the burden on brokers?
5. If this proposal effectively reduced instances of illegal brokering through carrier policing with transparency information, would the brokers engaged in illegal practices exit the market, resulting in the transfer of illicit profits to legally operating motor carriers and or brokers?
6. Should freight brokers and household goods brokers be subject to the same record keeping requirements under Section 371.3? If your answer is "no", why should they be subject to different requirements?
7. Should parties requesting records under Section 371.3(c) be required to submit the request in writing? Should parties requesting records under Section 371.3(c) be required to submit their request electronically? Would requiring a specific format for submitted request impose a cost on the parties or otherwise detour requests for transparency?
8. Would the proposal the records be provided electronically under Section 371.3(c) make broker transparency more likely as compared to not specifying a method of providing the records? Should the FMCSA be more specific in requiring a particular format for records provided under Section 371.3(c), and if so, what method and or format is preferable?

Comments must be filed with the FMCSA by the January 20, 2025 deadline. Comments containing any sensitive information considered Business Confidential Information must be notated as

described in the NPRM. The FMCSA will review all submitted comments in order to understand the concerns from stakeholders including carriers, brokers, shippers, industry associations, and the public. Based on the feedback received, the FMCSA may choose to conduct a more detailed regulatory impact analysis to evaluate the proposed rule's potential effects on the industry or the economy as a whole. Alternatively, the FMCSA may issue a Supplemental Notice of Proposed Rulemaking if significant revisions are required or simply proceed toward a Final Rule.

Impact on Your Business

Whatever your role in the movement of cargo, the FMCSA's proposed rule could have a significant impact. The regulation will challenge relationships between brokers in the logistics industry and their shipper customers as well as servicing carriers. Those stressors may dramatically change rate negotiation, contractual terms, and operational practices within that segment of the transportation industry. At a minimum, brokers will likely need to invest in electronic recordkeeping systems and adjust their processes to capably and timely produce required reporting upon request. Shippers and motor carriers will obtain much greater insight into the financial details of their transactions with brokers, which may drive relative negotiating power.

Given the significant impact this proposed rule may have on all stakeholders in the transportation industry, coupled with the upcoming arrival of a new Administration that may have a different regulatory perspective and set of priorities, we are strongly recommending that clients carefully review the proposed rule and consider preparing comments to ensure their perspectives are taken into consideration by the FMCSA.

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