

Freight Brokers Take Note: Pending Amendments to the Freight Broker Regulations in the United States

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Introduction

Canadian freight brokers who arrange the carriage of goods over United States routes have long been advised to comply with American laws. Some time ago, the United States Congress enacted the *"Moving Ahead for Progress in the 21st Century Act"* (known as "MAP-21") which imposes requirements for freight brokers to hold an authority from the Federal Motor Carrier Safety Administration (the "FMCSA") and to obtain and maintain a surety bond for U.S. \$75,000.

On November 28, 2013, the Canadian Trucking Alliance (the "CTA") announced in a press release that it was seeking clarification from the FMCSA on the applicability of the MAP-21 requirements to Canadian motor carriers who broker shipments between the United States and Canada. Would an entity domiciled in Canada brokering cross-border or interstate freight require the MAP-21 authority and surety bond?

The CTA thereafter announced on April 9, 2014 that it had received confirmation from counsel for the FMCSA that motor carriers who engage in the brokering of freight between the United States and Canada were in fact required to comply with the MAP-21 requirements. (Note that there is an "interline" exception to the MAP-21 requirements: a motor carrier engaging the services of an interline motor carrier partner to perform a portion of the former's bill of lading scope of carriage mandate is not considered to be a brokering exercise so as to invoke the application of MAP-21).

The considered "best practice" has been for Canadian domiciled motor carriers *and freight brokers* who tender cross-border freight to third party motor carriers to comply with the MAP-21 requirements. Compliance would avoid regulatory infraction proceedings and could be marketed as a "value add" or a selling feature for freight brokers to advertise to potential or existing shipping customers as well as motor carriers.

It would then follow that entities brokering cross border freight will need to take note and be current with certain pending amendments to other current freight broker regulations in the United States.

Pending Changes to the *"Transparency in Broker Transactions"* Regulations in the United States

- 49 CFR 371.3 *"Records to be Kept by Brokers"*

The FMCSA has proposed amendments to its freight broker rules in response to petitions from the Owner-Operator Independent Drivers Association (the "OOIDA") and the Small Business in Transportation Coalition (the "SBTC").

Brokers are regulated by United States Regulation 49 CFR 371. Under this Regulation, the motor carrier who receives brokered freight for carriage has the right to review the referring broker's record of the transaction, which stakeholders often refer to as "broker transparency".

The existing broker transparency requirements in the above Regulation came about as a result of the concern that while brokers provide a service in matching motor carriers with shippers (which benefits carriers) that there could be an “asymmetry” of information between the parties which could “affect the contracting process by limiting parties’ ability to negotiate for their desired terms”. These risks could lead to market inefficiencies, such as decreased freight capacity or decreased market competition, which could arise when parties lack material information about the transaction. Accordingly, the FMCSA has attempted to address these concerns by requiring freight brokers to keep certain records of their transactions and to make them available to motor carriers and shippers involved in those transactions. Making the records available to the transacting parties – “broker transparency” – is meant to inform business decisions and enable self-policing of abuses that may arise.

Examples of situations calling for better broker transparency concern the practice of brokers assessing “charge backs” to carriers, or charging “accessorial fees” and “surcharges” to their shipper customers.

There have been concerns expressed in cases where a carrier has delivered a load, obtained a clean bill of lading from the consignee and then received a claim or a “charge back” on the load from the broker despite the clean bill of lading. Motor carriers often contend that these claims lack sufficient explanation or description of the reason for the charge back and they often find it difficult to contest them, particularly when the payment for the freight charge is withheld pending resolution of the claim.

Concerns have also been expressed with detention charges and fuel charges, where the rates and conditions of the fees that brokers charge shippers are different than the rates and conditions of payment remitted to the carrier, despite the fees being premised on the carrier’s operating costs. As an example, fees for detention time are premised on the operating costs of keeping a truck idle while waiting to load or unload, including a driver’s time. Brokers have been known to charge the shipper for detention time at higher rates than they have had to pay to the carrier. Similar concerns have been raised concerning a motor carrier’s fuel surcharges.

The “Proposed Rule”

In light of the foregoing, the FMCSA has published a “Proposed Rule” Amendment to Regulation 371. While said to be responsive to the petitions received to better enforce the broker transparency requirement, the proposed provisions differ from those requested by the OOIDA and the SBTC. The Proposed Rule would revise the regulatory language to make clear that brokers have a regulatory obligation to provide transaction records to the transacting parties on request. The Proposed Rule would also make changes to the format and content of the records and to better tailor the required contents of the records for the purpose of broker transparency.

The Proposed Rule amendments involve the following four elements:

1. The first proposed provision would require freight brokers to keep their records in an electronic format. The goal is to make their records more accessible to motor carriers and shippers on request – as opposed to the current practice where records might only be made physically available at a broker’s business address.
2. The second proposed provision would modernize and tailor the required contents of the records to better achieve broker transparency. The current requirement distinguishes between brokerage and non-brokerage services, which is rooted in a previous regulatory approach. The FMCSA proposes eliminating this distinction, instead requiring that the records contain, for each shipment in the transaction, all charges and payments connected to the shipment, including a description, amount and date. This is substantially similar to the current requirement but removes the outdated distinction. The record would also be required to include any claims connected to the shipment, such as a shipper’s claims for damage or delay. This amendment would ensure that the parties have full visibility into the payments, fees and charges associated with the transaction so they can resolve issues and disputes among themselves without resorting to costlier remedies.
3. The third proposed provision would clarify the obligation imposed on brokers to respond to requests for transaction records and the process parties must follow when requesting and supplying such records. The current regulation frames the broker transparency requirement as a right, given to the transacting parties to review records. The proposed amendment would reframe broker transparency as a regulatory duty imposed on brokers to provide records to the transacting parties.
4. The fourth proposed provision would require brokers to provide the records (that are required to be maintained) within 48 hours of when a party to the transaction requests those records. This provision is intended to ensure that the requesting party receives the records in a timely manner and to support the resolution of issues around service or payment.

Can the Parties to a Transaction Waive the Broker’s Record Keeping and Transparency Requirements by a Term in a Broker-Carrier Contract?



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Parties who broker freight may wish to contract out of a transparency requirement. The broker may not want a carrier to learn what the broker's "mark up" or profit margin is between the carrier's freight charge and the amount invoiced by the broker to the shipper. This information in the hands of the carrier may pose a "moral hazard" in terms of being an inducement to the carrier seeking to directly solicit future business from the broker's shipper customer. No doubt this places a premium on the insertion of enforceable "confidentiality of information" clauses and language prohibiting a carrier from "back soliciting" shippers directly for business.

Contracts between brokers and carriers frequently contain a waiver of this right, using language such as:

Free and Voluntary Waiver of § 371.3(c); Inspection Rights. CARRIER hereby freely and voluntarily waives its rights to inspection of broker records, found under Federal Statute section 371.3 subsection (c). CARRIER hereby acknowledges that the waiver of its inspection rights is free and voluntary, was not coerced in any manner, and is not a requirement or precondition to doing business with BROKER. BROKER acknowledges that CARRIER entering this waiver of its rights under section 371.3(c) is not a precondition or requirement to doing business.

There is an argument that a contractual waiver in the nature of the foregoing is invalid and unenforceable. The Regulation does not include language permitting waiver by an agreement between the transacting parties and, moreover, FMCSA "guidance" suggests that attempts to contract around the Regulation would be considered invalid.

However, the Transportation Intermediaries Association (the "TIA"), on behalf of the brokerage industry, has submitted that it is in fact legal for brokers to contract out of Regulation 371.3. This position is based on somewhat intricate arguments that, with regulatory deregulation over recent years, "freedom of contract" should, and in fact does, remain for the transacting parties to contract freely on point. The TIA has expressed concern that the current regime presents actual or potential "regulatory overreach" over the brokerage profession.

The OOIDA requested that, in formulating the Proposed Rule, the FMCSA explicitly prohibit brokers from including any provision in their contracts requiring a motor carrier to waive its rights to access the transaction records. For its part, the SBTC requested the FMCSA to prohibit brokers from coercing or requiring parties to broker's transactions to waive their right to review the record of a transaction as a condition of doing business and to prohibit the use of clauses in the nature of the above example language.

This issue was not addressed by the FMCSA in the Proposed Rule. It appears that while, on the one hand, the FMCSA clearly desires that the "contracting playing field" be made more even for the transacting parties, on the other hand, it is not unaware of the compelling business interests in protecting proprietary and commercial information. It has been noted that the existing Regulation and the Proposed Rule do not require public disclosure of broker pricing or other records. Regulation 371.3 does not require the broker to disclose to the carrier *all* details of the transaction, but rather only the transaction specific details listed in 371.3(a):

§ 371.3 Records to be kept by brokers.

- (a) A broker shall keep a record of each transaction. For purposes of this section, brokers may keep master lists of consignors and the address and registration number of the carrier, rather than repeating this information for each transaction. The record shall show:
- (1) The name and address of the consignor;
 - (2) The name, address, and registration number of the originating motor carrier
 - (3) The bill of lading or freight bill number;
 - (4) The amount of compensation received by the broker for the brokerage service performed and the name of the payer;
 - (5) A description of any non-brokerage service performed in connection with each shipment or other activity, the amount of compensation received for the service, and the name of the payer; and
 - (6) The amount of any freight charges collected by the broker and the date of payment to the carrier.
- (b) Brokers shall keep the records required by this section for a period of three years.
- (c) Each party to a brokered transaction has the right to review the record of the transaction required to be kept by these rules.



Above all, it is fair to say that the “jury is still out” on the issue as to whether a freight broker can “contract out” of the above record keeping and transparency requirements.

Status of the Proposed Rule

The time period for stakeholder submissions has now closed and we await word as to what extent the Proposed Rule will be adopted into law in the United States. In the meantime, freight brokers must continue to be duly diligent with regulatory compliance and in negotiating their contract terms with their shipper customers and the motor carriers to whom they broker freight. A PDF version is available for download [here](#).

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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