

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**PETITION FOR RULEMAKING:
ELIMINATION OF 49 CFR §371.3(c) AND GUIDANCE ON DISPATCH SERVICES**

SUBMITTED BY THE

Transportation Intermediaries Association
1625 Prince Street, Suite 200
Alexandria, VA 22314
703-299-5700
www.tianet.org

Chris Burroughs
Vice President of Government Affairs

Richard D. Gluck
General Counsel

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Pursuant to 49 C.F.R. §389.31(2), The Transportation Intermediaries Association (TIA) submits this petition for rulemaking to eliminate the requirements of 49 CFR §371.3(c) and asks the Agency to develop guidance on what legally constitutes a “dispatch service.” As discussed in more detail to follow, the proposed modifications and clarifications would eliminate an outdated regulation that dates back to 1980 that is not applicable to the current marketplace. TIA would also have the Agency promulgate guidance to the public on what constitutes a legitimate “dispatch service” and remove unethical and unscrupulous actors from the marketplace.

Pursuant to 49 C.F.R. §389.31(3), TIA affirms that it is a national trade association representing the interests of the third-party logistics industry, including those companies licensed as brokers of property and freight forwarders. TIA supports requirements that improve safety by removing nefarious entities from the marketplace. The revisions proposed herein will improve safety for all entities within the transportation marketplace by removing bad actors from the marketplace and eliminating an administrative burden from the Agency to enforce outdated and unnecessary regulations.

IDENTITY AND INTEREST OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION

TIA is the professional organization of the \$214 billion third party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all disciplines doing business in domestic and international commerce. TIA is the voice of transportation intermediaries to shippers, carriers, government officials, and international organizations.

TIA members include more than 1,800 motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and NVOCCs), air forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers. TIA members handle the purchase of more than \$100 billion worth of transportation each year and employ more than 130,000 people across the country.

TIA is also the U.S. member of the International Federation of Freight Forwarders Associations (FIATA), the worldwide trade association of transportation intermediaries representing approximately 50,000 companies in virtually every trading country.

Transportation intermediaries or third-party logistics professionals act somewhat as the “travel agents” for freight; however, given the wide varieties of freight, specific needs of each shipper the diverse issues applicable to anyone load, third-party logistics professionals must have expertise far beyond what a traditional “travel agent” must possess. They serve tens of thousands of shippers and carriers, bringing together the transportation needs of the cargo interests with the corresponding capacity and special equipment offered by rail, motor, air, and ocean carriers.

Transportation intermediaries are companies whose expertise is providing mode and carrier neutral transportation arrangements for shippers with specific needs and requirements and matching those with the ability and expertise of the underlying operating carriers.

PROPOSED ACTION AND EXPLANATION OF PURPOSE

1. TIA seeks elimination of 49 CFR §371.3(c)

The regulation at 49 CFR 371.3(c) provides as follows:

§ 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.

In response to President Trump's Executive Order 13924, entitled the "Regulatory Relief to Support Economic Recovery", TIA seeks the elimination of 49 CFR §371.3(c). 49 CFR 371.3(c) was formalized

in the Federal Register on May 12, 1980, during a time of deregulation within the transportation industry. Prior to the Motor Carrier Act of 1980, motor carriers could only operate in certain lanes, a limited number of licenses were issued to brokers and motor carriers, and rates were filed directly with the federal government for enforcement.

Additionally, in 1980 the broker was paid a percentile commission from the motor carrier to find freight to be carried. This is not how the market operates today. At the time this regulation was put in place it was designed so that the motor carrier could verify that the commission paid was correct per the agreement with the broker. Fresh produce shipments still work this way today under the (Perishables Agricultural Commodities Act) PACA rules, but that is not how brokerage works in the transportation of general freight.

The Interstate Commerce Commission's (ICC) commentary in the Federal Register notice published on May 12, 1980 offers an interesting perspective on the purpose of the broker transaction (emphasis added):

*The amount of the broker's fee is not regulated by the Commission. This means that a broker must engage in a bargaining process with its principals. The amount of commission that a principal agrees to pay will vary according to the benefits it perceives it will gain from the transaction. No party is obligated to deal with a broker or pay its commissions. A party may either choose to do without the brokers' services or to look for another broker who will offer the service at a lower price. In this regard, we note that the property broker industry is a highly competitive one. **Our goal in regulating transactions between brokers, carriers, and shippers is to remove all unnecessary restrictions which might impede the free operation of the marketplace.***

Today, forty years later, 49 CFR §371.3(c) is in direct conflict with the original intent of the ICC to ensure that "all unnecessary restrictions which might impede the free operation of the marketplace" are removed. In today's marketplace brokers are not commissioned sales agents of motor carriers. As noted above brokers pay motor carriers regardless of the rate that the shipper pays the broker. The need to verify commissions no longer exists.

This change occurred because motor carriers wanted the broker to pay them more quickly than the shipper was willing to pay the broker. For example, a motor carrier might insist on payment within thirty days of delivery, while a shipper might take sixty, ninety or even a hundred twenty days to pay the broker. To satisfy both parties the broker has to bear the credit risk of advancing the funds to the carrier before the broker collects payment from the shipper.

Furthermore, within the free and open marketplace that currently exists, efficient supply-chains have become a competitive advantage. Shippers do not want their proprietary rate and transportation costs to be made available to their competitors, either directly or through leakage of information through third parties. For example, Superstore A does not want Superstore B to know their lanes, volumes and freight rates and vice versa. Because of these legitimate disclosure and confidentiality concerns, shippers often require confidentiality provisions in their contracts with brokers and, thus, brokers often are required to include confidentiality provisions and other contract language that motor carriers waive their rights to see the transaction documents under section 371.3(c). Most carriers do not object because they want the business and have no need to verify the broker's commission, because that scenario is no longer applicable.

In terms of enforcement, prior to this becoming a recent hot button issue, with truck protests outside the White House during the COVID-19 pandemic, there has not been one single complaint made to the Department of Transportation's (DOT) National Consumer Complaint Database (NCCDB) for a violation of a broker not disclosing their commission under 49 CFR §371.3(c). To the extent that there were temporary increases in gross margin percentages for brokers in April 2020, the marketplace rapidly adjusted. In a matter of just a few weeks, gross margin percentages were at and have actually dipped below pre-pandemic expectations. In fact, most broker's gross margin percentages are currently lower today than they were in January and February 2020.

Moreover, motor carrier transportation on the spot market is one of the most transparent marketplaces in the world. Load boards, the internet, and rate quotes in person to person communications within the industry provide the rate transparency that was intended by 49 CFR §371.3 when commissions paid by carriers to brokers were common. Motor carriers have sufficient access to current market rates without inspecting brokers' shipment records to find out what the brokers' gross margins are on a load-by-load basis.

Finally, gross margins on a load-by-load basis is not indicative of the net profit that brokers and other intermediaries receive. Because brokers are neither the commission or other agent of the carrier or the shipper, but are independent, and because brokers are required to pay carriers regardless of (and typically much sooner than) the broker receiving payment from the shipper, brokers take on both significant credit risk of shippers and the cost of carrying the account receivable from the shipper - even when shippers pay timely according to the credit terms extended. Additionally, brokers are an integral part of the supply chain, upon which many manufacturers, distributors and other shippers rely for their logistics needs. In order to secure freight from many medium and large shippers, brokers must prepare and submit sophisticated requests for proposal ("RFPs") and other bids and commit to long-term pricing in those bids. Pricing models are both sophisticated and extremely

competitive in order to be awarded freight or various traffic lanes from a shipper. One cannot reasonably expect small and medium sized carriers to submit the necessary RFPs to obtain freight from large shippers or to be able to compete for direct award of freight from such shippers. Brokers fulfill this need in the supply chain and invest substantially in the technology, education and other tools in order to do so efficiently. Indeed, without brokers, small and medium carriers would never have freight from medium and large shippers available to them.

In summary, TIA implores the Agency to eliminate 49 CFR §371.3(c) to ensure that a free and open marketplace continues to be allowed, per the original intent of the ICC.

2. TIA seeks guidance on what constitutes a “dispatch service”

There is currently a dangerous loophole in the transportation market of “dispatch services” who are essentially unlicensed brokers. These services handle freight monies but do not meet the statutory licensing or financial security requirements. A legal dispatch service will provide a service on behalf of a motor carrier, where they assist on booking loads and other services for them. The dispatch service is paid a commission by the motor carrier for their services, not the model that generally applies to brokers, where the shipper pays the broker for their service and the broker pays the motor carrier. We believe there are many illegal dispatch services that are operating illegally as unlicensed brokers. FMCSA should prohibit these companies from offering such a service without a license.

As a first step, some clarification is needed as to how legitimate motor carrier agency is distinguished from unlicensed brokerage (even if it is called a “dispatch service”). In examining what a dispatch service is, one has to consider the definition under which they say they operate. This definition is contained under 49 CFR 371.2(b), which reads:

§371.2 Definitions. (b) Bona fide agents are persons who are part of the normal organization of a motor carrier and perform duties under the carrier’s discretion 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.

Under this definition, the immediate question is whether or not a company/person could be an agent for multiple motor carriers without violating the last clause of this definition: “precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others.” In speaking with several DOT officials at the headquarters in Washington, DC and field offices throughout the United States, there is a consensus that the regulation does not directly prohibit a company from representing more than one motor carrier. However, they also believe that the intention is to represent only one, because in

practice it is difficult to see how multiple representation does not lead directly to allocation of traffic in violation of the rule quoted above.

Furthermore, the DOT officials agreed that if a dispatch service is operating as an agent for more than one motor carrier, they are in fact brokering freight and should be licensed. Even with this interpretation from the Agency itself, there is still a lack of clarity and guidance on this issue, which has allowed these unscrupulous entities to continue to operate illegally, and to handle freight monies without any security, in direct violation of the congressional intent of the bonding and trust requirements in the statute.

We want to be clear that a dispatch service is not operating illegally under the definition above, if they are working on behalf of one motor carrier, and they do not accept payment on behalf of the motor carrier. For example, a legal transaction would be that the shippers pay the broker, the broker pays the motor carrier, and the motor carrier pays the dispatch service.

TIA implores the Agency to publish guidance that the legal duties of a dispatch service allow them to be an agent for one motor carrier, but anything further would require a brokerage license and compliance with the financial responsibility requirements applicable to brokers—especially where the dispatch service is handling freight money due to the motor carrier from the shipper. This guidance would ultimately enable private legal action to be taken for violations, which would allow the public and the Agency both to enforce the provisions of this regulation.

CONCLUSION

TIA urges the Agency to take immediate action with regard to this petition. The actions requested will ensure that a free, open and competitive market remains in the transportation marketplace as the ICC intended, and that entities skirting regulations and operating without any financial recourse are removed as quickly as possible. These changes will improve safety throughout the supply-chain by barring irresponsible actors from the marketplace.

Respectfully submitted,

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