

**STATEMENT OF SUZANNE M. Te BEAU
CHIEF COUNSEL
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
BEFORE THE HOUSE COMMITTEE ON TRANSPORTATION AND
INFRASTRUCTURE
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
MAY 6, 2008**

Chairman DeFazio, Ranking Member Duncan, and Members of the Subcommittee, thank you for inviting me today to describe the Federal Motor Carrier Safety Administration's (FMCSA's) jurisdiction over interstate property brokers and the leasing of commercial motor vehicles. The Secretary of Transportation exercises statutory authority "over transportation by motor carriers and the procurement of that transportation" to the extent the transportation is in interstate or foreign commerce. The authority to execute this jurisdiction is delegated to FMCSA.

Brokers are transportation intermediaries who procure the services of motor carriers to transport property. Generally, brokers do not handle the freight nor do they assume legal liability for cargo loss and damage. On behalf of shippers, they arrange for motor carriers to transport individual shipments from origin to destination, a definition codified at 49 U.S.C. §13102(2).

Available statistics indicate a growing reliance on brokers in the shipment of goods. FMCSA's Motor Carrier Management Information System (MCMIS) indicates that approximately 16,930 active general commodities brokers were registered with the Agency as of April 2006. The number of active property brokers registered with FMCSA has increased to 20,268, as of April 25, 2008, 813 of which were household goods brokers. The number of active property brokers registered has increased 15 percent since 2006. These figures indicate that property brokers represent an expanding segment of the transportation industry and are being utilized to help meet the transportation needs of a large number of commercial shippers.

History of Broker Regulation

Brokers arranging for transportation of property in interstate commerce were regulated initially by the Interstate Commerce Commission (ICC) in 1935. Brokers were required to obtain operating authority from the ICC and meet financial responsibility and other regulatory requirements.

The ICC Termination Act of 1995 (P. L. 104-88, or ICCTA) continued the licensing (i.e., registration) and bond requirements for property brokers; however this authority was transferred to the Department of Transportation where it was delegated to the Office of Motor Carriers (OMC) within the Federal Highway Administration. The Motor Carrier Safety Improvement Act of 1999 (P. L. 106-159, or MCSIA) then established OMC as FMCSA, a free standing operating administration within the Department, to elevate the

importance of the agency's safety mission and place it on equal standing with the other safety operating administrations in the Department. MCSIA, however, did not affect any of the existing requirements concerning brokers. It is important to note that the ICC did not have authority over the regulation of fuel surcharges, nor does FMCSA have such authority today. Thus, the Department does not have authority to mandate that brokers pass receipts from broker-imposed fuel surcharges onto independent drivers.

Prior to the enactment of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (P. L. 109-59, or SAFETEA-LU) on August 10, 2005, the Agency's jurisdiction over brokers basically consisted of the following: 49 U.S.C. 13904, which required FMCSA to register all brokers, provided the prospective registrant was "fit, willing, and able" to be a broker and comply with applicable regulatory requirements; 49 U.S.C. 13906 which limited registration to brokers who filed with the Agency "a bond, insurance policy, or other type of security...."; and 49 U.S.C. 13303 and 13304, which collectively required brokers to designate process agents.

Section 4142(c) of SAFETEA-LU continued the registration requirement for brokers of household goods. However, it amended 49 U.S.C. 13904, providing that the Secretary *may* register a person to be a broker of non-household goods (otherwise known as general commodities brokers) to provide service subject to FMCSA jurisdiction *if* the Secretary finds that such registration is needed for the protection of shippers and that the person is fit, willing, and able to provide the service and to comply with applicable regulations of the Secretary.

On August 24, 2006, FMCSA, under authority delegated by the Secretary, published a notice in the Federal Register finding that continued registration of non-household goods brokers under 49 U.S.C. 13904 is needed for the protection of shippers and that brokers must register pursuant to 49 U.S.C. 13901 to engage in interstate transportation. As a result, property brokers remain subject to both registration and bond requirements.

In sum, the Federal Government's jurisdiction over interstate property brokers has remained relatively unchanged from its origin in 1935. Generally, property brokers are required to register with FMCSA for authority to operate, to file evidence of financial responsibility, and to designate an agent for purposes of process service.

Process of Obtaining Authority and Oversight of Brokers

In order to obtain authority to operate as a broker, applicants must register pursuant to 49 U.S.C. 13901 and be granted operating authority. A prospective broker is required to file an OP-1 Form to request the authority to become a broker. This filing can be completed either on-line or in paper format. Upon completion of the filing, analogous to the process for obtaining authority to operate as a motor carrier, it is published in the FMCSA Register and there is a 10-day period to allow for protests. Before the broker authority is granted, the applicant must also file evidence of a surety bond or trust fund to meet the financial responsibility requirements and a BOC-3 Form designating the process agent.

After the broker authority is granted, FMCSA monitors the status of the surety bond or trust fund agreement via the Licensing and Insurance (L&I) system. The L&I system will generate an automatic notice to the broker if there are proposed changes to its operating authority status. One example of a proposed change to operating authority is the receipt of a financial responsibility cancellation notice. The financial institution filing the surety bond or trust fund agreement is required to provide 30 days' written notice to the FMCSA prior to cancellation. Upon receipt of the notice of cancellation the FMCSA issues a notice of investigation informing the broker that if we do not receive a replacement surety bond or trust fund the broker authority will be revoked. If the replacement surety bond or trust fund is not received within the prescribed timeframe, the broker authority is revoked. The broker may have its authority reinstated if a surety bond or trust fund is received at a later date.

The FMCSA conducts reviews of the operations of brokers for compliance with the statutory and regulatory requirements; however, these reviews are generally undertaken based on complaints received by the Agency that a broker is noncompliant. It is our experience that in many instances the complaints concern brokers of household goods.

History of Leasing Regulation

Independent truckers (also known as owner-operators) usually own and operate one, or perhaps a few, trucks. Because of the small size of their operations, they may not seek their own operating authority, choosing instead to lease their equipment and services to a regulated carrier, transporting freight under the regulated carrier's operating authority. The owner-operator generally must cover most of the costs of operation and is usually paid either by receiving a pre-determined portion of the gross revenue or a fixed amount per mile. The amount of compensation is determined by the parties to the leasing contract; FMCSA does not have authority to regulate compensation between the parties.

The Federal Government has regulated the leasing of motor vehicles to provide interstate for-hire transportation for more than 50 years. The U.S. Supreme Court held in 1953 that the ICC had authority to regulate these activities under its general powers even though the Interstate Commerce Act did not specifically grant such authority. In 1956, Congress enacted legislation expressly authorizing the ICC to impose certain requirements on the use of leased vehicles by for-hire motor carriers to provide interstate transportation. The motor carrier industry has since adopted long-standing leasing practices in accordance with these established ICC requirements. These requirements, which are now codified at 49 U.S.C. 14102(a), include the requirement of a written lease signed by both parties which specifies its duration and the compensation to be paid by the motor carrier. The leasing requirements do not apply to property brokers, who may not provide interstate transportation unless they are also registered with FMCSA as a motor carrier. Accordingly, any transportation provided by an entity having dual authority would be as a motor carrier, not a broker.

In response to serious financial problems affecting the nation's independent truckers, the ICC made significant revisions to its leasing regulations in 1979. These regulations,

commonly known as the truth-in-leasing regulations, required, among other things, that the authorized motor carrier fully disclose in the lease all deductions from owner-operator compensation and established requirements governing escrow funds deposited with the motor carrier to guarantee performance or cover expenses initially paid by the carrier but ultimately borne by the owner-operator. The regulations also required the carrier to pay the owner-operator within 15 days after submission of the necessary delivery documents. Although the regulations govern the timeliness of payment and require that the method of compensation be specified in the lease, they do not mandate any particular method or amount of compensation. In 1980, the U.S. Court of Appeals for the District of Columbia Circuit upheld these regulations as a valid exercise of the ICC's authority to regulate leasing contracts.

In 1995, the ICCTA transferred the ICC's authority over motor carrier leasing arrangements to the Secretary, and it now resides with FMCSA. The Act did not make any substantive changes to the ICC's leasing authority under the former Interstate Commerce Act. However, Congress clearly directed that leasing disputes be resolved primarily through private rights of action. In 1996, the former ICC truth-in-leasing regulations were recodified without substantive change at 49 CFR Part 376.

Conclusion

Mr. Chairman, I appreciate the opportunity to provide background on FMCSA's authority over brokers and motor carrier leasing requirements today.

I would be pleased to answer any questions you or other members of the Subcommittee may have.