

AIPBA

AIPBA Statement on FMCSA's Denial of AIPBA's Application for a Categorical Exemption from the \$75,000 Broker Bond

March 30, 2015--The FMCSA has announced this morning it has denied the AIPBA's Broker Bond Exemption application.

The decision is slated to be published in the Federal Register tomorrow and has been opened to public inspection today at:

<https://www.federalregister.gov/articles/2015/03/31/2015-07353/exemption-applications-denials-association-of-independent-property-brokers-and-agents>

AIPBA offers this statement in response to the FMCSA's decision:

The AIPBA is very disappointed in FMCSA, in this instance. We disagree with the long-awaited conclusion rendered and find it totally devoid of sensitivity toward the nearly 10,000 small business intermediaries, especially members of the minority brokerage community, that were revoked in the first two weeks of December of 2013 and the anti-competitive obstacles to entry currently in place due to a bond obviously set too high for over 40% of the brokerage industry to handle.

Furthermore, we believe that the small business segment of the trucking industry should take notice that FMCSA is next on track to adversely affect small business truckers with respect to a significant insurance increase in order to appease big trucking, personal injury attorneys, and safety advocates.

By FMCSA's own admission, whereas AIPBA offered that 9,800 intermediaries were revoked in the first two weeks of December 2013 as a direct result of enforcement of a \$75,000 minimum bond, FMCSA acknowledges in their decision that 8,962 intermediaries were indeed lost during the entire month of December 2013, the difference representing a relatively small amount of intermediaries that were reinstated in the last two weeks of that month and other new non-small business broker applicants MAP-21 sparked as indicated below.

While FMCSA points to a small increase over the year that followed, it neglects to acknowledge that a significant part of that increase is due to the fact that MAP-21 reinforced the need for large carriers to obtain broker licenses when they arrange transportation (formerly asserted to be unregulated as a matter of “interlining”) when the carrier does not take possession of the property at least at some point in the shipment. The current broker census therefore cannot be fairly attributed to a return of these small business brokers that were utterly decimated in December 2013.

The AIPBA notes that FMCSA:

"...has concluded that the exemption should be denied on the basis that 49 U.S.C.13541 does not give FMCSA the authority to essentially nullify a statutory provision by exempting the entire class of persons subject to the provision."

Yet we would bring to trucking media's attention that while FMCSA alleges it does not have such lawful authority, it does not state why it believes it does not have the authority.

The agency properly notes that the statute states as follows:

Section 13541(a) of title 49 of the United States Code (49 U.S.C. 13541) requires the Secretary of Transportation (Secretary) to exempt a person, **CLASS OF PERSONS**, or a transaction or service from the application, in whole or in part, of a provision of 49 U.S.C., Subtitle IV, Part B (Chapters 131-149), or to use the exemption authority to modify the application of a provision of 49 U.S.C. Chapters 131-149 as it applies to such person, **CLASS**, transaction, or service when the Secretary finds that the application of the provision (emphases added):

- Is not necessary to carry out the transportation policy of 49 U.S.C. 13101
- Is not needed to protect shippers from the abuse of market power or that the transaction or service is of limited scope; and
- Is in the public interest.

So, the Agency clearly knows that it does, in fact, have the authority to exempt an entire class such as brokers or forwarders.

And while the Agency states:

“The exemption authority provided by section 13541 “may not be used to relieve a person from the application of, and compliance with, any law, rule, regulation, standard, or order pertaining to cargo loss and damage [or] insurance... .” 49 U.S.C. 13541(e)(1).”

... it would appear FMCSA has conveniently danced around this issue in their decision without making the rational logical connection that they do not have the authority BECAUSE they believe bonds are insurance as this would then give rise to the issue of

how financial institutions can continue to issue non-insurance BMC-85 trust fund instruments if bonds are insurance.

We note they did not omit this important connection in a footnote within their April 2014 Report to Congress (<http://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Financial-Responsibility-Requirements-Report-Enclosure-FINAL-April%202014.pdf>) when they stated:

“The term “financial responsibility” used here refers to insurance. More specifically, it means liability coverage for bodily injury or property damage in the case of freight and passenger motor carriers as well as freight forwarders. When it comes to brokers and freight forwarders, insurance also means coverage for claims against unpaid freight charges. The terms “financial responsibility” and “insurance” are used interchangeably throughout this report.”

I note I specifically brought this to the FMCSA’s attention last fall and it appears they have side-stepped this issue.

We will leave this matter, however, to trucking media to further explore and investigate.

AIPBA is proud to zealously defend the interests of small and mid-sized brokers in this matter. We believe we made a good case for why the exemption should have been granted by FMCSA and that our arguments on how the three statutory criteria were in fact, met... an argument in line with FMCSA’s own rationale and concern about anti-competitive impact of raising the bond beyond \$25,000 during bona fide household goods broker rulemaking between 2007 and 2010.

Sadly, it appears FMCSA was simply not willing to stand up to big business interests and courageously go out on a limb in this instance.

And while it would appear that FMCSA has now been captured by big business interests, we are relieved that this matter is no longer on hold at the Agency level and that justice may now be pursued through the Federal court system on dual fronts in the matters of “Association of Independent Property Brokers and Agents, Inc. v. Foxx, No. 13-15238-D (11th Cir.)” and “*Association of Independent Property Brokers and Agents, Inc. v. Foxx et al*, No. 5:15-cv-00038-JSM-PRL (M.D. Fla.)”

We have faith in the judicial system and are confident that justice will ultimately be served-- albeit very slowly-- through the federal courts and we thank the Small Business Administration for its assistance in getting FMCSA to finally pull the trigger with a decision so these cases may now proceed.