January 22, 2014 **Via Certified U.S. Mail & Facsimile**

Docket Management Facility (M-30),
U.S. Department of Transportation,
West Building Ground Floor, Room W12-140,
1200 New Jersey Avenue SE.,
Washington, DC 20590-0001.

Re: FMCSA Docket ID "FMCSA-2013-0513"
Supplement to AIPBA Exemption Application

Ladies and Gentlemen:

On August 14, 2013, the Association of Independent Property Brokers & Agents ("AIPBA") filed an application for an exemption for all property brokers and surface freight forwarders from the $75,000 minimum bond provision included in section 32918 of the *Moving Ahead for Progress in the 21st Century Act* ("MAP-21"), now codified in 49 U.S.C. 13906. AIPBA filed the exemption application pursuant to 49 U.S.C. 13541. The Federal Motor Carrier Safety Administration ("FMCSA") has decided to consider AIPBA's exemption application, and in response to the FMCSA's request for comments, AIPBA files this letter as a supplement to AIPBA's exemption application.

I. AIPBA's Position in the Exemption Application.

AIPBA argues that the $75,000 bond requirement is contrary to the transportation policy of 49 U.S.C. 13101 because it violates the policy of "encourage[ing] fair competition, and reasonable rates for transportation by motor carriers of property" and "allow[ing] a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public.'' 49 U.S.C. §13101 (a)(2)(A) and (D) (2013). AIPBA also argues that the $75,000 broker bond requirement "is not necessary to protect shippers from the abuse of market power." AIPBA asserts that "the unnecessarily high $75,000 broker bond requirement will cause the majority of property brokers to leave the marketplace, which will expose shippers to abuses of market power by the few large property brokers able to stay in business.''

With regard to the public interest, AIPBA believes the new bond requirement will "cause a significant increase in consumer prices once the supply of property brokers is drastically reduced." AIPBA asserts that a lack of competition will require shippers to pay more for transportation services.

In addition to predicting that small and mid-sized brokers would be forced out of the market place due to the new higher bond requirement, AIPBA argues that the new requirement would also be a barrier to entry into the market place for otherwise would-be property brokers and forwarders.

II. Information or Data Concerning Impact of New Bond Requirement Available Since Filing of Exemption Application Support Granting Exemption Application.

In FMCSA's request for comments on AIPBA's exemption application, FMCSA specifically requests that the public "provide data or information concerning the impact of the new bond requirements and/or the impact of granting this exemption request on carriers, brokers, freight forwarders and shippers." AIPBA believes that the data and information available since AIPBA submitted the exemption application supports AIPBA's arguments for exemption.

On September 5, 2013, FMCSA published "guidance" in the Federal Register concerning section 32918 of MAP-21. On October 1, 2013, FMCSA published a final "technical amendment" rule, amending 49 CFR part 387 to set an actual $75,000 surety bond/trust fund requirement for brokers of property and freight forwarders, without public notice and comment.

Prior to the October 1, 2013 implementation date of MAP-21, AIPBA asserted that a new $75,000 bond amount would result in the revocation of thousands of broker licenses, the loss of tens of thousands of broker and freight agent jobs, an increase in shipping costs and consumer prices, and a decrease in rates to truckers, due to the oligopoly that such an unreasonably high financial security requirement would cause. AIPBA argued that once thousands of brokerages were forced to leave the industry, the remaining big brokerages could charge shippers more and pay truckers less to increase profit margins. As of January 16, 2014, the data available shows that AIPBA's assertions regarding the impact of the increased financial security were accurate. AIPBA believes that the trend of brokers leaving the industry will continue to happen.

III. Disintermediation: the Impact of the $75,000 Bond on the Transportation Intermediary Industry.

In September, FMCSA announced it would be implementing a $75,000 broker bond over a two month phase-in period. In accordance with that notice, FMCSA published a

"technical amendments" rule on October 1, 2013. That rule is currently the subject of a lawsuit currently pending before the US Court of Appeals for the Eleventh Circuit. Between December 2, 2013 and December 16, 2013, FMCSA revoked the licenses of property brokers and the authority of surface freight forwarders. In all, the operating rights of nearly 10,000 intermediaries were revoked during this period. We offer the revocation breakdown by type of intermediary. *(Note: all data comes from the FMCSA Daily Register as complied by mycarrierresources.com):*

PROPERTY BROKERS
Total No. of Property Brokers Revoked Since Dec. 1, 2013: 8,218
Total Property Broker Census as of Oct.1, 2013: 21,565
Percentage of Brokers Revoked: 38%

SURFACE FREIGHT FORWARDERS
Total No. of Surface Freight Forwarders Revoked Since Dec. 1, 2013: 1,583
Total Surface Freight Forwarder Census as of Oct. 1, 2013: 2,212
Percentage of Surface Freight Forwarders Revoked: 72%

ALL FMCSA REGULATED INTERMEDIARIES
Total No. of Intermediaries Revoked Since Dec. 1, 2013: 9,801
Total Intermediaries Census as of Oct. 1, 2013: 23,777
Percentage of Intermediaries Revoked: 41%

Congress did not express an intent to implement a policy of disintermediation, and the widespread disintermediation does not comport with the transportation policy set forth in 49 U.S.C. §13101. This is therefore an "unintended consequence" of the new bond.

In addition, AIPBA expects a secondary wave of revocations when bonding companies who rushed to acquire market share adjust their rates after the financial security market settles. A few of the sureties were issuing broker financial security instruments without cash collateral or reviews of financials, and were boasting a "99.9% approval rate" by offering instruments at a cost up to $10,000 per year. Despite these programs, 8,200 brokerages were unable to secure such an instrument. These newly created instruments are unstable and not viable long term due to lack of cash collateralization and irresponsible reviews of financials or lack thereof. As a result, once these instruments are removed from the financial security market, many of those brokers that were able to secure one of these shaky bonds will realize they do not qualify for the standard instrument at renewal time, which requires a review of balance sheets and other financials. As a result, the adjustment to more stringent review and higher premiums will generate another spike of revocations when brokers are unable to secure new bonds.

IV. Evidence of Immediate Loss of Jobs.

Transport Topics, a trade publication, recently published four Department of Labor initial jobless claims reports that directly correlate to the impact of the $75,000 bonds. On November 21, 2013, two weeks before the 9,800 broker and forwarder revocations, the Labor Department reported initial jobless claims declined by 21,000. http://www.ttnews.com/articles/basetemplate.aspx?storyid=33543&t=Weekly-Jobless-Claims-Fall-by-21000. The week before the revocations, first time job claims were at a two month low. Claims for the week ending November 30, 2013 fell by 23,000 to 298,000, the lowest level since the first week of September 2013. http://www.ttnews.com/articles/basetemplate.aspx?storyid=33634&t=Initial-Jobless-Claims-Drop-to-Two-Month-Low.

For the week ending December 7, 2013, however, jobless claims shot up by 68,000 to a two-month high of 368,000. http://www.ttnews.com/articles/basetemplate.aspx?storyid=33693&t=Jobless-Claims-Rise-From-Three-Month-Low. The next week, initial jobless benefit claims rose to their highest level since March, with new claims rising by another 10,000 to 379,000. http://www.ttnews.com/articles/basetemplate.aspx?storyid=33747&t=Jobless-Claims-Rise-to-9-Month-High. When the revocations stopped, the level was corrected. A week after the revocations ended, jobless claims dropped by 42,000 for that week. http://www.ttnews.com/articles/basetemplate.aspx?storyid=33799&t=Jobless-Claims-Drop-by-42000-for-Week. Two weeks after the revocations, claims fell another 2,000 to 339,000. http://www.ttnews.com/articles/basetemplate.aspx? storyid=33819&t=Jobless-Claims-Fall-to-Lowest-Level-in-a-Month.

There is clearly a correlation between the license revocations and the spike in initial jobless claims. Indeed, since many brokers pay their agents on a 1099 independent contractor basis and most of the affected brokers were self-employed, AIPBA believes that the cited job statistics, which would apply mainly to the W-2 broker sales agents, do not completely show the severity of the impact of the license revocations.

V. Adverse Impact on Consumer Prices.

The Consumer Price Index for December 2013, which was released on January 16, 2014, shows that AIPBA was correct in asserting that prices for goods would increase. See http://www.bls.gov/news.release/cpi.nr0.htm ("On a seasonally adjusted basis, the Consumer Price Index for All Urban Consumers increased 0.3 percent in December after being unchanged in November").

VI. Adverse Impact on Rates for Truckers.

According to DAT Trendlines, which monitors freight rates, for the week of January 5 through 11, "freight activity came back in a big way in the first full week following the holidays. Overall, the average load volume across all equipment types was up 74%, including an 84.9% increase for vans. Despite the surge in volumes, the average rate for all equipment types dropped…" http://www.dat.com/resources/trendlines.aspx.

VII. Projected Increased Market Share for Large Brokerages.

AIPBA asserts that a review of the 2014 quarterly profit and loss statements of the publicly traded large brokerages cross-referenced against the American Trucking Association truck tonnage reports for those periods will reveal massive profit gains. The larger brokerages have engaged in 18 months of aggressive recruiting tactics and used the unattainable broker bond threshold to force formerly independent brokers to work as agents for them. This constitutes use of the governmental process as a weapon by large companies to defeat competition by small players. Unfortunately, these statistics will not be available until after the comment period expires.

VIII. During Prior Rulemaking, FMCSA Already Determined that a $25,000 Financial Security Amount was the Appropriate Security for a Subset of Property Brokers, as a Higher Security Amount was Not in the Public's Interest.

When FMCSA was engaged in proper rulemaking related to property brokers in 2010, FMCSA stated that increasing the bond amount to $25,000.00 to adjust for inflation was likely adequate, and it had not heard any justification for a higher amount. Specifically, FMCSA stated, "commenters that favored increasing the amount of the surety bond or trust fund did not provide adequate justification for an increase above $25,000, especially in light of the number of small business household goods brokers and the potential impact of significantly increasing the amount of financial responsibility beyond a level adjusted for inflation." See 75 FR 72987 (2011).

Congress stated that the increased financial security amount was necessary to fight fraud in the property broker industry. However, there is no data or findings of fact in MAP-21 or the amended 49 U.S.C. §13906 which state that a $75,000.00 bond would be more effective than a $10,000.00 bond at combating fraud, or that a lesser amount would not also be effective. In addition, if such data existed, FMCSA would have reviewed such data when FMCSA debated raising the financial security amount in 2010, and FMCSA would have used such data as a justification for raising the financial security amount.

IX. The Number of Brokers who Left the Industry Largely Reflects the Numbers who Left Due to Revocations, and Were Not Brokers Already Inactive.

Some members of the trucking industry have speculated that the high revocation numbers are due to an "outdated database" or an administrative purging of companies that were already out of business or inactive. This is incorrect. Each of the 8,200 broker licenses revoked had active authority, which means each broker was paying a significant sum of money to keep the original bond in place and their broker's license active.

The prominent members of the trucking industry that are attempting to publicly downplay the 9,800 transportation intermediary license revocations are, in large part, the same members of the industry who lobbied for the increase in the financial security amount. However, the allegation that the actual impact of the $75,000 requirement has been “minimal” is directly contradicted by FMCSA’s statistics. FMCSA provided the statistics cited above, and FCMSA cannot revoke a license that is already “inactive.” Revocation is the very process of changing an active license to inactive status. These 9,800 intermediaries were therefore all active entities that had their licenses revoked directly because of the inability to meet the new bond requirement. FMCSA’s own records show that, in 2013, only 56 broker licenses were revoked per week, on average. Here, 8,200 licenses were suddenly revoked in a mere 10 day period.

X. The Exemption Should Be Granted, Because the Increased Financial Security Amount was Procured with Intent Directly Contrary to the Transportation Policy.

As previously noted, the transportation policy of 49 U.S.C. 13101 is to “encourage fair competition, and reasonable rates for transportation by motor carriers of property” and “allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public.'' 49 U.S.C. §13101 (a)(2)(A) and (D) (2013). It is AIPBA’s position, however, that the increased security amount was lobbied for and procured to limit competition to reduce the price options available to the public.

The trade groups who supported the increased financial security amount have publicly stated they wished to remove brokers from the industry, or have acknowledged the law they sought to effect would remove “underfunded brokers” from the industry. There is no evidence that a $75,000 broker bond requirement would fight fraud as proponents suggest or that it is necessary to carry out the transportation policy of 49 USC section 13101. It is therefore arbitrary, not reasonably related to a legitimate government

purpose, and contrary to an agency determination.

AIPBA has asserted to members of Congress, the federal courts, the Small Business Administration, and the United States Department of Justice Antitrust Division that AIPBA

believes the increased $75,000.00 financial security amount was the product of unlawful lobbying that went beyond the protection of the *Noerr-Pennington Doctrine.* AIPBA's position is that the lobbying for an increased financial security amount constituted use of the governmental system as a weapon through outright collusion by other trade groups rather than bona fide fact-finding. The Department of Justice has advised AIPBA that AIPBA's antitrust complaint is currently "under review."

The history of certain trade groups' activities emphasizes that that intent behind the increased financial security amount does not comport with the intent of the transportation policy. In 2003, OOIDA petitioned FMCSA to raise the property bond from $10,000 to up to $500,000. FMCSA ignored this request, presumably due to the same concerns over anti-competitive effects referenced during the 2010 broker rulemaking. In response to the original 2003 OOIDA bond proposal, TIA President Bob Voltmann wrote, "fraud exists in both the brokerage and the motor carrier industries, and increasing the bond will have no effect on fraudulent operators." Transport Topics, May 13, 2004, http://www.ttnews.com/articles/ basetemplate.aspx?storyid=11447.

TIA then began selling optional $100,000 bonds to brokers, which became a significant revenue stream for TIA. Subsequently, in January 2010, OOIDA and TIA announced in the Journal of Commerce that they had "compromised" on a new $100,000 broker bond amount proposed as necessary to "fight fraud". http://www.joc.com/trucking/brokers-would-accept-higher-ond.

In November 2010, after a three-year rulemaking process, FMCSA promulgated new rules for brokers of household goods, a subset of property brokers, at the behest of the American Moving & Storage Association ("AMSA"). Among the new regulations that resulted was an increase in the minimum financial security requirement for brokers of household goods from $10,000 to $25,000, which went into effect on January 1, 2012. At that time, FMCSA stated that increasing the bond amount to $25,000.00 to adjust for inflation was likely adequate and it had not heard any justification during the public notice and comment process for a higher amount. Specifically, FMCSA stated "commenters that favored increasing the amount of the surety bond or trust fund did not provide adequate justification for an increase above $25,000, especially in light of the number of small business household goods brokers and the potential impact of significantly increasing the amount of financial responsibility beyond a level adjusted for inflation." See 75 FR 72987 (2011).

Despite FMCSA's determination that there was no need to increase the bond amount over $25,000 to avoid anti-competitive effects, OOIDA and TIA returned to Congress and again lobbied for a $100,000 property broker bond. In 2011, after making no progress in the Senate, the "Fighting Fraud in Transportation Act of 2011" ("FFIT") was introduced in the House of Representatives as HR 2357 as a result of OOIDA and TIA lobbying. This

bill, which included a $100,000 property broker bond, did not prevail in committee as stand-alone legislation.

At that time, TIA's president, Robert Voltmann, was quoted in a Transport Topics article as stating the increased bond amount would only hurt "underfunded or undercapitalized brokers [since]… A $100,000 bond to move DOD freight costs $1,500. If you can't afford $1,500 what right do you have to collect someone else's money? You shouldn't start a brokerage if you don't have proper capitalization [at least $1,500]." Transport Topics, July 4, 2011. TIA later began offering a $75,000 bond asking for $8,000 in collateral, a $2,000 "program fee," and up to $5,600 per year in premiums for the bond despite the representation that a mere $1,500 would solve the issue.

Similarly, immediately after MAP-21 was passed in July, 2012, Transport Topics published an article on the impact of the new $75,000 bond. The end of the article reveals that some bonding companies began asking for 150% collateral, "Vince Santiago, owner of VETrans LLC, a small Covington, Wash.-based broker, said the new bond requirement could put him out of business. "I called several underwriters to check this out, and they said they wanted one-and-a-half times the surety requirement to cover the bond," Santiago told TT. "I don't have $112,000 sitting around. I don't know what I'm going to do." Transport Topics, July 2012.

AIPBA contends that none of these acts of petitioning the government constituted a "valid effort to influence government action." Allied Tube & Conduit Corp v. Indian Head, Inc., 486 U.S. 492, 499 (1988). This position is supported by the fact that FMCSA and two different Congressional committees repeatedly refused to treat the proposed OOIDA and TIA bond amounts between $100,000 and $500,000 as appropriate.

The lobbying for a large increase in broker financial security amounts is also representative of anticompetitive behavior due to the nature of broker security instruments. Industry participants who lobbied for the increased financial security amount, like TIA, also sell BMC-84 broker bonds. A BMC-84 bond does not require full collateralization, but is secured based upon a review of an existing business' financials, personal credit and/or personal guarantees. The alternative statutory security to the bond is a BMC-85 trust fund. A BMC-85 trust fund is secured by collateral equal to the value of the security. At the $10,000 level, new entrant property brokers could secure a trust fund by furnishing $10,000 cash to collateralize the trust. However, far fewer new

entrants have the ability to furnish $75,000 solely for the purpose of collateralizing a financial security instrument. Therefore, a large increase in the broker financial security amount results in a large increase in market share for entities that offer broker bonds as opposed to trust fund instruments. Notably, TIA has recently complained to FMCSA about
Pacific Financial Association ("PFA"), a BMC-85 trust fund supplier that had approximately 25% of the broker financial security market share under the $10,000

financial security amount. A coalition of BMC-85 providers has filed a letter with the United States Department of Justice supporting AIPBA's assertion that the $75,000 financial security amount was procured for anticompetitive reasons, rather than in furtherance of the national transportation policy.

XI. The $75,000 Security Amount is Not Necessary to Implement the National Transportation Policy.

AIPBA asserts that a $75,000 bond to protect carriers is not necessary to implement the national transportation policy because there is no shipper bond to protect carriers when they receive loads without the involvement of an intermediary. In those instances, carriers are expected by FMCSA to engage in responsible business practices to protect themselves from non-payment and do their due diligence regarding the shipping party.

Each party should be expected to take individual responsibility for their own business decisions and make credit decisions after doing their due diligence rather then set unreasonable barriers to entry that affect competition.

XII. The $75,000 Financial Security Amount is Not Necessary to Protect the Public Interest Because Fraud can be Prevented by Criminal Enforcement Rather than Economic Regulation.

The stated purpose of the increased financial security amount in MAP-21 was to fight fraud, which is a crime. A bond is useful for mitigating the impact of economic harm, but is not an appropriate tool for punishing or deterring criminal behavior. The only way to truly deter fraud among brokers is to punish brokers who engage in criminal behavior, not to require that all brokers carry high financial security amounts.

XIII. Because AIPBA and Those Who Have Filed Comments in Support of the Exemption Application Have Met the Three Statutory Criteria, FMCSA Should Grant the Exemption Application.

Pursuant to 49 U.S.C. § 13541, FMCSA "shall exempt a person, class of persons, or a transaction or service from the application, in whole or in part, of a provision of this part, or use this exemption authority to modify the application of a provision of this part as it

applies to such person, class, transaction, or service, when the Secretary or Board finds that the application of that provision (1) is not necessary to carry out the transportation policy of section 13101; (2) is not needed to protect shippers from the abuse of market power or that the transaction or service is of limited scope; and (3) is in the public interest." 49 U.S.C.A. § 13541 (a) (2013). In this case, the amendment to 49 U.S.C. 13906 that requires the broker security to be increased to at least $75,000 is not necessary to carry out the national transportation policy of 49 U.S.C. § 13101. Actually, enforcement of the

new financial security minimum is contrary to the national transportation policy of 49 U.S.C. § 13101 because it restricts opportunity, competition and reasonable rates.

Secondly, the new minimum financial security is not necessary to protect shippers from abuse of market power. As AIPBA has stated, the new minimum security amount is the direct result of collusion to abuse market power. The exemption would help stop the loss of property brokers and provide more options for shippers, which would protect shippers.

Third, it is in the public interest to allow open competition, as the public benefits from lower consumer prices and increased employment. A larger pool of property brokers provides more competition and better access to brokers for shippers, which reduces the overall prices of products to consumers.

It is important to note that while the Secretary of Transportation has discretion whether to begin an exemption proceeding, the Secretary of Transportation is obligated to grant an exemption that meets the three statutory criteria. Compare 49 U.S.C. § 13541 (b) (2013) ("The Secretary or Board, as applicable, *may*, where appropriate, begin a proceeding under this section on the Secretary's or Board's own initiative or on application by an interested party") and 49 U.S.C. § 13541 (a) (2013) ("the Secretary or the Board, as applicable, *shall* exempt a person, class of persons, or a transaction or service from the application, in whole or in part, of a provision of this part, or use this exemption authority to modify the application of a provision of this part as it applies to such person, class, transaction, or service, when the Secretary or Board finds that the application of that provision…") (*emphasis added*). Therefore, if FMCSA concludes that AIPBA, and those in support of AIPBA's exemption application, have met the three statutory criteria, then it is AIPBA's position that FMCSA has an affirmative obligation to grant the request.

Thank you.

Sincerely,

JAMES P. LAMB
AIPBA President