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Motor Carrier Broker and Freight Forwarder Surety Bond and Trust Fund Regulations Revised



David Popowski*

In 2012, Congress enacted the MAP-21 legislation that contained requirements for the financial security of motor carrier brokers ("brokers") and freight forwarders;¹ and directed the Secretary of Transportation by and through the Administrator of the Federal Motor Carrier Safety Administration (FMCSA) to promulgate appropriate regulations.

On January 5, 2023, FMCSA published a Notice of Proposed Rulemaking entitled "Broker and Freight Forwarder Financial Responsibility" that was published in the Federal Register.² The objective of this rulemaking was to complete the implementation of the directive of Congress and to help ensure that motor carriers are paid for the services they provide for brokers and freight forwarders. The FMCSA received 340 comments.

On November 16, 2023, FMCSA issued pre-publication regulations that establish more stringent standards regarding motor carrier broker and freight forwarder surety bonds.³ The regulations have various prospective compliance dates.

Without providing the underlying transportation services, Brokers arrange for transportation by motor carrier and freight forwarders consolidate shipments for shippers.⁴ They must have a surety bond

or trust fund in the amount of \$75,000 to pay claims arising out of the failure of the broker to pay freight charges. Surety bonds are typically provided by entities akin to insurance companies; and trust funds by businesses involved in finance.

The new regulations cover five separate areas: (1) assets readily available in trust funds; (2) immediate suspension of broker/freight forwarder operating authority; (3) surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency; (4) enforcement authority; and (5) entities eligible to provide trust funds for brokers and freight forwarders.

Addressing the above areas seriatim, the FMCSA declared:

- 1. Assets** – Cash, irrevocable letters of credit issued by a federally-insured depository institution, and Treasury bonds will constitute the acceptable categories of assets readily available for trust funds.
- 2. Suspension of Authority** – A bond or trust fund should be considered to have fallen below \$75,000 when either an actual drawdown occurs, or when the surety provider or financial institution receives legitimate claims that have not been adequately addressed and will inevitably result in the bond or trust fund falling below that amount. Consistent with the requirement for brokers and freight forwarders to maintain \$75,000 in available assets, FMCSA determined that the definition of a financial institution should include only highly regulated depository institutions, insurance companies,

or equivalent entities. This decision is intended to ensure that a broker's or freight forwarder's surety bond or trust fund assets remain stable, secure, and readily available.

- 3. Failure or Insolvency** – FMCSA added provisions to the regulation delineating the process for surety providers or financial institutions to notify FMCSA of changes to a broker's or freight forwarder's financial security status. Such notification must be made in writing, by electronic means, within two business days of either a payment from the bond or trust that causes the available financial security to fall below \$75,000 or a determination by the surety provider or financial institution that such payment will be inevitable once the 60-day period for submission of claims has elapsed. After a surety provider or financial institution notifies FMCSA that a broker or freight forwarder's available financial security has fallen below \$75,000, FMCSA will send written notification to the broker or freight forwarder and allow seven business days for response. If the broker or freight forwarder presents evidence that the notification from the surety provider or financial institution was sent to FMCSA in error, the available financial security has been restored to the required minimum amount, or the pending claims have been satisfied without the use of surety bond or trust fund assets, FMCSA may find that immediate suspension is not warranted. FMCSA

* Popowski Law Firm LLC, Charleston, SC

will also allow brokers or freight forwarders to cure a default after a suspension has been implemented. FMCSA made changes in the final rule to specify that the immediate suspension procedures do not apply when a broker or freight forwarder has filed a proceeding pursuant to Title 11, United States Code, in addition to changes in the definition of financial failure or insolvency.

4. **Enforcement** – The final rule specifies the monetary penalty for which a surety company or financial institution found to be in violation as well as a mandatory ineligibility period for providing broker financial security.
5. **Entities Providing Trust Funds** – The definition of a financial institution should include only highly regulated depository institutions, insurance companies, or equivalent entities. This decision is intended to ensure that a broker's or freight forwarder's surety bond or trust fund assets remain stable, secure, and readily available.

For easy reference, the new rules are set forth below.

Part 387—Minimum Levels of Financial Responsibility for Motor Carriers

3. The authority citation continues to read as follows:

Authority: 49 U.S.C. 13101,⁶ 13301,⁷ 13906,⁸ 13908,⁹ 14701,¹⁰ 31138,¹¹ and 31139;¹² sec. 204(a), Pub. L. 104-88,¹³ 109 Stat. 803, 941; and 49 CFR 1.87.¹⁴

§ 387.307

Property broker surety bond or trust fund.

This section is effective January 16, 2025.

- (a) *Security.* A broker must have a surety bond or trust fund of \$75,000 in effect. FMCSA will not register a broker until a surety bond or trust fund for the full limits of liability prescribed herein is in effect. The broker registration shall remain in effect only as long as a surety bond or trust fund remains

in effect and shall ensure the financial responsibility of the broker. Evidence of a surety bond must be filed using FMCSA's prescribed Form BMC-84. Evidence of a trust fund with a financial institution must be filed using FMCSA's prescribed Form BMC-85. The surety bond or the trust fund shall ensure the financial responsibility of the broker by providing for payments to shippers or motor carriers if the broker fails to carry out its contracts, agreements, or arrangements for the supplying of transportation by authorized motor carriers.

- (b) *Acceptable assets.* Beginning on January 16, 2026, trust funds under this section must contain assets aggregating to \$75,000 that can be liquidated to cash within 7 calendar days. As of this date, acceptable assets included in any trust fund filed under this section are limited to cash, irrevocable letters of credit issued by a federally insured depository institution, and Treasury bonds.
- (c) *Financial institution.* When used in this section and in forms prescribed under this section, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, shall mean each agent, agency, branch or office within the United States of any person, as defined by the ICC Termination Act, doing business in one or more of the capacities:
 - (1) An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h));¹⁵
 - (2) A commercial bank or trust company;
 - (3) An agency or branch of a foreign bank in the United States;
 - (4) An insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(2));¹⁶
 - (5) A thrift institution (savings bank, building and loan association, credit union, industrial bank or other);

- (6) An insurance company;
- (7) Until January 16, 2026, a loan or finance company; or
- (8) A person subject to supervision by any State or Federal bank supervisory authority.

(d) *Forms and Procedures.*

- (1) Forms for broker surety bonds and trust agreements. Form BMC-84 broker surety bond will be filed with FMCSA for the full security limits under paragraph (a) of this section; or Form BMC-85 broker trust fund agreement will be filed with FMCSA for the full security limits under paragraph (a) of this section.
- (2) Broker surety bonds and trust fund agreements in effect continuously. Surety bonds and trust fund agreements shall specify that coverage thereunder will remain in effect continuously until terminated as herein provided in paragraphs (d) (2)(i) and (d)(2)(ii) of this section.

(i) *Cancellation notice.* The surety bond and the trust fund agreement may be cancelled only upon 30 days' written notice to FMCSA, on prescribed Form BMC-36, by the principal or surety for the surety bond, and on prescribed Form BMC-85, by the trustor/broker or trustee for the trust fund agreement. The notice period commences upon the actual receipt of the notice at FMCSA's Washington, DC office.

(ii) *Termination by replacement.* Broker surety bonds or trust fund agreements which have been accepted by FMCSA under these rules may be replaced by other surety bonds or trust fund agreements, and the liability of the retiring surety or trustee under such surety bond or trust fund agreements shall be considered as having terminated as of the effective date of the replacement surety bond or trust fund agreement. However, such termination shall not affect the liability of the surety or the trustee hereunder for the payment

of any damages arising as the result of contracts, agreements or arrangements made by the broker for the supplying of transportation prior to the date such termination becomes effective.

(e) *Immediate suspension.*

(1) A surety company issuing a Form BMC-84 or a financial institution issuing a Form BMC-85 must notify FMCSA in writing, by electronic means, when the surety company or financial institution:

(i) Makes a payment, with the consent of the broker, from the surety bond or trust fund for a claim by a shipper or motor carrier that causes the surety bond or trust fund to fall below \$75,000;

(ii) Makes a payment in any case in which the broker does not respond within 7 business days to address the validity of the claim, and the surety provider or financial institution determines that the claim is valid, and the payment causes the surety bond or trust fund to fall below \$75,000;

(iii) Makes a payment due to a judgment against the broker that causes the surety bond or trust fund to fall below \$75,000; or

(iv) Determines that the broker is experiencing financial failure or insolvency and that the surety company or financial institution will be required to pay one or more claims pursuant to 49 U.S.C. 13906(b)(6)¹⁷ in an amount that will cause the surety bond or trust fund to fall below \$75,000. The surety company or financial institution may make this determination when:

(A) It receives one or more claims that, if paid, would reduce the balance of the trust fund or surety bond below the required minimum;

(B) It has notified the broker of such claims and provided 7 business days for the broker to respond to the determination; and

(C) Either the broker fails to respond within the time period provided in paragraph (e)(1)(D)(ii) of this

section, or provides a response and the surety company or financial institution nevertheless determines that the claim is legitimate and that the surety company or financial institution expects to make one or more payments on the claim from the bond or trust fund.

(2) Paragraph (e)(1) of this section does not apply when a broker has filed to initiate a proceeding pursuant to Title 11 of the United States Code.

(3) The notification to FMCSA must include the broker's MC number or USDOT number, a description of the reason for the notification, and either:

(i) Evidence of the date a payment was made under paragraphs (e)(1)(i) through (iii) of this section and amount of such payment, or

(ii) A list of currently pending claims, amounts, and evidence that the surety company or financial institution complied with the notification requirements in paragraph (e)(1)(D) of this section.

(4) The notification to FMCSA must be made within 2 business days of a payment or determination.

(5) Upon notification by the surety company or financial institution in accordance with paragraphs (e)(1) through (4) of this section, FMCSA will provide written notice to the broker that its operating authority registration issued pursuant to part 365 of this chapter will be suspended within 7 business days of the date of the notice unless the broker provides written evidence to FMCSA that the notification was sent in error, the surety bond or trust fund has been restored to the \$75,000 amount required by this section, or the pending claims have been satisfied without the use of surety bond or trust fund assets.

(6) If the broker fails to respond to the notice within 7 business days, FMCSA will enter a suspension of the broker's authority and provide written notice to the broker that the suspension is in effect. A broker whose authority has

been suspended may request FMCSA to lift the suspension by providing written evidence that the notification was sent in error; the surety bond or trust fund has been restored to the \$75,000 amount required by this section; or the pending claims have been satisfied without the use of surety bond or trust fund assets. FMCSA will consider such evidence and provide written notice to the broker of its determination.

(f) *Financial failure or insolvency of the broker.*

(1) For purposes of this section, a *financial failure or insolvency* of a broker is defined as any payment made or other default pursuant to § 387.307(e)(1) not cured in accordance with § 387.307(e)(5) or (6).

(2) For purposes of this provision, a filing related to the broker pursuant to Title 11 of the United States Code does not constitute financial failure or insolvency.

(3) If a surety company or financial institution makes a determination as described in paragraph (f)(1) of this section, such surety company or financial institution shall initiate cancellation of the Form BMC-84 or Form BMC-85 pursuant to paragraph (d)(2)(i) of this section.

(4) Upon notification by the surety company or financial institution, FMCSA will provide written notice of the cancellation in the FMCSA Register on its public website. The surety or financial institution must accept claims against the BMC-84 surety bond or BMC-85 trust fund for 60 calendar days (extended to the next business day if the final day of the period falls on a weekend or Federal holiday) following FMCSA's public notification of the financial failure or insolvency in the FMCSA Register.

(5) If a surety company or financial institution notifies FMCSA of its determination pursuant to paragraph (e)(1)(iv) that a broker is experiencing financial failure or insolvency and

the broker subsequently satisfies all pending claims that would have reduced the surety bond or trust fund below \$75,000, the surety company or financial institution must immediately notify FMCSA that the broker is no longer experiencing financial failure or insolvency. Upon receiving evidence from the broker that the surety company or financial institution has terminated the cancellation process and reinstated the bond or trust, or that the broker has obtained a new bond or trust from another eligible surety company or financial institution, FMCSA will promptly provide written notice in the FMCSA Register on its public website that the financial failure or insolvency has been cured.

(g) *Suspension of surety company or financial institution.*

(1) If a surety company or financial institution violates the requirements of this section or 49 U.S.C. 13906(b) or (c),¹⁸ FMCSA shall suspend the authorization of such surety company or financial institution to have its instruments filed as evidence of financial responsibility pursuant to § 387.307 for 3 years.

(2) If FMCSA initiates a suspension action pursuant to paragraph (g)(1) of this section it shall provide written notice to the surety company or financial institution, provide 30 calendar days (extended to the next business day if the final day of the period falls on a weekend or Federal holiday) for

the surety company or financial institution to provide evidence contesting such proposed suspension, and then render a final decision in writing.

I concur with a colleague in the surety bond and trust fund industry, who advises that it is very possible that the removal of loan or finance company from the list of approved trust providers in the regulations might be disruptive to a large percentage of the brokers relying on trusts. Less likely, but possibly still disruptive, would be the regulation specifying only cash, treasury debt, or an irrevocable letters of credit from a federally insured financial institution as acceptable assets securing trusts.

Endnotes

- ¹ Pub. L. 112-141, 126 Stat. 405, 822), Section 32918
- ² Docket No. FMCSA-2016-0102, 88 FR 830. Online at: <https://www.federalregister.gov/citation/88-FR-830>. Accessed 4 Dec. 2023.
- ³ Online at: <https://www.federalregister.gov/documents/2023/11/16/2023-25312/broker-and-freight-forwarder-financial-responsibility>. Accessed 4 Dec. 2023.
- ⁴ 49 U.S.C. 1310. *Definitions* (2)(Broker) and (8)(Freight Forwarder).
- ⁵ See 49 U.S.C. Section 13906(b)(2), *Broker financial security requirements – Scope of financial Responsibility*; and 49 Code of Federal Regulations Part 387.307, *Property broker surety bond or trust fund*.
- ⁶ Online at: <https://www.govinfo.gov/link/uscode/49/13101>. Accessed 4 Dec. 2023.
- ⁷ Online at: <https://www.govinfo.gov/link/uscode/49/13301>. Accessed 4 Dec. 2023.
- ⁸ Online at: <https://www.govinfo.gov/link/uscode/49/13906>. Accessed 4 Dec. 2023.
- ⁹ Online at: <https://www.govinfo.gov/link/uscode/49/13908>. Accessed 4 Dec. 2023.
- ¹⁰ Online at: <https://www.govinfo.gov/link/uscode/49/14701>. Accessed 4 Dec. 2023.
- ¹¹ Online at: <https://www.govinfo.gov/link/uscode/49/31138>. Accessed 4 Dec. 2023.
- ¹² Online at: <https://www.govinfo.gov/link/uscode/49/31139>. Accessed 4 Dec. 2023.
- ¹³ Online at: <https://www.govinfo.gov/link/plaw/104/public/88>. Accessed 4 Dec. 2023.
- ¹⁴ Online at: <https://www.ecfr.gov/current/title-49/section-1.87>. Accessed 4 Dec. 2023.
- ¹⁵ Online at: <https://www.govinfo.gov/link/uscode/12/1813>. Accessed 4 Dec. 2023.
- ¹⁶ Online at: <https://www.govinfo.gov/link/uscode/12/1813>. Accessed 4 Dec. 2023.
- ¹⁷ Online at: <https://www.govinfo.gov/link/uscode/49/13906>. Accessed 4 Dec. 2023.
- ¹⁸ Online at: <https://www.govinfo.gov/link/uscode/49/13906>. Accessed 4 Dec. 2023.