

COMPLIANCE BULLETIN

FMCSA Interprets “Broker” and “Bona Fide Agents” Definitions

On Nov. 16, 2022, the Federal Motor Carrier Safety Administration (FMCSA) issued [interim guidance](#) to inform the public and regulated entities of its interpretation of the definitions of “broker” and “bona fide agents.” Both definitions relate to all brokers of transportation by motor vehicles.

The FMCSA issued this guidance to better define these terms as required by the Infrastructure Investment and Jobs Act (IIJA).

This interim guidance is effective immediately. In response to this guidance, the FMCSA is also seeking comments from stakeholders, which must be received on or before Jan. 17, 2023.

Originally, comments were requested by June 10, 2022, from stakeholders during the development of the guidance. Over 80 stakeholders filed comments in the public docket.

Action Steps

Motor carriers and employers should review the interim guidance and the factors used to interpret the definitions of “broker” and “bona fide agent.” The FMCSA is looking for comments from stakeholders that are relevant to identifying a dispatch service that engages in actions that would require broker authority compared with actions that don’t require broker authority. If any affected employers or motor carriers have comments or concerns, they should submit them prior to Jan. 17, 2023.

Important Considerations

Under the IIJA, the FMCSA must, at minimum, do the following when issuing its guidance:

- Examine the role of a dispatch service in the transportation industry;
- Examine the extent to which dispatch services could be considered brokers or bona fide agents; and
- Clarify the level of financial penalties for unauthorized brokerage activities under 49 U.S.C. 14916, applicable to a dispatch service.

Important Dates

Nov. 16, 2022

The interim guidance became effective.

Jan. 17, 2023

Deadline for submitting comments on the interim guidance.



Background

The term “broker” has two different definitions relevant to the FMCSA. Under 49 U.S.C. 13102(2), it means a “person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.”

Under 49 CFR 371.2(a), the term “broker” means a “person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.”

Bona fide agents are defined as “persons who are part of the normal organization of a motor carrier and perform duties under the carrier’s directions 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.” 49 CFR 371.2(b).

The IIJA directed the FMCSA to issue guidance clarifying the definitions of the terms “broker” and “bona fide agents.” This guidance must take into consideration the extent to which technology has changed the nature of freight brokerage, the role of bona fide agents and other aspects of the freight transportation industry. Additionally, when issuing the guidance, FMCSA was required to minimally:

- Examine the role of a dispatch service in the transportation industry;
- Examine the extent to which dispatch services could be considered brokers or bona fide agents; and
- Clarify the level of financial penalties for unauthorized brokerage activities under 49 U.S.C. 14916, applicable to a dispatch service

Definition of Broker

While the FMCSA is unable to change the definition of “broker” outside of the formal rule-making process, it is able to provide clarification of the meaning. A majority of stakeholders believed that the current definition of broker was adequate. Accordingly, the FMCSA determined that it needed to clarify the definition in only one area: the relevance of an entity’s handling of funds in a transaction between shippers and motor carriers.

After consideration of the stakeholder comments and the important role of financial responsibility in broker regulation, FMCSA will clarify that handling money exchanged between shippers and motor carriers is a factor that strongly suggests the need for broker authority but is not an absolute requirement for one to be considered a broker.

Definition of Bona Fide Agent

The FMCSA is mandated to clarify the definition of “bona fide agents” in 49 CFR 371.2. After careful consideration, the FMCSA determined that representing more than one motor carrier does not necessarily mean one is a broker rather than a bona fide agent. Any determination would be highly fact-specific and would entail determining whether the person or company is engaged in the allocation of traffic between motor carriers.

Role of Dispatch Services

The FMCSA was required by the IIJA to examine the role of dispatch services in the transportation industry and the extent to which such services could be considered brokers or bona fide agents. After consideration of the public comments, the



FMCSA determined it is clear that there is no commonly accepted definition of a dispatch service, as such services appear to have certain common features. First, they work exclusively for motor carriers, not for shippers. Second, they source loads for motor carriers. And third, they perform additional services for motor carriers that are unrelated to sourcing shipments.

Dispatch Service: Broker or Bona Fide Agent

The FMCSA was required by the IJIA to examine when a dispatch service could be considered a broker and when it could be considered a bona fide agent. The FMCSA clarified that when a dispatch service does not participate in the arrangement of freight or when it represents only one motor carrier, it is not a broker. If a dispatch service arranges transportation on behalf of multiple motor carriers and engages in the allocation of traffic, however, pursuant to 49 CFR 371.2, it is not a bona fide agent and must obtain broker operating authority registration.

Ultimately, the analysis of whether a person or entity requires broker authority is often highly fact specific and must be made on a case-by-case basis. Regarding whether a dispatch service is a bona fide agent, one must analyze whether the service falls within the definition of “bona fide agent” in 49 CFR 371.2(b). However, if the dispatch service allocates traffic between two motor carriers, it cannot be a bona fide agent by definition.

Generally, the factors relevant to whether a dispatch service is **not required** to obtain broker authority are when the dispatch service:

- Has a written legal, contractual relationship with a motor carrier that clearly reflects the motor carrier is appointing the dispatch service as a licensed agent for the motor carrier. This is often a long-term contractual relationship;
- Has a written legal contract that specifies the insurance and liability responsibilities of the dispatch service and motor carrier;
- Must meet all state licensing requirements;
- Goes through a broker to arrange for the transportation of shipments for the motor carrier. The dispatch service may not seek or solicit shippers for freight;
- Does not provide billing nor accept compensation from the broker, third-party logistics company or factoring company, but instead receives compensation from the motor carrier(s) based on the predetermined written legal, contractual agreement;
- Is not an intermediary or involved in the financial transaction between a broker and motor carrier;
- Is an IRS 1099 recipient from the motor carrier or a W2 employee of the motor carrier as specified in the legal written contract agreement;
- Discloses that they are a dispatch service operating under the authority of a specific motor carrier, and the shipment is arranged for that motor carrier only;
- Does not subsequently assign or arrange for the load to be carried/moved by another motor carrier; or
- Does not provide their “services” for a motor carrier unless that motor carrier specifically appointed the dispatch service as their agent in accordance with the aforementioned requirements.

The following factors would indicate the dispatch service **should obtain** broker authority when the dispatch service:

- Interacts or negotiates a shipment of freight directly with the shipper or a representative of the shipper;
- Accepts or takes compensation for a load from the broker or factoring company or is involved in any part of the monetary transaction between any of those entities;

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- Arranges for a shipment of freight for a motor carrier when there is no written legal contract with the motor carrier that meets the aforementioned criteria;
- Accepts a shipment without a truck/carrier, then attempts to find a truck/carrier to move the shipment;
- Is a named party on the shipping contract; or
- Is soliciting the open market of carriers for the purposes of transporting a freight shipment.

According to the FMCSA, it was clear, based on feedback from the industry, that there is a need and desire for dispatch services among large and small motor carriers. A beneficial role that a dispatch service may provide is the outsourcing of resources for small motor carriers who cannot afford a full-time employee to perform these functions. The dispatch service can help to ensure the motor carrier has a steady stream of shipments while allowing the motor carrier to focus on its core business of safely transporting freight. The FMCSA stated that it does not believe it is the intent of U.S. Congress to eliminate the services that dispatch services provide.

While no single factor is paramount in assessing the business relationship between a dispatch service and a motor carrier, the extent of a motor carrier's control over the individual(s) performing the dispatch services is highly significant; i.e., the dispatch service works on behalf of the motor carrier and makes decisions based on the motor carrier's guidance and direction. The FMCSA determines whether a dispatcher is conducting broker operations on a case-by-case basis, utilizing factors previously discussed.

Financial Penalties

The FMCSA clarified the level of penalties for unauthorized brokerage applicable to dispatch services. If the dispatch service is deemed to be providing unauthorized brokerage services pursuant to 49 U.S.C. 14916, the service will be subject to applicable penalties. If no finding of unauthorized brokerage is made, it will not be subject to such penalties.