BEFORE THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

NOTICE AND REQUEST FOR COMMENTS

"AGENCY INFORMATION COLLECTION ACTIVITIES: REQUEST APPROVAL OF A NEW INFORMATION COLLECTION: FMCSA REGISTRATION SYSTEM (FRS)"

FMCSA-2024-0109 (89 FR 28841)

COMMENTS ON BEHALF OF THE FOLLOWING STAKEHOLDERS:

Air & Expedited Motor Carriers Association (AEMCA)
Airforwarders Association (AfA)
Alliance for Safe, Efficient and Competitive Truck Transportation (ASECTT)
American Home Furnishings Alliance (AHFA)
Apex Capital Corp
Auto Haulers Association of America (AHAA)
Specialized Furniture Carriers
The Expedite Association of North America (TEANA),
Transportation & Logistics Council (T&LC),
Transportation Loss Prevention and Security Association (TLP&SA)

Submitted by:

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Date Due and Filed: June 18, 2024

COMMENTS ON BEHALF
OF THE ABOVE-NAMED STAKEHOLDERS

1. Background. The undersigned parties and associations named on the cover page (Stakeholders) have engaged directly with the Federal Motor Carrier Safety Administration (FMCSA or Agency) since it first announced the FRS proposal. On April 19, 2024 – the very date on which the proposal was published in the Federal Register –Stakeholders sent a letter to Ms. Sue Lawless, the Agency's Acting Deputy Administrator. The letter expressed concern that the FRS proposal was premature and could not be artificially separated from currently pending proposals to amend motor carrier, broker and forwarder registration requirements relating to safety fitness and prevention of fraud.

Subsequently, Stakeholders have discovered that their letter to Ms. Lawless was not placed in the Comments section of this docket. In order to make sure that their concerns are considered while avoiding unnecessary repetition, Stakeholders are attaching that letter as Appendix A hereto along with a related letter to Mr. Kenneth Riddle, Director of the Agency's Office of Registration. The positions expressed in those letters are hereby incorporated by reference in these Comments.

2. Summary. While we commend the Agency for recognizing that closer scrutiny of registration applications is necessary to prevent supply chain fraud ranging from identity theft to stolen loads, the FRS questionnaire alone would not be nearly enough unless backed up by hands-on vetting and verification of applicants before operating authority is granted. Related developments in the weeks following April 19 have only confirmed our concerns that the FRS alone is an incomplete and piecemeal approach to the need for investigating the authenticity and safety fitness of applications for registration.

3. Applicable Statutes – PRA and APA. For one thing, this docket is designated at www.regulations.gov as a "non-rulemaking" matter that supposedly involves only a new

"information collection" under the Paperwork Reduction Act (PRA), Pub.L. 104-13; see 44 USC 3506, 3507. In fact, however, an applicant before the Agency would need to disclose the "information" being "collected" in order to become licensed as a motor carrier, broker or forwarder. The formulation of such disclosure requirements qualifies as "rulemaking" under the Administrative Procedure Act (APA) at 5 USC 551(4), (5). Licensing, in turn, is a form of "adjudication" as defined by APA at 5 USC 551(6), (7). To close the loop, the PRA itself provides that any collection of information to be "contained in a proposed rule" must be subjected to "notice and comment through the notice … for the proposed rule"; 44 USC 3506(c)(2)(B). Thus, APA notice-and-comment requirements for a rulemaking cannot be escaped by labelling this proceeding as merely an information collection.

Moreover, the Agency itself admitted at a May 29 listening session that rulemaking would be required for certain proposed elements of FRS. These included changing application fee amounts, making all registrations non-transferable, requiring annual updates of registration data, and allowing on-line challenges to applications for registration. How the registration process would be made simpler and more transparent by case-by-case application of APA due process requirements is not apparent.

4. Role of Third-Party Service Providers. Equally mysterious at this point is the possible impact of FRS on third party service providers for registration applicants. On one hand, the April 19 notice suggests that the changes under consideration could extend to insurance forms and filings as well as to designations of process agents; see 89 FR at 28842. Although participants in FRS stakeholder meetings and listening sessions have expressed concern about fraudulent addresses in process agent filings, the notice itself proposes no specific changes to the requirements for such filings.

5. Agency Enforcement Powers under *Riojas*. Another issue has been raised by the Agency itself, which questions its own power to penalize perpetrators of registration fraud. Citing decisions issued by an Administrative Law Judge (ALJ) in an enforcement case cited as Docket No. FMCSA-2012-0874, *In Re Riojas et al.*, Agency officials have stated in listening sessions that this case bars FMCSA from assessing civil penalties for violation of its "commercial regulations" without first obtaining court approval. With due respect, this view seriously understates the Agency's powers.

In actuality, there were two ALJ decisions in *Riojas*, neither of which ever took effect because the case ultimately was settled. The first ALJ decision (*Riojas I*) was issued May 8, 2019; the second (*Riojas II*) came out five days later. On one hand, *Riojas I* (at pp. 15-19) did hold that court proceedings were required to enforce civil penalties relating to evasion of regulation, to reports and recordkeeping, and to cargo securement. It did so after a laborious effort to parse out limits of certain FMCSA civil penalty powers based on a convoluted discussion of legislative history and a series of statutory recodifications. On the other hand, the same ALJ in *Riojas II* (at pp. 25-26, 28-29 and 50-51) required no court proceedings for FMCSA enforcement of penalties for operating with an Unsatisfactory safety rating, for fraud in the licensing application process, and for violating the "reincarnation" rules against obtaining a new MC number to continue operating a carrier shut down for safety violations.

The ALJ draws no discernible boundary between "commercial" violation penalties that require a court order and "safety" violation penalties that do not. To the contrary, all violations addressed in these two decisions evidently contain both "commercial" and safety elements. Moreover, Title 49 of the Code of Federal Regulations contains no such thing as a subdivision labeled "Commercial Regulations." Parts 300 through 399 of that title address matters ranging

from licensing to recordkeeping to safety requirements, all encompassed by the "Federal Motor Carrier Safety Regulations."

As an additional basis for limiting the Agency's powers, the ALJ in *Riojas I* (at pp. 17-18) purports to criticize and disregard a federal appeals court decision in *Dandino, Inc. v. U.S. Dept. of Transp.,* 729 F.3d 917 (9th Cir. 2013). But a pair of ALJ decisions in an FMCSA case that never became administratively final, and are largely built on distinctions without a difference, bear few hallmarks of inherent authority in the face of APA judicial review as exercised in *Dandino*.

6. A "Whole of Government" Approach is Vital in Fighting Freight Fraud. Finally, these Stakeholders are aware that the Agency prioritizes highway safety in using its limited resources. On the other hand, Stakeholders and their members often experience freight fraud as either a cause or an effect of road safety violations. Moreover, other federal agencies can serve as force multipliers for FMCSA efforts in this area. For example, the Corporate Transparency Act (31 USC 5336) now requires most U.S. companies throughout the economy to report their corporate affiliations to the Treasury Department's Financial Crimes Enforcement Network (FinCEN). As FinCEN grows its database, FMCSA and Treasury should be able to cooperate on efforts to prevent scofflaw carriers and intermediaries from registering new affiliates as "chameleon" operators. Similar efforts may be possible between the Agency and a Supply Chain Fraud and Theft Task Force that will be created if the 2025 House of Representatives version of the Department of Homeland Security Appropriations Bill becomes law. See H.R.Rep. No. 118-XXX (118th Cong. 2nd Sess.), p. 38.

7. Conclusion. In conclusion, the undersigned stakeholders renew their previous request that implementation of the new application be postponed for the following additional reasons: (1) the Agency's acknowledgment in its May 29 listening session that additional rulemaking would be necessary to vet existing carriers and intermediaries, regardless of

commodity or size of equipment; (2) pending rulemakings which are intended to address the need for vetting all new applicants for safety; (4) the absence of clarity on the FMCSA's role in identifying, policing, and prosecuting supply chain fraud; and (5) pending congressional initiatives and the unaddressed possibility of inter-agency coordination to address supply chain fraud with the full implementation of government resources.

Respectfully submitted,

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Date Due and Filed: June 18, 2024

APPENDIX A

April 19, 2024

Hon. Sue Lawless
Acting Deputy Administrator
Federal Motor Carrier
Safety Administration
Via Email: Sue.Lawless@dot.gov

Re: Request for Postponement / 89 FR 28841

Dear Ms. Lawless:

The purpose of this letter is to request the Federal Motor Carrier Safety Administration ("FMCSA" or "Agency") to postpone implementation of its proposed new "information collection" programs (application forms and procedures) that were announced in today's Federal Register (89 FR 28841). This proposal is premature because it makes no reference to urgent and pending proposals for substantive reforms in the registration process related to vetting of registrants for safety fitness and for fraud prevention. The undersigned stakeholders share a longstanding concern for those issues, and urge the Agency to undertake registration reform in a coordinated, comprehensive manner for the following reasons:

1. One of the Agency's stated goals in the new application process (as announced in its recent presentations to stakeholders) is to identify and prevent fraud, yet the Agency has not identified the prime sources of fraud or the extent to which fraud is being perpetrated by bad actors among the intermediaries and third parties involved in the application process.

2. The new on-line application is complex, lengthy, and will encourage the use of unvetted third parties posing as "consultants" and "agents." Even experienced attorneys and practitioners face difficulties because it is difficult to review the on-line application questionnaire as a whole without logging in as a prospective applicant.

3. The new applicant procedure envisions renumbering of registrants to include all operators in interstate commerce, but without specifying the scope and intent of the applicant's proposed operations, let alone testing its compliance with statutes and rules for safety and fraud prevention. The proposal announced today disregards 49 U.S.C. §13901(b), which mandates that registration numbers must indicate the type of service for which the provider is registered.

4. The Agency has announced several new initiatives which should be completed first:

(a) its proposal to hire a new Supervisory Financial Analyst (Deputy Division Chief), who would enable it to develop budgeting and fee structures under which the Agency could afford to vet applicants for safety and existence as bona fide operations; and

(b) two currently pending petitions for rulemaking which should be considered as part and parcel of any new application process:

(i) The Transportation Intermediaries Association ("TIA"), based upon MAP-21 (Pub.L. 112-141), has filed a petition requesting the Agency to test brokers' ability to comply prior to issuance of brokers' licenses. This proposed rulemaking would involve the role of the Agency in regulating brokers and will call into question the Agency's existing position that it has no responsibility for vetting, policing, and prosecuting fraud involving brokers.

(ii) In addition to TIA's petition, there is another pending petition for reconsideration in a rulemaking docket having its ultimate origins in the Motor Carrier Safety Improvement Act of 1999; it would require testing and vetting of new motor carriers as a prerequisite to a grant of authority. The Agency's latest regulatory agenda has calendared action on this measure for July of this year. This petition would have a direct effect on the nature and extent of any new application process, and necessarily would address whether or not safety vetting is required.

5. The above two rulemakings involve issues of general transportation importance in which these stakeholders have a vital interest. Those dockets also are intertwined with the Agency's pending rulemaking on a new safety fitness rule, which likewise implicates the vetting of carriers for protection of the public, and the "red light green light" issue which is of major concern to stakeholders.

6. Currently the Agency has no process for pre-issuance training, testing, or vetting with respect to carrier or broker applications, which are summarily granted. The Agency's initiative to make its data more accurate and accountable is to be encouraged. Yet, premature issuance of new authority cannot address the important underlying safety and antifraud enforcement/vetting issues which need to be resolved as a prerequisite.

7. Finally, with bipartisan Congressional support, the Agency and the Office of the Inspector General were asked to determine who at the U.S. Department of Transportation would accept responsibility for monitoring fraud, enforcing federal anti-fraud statutes and prosecuting violators to the fullest extent of federal law. No response to this request has been received. Until this congressional inquiry is addressed, any permanent change in federal application procedures affecting safety or fraud should be held in abeyance.

The undersigned parties, including over a dozen stakeholders in widely varying supply-chain sectors, wish to participate in all current, present, and future dockets affecting safety and fraud related issues and request advance notice of any further change in the pending proposals discussed above.

Please consider this request as soon as possible in light of the short time frame to formally address these issues in the context of the Agency's Federal Register announcement today and the attached letter to Mr. Riddle.

Respectfully,

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cc: Thomas P. Keane
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Kenneth Riddle
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Docket No. FMCSA-2024-0109 – Request for Approval of New Information Collection – FMCSA Registration System

From: Henry Seaton (heseaton@aol.com)

To: kenneth.riddle@dot.gov

Date: Friday, April 19, 2024 at 03:26 PM EDT

Dear Mr. Riddle,

I have just reviewed the Notice and Request for Comments which appeared today under your signature. Attached is a copy of a contemporaneous letter we have prepared for sending to the Acting Director today before receiving notice of your formal request to OMB.

Therein, we set forth a request that the implementation of the new program be postponed for good cause shown including the questions we have discussed concerning the content of the material to be collected and the pendency of rulemaking involving the Agency's responsibility for testing of carriers, brokers, and forwarders in the application process.

While, as a matter of advocacy, our coalition is prepared to intervene in the pending rulemaking or file a similar request, the Agency's announced nexus between the new application and its effect on safety and fraud prevention will require addressing the effect of the proposed rule on broader issues of the proposed new safety fitness determination and the two pending rulemakings concerning the Agency's role in fraud detection, enforcement, and prosecution which is otherwise unresolved.

If somehow the issues raised in the attached letter to the Acting Director can be resolved short of notice and comment, please let me know.

Yours truly,

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