September 10, 2019

Via Express U.S. Mail & Email
Attachments by Hardcopy Only

The Honorable Raymond Martinez, Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Docket No. FMCSA-2013-0513; RESUBMISSION OF TRANSPORTATION INTERMEDIARY BOND EXEMPTION APPLICATION PURSUANT TO 49 U.S. Code § 31315(b)(3) & 49 CFR 381.317; REQUIRED TO BE PUBLISHED IN THE FEDERAL REGISTER "UPON RECEIPT" PURSUANT TO 49 U.S. CODE § 31315

Dear Mr. Martinez,

Pursuant to 49 U.S. Code § 31315(b)(3) and 49 CFR 381.317, the Small Business in Transportation Coalition ("SBTC") hereby **resubmits** to you --pursuant to your authority delegated by the Secretary of Transportation –the Association of Independent Property Brokers & Agents' ("AIPBA") Broker Bond Exemption Application[1] in the matter of Docket No. FMCSA-2013-0513. We offer this letter, which we contend "reasonably address(es) the reasons for denial." We hereby request reconsideration of said denial.

Background

The AIPBA submitted its Exemption Application on August 14, 2013 incorporated here by reference (Exhibit A)[2]. FMCSA denied said application through a late decision[3]

[1] The AIPBA small broker group merged with the broader SBTC small carrier, trucker and broker group in 2016.
[2] We note here FMCSA did not hold AIPBA accountable for compliance with 49 CFR 381.310 on this class exemption application as it did SBTC on the ELD class exemption application (Docket No. FMCSA-2018-0180) and accepted the application without the carrier-specific details required by 49 CFR 381.310.
[3] Although FMCSA is required by Federal Law to rule on exemption applications within 180 days, which, in this case, was mid-February of 2014, FMCSA issued the decision more than one year late at the end of March 2015 despite there being a mere 81 comments in the docket to review: "49 U.S. Code § 31315(b)((7)Applications to be dealt with promptly.— The Secretary shall grant or deny an exemption request after a thorough review of its safety implications, but in no case later than 180 days after the filing date of such request."

published in the Federal Register on March 31, 2015 (Exhibit B) stating: (1) *"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;"* and (2) even if it did have the lawful authority:

> *"AIPBA's exemption application does not meet the factors provided in section 13541 because (1) the new $75,000 bond requirement is necessary to carry out the National Transportation Policy at 49 U.S.C.13101, (2) there has been no showing that the $75,000 requirement "is not needed to protect shippers from the abuse of market power" and (3) the requested exemption is not in the public interest."*

Congress raised the broker bond through the Moving Ahead for Progress in the 21st Century Act ("MAP-21") from $10,000 to $75,000, which forced 40% of the industry at the time out-of-business in December of 2013 and directed FMCSA to report to Congress every four years on the impact of that new $75,000 bond by assessing the "appropriateness" of this bond amount.

Twice now in 2014[4] and again in 2018[5], the agency has skirted this issue in its reports to Congress, suggesting the agency's understanding is that no one in the industry really cares about the broker bond anymore and that somehow alleviates their responsibility to comply with a Congressional mandate and report on the appropriateness of the $75,000 amount. Here is the exact provision FMCSA is unlawfully disregarding:

> *"SEC. 32104. FINANCIAL RESPONSIBILITY REQUIREMENTS. Not later than 6 months after the date of enactment of this Act, and every 4 years thereafter, the Secretary shall— (1) issue a report on the appropriateness of— (A) the current minimum financial responsibility requirements under sections 31138 and 31139 of title 49, United States Code; and (B) the current bond and insurance requirements under sections 13904(f), 13903, and 13906 of title 49, United States Code; and (2) submit the report issued under*

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[4] https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Financial-Responsibility-Requirements-Report-Enclosure-FINAL-April%202014.pdf

[5] https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/mission/policy/397671/financial-responsibilityreport-final-march-2018.pdf

> *paragraph (1) to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives."*

As pointed out by AIPBA, we note here that during previous 2010 household goods broker bond rulemaking, the agency concluded bonds over $25,000 would have "anti-competitive" effects that would adversely affect small businesses.[6]

Since the broker bond was raised to $75,000 in December of 2013, formally licensed brokers have continued to operate unlawfully without a license and bond by simply calling themselves "dispatchers" or "dispatch services" with impunity.

SBTC therefore petitioned FMCSA on October 4, 2018 (Exhibit C) to change the regulatory definition of broker in the hopes FMCSA will enforce unlawful property brokerage activities. FMCSA has indicated it plans to entertain our request but has undertaken taken no such rulemaking to date.[7]

SBTC believes this clarification is necessary before it can engage in private causes of action against unlicensed entities that are unlawfully arranging for motor carrier transportation, which are authorized by MAP-21.

Federal Lawsuit

SBTC filed a Federal Lawsuit SMALL BUSINESS IN TRANSPORTATION COALITION v. U.S. DEPARTMENT OF TRANSPORTATION et al in District of Columbia District Court (1:2019cv01311) on May 6, 2019 seeking the Court to compel agency action on two other exemption applications. This third SBTC exemption application relates to this

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[6] Docket No. FMCSA-2004-17008; https://www.federalregister.gov/documents/2010/11/29/2010-29813/brokers-of-household-goods-transportation-by-motor-vehicle

[7] It is well established that a failure to act on a petition for rulemaking is a discrete agency action subject to judicial review if unreasonably delayed. See, e.g., In re Am. Rivers & Idaho Rivers United, 372 F.3d 413, 418 (D.C. Cir. 2004) (holding that agency was obliged by the APA to respond to regulatory petitions, even for a discretionary action, within a reasonable time); see generally Jason A. Schwartz & Richard L. Revesz, Petitions for Rulemaking: Final Report to the Administrative Conference of the United States15–17 (Nov. 5, 2014), https://www.acus.gov/report/petitions-rulemaking-final-report ("[C]ourts have nearly unanimously found that agency responses (or lack thereof) to petitions for rulemakings are reviewable under the APA.") (citing 5 U.S.C. §§ 701–706).

lawsuit insofar as SBTC has already experienced three unlawful delays in the publication of its exemption applications in the Federal Register during the past two years.

SBTC's Interest in the AIPBA Application for Exemption
On behalf of its small broker members:

Under the current regulatory climate, unlicensed entities, including motor carriers and dispatch services, are permitted to engage in unfair competition because FMCSA has not enforced the broker licensing requirement and has allowed unlicensed entities arranging for transportation to operate with impunity. FMCSA promised to crack down on unlawful operations through a "comprehensive enforcement program" on September 5, 2013[8], six years ago as of last week but has failed to make good on this promise.

We are therefore now asking for all small property brokers and freight forwarders as defined by the SBA for freight transportation arrangement (NAICS code 488510[9]) with revenues under $15 million be made exempt for 5 years to give FMCSA more time to develop its "comprehensive enforcement program" to enforce the licensing and bonding requirement.

On behalf of its small carrier and owner-operator members:

During the Great Recession of 2017-2018, many of SBTC's small carriers and owner-operator members survived this difficult time by securing a broker license and brokering freight to themselves and outsource to other carriers. This enabled them to 'cut out the middle man.' The raising of the property broker bond to $75,000 effectively eliminated this revenue-enhancement mechanism and forced small carriers and owner-operators to work with the large brokers represented by the Transportation Intermediaries Association (TIA).[10]

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[8] https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Federal_Register_Notice_Registration_and_Financial_Security_Requirements_for_Brokers_of_Property_and_Freight_Forwardres_508CLN.pdf

[9] https://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

[10] Talk of "consolidating" the brokerage industry dates back to 2011. TIA effectively lobbied for the higher bond which had the effect of smaller brokers having to become agents of larger brokers. AIPBA complained to FTC and DOJ (https://www.linkedin.com/pulse/20140818121952-21695323-the-aipba-collusion-complaint) about TIA's lobbying on antitrust grounds, citing the sham exemption to the Noerr-Pennington Doctrine (i.e. raising the bond

With fears of yet another recession on the horizon, now is the time for FMCSA to grant this exemption as it is in the public interest to ensure an uninterrupted supply chain.

Despite arguments made by other trucker-only and carrier-only trade groups which refuse to look at the big picture and think outside the box, we made a pitch for lowering the bond to our small carrier and owner operator members (Exhibit D) so they are not reliant on –and at the mercy of-- big brokers. Rather than have no choice but to secure loads from large brokers, SBTC believes that small carriers should have the right to add small brokerage components to their existing operations. The current bond level impedes this.

Comes Now, SBTC to 'Reasonably Address the Reasons for Denial'
FMCSA Claim One: "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;

SBTC Response to FMCSA Claim One:
We understand the agency's position on this matter. In reconciling one statute MAP-21, against another, 49 U.S.C. 13541, we understand FMCSA adopted the position that MAP-21 prevents FMCSA from approving a **blanket** class exemption application for all brokers and forwarders under the theory "The Constitution does not authorize members of the executive branch to enact, amend, or repeal statutes." {citing Terran v. Secretary of Health and Human Services, 195 F.3d 1302, 1312 (Fed. Cir. 1999)}.

But we ask the agency to acknowledge the fact that Congress has passed enabling legislation to grant not only individual exemptions, but specifically, **class** exemptions in non-blanket instances.

> *(a) In General.—In any matter subject to jurisdiction under this part, 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*

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was not about fighting fraud as TIA suddenly purported, but in furtherance of the consolidation scheme to create an oligopoly and fight competition. FTC passed on pursuing the matter and DOJ began a "review." FMCSA then maliciously asked FTC to make a case against the undersigned's private business activity, who was then-President of AIPBA, in retaliation for two lawsuits AIPBA brought against FMCSA over the $75,000 bond requirement.

> *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 (emphasis added).*

In looking at the MAP-21 statute, we note Congress does not expressly remove said exemption authority on the matter of the broker/forwarder bond. Had Congress intended to restrict the agency from issuing class exemptions from the $75,000 intermediary bond, it would have added specific language to that effect to the law. But it did not. MAP-21 states with respect to property brokers:

> *Minimum financial security.--Each broker subject to the requirements of this section shall provide financial security of $75,000 for purposes of this subsection, regardless of the number of branch offices or sales agents of the broker.*

And with respect to freight forwarders:

> *Minimum financial security.--Each freight forwarder subject to the requirements of this section shall provide financial security of $75,000, regardless of the number of branch offices or sales agents of the freight forwarder.*

So, we are left with the fact that Congress does afford the agency the flexibility to grant class exemptions to some extent.

The only actual restriction in place deals with insurance and bonds are not insurance. AIPBA articulated this in its original application and addresses this again in our conclusion.

SBTC contends the whole purpose of having regulatory agency engage in rulemaking and be given discretion by Congress to grant such exemptions from its rules is to rely on an agency's specialized knowledge, insight and expertise in a given field like transportation. Again, FMCSA showed it possesses such specialized knowledge, insight

and expertise when it suggested that bonds over $25,000 would have anti-competitive effects that would adversely affect small businesses in 2010.

SBTC has therefore showed that Congress has in fact passed enabling legislation allowing agencies to grant waivers and exemptions, including class exemptions and FMCSA has class exemption authority to address the current request.

Furthermore, since FMCSA denied this exemption, the Administrative Conference of the United States ("ACUS"), an independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure, has issued the following guidelines on how an agency should address requests for exemptions.[11]

ACUS Recommendation 2017-7 adopted on December 15, 2017, states:

> *Individuals and entities regulated by federal agencies must adhere to program-specific requirements prescribed by statute or regulation. Sometimes, however, agencies prospectively excuse individuals or entities from statutory or regulatory requirements through waivers or exemptions.[1] The authority to waive or exempt regulated parties from specific legal requirements affords agencies much-needed flexibility to respond to situations in which generally applicable laws are a poor fit for a given situation.[2] Emergencies or other unforeseen circumstances may also render compliance with statutory or regulatory requirements impossible or impracticable.[3] In such instances, requiring strict adherence to legal requirements may not be desirable.[4] This is particularly true when the recipient of a waiver or exemption demonstrates that it intends to engage in conduct that will otherwise further the agency's legitimate goals.*
>
> *Yet, waiving or exempting a regulated party from a statutory or regulatory requirement also raises important questions about predictability, fairness, and protection of the public. For instance, when an agency decides to waive legal requirements for some but not all regulated parties, the decision to grant a waiver or exemption may create the appearance—or perhaps even reality—of irregularity, bias, or unfairness. Waiving or exempting a regulated party from a legal requirement, therefore, demands that agencies simultaneously consider regulatory flexibility, on the one hand, and consistent, non-arbitrary administration of the law, on the other.*

[11] https://www.acus.gov/recommendation/regulatory-waivers-and-exemptions

Agencies' authority to waive or exempt regulated parties from legal requirements may also intersect with other principles of administrative law. When agencies frequently issue waivers or exemptions because a regulation is outdated or ineffective, for example, amending or rescinding the regulation may be more appropriate in some circumstances, despite the necessary resource costs.[5] Such revisions can enhance efficiency and transparency. The requisite notice-and-comment procedures can also foster public participation and informed decision making.

The following recommendations offer best practices and factors for agencies to consider regarding their waiver and exemption practices and procedures. They are not intended to disturb or otherwise limit agencies' broad discretion to elect how to best use their limited resources.

RECOMMENDATION

Scope of Waiver and Exemption Authority

1. When permitted by law, agencies should consider creating mechanisms that would allow regulated parties to apply for waivers or exemptions by demonstrating conduct that will achieve the same purpose as full compliance with the relevant statutory or regulatory requirement.

2. When consistent with the statutory scheme, agencies should endeavor to draft regulations so that waivers and exemptions will not be routinely necessary. When an agency has approved a large number of similar waivers or exemptions, the agency should consider revising the regulation accordingly. If eliminating the need for waivers or exemptions requires statutory reform, Congress should consider appropriate legislation.

Exercising Waiver or Exemption Authority

3. Agencies should endeavor, to the extent practicable, to establish standards and procedures for seeking and approving waivers and exemptions.

4. Agencies should apply the same treatment to similarly situated parties when approving waivers and exemptions, absent extenuating circumstances.

5. Agencies should clearly announce the duration, even if indefinite, over which a waiver or exemption extends.

Transparency and Public Input in Seeking and Approving Waivers and Exemptions

6. Agencies should consider soliciting public comments before establishing standards and procedures for seeking and approving waivers and exemptions.

7. Agencies should endeavor, to the extent practicable, to make standards and procedures for seeking and approving waivers and exemptions available to the public.

8. Agencies should consider soliciting public comments before approving waivers or exemptions.

9. Agencies should provide written explanations for individual waiver or exemption decisions and make them publicly available to the extent practicable and consistent with legal or policy concerns, such as privacy. Further, agencies should consider providing written explanations of representative instances to help illustrate the types of activities likely to qualify for a waiver or exemption.

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[1] Agencies may also retrospectively *decline to bring an enforcement action once a legal violation has already occurred. This recommendation, however, is confined to the agency practice of prospectively waiving or exempting regulated parties from legal requirements.*

[2] The terms "waiver" and "exemption" carry various meanings in agency practice. For the purposes of this recommendation, when Congress has expressly authorized an agency to excuse a regulated party from a legal requirement, the term "waiver" is used. If an agency is implicitly authorized by Congress to excuse a regulated party from a legal requirement, "exemption" is used. These definitions stem from the report underlying this recommendation. See *Aaron L. Nielson, Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices (Nov. 1, 2017) (report to the Admin. Conf. of the U.S.), https://acus.gov/report/regulatory-waivers-and-exemptions-final-report. Some agencies may also derive authority to grant waivers or exemptions from presidential delegations under Article II of the Constitution. That category of waivers and exemptions is outside the scope of this recommendation.*

[3] See, for example, the Stafford Act, 42 U.S.C. § 5141, authorizing any federal agency charged with the administration of a federal assistance program in a presidentially declared major disaster to modify or waive administrative conditions for assistance if requested to do so by state or local authorities.

[4] Of course, agencies cannot issue waivers or exemptions unless authorized by law, and even when authorized by law, agencies must not issue them in an arbitrary fashion.

[5] See *Admin. Conf. of the U.S., Recommendation 2014-5,* Retrospective Review of Agency Rules*, ¶ 5, 79 Fed. Reg. 75,114, 75,116 (Dec. 17, 2014) (identifying petitions from stakeholder groups and members of the public and poor compliance rates as factors to consider in identifying regulations that may benefit from amendment or rescission).*

Citation: Admin. Conf. of the U.S., Recommendation 2017-7, Regulatory Waivers and Exemptions*, 82 Fed. Reg. 61,728, 61,742 (Dec. 29, 2017).*

Here, we suggest that given a regulatory climate in which: (1) FMCSA has failed since 2013 to report on the appropriateness of the bonding requirement as directed by Congress so that Congress might act to lower the bond; (2) FMCSA has failed since 2013 to proceed with its promises to commence a "comprehensive enforcement program" to deal with illegal intermediaries; and (3) FMCSA has failed to commence rulemaking since our 2018 request to codify past ICC rulings that make it clear that unlicensed "dispatch services" are, in effect, unfairly competing by operating as illegal intermediaries without a bond at all, small brokers and forwarders trying to operate lawfully and small carriers and independent owner-operators wishing to add brokerage components to their existing businesses are at a distinct and unfair disadvantage when having to post $75,000 in financial security.

We believe ACUS would suggest, here, that an exemption is appropriate along the lines of "much-needed flexibility to respond to situations in which generally applicable laws are a poor fit for a given situation" ... and that the climate we cite constitutes "…unforeseen circumstances (that) may also render compliance with statutory or regulatory requirements impossible or impracticable..." and that "requiring strict adherence to legal requirements may not be desirable."

SBTC believes no small transportation intermediary entity should have to be bonded until and unless all small intermediary entities are required to be bonded; that the requirement to be bonded be clearly defined by FMCSA as a matter of a proper definition of the term "broker;" and that the bonding requirement be enforced against all intermediaries in a fair and even fashion. Until FMCSA levels the playing field, enforcement against some transportation intermediaries --but not others --constitutes an unlawfully arbitrary and capricious regulatory scheme.

Whereas AIPBA sought for the FMCSA to "permanently exempt all property brokers and freight forwarders from the $75,000 broker bond provision of MAP-21. . . .", comes now, the SBTC to request a temporary 5 year exemption from the bonding requirement, one that is limited to small business brokers and forwarders with annual revenues under $15.010 million[12], which, again, is the small business threshold set by the Small

[12] As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenue.

Business Administration for entities involved with "Freight Transportation Arrangement" (NAICS Code 488510).[13]

SBTC contends that by narrowing the class to small business entities, it is requesting a bona fide, lawful exemption from the bonding statute as opposed to asking for the nullification of an act of Congress. As large intermediaries would still be required to comply with the bonding requirement, this revised application for exemption cannot be now reasonably construed as asking FMCSA to nullify an act of Congress outright and we have reasonably addressed the FMCSA's concern.

Like AIPBA in its original application, SBTC again points to how FMCSA previously expressed concern about the anti-competitive impact of bonds over $25,000 on small entities back in November 2010. Specifically, FMCSA at the time 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."*

This is now FMCSA's chance to utilize its regulatory expertise and exemption authority duly granted by Congress to press the pause button and address a bona fide grievance the licensed small business intermediary community has and reverse anti-competitive effects FMCSA knows the $75,000 bond has caused, but has just not revealed to Congress yet.

FMCSA Claim Two: "AIPBA's exemption application does not meet the factors provided in section 13541 because (1) the new $75,000 bond requirement is necessary to carry out the National Transportation Policy at 49 U.S.C.13101, (2) there has been no showing that the $75,000 requirement "is not needed to protect shippers from the abuse of market power" and (3) the requested exemption is not in the public interest."

[13] https://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

SBTC Response to FMCSA Claim Two:

Here, the agency addresses the three statutory factors, but does so in an arbitrary and capricious manner. It appears the agency wanted to deny the application, presumably, because it has been captured by big business interests, and it determined the only way it could do so is if it published a statement that says: (1) the new $75,000 bond requirement is necessary to carry out the National Transportation Policy at 49 U.S.C.13101, (2) there has been no showing that the $75,000 requirement "is not needed to protect shippers from the abuse of market power" and (3) the requested exemption is not in the public interest.

But the agency does not offer any rationale or explanation besides these mere statements to indicate **why** the new $75,000 bond requirement is necessary to carry out the National Transportation Policy at 49 U.S.C.13101; or **why** it believes there has been no showing that the $75,000 requirement "is not needed to protect shippers from the abuse of market power" when AIPBA clearly showed the bond, in practice, essentially exists to guarantee payment to carriers, not shippers, and how more competition –not less—actually protects shippers from abuse of market power; or **how** exactly the requested exemption is not in the public interest.

In fact, it has made no showing to these effects whatsoever. Perhaps it did not do so as this comment was an aside to the main reason of denial it offered, namely, that FMCSA did not have the authority to nullify an act of Congress.

Absent such a showing, the law actually **requires** FMCSA to issue the exemption given the word "shall" in the enabling statute. As you have made no showing to the contrary, we contend you **must** now issue the exemption as a matter of law in accordance with the original showing made by AIPBA in the original application which we affirm here.

Resubmission Process
FMCSA has promulgated a rule which affords an applicant the right to resubmit an exemption application if denied:

§ 381.317 May I resubmit my application for exemption if it is denied?
If the Administrator denies your application for exemption and you can reasonably address the reasons for denial, you may resubmit your application following the procedures in § 381.310.

This rule essentially restarts the application process as per the reference to *§ 381.310, which then invokes, § 381.315(a).*

§ 381.315 What will the FMCSA do after the agency receives my application for an exemption?
(a) The Federal Motor Carrier Safety Administration will review your application and prepare, for the Administrator's signature, a Federal Register notice requesting public comment on your application for an exemption. The notice will give the public an opportunity to review your request and your safety assessment or analysis (required by § 381.310) and any other relevant information known to the agency.

This rule therefore requires FMCSA to now republish this application in the Federal Register **and again open this matter up for public notice and comment.**

Furthermore, Federal Law codified at 49 U.S. Code § 31315(b)(6) also requires FMCSA to now publish the application in the Federal Register "upon receipt:"
(6)Notice and comment.—
(A)Upon receipt of a request.—

Upon receipt *of an exemption request, the Secretary* ***shall*** *publish in the Federal Register (or, in the case of a request for an exemption from the physical qualification standards for commercial motor vehicle drivers, post on a web site established by the Secretary to implement the requirements of section 31149) a notice explaining the request that has been filed and shall give the public an opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request. This subparagraph does not require the release of information protected by law from public disclosure (emphases added).*

And, the statute requires FMCSA to rule on the application within 180 days:
49 U.S. Code § 31315(b)((7)Applications to be dealt with promptly.—
The Secretary shall grant or deny an exemption request after a thorough review of its safety implications, ***but in no case later than 180 days*** *after the filing date of such request (emphasis added).*

SBTC therefore requests that FMCSA process this resubmitted application in accordance with the law.

Court Supervision
As FMCSA has a history and pattern of failing to publish the SBTC's applications for exemptions in the Federal Register "upon receipt" as is required by Federal Law on three prior occasions, and the SBTC is currently suing FMCSA in Federal Court over FMCSA's failure to comply with the aforementioned statute, SBTC intends to request court supervision over this process to ensure FMCSA complies with procedural requirements of the aforementioned statute.

Conclusion
Finally, FMCSA needs to address the fact that 10,000 small business intermediaries, including members of the minority brokerage community, were revoked in the first two weeks of December of 2013 and there are 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 in 2013. FMCSA has never reported this to Congress. It is now time to do so.

By FMCSA's own admission in its denial of the AIPBA application, 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 your 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… many of whom continue to operate unlicensed with no bond under the guise of being "dispatchers."

The agency properly notes in the denial 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.

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 danced around this issue in your decision. If you were to proclaim bonds are insurance as a matter of law, then this would give rise to the issue of how financial institutions can continue to issue non-insurance BMC-85 trust fund instruments without being duly licensed insurance providers.

We note you spoke to this point in a footnote within you 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 you 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."*

Nonetheless, as AIPBA pointed out in its application, Congress makes the proper distinction where FMCSA does not.

SBTC is proud to zealously defend the interests of its small business broker and forwarder members in this matter. We believe we make a good case for why the exemption should now be granted by FMCSA and that the three statutory factors have been addressed to support exemption. And we contend our argument is 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. We further believe completion is good for everyone involved including our carrier members, shippers and the consumer public. We therefore believe there is now no rational basis for FMCSA to deny this exemption application and we look forward to your timely approval of this request.

Sincerely,

/s/JAMES LAMB, President
Small Business in Transportation Coalition ("SBTC")