

**BEFORE THE  
DEFENSE ACQUISITION REGULATIONS SYSTEM  
UNITED STATES DEPARTMENT OF DEFENSE**

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**COMMENTS OF  
THE OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC**

**IN RESPONSE TO  
PUBLICATION OF INTERIM RULE WITH REQUEST FOR COMMENTS**

**[48 CFR Parts 247 and 252]  
RIN 0750-AG30**

**Defense Federal Acquisition Regulation Supplement:  
Motor Carrier Fuel Surcharge (DFARS Case 2008-D040)**

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**JAMES JOHNSTON  
President  
Owner-Operator Independent  
Drivers Association, Inc**

**September 28, 2009**

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**I. INTRODUCTION**

**A. Procedural Statement**

These comments are submitted by the Owner-Operator Independent Drivers Association, Inc. (“OOIDA” or “Association”) related to amending the Defense Federal Acquisition Regulation Supplement (“DFARS”) to implement Section 884 of the National Defense Authorization Act (“NDAA”) for Fiscal Year 2009. This response is to the publication of an Interim Rule with request for comments published by the Department of Defense (“DOD”), DFARS Case 2008-D040, RIN 0750-AG30 [74 FR 144] (July 29, 2009) which requires DOD to ensure that fuel-related adjustments in contracts for carriage are passed through to the person or entity bearing the cost of the fuel to which the adjustment relates.

**B. The Interest of the Owner-Operator Independent Drivers Association, Inc**

The Owner-Operator Independent Drivers Association, Inc. is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small business motor carriers and professional drivers. The 158,000 members of OOIDA are professional drivers and small business men and women located in all 50 states and Canada. One-truck motor carriers represent nearly half the total number of active motor carriers operating in the United States while approximately 96 percent of active motor carriers operate 20 or fewer trucks. The address of the Association is:

Owner-Operator Independent Drivers Association, Inc.  
P.O. Box 1000  
1 NW OOIDA Drive  
Grain Valley, Missouri 64029  
[www.oida.com](http://www.oida.com)

The Association actively promotes the views of small business truckers and professional drivers through its interaction with state and federal government agencies, legislatures, the courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the position of small business truckers and professional drivers on numerous committees and in various forums on the local, state, national, and international levels. Implementation of Section 884 of the NDAA will benefit the many members of OOIDA as well as the entire motor carrier industry who haul DOD shipments where a fuel-related adjustment (or fuel surcharge) is assessed but not always passed through to those bearing the increased cost of fuel.

## **II. SUMMARY**

The DOD pays a fuel related adjustment on certain shipments made via motor carrier to help off-set increased fuel cost. This is done in order to avoid constantly re-adjusting base freight rates and to also help stabilize the “truck available” marketplace for DOD shipments. It is critical for our national defense that DOD transportation contracts do not unduly discourage motor carriers from hauling DOD freight because fuel-related adjustments being paid by the DOD are arbitrarily “pocketed” by intermediaries who do not bear the cost of fuel involved with transporting that freight.

Since the advent of fuel surcharges and because of the hyper-competitive nature in which most freight is competitively bid many motor carriers, both small and large, are often tendered

freight based upon local market factors. Transportation intermediaries often use those local market factors to unfairly siphon fuel surcharge revenue into their own pocket instead of actually passing it along to those who provide the actual transportation and pay for the fuel involved in that transportation. During the past few years certain public traded transportation/logistics companies have reported significant increases in their profits from fuel surcharge revenue – especially non-asset based intermediary companies<sup>1</sup>. When any entity within the supply chain unjustly enriches itself by refusing to pass along fuel surcharges to the actual cost bearer in addition to the base rate, the DOD, motor carriers, owner operators and ultimately the American taxpayer are being fleeced.

Congress recognized this gross inequity and how it can actually work to destabilize the ready marketplace for available transportation that the military depends upon. By including Section 884 in the NDAA for Fiscal Year 2009, the DOD is now mandated to ensure that, “to the maximum extent practicable, in all carriage contracts in which a fuel-related adjustment is provided for, any fuel-related adjustment is passed through to the person who bears the cost of the fuel that the adjustment relates to<sup>2</sup>”. OOIDA comments will focus on how the DOD can meet this mandate.

### **III. COMMENTS OF THE ASSOCIATION**

The recent history of volatility in fuel prices is best exhibited by reviewing the Domestic Freight Fuel Surcharge Table<sup>3</sup> maintained by the Surface Deployment and Distribution Command (“SDDC”). While the motor carrier industry is not facing the record high prices for fuel seen one year ago, our nation’s current economic slump has placed significant downward

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<sup>1</sup> *Securities and Exchange Commission filings of public traded companies.*

<sup>2</sup> *Text of Public Law 110-417 from the NDAA for Fiscal Year 2009, 110<sup>th</sup> Congress.*

<sup>3</sup> <http://www.sddc.army.mil/Public/Global%20Cargo%20Distribution/Domestic/Fuel/Domestic%20Freight%20Fuel%20Surcharge%20Table?summary=fullcontent>

pressure on market transportation rates received by all motor carriers – especially those dependent upon transportation intermediaries for their freight base. Essentially, there are still more trucks competing for even fewer loads of freight and in-turn, a record number of motor carrier bankruptcies and liquidation have ensued. In this environment, it is more important than ever before that fuel surcharges paid by DOD actually flow to the entity bearing the cost of fuel to transport DOD freight.

The alternative for DOD is that the fuel-related adjustments meant to be paid to help maintain motor carrier viability does not pass through to the bearer of the cost for which the funds are intended. In the current economic down-turn, motor carriers, especially small business motor carriers which dominate the trucking industry<sup>4</sup> will continue to fail in record numbers very likely setting-up DOD for significant future rate increases when the economy returns to a growth cycle. This can result because of a building imbalance between overall increasing freight levels and the decreased level of available trucks and drivers that have been driven from the marketplace. Essentially, DOD faces being financially penalized for not ensuring current funds intended to stabilize motor carrier availability are used for their intended purpose. This topic was discussed in public during the most recent meeting of the Surface Committee of the National Defense Transportation Association (“NDTA”) at its annual Symposium in Nashville, Tennessee where many industry participants warned of an impending “capacity crunch” when the “economy returns”.

OOIDA agrees in principle<sup>5</sup> with the proposed amendments to 48 CFR Parts 247 and 252 which read as follows:

**247.207 Solicitation provisions, contract clauses, and special requirements**

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<sup>4</sup> See: <http://www.whitehouse.gov/OMB/inforeg/2003iq/175.pdf> (pp. 3)

<sup>5</sup> *Non-compliance should result in failure to contract with DOD for transportation related services.*

Use the clause at 252.247-7003, Pass Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer, in solicitation and contracts for carriage in which a motor carrier, broker, or freight forwarder will provide or arrange truck transportation services that provide for a fuel-related adjustment. This clause implements Section 884 of the National Defense Authorization Act for Fiscal Year 2009.

**252.247-7003 PASS-THROUGH OF MOTOR CARRIER FUEL SURCHARGE ADJUSTMENT TO THE COST BEARER (JUL 2009)**

- (a) The Contractor shall pass through any motor carrier fuel-related surcharge adjustment to the person, corporation, or entity that directly bears the cost of fuel for shipments(s) transported under this contract.
- (b) The Contractor shall insert the substance of this clause, including this paragraph (b), in all sub-contracts with motor carriers, brokers, or freight forwarders.

However, OOIDA is concerned that the intent of Section 884 can be easily circumvented by dishonest transportation intermediaries without DOD incorporating into the Bill of Lading disclosure of the amount being paid for a fuel-related adjustment of a particular shipment. Without such disclosure transportation middlemen would be allowed to claim they have complied with the letter of the law by passing along *only* the fuel-related adjustment amount or portion thereof – even if that amount was the entirety of the agreed upon carriage charges between the intermediary and the transportation provider absent payment of any base transportation charges. This probability becomes more likely as fuel prices raise dramatically and surcharging becomes a much larger component in addition to to base transportation charges. This is not a purely academic argument since OOIDA members actually presented documentation to the Association last year demonstrating similar practices by transportation intermediaries involved with DOD shipments.

Section 884 of Public Law 110-417 contains the following language which would permit DOD to incorporate disclosure onto the Bill of Lading:

**(c) DISCLOSURE**

The Secretary shall publically disclose any decision by the Department of Defense to pay fuel-related adjustments under contracts (or category of contracts) covered by this section.

Making this additional step will assist DOD in making enforcement of Section 884 “self-policing” by transparently conveying the fuel-related adjustment being paid by DOD to every party of the transaction. By DOD taking the additional step permissible under the law, violations of Section 884 can be easily communicated to Inspector General of the Department of Defense<sup>6</sup> for investigation and adjudication.

#### **IV. CONCLUSION**

The objective of Section 884 is clear: fuel-related adjustments paid by DOD need to flow-down in their entirety to the entity that bears the cost for fuel. Inclusion of the required language in all carriage contracts containing any fuel-related adjustment is an important first step. For DOD to avoid becoming entangled in disputes arising out of failure to comply by those it contracts with, full disclosure of fuel-related adjustment should be included on the Bill of Lading for every shipment tendered.

Respectfully submitted,

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JAMES JOHNSTON  
President  
Owner-Operator Independent  
Drivers Association, Inc.

September 28, 2009

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<sup>6</sup> <http://www.dodig.mil/HOTLINE/index.html>