

BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION  
DEPARTMENT OF TRANSPORTATION

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COMMENTS OF THE  
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.  
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

DOCKET NO. FMCSA-2011-0259

Amendment to Agency Rules of Practice

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FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION  
DEPARTMENT OF TRANSPORTATION

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The Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) submits these comments in response to the December 13, 2011, Notice of Proposed Rulemaking (“Notice”) published at 76 Fed. Reg. 77458 by the Federal Motor Carrier Safety Administration (“FMCSA” or “Agency”), Docket No. FMCSA-2011-0259, seeking public comments on proposed amendments to the Agency’s Rules of Practice that would make it more difficult for motor carriers, intermodal equipment providers, property brokers, and freight forwarders (“regulated parties”) that repeatedly violate applicable safety statutes or regulations to evade appropriate enforcement action based upon that history. Specifically, FMCSA has proposed modifications to 49 C.F.R. § 386.18 to make it clear that payment of a proposed civil penalty constitutes an admission of liability by the party responding to a Notice of Claim, unless otherwise agreed by both the Agency and the responding party. FMCSA has also proposed revisions to 49 C.F.R. § 386.73 that makes it difficult for regulated parties to register new or multiple related business entities for the primary purpose of avoiding future enforcement action based upon a negative compliance history. This would be accomplished by authorizing FMCSA to issue out-of-service orders to entities determined by the Agency to be reincarnations or affiliates of parties with poor compliance records and also by allowing consolidation of compliance records of reincarnated or affiliated entities.

OOIDA is a not-for-profit corporation incorporated in 1973 in Missouri with its principal place of business located at 1 NW OOIDA Drive, Grain Valley, Missouri 64029. The approximately 150,000 OOIDA members are independent owner-operators, small-business motor carriers, and professional truck drivers (“small-business truckers”) located in all 50 states and Canada. Since one-

truck motor carriers represent nearly half the total number of active motor carriers operating in the United States, and approximately 93 percent of active motor carriers operate 20 or fewer trucks, these small-business truckers have a significant presence in the trucking industry. OOIDA is the largest international trade association promoting their views before government agencies, legislatures, courts, other trade associations, and private businesses; as well as numerous local, state, national, and international committees and forums.

Because OOIDA's member small-business truckers can suffer financially when regulated parties escape liability for their actions, which can have a direct affect on the safety of their operations, OOIDA is filing these comments on behalf of the small-business trucking community. As discussed below, these comments are generally supportive of FMCSA's proposed amendments to the current regulations. OOIDA firmly believes that FMCSA needs to close the loopholes in the Agency's current Rules of Practice that make it easy for regulated entities both to evade appropriate Agency enforcement actions and, in certain instances, to escape their financial responsibility to the truckers who move cargo on their behalf.

## DISCUSSION

### I. FMCSA's records should contain full compliance histories.

FMCSA has proposed in its Notice to modify 49 C.F.R. § 386.18 to make it clear that payment of the full proposed civil penalty constitutes an admission of the facts and violations as set forth in a Notice of Claim ("NOC"). This general rule would ordinarily apply whether payment is made with or without written objections. 76 Fed. Reg. at 77461. This clarification ensures a complete Agency record that prevents parties with abundant financial resources from avoiding the escalating civil penalties and other adverse consequences that could otherwise be imposed in future enforcement actions by simply lodging an objection with any payment made. 76 Fed. Reg. at 77460.

OOIDA supports the proposed modification. Allowing a regulated party stating an objection to totally avoid any admission of liability turns the enforcement process from one intended to improve highway safety, its primary objective, into a revenue-generating enterprise. The proposed modification shifts the focus back to safety, and does so while affording full due process to those responding to claims. Parties considering full payment of a claim still have the opportunity to attempt to negotiate an agreement with FMCSA that would limit the admission of liability. *See id.* at 77461. The rules will also continue to allow a party that does not believe any regulatory violation has occurred to contest the claim and adjudicate the matter administratively. 49 C.F.R. § 386.14(d).

OOIDA would note, as FMCSA surely recognizes, that the elimination of what is effectively a *nolo contendere* plea option (payment without admitting guilt) is likely to decrease the number of claims resolved by voluntary payment of the penalty and, consequently, to increase the number of negotiated or litigated claims. The Agency must therefore be prepared to allocate the additional manpower and resources needed to resolve an increased number of disputed enforcement actions if the system is to continue to operate efficiently. This is especially likely where an Agency intervention and the resulting assessment set forth in a NOC is based in part on derogatory data contained in the Carrier Safety Measurement System (“CSMS”). While due process considerations are contemplated in Part 386 as part of an enforcement proceeding, there is no similar or meaningful consideration in the Data Q process for motor carriers or drivers challenging erroneous or adjudicated violation data submitted by FMCSA’s state partners which can be the basis for an Agency intervention. OOIDA is hopeful that FMCSA remedies this lack of due process so that regulated entities are not needlessly ensnared by Agency enforcement actions based on flawed and misleading data.

II. Reincarnated or affiliated companies should be treated as one for out-of-service actions and recordkeeping purposes.

In the Notice, FMCSA proposes a new regulation, to be codified at 49 C.F.R. § 386.73, that is intended to prevent carriers and other regulated parties from continuing in business after being placed out-of-service by transferring their operation to an affiliated, already-existing entity or by registering themselves with FMCSA in the guise of a new company. The deterrent effect derives from FMCSA's proposed authority to include such "reincarnated" entities within the scope of an out-of-service order as well as the proposed ability to consolidate records of reincarnated and affiliated companies. The commentary in the Notice indicates that the Agency has treated reincarnation entirely as a safety issue. OOIDA agrees that there are carriers that reincarnate themselves primarily for the purpose of evading out-of-service orders or other adverse consequences flowing from unsafe practices, and believes that the newly-proposed § 386.73 will help to thwart such practices.

However, the out-of-service and consolidation provisions could have an additional benefit, not previously considered by FMCSA, that should be addressed in the proposed consolidation regulation as well. It is OOIDA's experience that regulated parties, both carriers and brokers, often establish a network of affiliated companies or reincarnate themselves primarily for financial reasons. This practice can allow an entity with financial problems to avoid paying creditors which also does include various units of state and federal government. Economics and safety are linked as the Agency has found with motor coach and household goods carriers. Businesses that are continually allowed to reincarnate with new authority while also leaving financial destruction in their wake, wreak havoc on the operations of small-business truckers and their ability to maintain equipment. To cover this eventuality, OOIDA would ask that a subsection (6) be added to the proposed § 386.73(b), which describes the situations where consolidation is appropriate, to require consolidation when new or

affiliated entities are registered primarily to “Avoid paying liabilities owed to creditors, including but not limited to the parties actually providing transportation services.”

An example of a carrier with a large number of affiliates that recently came to OOIDA’s attention is First Coast Logistics, a drayage carrier. A check of the FMCSA’s records revealed that First Coast has 17 affiliated carriers and freight forwarders. While separately registered, all 17 have the same stated place of business in Jacksonville, Florida, the same phone number, and the same point of contact, a Deborah Cannon located in Jacksonville. This strongly suggests that they are not truly independent operations. OOIDA, of course, does not know the reasoning behind the registration of so many related companies, which could conceivably have a legitimate business purpose. Nevertheless, OOIDA firmly believes, whatever the reason, it is logical that all records retained by FMCSA for such related companies should be consolidated by the Agency for regulatory purposes, unless those entities can prove to FMCSA’s satisfaction that the separations have nothing to do with the possible avoidance of negative compliance effects or financial responsibilities.

OOIDA itself has had direct experience with carriers that reincarnate themselves, not simply to evade poor safety records, but to escape financial obligations to drivers. OOIDA was a plaintiff in two class action lawsuits filed against Ledar Transport, Inc. (“Ledar”), which charged the motor carrier with violations of the Truth-in-Leasing regulations that resulted in drivers being shortchanged. *Owner-Operator Independent Drivers Ass’n v. Ledar Transport, Inc.*, No. 00-0258-CV-W-2-FJG (W.D.Mo); *Padrta v. Ledar Transport, Inc.*, No. 96-0324-CV-W-2 (W.D.Mo.). During the litigation, OOIDA learned that Ledar’s owners had a long history of creating and registering new companies (motor carriers and brokers) after an existing operation had been placed out-of-service, had its safety rating reduced from satisfactory to conditional, or had its authority revoked. FMCSA’s records show that this reincarnation allowed the principals to continue operating notwithstanding a

clear and repeated pattern of unsafe operations.<sup>1</sup> Although OOIDA won both of the lawsuits, Ledar's ability to shut down problem operations and register new companies in spite of its poor record and legal judgments finding them in violation of certain FMCSA rules, allowed Ledar to cheat the drivers represented by OOIDA (all small-business truckers with limited funds) out of earned compensation and made it impossible for OOIDA to collect most of the judgment amounts awarded to the drivers.

The financial ripples emanating when a broker ceases operations can be equally devastating and, as with motor carriers, should be limited by the Agency when a broker reincarnates itself and continues operating through a newly-established and FMCSA-registered company. Over the years, OOIDA has been contacted by many members seeking assistance collecting their compensation from unscrupulous brokers who cheated them (and other creditors) by simply shutting down a floundering operation with financial problems, transferring their operations to a newly-registered brokerage, and posting a new \$10,000 bond. Gaps in FMCSA regulations that do not either require immediate notification to the Agency when the bond is hit or, when key personnel in an existing brokerage seek to register a new brokerage, require disclosure of the reasons behind the revocation of the prior bond, simply encourages bad actors to continually reincarnate their operations.

Further, because the mandatory broker bond is only \$10,000, the funds available to pay creditors of the defunct broker are typically grossly inadequate. In some cases, this means that the

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<sup>1</sup> That history shows that Ledar's original common carrier authority was revoked in 2004, and its contract authority was revoked in 2006. SLX, Inc., a related brokerage that eventually obtained its own motor carrier authority, was placed out-of-service and had its authority revoked in 2008. Just before that out-of-service order went into effect, the involved individuals formed a carrier that was granted contract operating authority under the name Interstate Distributors, Inc. That carrier's safety rating was reduced to conditional and its authority revoked in 2009, following 5 recordable crashes of which 3 resulted in injuries. Another brokerage, Highway Solutions, Inc., and carrier, R&R Express Freight, were established and continued operating using Interstate's trucks after Interstate lost its authority. After R&R's safety rating was reduced to conditional, it seems the same trucks began operating for another related company, TSX Inc.

carriers and their drivers who are actually moving the freight are never paid for their services; in other cases shippers are forced to pay twice for the same load, once to the broker and once to the motor carrier. Of course, this problem could largely be remedied if the amount of the broker bond was substantially increased as requested by OOIDA in a Jan. 23, 2004 petition filed with FMCSA. *See* [www.oida.com/MediaCenter/Press\\_Releases/PDFs/petition.pdf](http://www.oida.com/MediaCenter/Press_Releases/PDFs/petition.pdf) . However, a consolidation rule like that proposed, particularly if expanded to include reincarnations conducted to avoid financial obligations, would also help eradicate this substantial industry problem.

III. Conclusion.

For all the reasons discussed above, OOIDA supports the amendments to the Agency Rules of Practice being proposed in this proceeding. However, OOIDA would also ask that FMCSA increase the beneficial effects of the rule changes by expanding the proposed record consolidation rule at 49 C.F.R. § 386.73(b) to include an effort to escape financial obligations as a valid basis for consolidation.

Respectfully submitted,

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