



UNLAWFUL BROKERAGE ACTIVITIES REPORT TO CONGRESS

Pursuant to the Joint Explanatory Statement accompanying
the Consolidated Appropriations Act, 2023, (Pub. L. 117-328)
July 2024

This report to Congress is prepared at the direction of the Joint Explanatory Statement accompanying the Consolidated Appropriations Act, 2023, Pub. L. 117-328, which required the Federal Motor Carrier Safety Administration (FMCSA) to report on efforts to ensure full compliance with, and enforcement of, the requirements in 49 U.S.C. 14916, Unlawful Brokerage Activities. The report addresses FMCSA's adjudication of civil penalties for commercial violations in the federal district courts; potential barriers to such enforcement through the courts; alternative enforcement mechanisms for unlawful brokerage activities available to FMCSA; implementation of Infrastructure Investment and Jobs Act (IIJA) section 23021 to clarify the definition of "broker" under FMCSA regulations; and whether new legislative authority or the clarification of existing legislative authority is necessary to address unlawful brokerage adequately. Additionally, this report addresses safety concerns arising from unlawful brokerage activities.

Efforts Taken Regarding Enforcement of Commercial Violations in the Federal District Courts and Potential Barriers to Such Enforcement

As Congress recognized in House Report 117-402, "in 2019 a DOT Administrative Law Judge held in *Darlene Riojas et al.*, Docket No. FMCSA-2012-0174, that the FMCSA does not have the statutory authority to administratively adjudicate and assess civil penalties for violations of Subtitle IV, Part B of title 49, United States Code, and that the FMCSA must seek an adjudication of civil penalties for such violations in the United States District Court." The commercial regulations affected by the *Riojas* decision include the Agency's broker and household goods (HHG) consumer protection regulations. FMCSA and the U.S. Department of Transportation (DOT) are developing processes to refer cases to the U.S. Department of Justice (DOJ) for the adjudication of civil penalties and judicial enforcement in the federal district courts for certain violations of commercial regulations that were affected by the *Riojas* decision, particularly HHG consumer protection violations. FMCSA/DOT have referred several cases to DOJ for potential enforcement, including for unauthorized HHG brokerage.

The need to refer cases to DOJ for the assessment of civil penalties for violations of commercial regulations creates a significant barrier to enforcement, including for unauthorized brokerage violations. Without statutory authority to assess civil penalties administratively for violations of FMCSA's commercial regulations, FMCSA's ability to effectively enforce these regulations is significantly limited. Unless a regulated entity that violates FMCSA's commercial regulations voluntarily resolves its noncompliance, FMCSA must refer cases to DOJ for enforcement of those regulations. The need to refer cases to DOJ complicates and hampers the ability of FMCSA to enforce the Agency's commercial regulations, including those regarding unauthorized brokerage.

Recent Efforts Taken by FMCSA to Address Broker Non-Compliance

FMCSA launched the 2023 Operation Protect Your Move HHG enforcement activity in response to the significant uptick in complaints against movers and brokers for extorting exorbitant additional charges from consumers. As part of the Agency's 3-week enforcement sweep to curtail HHG moving scams, dozens of highly trained agency personnel conducted more than 100 investigations across 16 states. This targeted work resulted in almost 80 enforcement actions and led to the revocation of an HHG motor carrier's operating authority. Approximately six brokers have enforcement cases under review by FMCSA as of the date of submission of this report. FMCSA continues its multi-prong approach to identifying and taking action against movers and brokers who are defrauding consumers.

In addition, in 2023, FMCSA conducted HHG broker investigations in Nevada, New Jersey, New York, and Florida, reviewing 35 HHG and property brokers in total. The Agency found 166 violations, closed 544 complaints, and issued 17 Letters of Probable Violation (LOPVs). The Agency also conducted four property broker investigations in New York. FMCSA expects to continue its expanded broker enforcement efforts in 2024.

In conjunction with compliance focused efforts, FMCSA has increased its public outreach and communication relating to unlawful brokerage. The Agency is planning additional communication efforts to raise awareness of unlawful brokerage activities involving general freight.

The Agency also completed a rulemaking on broker financial responsibility in 2023. 88 FR 78656 (Nov. 16, 2023). In that rule, FMCSA finalized regulations pertaining to the following: 1) the composition of broker trust funds; 2) immediate suspension of broker/freight forwarder operating authority registration; 3) surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency; 4) FMCSA enforcement authority; and 5) entities eligible to provide trust funds for broker financial responsibility.

Alternative Brokerage Enforcement Mechanisms Available to FMCSA

Prior to the *Riojas* decision, FMCSA assessed civil penalties for unauthorized brokerage violations via Notices of Claim (NOCs). Between 2014 and 2019, FMCSA issued approximately 20 NOCs for violations of 49 U.S.C. 14916 (unlawful brokerage activities). Since the *Riojas* decision in 2019, however, FMCSA has lacked the statutory authority to assess civil penalties administratively for unauthorized brokerage violations. Subsequent to *Riojas*, FMCSA has two alternative enforcement mechanisms available for unauthorized brokerage enforcement: (1) Notices of Violation and (2) Letters of Probable Violation. Each enforcement tool serves a particular purpose to further compliance.

Notice of Violation (NOV)

FMCSA may issue an NOV to a non-registered entity performing brokerage operations without broker operating authority registration to induce compliance. The NOV will state the violations and the corrective actions the broker must take to comply. The broker has 30 days to acknowledge receipt of the NOV and submit proof of the corrections. No further action is needed if the broker takes sufficient corrective action within 30 days of the NOV issue date. FMCSA does not propose civil penalties as part of an NOV.

Letter of Probable Violation (LOPV)

FMCSA may issue an LOPV to a non-compliant broker or non-registered entity performing brokerage operations without broker operating authority registration when a civil penalty is deemed fit for *Riojas*-affected violations. An LOPV is an enforcement action that identifies areas of non-compliance and proposes a civil penalty for such non-compliance. The LOPV serves as a valuable tool to encourage brokers and carriers to enter into settlement arrangements to mitigate the identified violations and take corrective actions. Once the LOPV is issued, the broker has 30 days to respond. If the broker fails to respond to the LOPV or the broker's response to the LOPV is insufficient, FMCSA may refer the case to DOJ for judicial enforcement of FMCSA's commercial regulations, including the assessment of civil penalties, in federal court.

Coordination with Other Federal Agencies

FMCSA has coordinated with DOT's Office of the Inspector General (OIG) in HHG consumer protection cases, and the OIG has referred cases involving multiple victims of moving fraud to DOJ for further investigation and possible charges. The OIG worked with DOJ to indict several company officials, which resulted in convictions and incarceration. FMCSA has collaborated with the OIG and other federal agencies, including the Federal Bureau of Investigation and the Department of Health and Human Services, and state enforcement authorities on several cases and investigations, some leading to indictments and convictions. While these collaborations were fruitful, the Agency recognizes that efforts in this area need to increase given the rapid expansion of fraud and other unlawful activity in the HHG arena and its impact on consumers. FMCSA is actively discussing methods to improve this coordination with DOJ through OIG and DOT's Office of the General Counsel.

In addition, FMCSA established an HHG State Enforcement Partnership Program under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). SAFETEA-LU gave states authority to enforce certain federal consumer protection regulations and statutes—in 49 U.S.C. 14710 for state agencies with regulatory authority over HHG, and in 49 U.S.C. 14711 for state Attorneys General. Currently, FMCSA has four State Attorney General partners pursuant to section 14711 and seven state partners under section 14710. State partners have taken enforcement, resulting in compliance, and placed some HHG brokers and HHG motor carriers out of business.

Safety Issues Related to Unlawful Brokerage

FMCSA is still assessing the relationship between motor carrier safety and incidence of unlawful brokerage. While the Agency has received multiple expressions of concern from stakeholders regarding fraud related to "double brokering," it lacks data to quantify or confirm a safety impact.

The Agency does acknowledge an association between motor carriers with poorer safety performance and carriers that lack a verifiable "brick and mortar" principal place of business (PPOB). And the Agency has also received comments and other information asserting that use of a virtual PPOB is more common among entities that engage in unauthorized brokerage.

As brokers do not typically engage in the actual transportation of goods, however, the direct safety impact of failing to register with FMCSA as a broker is unclear. In response to Congress's

mandate in the Joint Explanatory Statement, FMCSA is considering additional research into any safety nexus with unlawful brokerage.

Implementation of Section 23021 of the IIJA

After seeking public comment from stakeholders, on November 16, 2022, FMCSA issued interim guidance pursuant to the IIJA mandate to clarify the definition of broker under FMCSA regulations. 87 FR 68635. In its Federal Register Notice, FMCSA also sought public comment on the interim guidance.

On March 8, 2023, FMCSA announced a listening session on property broker issues, including the interim guidance, at the Mid-America Trucking Show on March 31, 2023. 88 FR 14439. The Agency also reopened the comment period on the interim guidance through April 6, 2023. Stakeholders submitted approximately 140 comments related to the guidance to FMCSA. As required by Congress, FMCSA issued final guidance on June 16, 2023. 88 FR 39368.

Need for New or Clarified Legal Authorities to Properly Address Unlawful Brokerage

The Agency believes that revision of its statutes to clearly vest FMCSA with the statutory authority to assess civil penalties administratively for unauthorized brokerage violations is necessary and beneficial. Such an action will allow FMCSA to assess civil penalties administratively and in a timely manner, rather than engaging in a lengthy referral process with DOJ.

In addition, there has been a significant increase in HHG consumer protection complaints since 2017. In particular, FMCSA saw HHG complaints more than double between 2019 and 2021 (receding in 2022 and 2023 but still well above 2019 levels), coinciding with the start of the Coronavirus 2019 pandemic and the impact of the *Riojas* decision. FMCSA's inability to assess civil penalties administratively not only for unauthorized brokerage, but for these HHG violations as well, has significantly undermined its ability to combat HHG moving and brokering fraud. Therefore, if Congress were to amend FMCSA's statutory authority to authorize administrative assessment of civil penalties for unauthorized brokerage, it would be helpful to include all violations of 49 U.S.C. sections 13101-14916, which include HHG consumer protection violations.