[4910-EX-P]

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 371

[Docket No. FMCSA-2023-0257]

RIN 2126-AC63

Transparency in Property Broker Transactions

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FMCSA proposes amendments to its property broker rules in response to petitions for rulemaking from the Owner-Operator Independent Drivers Association (OOIDA) and the Small Business in Transportation Coalition (SBTC). Under current regulations, the parties to a brokered freight transaction have a right to review the broker's record of the transaction, which stakeholders often refer to as "broker transparency." Contracts between brokers and motor carriers frequently contain waivers of this right. OOIDA requested that FMCSA promulgate a requirement that property brokers provide an electronic copy of each transaction record automatically within 48 hours after the contractual service has been completed, and explicitly prohibit brokers from including any provision in their contracts that requires a motor carrier to waive its rights to access the transaction records. SBTC requested that FMCSA prohibit brokers of property from coercing or requiring parties to brokers' transactions to waive their right to review the record of the transaction as a condition for doing business and prohibit the use of clause(s) exempting the broker from having to comply with this transparency requirement. Though the proposed rule is responsive to the petitions in reinforcing the broker transparency requirement, the proposed provisions differ from those requested by

OOIDA and SBTC. The proposed rule would revise the regulatory text to make clear that brokers have a regulatory obligation to provide transaction records to the transacting parties on request. The proposal would also make changes to the format and content of the records.

DATES: Comments must be received on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by Docket Number FMCSA-2023-0257 using any of the following methods:

- Federal eRulemaking Portal: Go to https://www.regulations.gov/docket/FMCSA-2023-0257/document. Follow the online instructions for submitting comments.
- Mail: Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590-0001.
- Hand Delivery or Courier: Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.
- Fax: (202) 493-2251.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Evans, Transportation Specialist, Commercial Enforcement Division, Office of Safety, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590-0001; (202) 568-0530; michael.evans@dot.gov. If you have questions on viewing or submitting material to the docket, call Dockets Operations at (202) 366-9826.

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I. Public Participation and Request for Comments

A. Submitting Comments

If you submit a comment, please include the docket number for this NPRM (FMCSA-2023-0257), indicate the specific section of this document to which your comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to https://www.regulations.gov/docket/FMCSA-2023-0257/document, click on this NPRM, click “Comment,” and type your comment into the text box on the following screen.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing.

FMCSA will consider all comments and material received during the comment period.

Confidential Business Information (CBI)

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (5 United States Code (U.S.C.) 552), CBI is exempt from public disclosure. If your comments responsive to the NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to the NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as “PROPIN” to indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the Freedom of Information Act, and they will not be placed in the public docket of the NPRM. Submissions containing CBI should be sent to Brian Dahlin, Chief, Regulatory Evaluation Division, Office of Policy, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590-0001 or via email at brian.g.dahlin@dot.gov. At this time, you need not send a duplicate hardcopy of your electronic CBI submissions to FMCSA headquarters. Any comments FMCSA receives not specifically designated as CBI will be placed in the public docket for this rulemaking.

B. Viewing Comments and Documents

To view any documents mentioned as being available in the docket, go to https://www.regulations.gov/docket/FMCSA-2023-0257/document and choose the document to review. To view comments, click this NPRM, then click "Browse Comments." If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

C. Privacy

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its regulatory process. DOT posts these comments, including any personal information the commenter provides, to www.regulations.gov as described in the system of records notice DOT/ALL 14 (Federal Docket Management System (FDMS)), which can be reviewed at https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices. The comments are posted without edit and are searchable by the name of the submitter.

D. Comments on the Information Collection

Written comments and recommendations for the information collection discussed in this NPRM should be sent within 60 days of publication to www.reginfo.gov/public/do/PRAMain. Find this information collection by clicking the link that reads "Currently under Review - Open for Public Comments."

II. Executive Summary

A. Purpose and Summary of the Regulatory Action

Property brokers match motor carriers with shippers, which can create new business opportunities for motor carriers and transportation solutions for shippers. This business model can also lead to an asymmetry of information between parties, which in

turn can affect the contracting process by limiting parties' ability to negotiate for their desired terms.[1] These risks can lead to market inefficiencies, such as decreased freight capacity or decreased market competition, which can arise when parties lack material information about the transaction. FMCSA and its predecessor agencies have attempted to address these problems by requiring property brokers to keep certain records of their transactions and make the records available to motor carriers and shippers involved in those transactions. Making the records available to the transacting parties, sometimes referred to as "broker transparency," is meant to inform business decisions and enable self-policing of abuses that may arise.

The Agency has received rulemaking petitions and other input from the public, however, that indicate many motor carriers cannot review the brokers' transaction records as the broker recordkeeping regulation intends. Brokers often include provisions in their contracts with motor carriers that require motor carriers to waive their ability to review broker records. In addition, even without waiver clauses, motor carriers often face practical hurdles in accessing records that they should be able to review under the current regulations. As a result of the SBTC and OOIDA petitions, the Agency reviewed its property broker recordkeeping requirements and is proposing certain amendments to those requirements. The proposed amendments are intended to reinforce broker transparency for motor carriers and to better tailor the required contents of the records to the purpose of broker transparency.

The current and proposed regulations are based on the Agency's authority to regulate the procurement of interstate transportation, which includes authority over property brokers and their arrangement of transportation. The Agency has the authority to collect information from brokers and require them to keep certain records. The Agency

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[1] Asymmetric information exists when one party in a transaction has more information than the other, which can result in a market failure. Asymmetric information provides an advantage to one side of a market over the other when negotiating a transaction. OMB Circular No. A-4, p. 17 (Nov. 9, 2023).

also has authority over the registration of property brokers, and when registering them, to determine whether the broker is willing and able to comply with all applicable regulations, including the recordkeeping regulations. In exercising its authority over brokers, the Agency is required to provide for the protection of motor carriers and shippers. The proposed rule would use and implement this authority by revising the broker recordkeeping requirements to further protect motor carriers and promote efficiency within the motor carrier transportation system.

B. Summary of Major Provisions

FMCSA proposes several amendments to 49 CFR 371.3, "Records to be kept by brokers." The first proposed provision would require property brokers to keep their records in an electronic format. This provision would serve the purpose of broker transparency by making it easier for motor carriers and shippers to review broker records on request, and remotely, as compared to the current practice of some brokers who respond to transparency requests by making only physical records available at their principal place of business. The Agency believes that many brokers already maintain their records in an electronic format.

The second proposed provision would modernize and tailor the required contents of the records to better achieve broker transparency. The current requirement uses a distinction between brokerage and non-brokerage services, which is rooted in a previous regulatory approach. FMCSA proposes eliminating this distinction and instead requiring that the records contain, for each shipment in the transaction, all charges and payments connected to the shipment, including a description, amount, and date. This is substantially similar to the current requirement but removes the outdated distinction. The record would also be required to include any claims connected to the shipment, such as a shipper's claims for damage or delay. This amendment would ensure the parties have full visibility

into the payments, fees, and charges associated with the transaction so they can resolve issues and disputes among themselves without resorting to costlier remedies.

The third proposed provision would clarify the obligation imposed on brokers to respond to requests for transaction records and the process parties must follow when requesting and supplying such records. The current regulation frames the broker transparency requirement as a right, given to the transacting parties, to review the records. The proposed amendment would reframe broker transparency as a regulatory duty imposed on brokers to provide records to the transacting parties.

The fourth proposed provision would require brokers to provide the records required to be maintained under § 371.3(a) within 48 hours when a party to the transaction requests those records. This provision is intended to ensure that the requesting party receives the records in a timely manner, to support the resolution of issues around service or payment.

C. Costs and Benefits

Broker transparency is intended to enable efficient outcomes in the transportation industry by providing the material information necessary for the transacting parties to make informed business decisions. Broker transparency also supports the efficient resolution of disputes between parties. Though the current regulations are meant to provide broker transparency, the Agency has heard through numerous listening sessions and comments from motor carriers that broker transparency is rare in practice. The Agency believes the revisions to the regulation will make it more likely that brokers will comply with their regulatory duty to provide information. The Agency analyzes these potential benefits qualitatively and seeks further information and data from the public to better analyze the benefits.

Some motor carriers believe that increased broker transparency would have a material effect on negotiated freight rates. The Agency believes that other market factors,

rather than the availability of additional information through broker transparency, are likely dominant in setting freight rates. However, the Agency has not ruled out the possibility that motor carriers and shippers could negotiate for better rates over time using the broker transparency information. The Agency seeks further comment on this issue.

The Agency believes that the cost of the proposed rule would be minimal. Based upon its interactions with brokers, the Agency believes that most brokers already keep records electronically and that these records already contain the information that would be required by the proposed rule. The Agency believes that brokers already provide information and documents, e.g., rate confirmation documents, to motor carriers. The Agency believes that these current practices can be adjusted, at relatively low cost, to provide broker transparency information within 48 hours of request. The Agency analyzes these potential costs qualitatively and seeks further information and data from the public to better analyze the costs. The Agency does not believe that this rule would be economically significant.

III. Abbreviations

API	Application programming interface
BLS	Bureau of Labor Statistics
COVID-19	Coronavirus disease 2019
DOJ	Department of Justice
DOT	Department of Transportation
DTSA	Defend Trade Secrets Act of 2016
EDI	Electronic data interchange
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
FR	Federal Register
HHG	Household goods
ICC	Interstate Commerce Commission
IT	Information technology
MATS	Mid-America Trucking Show
NAICS	North American Industry Classification System
NCCDB	National Consumer Complaint Database
NPRM	Notice of proposed rulemaking
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OOIDA	Owner-Operator Independent Drivers Association

PIA	Privacy Impact Assessment
PII	Personally identifiable information
PPP	Paycheck Protection Program
PTA	Privacy Threshold Assessment
SAS	Service Annual Survey
SBA	Small Business Administration
SBTC	Small Business in Transportation Coalition
Secretary	Secretary of Transportation
TIA	Transportation Intermediaries Association
UMRA	Unfunded Mandates Reform Act of 1995
U.S.C.	United States Code

IV. Legal Basis

The Secretary of Transportation (Secretary) has general jurisdiction to establish regulations concerning the procurement by property brokers of for-hire transportation in interstate or foreign commerce (49 U.S.C. 13501). The Secretary is authorized to obtain information from motor carriers, brokers, and other related parties that the Secretary determines is necessary to ensure a transportation system that meets the needs of the United States (49 U.S.C. 13101 and 13301(b)).

The Secretary has broad authority to adopt regulations to carry out the requirements of the commercial statutes in Title 49 U.S.C., subtitle IV, part B (49 U.S.C. 13301(a)). Some of the needs articulated in the national transportation policy (49 U.S.C. 13101) include encouraging fair competition and reasonable rates for transportation by motor carriers of property; promoting efficiency in the motor carrier transportation system; enabling efficient and well-managed motor carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; and improving and maintaining a sound, safe, and competitive privately owned motor carrier system. The Secretary is also authorized to prescribe the form of any required records prepared or compiled by brokers, including those related to movement of traffic and receipts and expenditures of money, and the time period for preservation of such records (49 U.S.C.

14122). Furthermore, under 49 U.S.C. 13904(e), regulations applicable to brokers "shall provide for the protection of motor carriers and shippers by motor vehicle."[2]

In recent years, many motor carriers, industry-wide, have expressed concern about their inability to access records pertaining to their transactions with brokers. The inability to obtain these records from brokers has led to financial harm, including but not limited to, an inability to present a proper defense when shippers or brokers allege problems with a shipment. Because FMCSA's mandate under 49 U.S.C. 13904 specifically includes providing for the protection of motor carriers with respect to broker regulations, and because a records-transmittal regulation would protect both motor carriers and shippers, FMCSA's promulgation of such a regulation is authorized by 49 U.S.C. 13904(e).

This rulemaking is intended to address an asymmetry of information between brokers, shippers, and motor carriers that affects the ability of all parties to participate effectively in a fair, efficient transportation system. FMCSA intends to modernize regulations applicable to broker recordkeeping and disclosure while complying with the requirement in 49 U.S.C. 13904(e) to ensure that the regulations provide for the protection of motor carriers and shippers. FMCSA relies on the statutory authorities cited above.

Authority to carry out the functions and exercise the authorities cited above is delegated to the FMCSA Administrator under 49 CFR 1.87(a)(1)-(3) and (5)-(6).

V. Background

FMCSA regulates property brokers, defined as persons who, for compensation, arrange or offer to arrange the transportation of property by an authorized motor carrier

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[2] The previous version of the statute (located at 49 U.S.C. 13904(c)) only required the Secretary to provide for the protection of shippers by motor vehicle in broker regulations. The Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141 (July 6, 2012), amended this provision to include the protection of motor carriers as a requirement for regulations applicable to brokers. Sec. 32916, Pub. L. 112-141, 126 Stat. 820 (July 6, 2012).

(49 CFR 371.2(a)). The property broker regulations include recordkeeping requirements, for each transaction, at 49 CFR 371.3 "Records to be kept by brokers." A brokered transaction for transportation of property involves at least a shipper seeking to have the property transported, a carrier willing to transport the property, and a broker who arranges the transportation. There may be separate contracts between the broker and the shipper and between the broker and the carrier, but the broker, carrier, and shipper are all party to the same brokered transaction for the purpose of the broker recordkeeping regulation. The relationship between the parties is further explained in the Property Broker Practices NPRM (45 FR 31140, 31141, May 12, 1980). Under the broker recordkeeping regulation, FMCSA requires brokers to make certain transaction records available to the transacting parties, that is, the shipper, the motor carrier, and any other party to the brokered property transaction. The availability of this information is sometimes referred to as "broker transparency." The term should not be misunderstood to mean public disclosure of the information, i.e., "public transparency."

FMCSA proposes to amend the broker transparency requirement. FMCSA initiated the rulemaking based on the grant of two rulemaking petitions regarding broker transparency, and the Agency has also received input on the topic through several related actions. The petitions and related actions are summarized below. The broker transparency regulation has a long history, with several predecessor rules and regulations. The regulatory history is summarized below.

A. History of Property Broker Regulations

Congress tasked the Interstate Commerce Commission (ICC) with regulating the motor carrier industry in the Motor Carrier Act of 1935, which included regulating property brokers operating in the industry (Pub. L. 74-255). The ICC issued its initial rule regulating brokers in 1949 (14 FR 2833, May 28, 1949). The rule was based on an ICC report entitled Practices of Property Brokers (Ex Parte MC-39, 49 Motor Carrier Cases

(MCC) 277 (May 16, 1949)). The report contemplated imposing a cap on broker commissions to address concerns over alleged excesses. The ICC postponed implementation of a cap because it lacked information to determine an appropriate upper limit. In the interim, the ICC believed that concerns over commissions could be addressed by having brokers maintain a public schedule of services with their maximum charges for brokerage services. The cap was not pursued further, and the interim solution persisted, as described in the follow-on report "Practices of Property Brokers" (Ex Parte MC-39, 53 MCC 633 (Dec. 27, 1951)).

The property broker regulations remained unmodified for several decades, except for a recodification that relocated them within Title 49, from part 167 to part 1045 (49 FR 20003, Dec. 20, 1967). On May 12, 1980, the ICC published an NPRM to revise the property broker regulations (45 FR 31140). This proposed rule sought to eliminate unnecessary regulations and to modify regulations that were unnecessarily restrictive. The intent generally aligned with the purpose of the Motor Carrier Act of 1980 (Pub. L. 96-296), which was not in force at the time, but which was enacted a few months later, on July 1, 1980. The ICC made this connection clear in the final rule published on October 17, 1980 (45 FR 68941). That rule explained that Congress had given the ICC the general mandate to open up the bargaining process between shippers and motor carriers, and it sought to remove unnecessary restrictions which might impede the free operation of the marketplace. The ICC viewed its revisions to the property broker regulations as consistent with those goals. The rulemaking put into place regulations that are substantially similar to FMCSA's current property broker regulations.

The final rule included a revised 49 CFR 1045.3, which had the same requirements as the current 49 CFR 371.3 in all significant respects, including the recordkeeping requirement placed on brokers and the right of each party to the transaction to review the record. In discussing the revisions to the required records in the

NPRM, the ICC stated that the primary purpose of the recordkeeping requirements was to ascertain whether improper rebating activities were taking place, and it noted that the proposed rule also included revisions to the rebating rules (45 FR 31140). When the ICC issued the original property broker regulations, it was concerned with a form of indirect rebating where brokers would undercharge for services to shippers as a means to secure and control the shippers' traffic and make up for the undercharging by charging motor carriers instead (49 MCC 277, 317-18). In the 1980 NPRM, the ICC stated that this concern over indirect rebating was no longer valid, and it revised the rebating regulations accordingly (45 FR 31140, 31141).

After explaining the revisions to the required record contents, the ICC then explained the addition of the right-to-review requirement as a replacement for more complex requirements in §§ 1045.5, 1045.6, and 1045.10 (45 FR 31140). The ICC explained that § 1045.5, which required brokers to make their maximum prices for brokerage services publicly available and to adhere to those prices, could be rendered ineffective by brokers giving a wide price range instead (45 FR 31140, 31141). The same was true of § 1045.6, which set forth similar restrictions on prices for non-brokerage services. In removing these regulations in favor of the new § 1045.3(c), the ICC explained that the new regulation would enable parties to determine what portion of their bill was related to the broker's services (45 FR 31140, 31141). Section 1045.10 prohibited brokers from charging both the shipper and the carrier for a service without first advising both parties of the details of the charges. The ICC stated that this requirement was unnecessary and potentially burdensome since proper notification could delay service, particularly when the broker was trying to arrange freight transportation on an expedited basis, and it was replaced by the right to review in § 1045.3(c) (45 FR 31140, 31141). The broker regulations remain substantially the same as when they were amended in 1980.

In 1996, pursuant to the ICC Termination Act (Pub. L. 104-88), responsibility for certain transportation regulations was transferred from the ICC to DOT and delegated by DOT to FHWA (61 FR 54706, Oct. 21, 1996). This transfer and redesignation included part 1045, which was moved to part 371. Part 371 was subject to a minor technical amendment in 1997 but has remained otherwise unchanged since that time (62 FR 15417, Apr. 1, 1997). FMCSA assumed responsibility for part 371 when the Agency was created by the Motor Carrier Safety Improvement Act of 1999 (Pub. L. 106-159), and the Secretary subsequently delegated authority to administer 49 U.S.C. chapters 131, 133, 135, and 139 to the FMCSA Administrator (65 FR 220, Jan. 4, 2000).

B. History of the Current Rulemaking

On May 6, 2020, the Small Business in Transportation Coalition (SBTC) petitioned the Department to initiate a rulemaking amending the broker transparency regulation. SBTC described § 371.3, the broker transparency regulation, as providing motor carriers with a "right to know" the rate offered by the broker as a proportion of the rate paid by the shipper to the broker. SBTC raised concerns about the widespread practice of brokers including clauses in their contracts that waive a carrier's rights under § 371.3(c). Transparency is necessary for a market to operate in an ethical and fair manner, SBTC argued, and the prevalence of waiver clauses undercuts that transparency. As a remedy, the petition proposed prohibiting brokers from requiring waiver of broker transparency as a condition of doing business. SBTC's petition referenced the economic impacts of the COVID-19 national emergency, impacts that were being acutely felt when the petition was filed in May 2020.

On May 19, 2020, the Owner-Operator Independent Drivers Association (OOIDA) petitioned the Department to initiate a rulemaking amending the broker transparency regulation. The petition sought two changes to § 371.3. First, the petition proposed adding a requirement that brokers provide a copy of the transaction record

required under § 371.3(a), in an electronic format, within 48 hours of the service being completed. Second, the petition proposed prohibiting brokers from including clauses in their contracts that waive motor carriers' rights to access the transaction records required under 371.3. The petition argued that the prevalence of waiver clauses and instances of retaliation by brokers against motor carriers seeking to exercise their rights under § 371.3(c) undercut the transparency envisioned by § 371.3. As with the SBTC petition, the OOIDA petition referenced the economic conditions affecting truckers at the time. Both petitions for rulemaking are included in the docket for this rulemaking.

FMCSA published a notice in the *Federal Register* on August 19, 2020, requesting public comment on OOIDA's and SBTC's rulemaking petitions (85 FR 51145). On October 16, 2020, the Agency extended the comment period by 30 days (85 FR 65898). The Agency received 1,391 comments on OOIDA's and SBTC's rulemaking petitions by the end of the extended comment period. The public commented on the transparency of charges and payments, broker margins, freedom of contract, pricing confidentiality, and the history of the broker transparency regulation. These issues are discussed below in Section VI.B., Comments and Agency Responses. On March 16, 2023, FMCSA granted OOIDA's and SBTC's rulemaking petitions. In the letters granting the SBTC and OOIDA petitions, FMCSA made clear that, while the Agency found good cause to open a rulemaking to amend 49 CFR 371.3, the proposed rule would not necessarily include the changes SBTC or OOIDA sought. The letters granting the petitions are available in the docket for this rulemaking.

C. Related Actions

In the time between the filing and grant of these petitions several related actions have provided the Agency with further information about broker transparency and wider context of the rulemaking. The related actions also indicate that the concerns surrounding

broker transparency have persisted beyond the specific economic conditions of the freight industry in 2020.

Shortly after the OOIDA and SBTC petitions were filed, the Transportation Intermediaries Association (TIA) filed a rulemaking petition on August 4, 2020, seeking the elimination of § 371.3(c) and requesting guidance on dispatch services. Only the portion directed towards the elimination of § 371.3(c) is relevant to this rulemaking.[3] The TIA petition argued that the regulation is outdated given the changes in the brokered freight industry since the regulation was introduced in 1980. The petition further argued that broker transparency jeopardizes the confidentiality of proprietary pricing, and that motor carriers have sufficient information about prevailing rates to make informed business decisions without needing the records required by § 371.3.

The Agency published a request for public comments regarding TIA's petition on November 25, 2020 (85 FR 75280) and received 179 comments in response. These comments were substantially similar to those filed in response to the OOIDA and SBTC petitions. FMCSA denied TIA's petition on March 17, 2023.[4] In denying the petition, the Agency stated that TIA's proposal would be contrary to the stated transportation policy goals in 49 U.S.C. 13101, including promotion of fairness and efficiency in the transportation industry.

While the SBTC, OOIDA, and TIA petitions were pending, FMCSA held a public listening session on October 28, 2020, regarding the three petitions and property brokers in general (85 FR 64613, Oct. 13, 2020). FMCSA received 76 written comments in response to the Federal Register notice announcing the listening session. During the listening session, participants expressed concerns about freight rates, disclosure of

[3] FMCSA issued guidance on the definitions of "broker" and "bona fide agent," including guidance on the role dispatch services play in the transportation industry and clarification on when such entities must register as brokers, on November 16, 2023 (88 FR 39368).
[4] The petition for rulemaking and denial letters are available in the docket for this rulemaking.

confidential pricing information, motor carriers directly soliciting shippers, so-called "double brokering," record-keeping costs, comparisons to other industries, charge backs, and detention time fees.

The Agency has received additional input from the public on the topic of broker transparency in several other contexts. In March 2023, the Agency held a listening session at the Mid-America Trucking Show (MATS) shortly after granting the SBTC and OOIDA petitions.[5] Despite the Agency's public statement that the listening session would focus on other broker matters, including financial responsibility, public commenters at MATS focused on broker transparency. Many of the transparency related concerns were consistent with those raised in the comments on the OOIDA and SBTC rulemaking petitions in 2020, suggesting that the issues raised at the time of the public comment period for those petitions had not subsided as of March 2023.

The topic of broker transparency has also appeared in the comments received on other proposed rules.[6] While comments are most useful to the Agency when directed towards the subject matter of the public notice to which they respond, the Agency acknowledges these ancillary comments as evidence of continuing concerns around broker transparency.

VI. Discussion of Proposed Rulemaking and Comments

FMCSA proposes this rulemaking in response to OOIDA's and SBTC's petitions. The NPRM differs in certain ways from the provisions sought by OOIDA and SBTC, as discussed below. The rulemaking is also informed by the comments received in response to the petitions, as well as in the related actions detailed elsewhere in this NPRM. The

[5] The transcript of the listening session is available in the docket for this rulemaking.
[6] See, e.g., Comment FMCSA-2023-0268-0026 (comment on "Fees for the Unified Carrier Registration Plan and Agreement") available at https://www.regulations.gov/comment/FMCSA-2023-0268-0026; comment FMCSA-2016-0102-0351 (comment on "Broker and Freight Forwarder Financial Responsibility") available at https://www.regulations.gov/comment/FMCSA-2016-0102-0351.

comments, input from related actions, and the Agency's responses are discussed after the provisions of the proposed rulemaking.

A. Proposed Rulemaking

To address the concerns over broker transparency raised in the rulemaking petitions and subsequent public comments, FMCSA proposes the following amendments to § 371.3, "Records to be kept by brokers," presented in the order in which they would appear in the section. The Agency also proposes a conforming amendment to § 371.2, "Definitions."

Sections 371.2 and 371.3 apply to all property brokers FMCSA regulates, as would the proposed amendments. Property brokers are divided between household goods (HHG) brokers, who arrange the transportation of personal property between homes, and non-HHG (i.e., general freight) brokers. FMCSA believes that the broker transparency regulation should continue to apply equally to HHG brokers and general freight brokers, and the Agency has not identified any rationale for imposing different transparency requirements on HHG brokers versus general freight brokers. The comments received to date do not raise any broker transparency concerns unique to HHG brokers, and the Agency seeks comment on this issue.

1. Brokers Must Keep Records in an Electronic Format

FMCSA proposes requiring that the records covered by § 371.3(a) be kept in an electronic format to promote compliance with the broker transparency requirement in § 371.3(c). The Agency is aware of brokers avoiding meaningful compliance with § 371.3(c) by making the required records available for inspection only at their principal place of business, which often makes inspection by the motor carrier difficult or impossible. By requiring that the records be kept in an electronic format, the Agency intends to remedy this issue. Because the Agency, based on its interactions with various brokers, believes that most freight brokers already keep their records in an electronic

format, this requirement should not impose a significant burden on these brokers. FMCSA believes that electronic recordkeeping may not be as common among household goods brokers and seeks comment on what burden, if any, would be imposed upon those brokers if electronic recordkeeping were required.

2. Revisions to the Required Contents of Brokers' Records

Within the recordkeeping requirements of § 371.3, paragraph (a) specifies the details that the records must contain. The Agency proposes the following revisions to ensure that the records are tailored to the needs of the parties, therefore better addressing the concerns of motor carriers while not imposing unnecessary recordkeeping burdens on brokers.

Date of Payment

The Agency proposes adding the date of payment from both the shipper to the broker and from the broker to the carrier. Some brokers commented that they bear significant risk because they tender payment to motor carriers prior to receiving payment from shippers, for instance, in a situation where the carrier is paid within 3 days of delivering a load, but the shipper has 30 days to pay the broker. On the other hand, motor carriers have commented about not being paid by brokers in a timely manner, often in the context of a charge back or other contractual dispute over whether the carrier performed their duties adequately under the contract. Including the date of payment would provide transparency to all parties about the benefits and risks of the carrier's payment structure. It would also provide motor carriers with necessary information in the event they experience charge backs or other instances of nonpayment, because the carrier would be better able to understand any deductions the shipper may have made to the payment it remitted to the broker and to verify that those deductions correspond to the charge back against the carrier.

Elimination of Brokerage Service vs. Non-brokerage Service Distinction

The Agency proposes eliminating the distinction between brokerage services and non-brokerage services in § 371.3(a) by removing current paragraph (5) and revising paragraph (4). This distinction was originally made by the ICC in its 1949 rule, which was based on the "Practices of Property Brokers" report. As explained in the report, the ICC was contemplating a cap on brokers' commissions. The ICC distinguished between brokerage and non-brokerage services to support implementation of the cap and to prevent brokers from circumventing it through charges for non-brokerage services. The contemplated cap was deferred from the 1949 rule and ultimately never adopted. Despite this, the distinction between brokerage and non-brokerage services was included as part of the rule and has remained in the regulations ever since.

The Agency believes that the distinction between brokerage and non-brokerage services is unnecessary for the purposes of the broker transparency regulation and proposes removing the distinction in favor of a simpler itemization requirement described below. The term *non-brokerage service* is defined at § 371.2(d), and used only in § 371.3(a)(5), so the Agency also proposes removing the definition of *non-brokerage service*, which would no longer be used.

Itemization of Charges and Fees

The Agency proposes clarifying that the records must itemize all charges and fees associated with the brokerage service, to include an amount and description of each charge and fee. Brokers would also be required to itemize any penalties assessed in connection with the shipment, for example, a penalty for late delivery or cargo damage. This revision is intended to ensure the parties have visibility into the payments, fees, and charges associated with the transaction, and can resolve issues and disputes without resorting to costlier remedies.

3. Brokers Must Provide Records Upon Request

In their petitions, both OOIDA and SBTC sought an explicit ban on waivers of the requirements in 371.3(c). However, as a general principle, parties are permitted to waive any right unless Congress, by statute, specifically makes a right non-waivable. The Agency has not identified any statutory provision in which Congress expressly barred waivers in this context, and therefore the Agency has not included the requested language in the revised regulation. The petitions did, however, identify inconsistencies between this regulation and the rest of part 371, which the Agency intends to address through this rulemaking. To this end, the Agency proposes amending the language of § 371.3(c) to more accurately describe the regulatory obligation imposed on brokers and the process for requesting and supplying transaction records.

When the ICC issued the broker transparency regulation in 1980, it stated that it would enable the elimination of other, more complex regulations. One of the major provisions eliminated, former 49 CFR 1045.10, related to the duties and obligations of a broker, which included giving fair advice to shippers and not misrepresenting or making false promises about the services motor carriers would provide; not misrepresenting or giving false information to motor carriers about the commodities in the shipment; advising both the shipper and carrier of the amount and basis of any compensation being received from the other; exercising due diligence in carrying out the terms of its contracts with shippers and motor carriers and ensuring prompt payment; and paying any freight charges in full to the carrier or carriers without deduction for any amount due to the broker from such carrier or carriers. The ICC was clear that its intention was not to eliminate these duties and responsibilities entirely, but rather that providing shippers and carriers with the ability to review the transaction records would ensure that brokers were acting honestly and fairly.

By phrasing the requirement as a private "right to review," the original regulation did not prohibit a broker from requiring a waiver of the private "right to review" as a condition of brokering a load to a motor carrier and did not contain an enforcement mechanism for the Agency to enforce the private "right to review." However, FMCSA believes the original wording did not adequately capture the ICC's intent that brokers continue to comply with those duties and obligations, particularly disclosure of such records to shippers and motor carriers who find value in such information. To address these concerns, FMCSA has reframed the disclosure requirement as a regulatory obligation, as the Agency believes this more closely aligns with the original intent of the regulation. Moreover, a regulated entity must adhere to the regulations and cannot "disguise its regulatory obligations as contractual ones." *Taylor Energy Co. LLC v. United States*, 975 F.3d 1303, 1306 (Fed. Cir. 2020). These changes would also ensure that the language in § 371.3(c) is consistent with the other broker requirements in part 371.

The proposed amendments to § 371.3(c) would clarify that brokers maintain a continuing duty to act fairly and honestly, and that visibility into the transaction records is the mechanism by which shippers and carriers can ensure that brokers are complying with this duty. The requirement to provide the records upon request would thus be made explicit as a regulatory obligation. The proposed rule would not, however, prohibit brokers from including confidentiality clauses in their contracts with motor carriers. As long as brokers are complying with the requirement to disclose records upon request, the parties may negotiate and reach agreements regarding non-disclosure of the information to non-parties.

4. Records Must Be Provided Within 48 Hours of Request

As discussed in the comments, the Agency is aware of brokers avoiding meaningful compliance with the regulation by delaying the availability of records for

review, and by restricting access for review to their principal place of business. The Agency proposes amending § 371.3(c) to require that records must be provided within 48 hours. This amendment is intended to provide the requestor with the records in a timely fashion, which enables the use of the records to resolve any issues around service or payment. By requiring the broker to "provide" records electronically, this amendment is intended to prevent a broker from only making its records available for review at its principal place of business or another, potentially inconvenient, location. Instead, the amendment plainly places the responsibility of delivering the information to the requestor on the broker.

B. Comments and Agency Responses

In the notice requesting public comment on OOIDA's and SBTC's rulemaking petitions (85 FR 51145, Aug. 19, 2020), the Agency posed a series of questions regarding the rulemaking sought by the petitions. FMCSA received a large number of comments in response to the notice, and in subsequent related actions, many responsive to the questions posed and others raising additional issues for the Agency's consideration. The comments expressed a range of views from motor carriers, brokers, and other interested parties, and the Agency's proposed rulemaking is informed by this input.

1. The Agency's Authority Over Broker Transparency

The first question the Agency posed in the notice regarding the rulemaking petitions referenced FMCSA's existing authorities related to brokers (49 U.S.C. 13101-14916) and asked what statutory provisions, if any, would be carried out by the regulatory changes requested petitioners requested. Both successful petitioners, OOIDA and SBTC, indicated that FMCSA has existing authority to carry out the proposed changes in the petitions for rulemaking. OOIDA indicated Congress has required the Secretary, and hence FMCSA, to regulate brokers to protect motor carriers, including requiring brokers to have a bond as found in 49 U.S.C. 13904(e) and (f), as detailed in

OOIDA's petition. SBTC indicated FMCSA already has existing authority to act on these petitions for rulemaking under U.S.C. 13101 through 14916, and more specifically, 49 U.S.C. 14906, which addresses evasion of regulation by motor carriers and brokers.

Few commenters responded directly to the Agency's questions about authority. Of those who did, most indicated that FMCSA has a mission to promote safe operation of commercial motor vehicles, and any form of market regulation falls outside of this mission. Scopelitis, a national transportation law firm, for example, indicated there is no need for the existing regulations in a highly competitive industry, much less the proposed addition of even more regulatory burden.

FMCSA also asked how a rule restricting the rights of private parties (e.g., brokers) from including certain terms in their agreements would align with the Agency's statutory authority. Few commenters directly addressed this question. TIA and MODE Transportation, for example, indicated that 49 U.S.C. 14101 provides brokers the option to include a waiver provision. The applicability of 49 U.S.C. 14101 is discussed in Section VI.B.8. The National Association of Small Trucking Companies did not cite a specific statute but indicated that dictating the terms of contracts between private parties was beyond FMCSA's authority. In contrast, OOIDA and SBTC commented that FMCSA has the authority to restrict private parties from including a waiver under FMCSA's existing authority. Overall, there was substantial disagreement on this question.

FMCSA response: As discussed in Section IV. Legal Basis, the Agency has the authority to establish certain regulations for property brokers. The Agency believes that the proposed rule, which revises the recordkeeping regulations for property brokers, falls squarely within this authority. Comments that characterize broker transparency as beyond the Agency's authority and unrelated to safety oversimplify both the Agency's authority and the purpose of broker transparency. FMCSA and its predecessor agencies have long

been responsible for regulating certain commercial aspects of motor carrier transportation, including broker recordkeeping.

2. FMCSA Enforcement Role

Question two asked how a rulemaking expanding FMCSA's enforcement of a requirement that brokers automatically disclose financial details about each transaction to the motor carrier transporting the load, as requested in the OOIDA and SBTC petitions, would align with the statutes identified above (i.e., 49 U.S.C. 13301 and 14122).

In its comments on the petitions, CR England Logistics stated that the rulemakings proposed by OOIDA and SBTC do not align with existing FMCSA statutes. TIA indicated that disclosure of financial details is in direct conflict with 49 U.S.C. 14101(b), in addition to Congressional intent. A small number of commenters, such as TIA, stated disclosure of commission, a violation of § 371.3, has not been an issue. TIA further stated there have been no complaints made to DOT's National Consumer Complaint Database (NCCDB) for a violation of a broker not disclosing its commission under § 371.3(c). OOIDA stated FMCSA would not experience additional burdens by adopting the changes proposed in the petitions and already has existing authority to do so under 49 U.S.C. 13904 and 14122.

FMCSA response: The Agency believes that the proposed rulemaking is an appropriate exercise of its authority that builds on the current recordkeeping requirements. Since the filing of these petitions, broker transparency has become a topic of intense interest in the transportation industry. According to Agency records, at least 32 complaints were received from 2018 through 2020. The Agency receives complaints through NCCDB and other sources. As detailed above, FMCSA believes the language of the original regulation does not accurately describe the transacting parties' rights and burdens, and that a broker's obligation to provide records is not premised on any inherent right of the carrier or shipper to receive those records, but rather on the Agency's

statutory authority to protect motor carriers in connection with its broker recordkeeping regulations.

FMCSA has several options for enforcing these regulations. In order to register with FMCSA, brokers must agree to comply with all applicable regulations (49 U.S.C. 13904(a)(2)), and FMCSA has the authority to suspend or revoke a broker's operating authority for willful failure to comply with a condition of registration (49 U.S.C. 13905(d)(2)(A)(iii)). FMCSA may also decline to renew a broker's registration if the broker has demonstrated it is not willing or able to comply with the regulations.

The Agency has a further option to seek a civil penalty for regulatory violations. The penalty schedule in 49 CFR part 386 Appendix B already sets out penalties for violations of FMCSA's commercial regulations in paragraph (g), as well as penalties for evasion in paragraph (i). The existing penalties cover violations of this proposed rule, so FMCSA does not propose a new enforcement mechanism or alter the current penalty schedule as part of this rulemaking. FMCSA is aware that the Department of Justice (DOJ) must bring certain enforcement actions for civil penalties on behalf of FMCSA.[7] However, parties may still file complaints with FMCSA for the Agency to investigate, take enforcement action within its existing authorities, and refer to DOJ as appropriate.

The Agency's exercise of authority to regulate broker recordkeeping, including its issuance of broker transparency regulations, is not in conflict with 49 U.S.C. 14101(b). That statute permits shippers and carriers to waive certain rights and remedies by contract, but for reasons discussed in section VI.B.8. of this NPRM, the Agency believes brokers are not shippers within the meaning set out by 49 U.S.C. 14101(b). Because the statute does not relate to brokers, it does not conflict with the Agency's broker

[7] See *In the Matter of Darlene Riojas, Manuel J. Riojas, Four Star Trucking, Inc., 7 Star Transport, LLC - Order Dismissing Three Charges for Lack of Subject Matter Jurisdiction, and Reserving Ruling on Other Summary Judgment Requests*, Docket No. FMCSA-2012-0174-0056 (May 8, 2019). This decision is available on the internet at https://www.regulations.gov/document/FMCSA-2012-0174-0056.

transparency regulations. Congress has also expressed its clear intent in 49 U.S.C. 13904(e) for the Agency to issue regulations applicable to brokers that provide protection for shippers and motor carriers, consistent with the Agency's responsibility to carry out the objectives of the national transportation policy and its general authority to regulate brokers of property.

3. Broker Size as Related to Transparency

The third question in the notice was whether the transparency issues raised by OOIDA and SBTC are limited to small brokers or large brokers (e.g., brokers with revenues above a certain threshold, brokers with a certain number of transactions, etc.) or whether they are more widespread such that the rulemaking should cover all brokers, regardless of size. The fourth question assumed that transparency issues were primarily associated with large brokers and asked what revenue threshold FMCSA should consider for the applicability of any new requirements. It also asked how the Agency could obtain accurate information about brokers' revenues.

Of the commenters that responded directly to the third question, the majority indicated that the proposed rule should apply equally to large and small brokers. These commenters included brokers and trade associations, such as England Logistics and OOIDA, and a large number of individuals involved in the trucking industry.

A smaller number of commenters responding to question four indicated that freight brokers, particularly large brokers, due to their size and resources, are taking advantage of the current situation. However, most commenters did not differentiate based on the size of the broker but rather stated that brokers as a whole were not transparent and were not treating motor carriers fairly.

FMCSA response: The Agency believes that the proposed broker transparency requirements should apply to all brokers, regardless of size, as is the case with the current

regulation. The Agency believes that a lack of broker transparency causes problems whether the broker who arranged the transportation is large or small.

4. Cost of Providing Transaction Records

The fifth question posed related to the most efficient and effective means for brokers to provide information, automatically and electronically, to motor carriers. The Agency asked whether each broker should have, for example, a stand-alone system with motor carriers receiving an email from the broker after the contractual service has been completed, or whether the brokers should be allowed to satisfy the request with partnerships or networks through which registered brokers would upload transaction information which would then be automatically transmitted via the network to the registered carrier associated with the transaction. The sixth question, related to the fifth, was a request for cost estimates for implementing an information technology (IT) solution to accomplish OOIDA's request, either through stand-alone systems run by individual brokers, or systems operated by groups of brokers notifying the individual motor carriers utilizing any of the brokers within the group.

The majority of the commenters agreed that electronic transmission is the most efficient means for brokers to provide information. However, one commenter, MODE Transportation, indicated that implementing an electronic or IT solution is not required to solve the transparency issue and was never envisioned when § 371.3 was developed. Echo Global Logistics stated that much of the information sought through broker transparency is already publicly available, including rate information from aggregators like DAT.com and required financial reports from publicly-held brokers. Echo Global Logistics argued that, given the public availability of this information, the cost of developing and maintaining an electronic reporting system to comply with the petitioners' proposed regulations is not justifiable.

There was disagreement among commenters as to whether a proposed electronic system should be stand alone or a current electronic format(s) which the broker may already be using. Some commenters mentioned use of existing electronic formats, such as email, spreadsheets, faxes, which are in common use to meet a proposed electronic requirement. However, most brokers that commented indicated that dedicated stand-alone systems such as an electronic data interchange (EDI) or application programming interface (API) are just as likely to be already in use by many freight brokers, and these systems provide the necessary data privacy and security. England Logistics mentioned that the data transmitted could potentially be trade secrets and therefore would require more intensive IT systems to protect.

In terms of cost, most commenters indicated that, if the use of a standalone system such as EDI or API were required, it would have a cost impact on those brokers which do not have such systems in place already. Both Axle and Lange Logistics indicated this cost impact may affect small businesses more profoundly than others.

Five commenters directly responded to question six and provided a cost estimate for brokers to establish an electronic system to transmit records. Trinity Logistics and Tucker Worldwide estimated a cost of $2,500 to $10,000 per carrier setup. TIA further provided an estimated cost example of a broker that utilizes 5,000 motor carriers in their database, using their own existing IT system (presumably EDI- or API-based), would incur a cost of $12.5 million to $50 million for implementation. ArcBest indicated personnel and equipment required to implement the electronic information transfer would be $500,000 per broker.

FMCSA response: FMCSA is not proposing to prescribe a specific type of electronic system brokers must use, provided the system complies with 49 CFR 390.32, “Electronic documents and signatures.” The Agency finds that the requirements listed there are appropriate in the context of the broker recordkeeping requirements and sees a

benefit in having a consistent standard for electronic documents. FMCSA's experience in reviewing brokers' records shows that most records covered by § 371.3(a), including bills of lading, are already kept in electronic format, though paper bills of lading may still be occasionally used. Thus, the burden on parties to keep and transmit transaction records electronically is expected to be minimal.

The proposed rule does not include an automatic disclosure provision. FMCSA believes that the cost estimates provided in response to question 6, which were related to developing an IT solution for automatic disclosure within 48 hours of the completion of contractual obligations, are overestimated. Since the rule does not include an automatic disclosure provision and records would only be provided upon request within 48 hours, the Agency expects that the costs would be significantly lower because brokers' existing systems, either as currently implemented or with minor modification, could be used to fulfill these requirements. However, the Agency lacks specific data to quantify these costs and is seeking public comments on the cost estimates for this proposal.

In response to the comment that much of the information brokers would have to provide is already publicly available, FMCSA notes that information found on publicly held brokers' financial reports is not transaction specific. While reviewing this information could give shippers and motor carriers a general sense of the state of the freight brokerage industry, it does not provide them with information about the loads they have consigned or hauled. Rate aggregation websites provide pricing information that carriers may find useful in deciding whether to accept an offer to haul a prospective load, but it is also not a substitute for broker transparency information. In particular, it would not provide shipper, carrier, or bill of lading information for a particular shipment, nor would it provide carriers with any information about chargebacks or other fees assessed against them in connection with a particular delivery. FMCSA therefore does not believe

relying on publicly-available information is an adequate substitute for the information disclosure proposed in this rule.

5. Economic Benefits to Motor Carriers and Costs to Brokers

Both rulemaking petitions linked broker transparency to concerns over carrier revenue and broker margins, and the notice requesting public comment sought input on these concerns. Margins, as discussed in this proposed rulemaking, refer to the division of a shipper's payment between the broker and the motor carrier, expressed as a percentage. SBTC stated that, in the context of the economic impact of the COVID-19 national emergency, freight rates had dropped drastically, yet brokers, in at least a few instances, were making large margins on freight. SBTC stated that it did not seek regulations limiting the amounts or percentages brokers earn, but it viewed broker transparency as essential to making sure market forces operate ethically and fairly. The OOIDA petition raised similar concerns. The notice asked for quantitative estimates of the economic benefits that would likely be achieved by motor carriers if FMCSA adopted the rules requested by OOIDA and SBTC, including how much additional revenue motor carriers might receive on a per-transaction basis. The notice also sought quantitative estimates of the economic costs to brokers or others, including how much profit reduction on a per-transaction basis brokers would experience and what percentage of the costs would be passed through to shippers or motor carriers.

Only a few commenters responded to these questions. OOIDA estimated that the additional revenue a carrier would earn in an individual transaction would be between tens to thousands of dollars, depending on the specifics of the transaction. This estimate was preceded by a discussion of increased convenience and a decrease in unfair billing practices, and it is unclear how OOIDA's estimated additional revenue was apportioned among the increase in convenience, the decrease in unfair billing practices, greater negotiating power for motor carriers, or other factors. Few of the comments from small

motor carriers contained responsive estimates, and several motor carriers noted that the current lack of broker transparency meant that they do not have access to the transaction information necessary to provide an informed estimate. Brokers commented that motor carriers would not receive any economic benefit from the proposed transparency rulemaking. Brokers provided estimates of the cost to comply with OOIDA's proposal based on information technology and staffing costs but did not provide an estimate of the economic impact due to changes to freight rates, profit reduction on a per-transaction basis for brokers, or percentage of costs that would be passed through to shippers or motor carriers.

Although the Agency received few quantitative estimates of the economic benefits of broker transparency to motor carriers and the economic costs to brokers, many comments addressed carrier revenue and broker margins. Motor carriers commented on the prevailing low freight rates at the time and provided examples of offers of one dollar or less per mile. Motor carriers described the impact of these low rates. For example, some comments stated that the offered rates make it difficult to cover motor carriers' operating expenses, including maintaining equipment in safe working condition. Some comments also described low rates as a contributor to undue stress on drivers and unsafe operating practices. Many comments from motor carriers characterized the rates as inequitable given the difficulty of the work they do and value of the service they provide. Many of these comments identified brokers as responsible, at least in part, for low rates and many characterized the brokers' business practices as deceitful. Carriers also say they cannot operate a profitable business unless they haul brokered loads, and some have reported taking brokered loads at a loss, citing the need for revenue to service business debts. In addition, many motor carriers expressed concern that they lack negotiating power to exclude transparency waiver provisions from contracts and, if they exercise

their right to view the transaction records, brokers will select other motor carriers to work with and refuse to do business with them in the future.

Many comments from motor carriers support the broker transparency proposals in the petitions as a remedy for the issues they raised. Some comments state that increased broker transparency would allow motor carriers to negotiate higher rates. Many comments simply supported broker transparency as a means for increasing carrier revenue, without describing how revenue would increase as a result of transparency. Other comments suggested modifying the rules requested by OOIDA and SBTC to address their concerns about low rates more directly, including several suggestions to provide the broker transparency information when the parties are negotiating a rate, before the service is provided. Some of these comments stated that the transparency information would not be useful to the carrier after the transportation service had been provided.

Some motor carriers did not support broker transparency and stated that the information is irrelevant to motor carriers because the only pricing information they need is the offered rate. Other commenters proposed a rule limiting broker margins to a certain percentage of the price paid by the shipper.

Many of the comments from brokers challenged the assertions made in the petitions and other comments regarding freight rates and broker margins. Broker commenters also argued that low freight rates are not a result of high broker margins but rather a result of broad market forces, particularly the short-term acute economic impact of the COVID-19 national emergency. They disputed claims about price gouging by identifying a variety of factors that influence the price a broker sets for a load. Brokers also explained that their contracts with shippers are typically for a set period, often one year, while their contracts with motor carriers are typically shorter, often on a load-by-load basis. As a result, the broker's margin for a load covered by the shipper contract will

fluctuate based on the spot market, so that the broker may have a higher margin on some loads and a lower, sometimes negative, margin on other loads. Brokers also explained that their margins should not be equated with profitability and described the various expenses incurred to provide brokerage services to shippers. These expenses would not be reflected in the broker transparency information.

Many of the comments from brokers stated that the rulemaking the petitions sought would not have the claimed effect of increasing carrier revenue. These comments stated that broker transparency would not increase freight rates. They also stated that load boards and other commonly available services already provide motor carriers with enough information regarding freight availability, traffic lanes, market rate information, seasonality adjustments, and so on to make informed business decisions, rendering the records available under § 371.3 unnecessary. Some comments added that motor carriers can decline to take a load if the offered rate is too low to be profitable. In response, some comments explained that motor carriers with leased trucks may accept unprofitable loads to secure revenue, even as that revenue is not profitable.

Since the comment period closed, FMCSA has received further input regarding broker transparency. This input includes further expressions of concern regarding low prevailing freight rates, and of the belief that the low freight rates are caused, at least in part, by high broker margins. There is continued interest from motor carriers in broker transparency as a solution to low prevailing rates.

FMCSA response: The purpose of the proposed rule is not to provide an economic benefit to motor carriers, nor to impact broker margins. However, the Agency considers the economic impacts of the proposed rule as part of its mandated regulatory analysis. The comments received to date do not conclusively establish what the economic impact of the proposed rule would be. As with the current rule, the proposed rule would give shippers and carriers the option to access information about a brokered freight transaction

after the parties have negotiated the terms of the contract and the transaction is complete but would not require disclosure prior to that time, nor would it require automatic disclosure. The information provided would allow the carrier to compare the amount that the shipper paid the broker to the amount that the broker paid the carrier but would not set or limit rates or brokers' margins. By clarifying the regulatory obligation for brokers to provide the transaction records, the proposed rule would make the information enumerated at § 371.3(a) available to all parties participating in a brokered freight transaction.

Although the Agency cannot determine, with the currently available information, what economic impact the proposed rule would have, two main theories can be derived from the comments. Under one theory, broker transparency would not provide an economic benefit to motor carriers even if such transparency was widespread. Motor carriers would not have access to the transparency information when determining whether to accept a brokered load at the broker's offered price or when negotiating the price of a load with a broker. The information, provided after the fact, would not change the price of the load. The information may not have an impact on the price of future loads for a variety of reasons. The carrier may not find the information from past transactions useful when negotiating prices for future loads offered by the same broker or loads offered by other brokers. If, based on the transparency information, the carrier chose not to accept future loads from that broker, the carrier might not be able to find higher-paying loads from other brokers. Relatedly, the broker in that scenario may be able to find other motor carriers willing to accept the load, even if one carrier refuses to work with them.

Under the second theory, broker transparency would provide an economic benefit to motor carriers if such transparency was more widely available. The broker transparency information might impact the price of future loads that the carrier accepts. Motor carriers may be able to negotiate a higher price if they can apply their knowledge

from previous loads to negotiations for future loads from the same broker or future loads with similar characteristics. Brokers may have to accept the higher price if they cannot find other motor carriers. Although the transparency information would not be publicly available, a broker might develop a reputation among motor carriers for offering low rates relative to the price paid by the shipper. If that reputation deterred motor carriers from taking loads, the broker may have to offer higher rates to place their loads. At least one broker highlighted concerns that transparency information could result in motor carriers directly soliciting shippers, bypassing brokers for future loads. The ICC considered this issue when it adopted the current regulations in 1980, emphasizing that motor carriers and shippers are free to deal directly with each other and "[o]nly where the shipper finds that it can get better service from the broker will it stay with the broker" (45 FR 68941, Oct. 17, 1980).

There exists a possibility that transparency information could reduce the exclusive knowledge that brokers bring to a transaction if shippers and motor carriers collect transparency information over time. If the Agency were to assume that the broker's exclusive knowledge is considered value-added and therefore currently captured in broker margins, then increased transparency with this proposal could result in downward pricing pressure on broker margins from motor carriers, shippers, or both.

As discussed in section VI.B.4, above, FMCSA does not view the information available on load boards or through other publicly available sources to be an adequate substitute for the transaction-specific information set out in this proposed rule. Shippers and motor carriers have an interest in knowing details about their particular shipments, especially when problems with a shipment arise or the compensation received differs from the contractual amount. Broker transparency provides the retrospective transaction-specific detail on completed loads necessary to resolve these issues. By contrast, the prevailing rate information available on load boards for prospective loads is useful for

making informed decisions about which offers to accept but is not useful in addressing issues with completed loads.

From the comments received, the Agency cannot determine whether either of these theories would prove correct under the proposed rule. The actual impact may be somewhere in between these theories, or both theories may be incorrect. If broker transparency remained rare under the proposed rule, there may not be any economic impact. The Agency seeks further comment to better estimate the economic impact of the proposed rule.

6. Transparency of Charge Backs, Accessorial Fees, and Surcharges

The broker transparency comments brought up several issues not raised in the petitions or in the notice. One issue was the transparency of charge backs. Several comments described questionable claims in situations where a carrier delivered a load, got a clean bill of lading from the receiver, and then later had a claim, or "charge back," on the load from the broker despite the clean bill of lading. Motor carriers contend that these claims often lack sufficient explanation or description of the reason for the charge back, and the motor carriers find it difficult to contest them, particularly when their payment for transporting the load is withheld unless they accede to the claim. In situations where the contracts include cross-collateralization provisions, payment for other loads transported by the same carrier for the same broker may also be withheld unless the claim is accepted.

Other comments described issues with detention charges and fuel surcharges, where the rates and conditions of the fees that brokers charge shippers are different than the rates and conditions of payments remitted to the carrier, despite the fees being premised on the carrier's operating costs. As an example, fees for detention time are premised on the operating costs of keeping a truck idle while waiting to load or unload, costs that include the driver's time. One commenter described a situation where the

broker charged the shipper for detention time after the first hour, at a rate of $50 per hour, but paid the carrier for detention only after 4 hours, and at a rate of $35 per hour. Comments from motor carriers expressed similar concerns regarding fuel surcharges.

FMCSA response: The practices identified in the comments are concerning because, depending on their prevalence, they may significantly disrupt the efficiencies and opportunities offered by brokered freight transactions. Broker transparency seems to be a useful tool in addressing these concerns, by providing parties to a brokered transaction visibility into the associated payments, fees, and charges, enabling the parties to resolve issues and disputes among themselves without resorting to costlier remedies. If a claim is made against a shipment, the carrier should be able to understand the basis of the claim, not just to dispute questionable claims, and in instances of well-founded claims, to take precautions with future shipments and thereby avoid such claims. On the remittance of surcharges, there may be a reasonable justification for a broker to remit less than the full amount of a surcharge received from a shipper to a carrier, but the carrier should be able to see that difference, particularly when the surcharge is premised on the carrier's operating costs.

In addressing broker transparency, FMCSA cannot replace prudent business judgment and cannot guarantee the trustworthiness of every shipper, broker, and carrier. However, the brokered freight transportation industry requires a certain degree of trust to operate efficiently. Trust is eroded when motor carriers are prevented from seeing the charges and payments associated with the service they are providing. In addition to creating mistrust, unsubstantiated and specious charges levied on motor carriers divert resources to paying or litigating the charges, that could otherwise be spent providing safe and efficient transportation.

7. Confidentiality of Pricing

Brokers commenting on transparency raised concerns about the confidentiality of their pricing. Brokers stated that shippers require pricing confidentiality in their contracts with brokers, which is one reason why brokers require confidentiality in their agreements with motor carriers. In this regard, several motor carriers noted that the broker-carrier contracts typically have confidentiality clauses, which would serve to protect shipper pricing in the context of greater broker transparency.

Brokers also asserted that their pricing can constitute trade secrets, and broker transparency requirements would conflict with the Defend Trade Secrets Act (DTSA) (18 U.S.C. 1831 et seq.). Motor carriers commented that DTSA doesn't apply to this situation because motor carriers have a right to the transaction information under the current regulations and, consistent with DTSA, the information can still be protected from public disclosure without waiving the carrier's right to access. Motor carriers argued that a broker disclosing to a carrier the transactional information to which the carrier is authorized to access is not equivalent to theft of a trade secret.

FMCSA response: The Agency recognizes that shippers, motor carriers, and brokers in a brokered freight transaction likely have a compelling business interest in protecting information about that transaction. The broker transparency regulation does not require public disclosure, and the Agency believes that broker transparency is compatible with the prudent protection of business information. Section 371.3 does not require the broker to disclose to the carrier all details of the business relationship between the broker and shipper, but rather only the transaction-specific details enumerated in § 371.3(a). The Agency believes that the confidentiality provisions in broker-carrier contracts can provide protection consistent with broker transparency. The concerns around confidentiality must be balanced against the issues that broker transparency is meant to remedy, as described above.

Regarding trade secrets, the Agency does not believe that § 371.3 in its current form, or with the amendments proposed, conflicts with trade secret protections. The DTSA prohibits economic espionage and theft of trade secrets, defined as when a person steals, receives, buys, possesses, duplicates, transmits, or engages in other similar activities regarding proprietary economic information, or conspires with others to do so. Here, the information is required to be kept and handled in accordance with a Federal regulation. Therefore, a broker or carrier is legally in possession of such information and does not violate the DTSA when it handles such information pursuant to the regulation. Parties are also permitted to include confidentiality clauses in their contracts that limit further disclosure of such information.

Moreover, while a pricing formula could be a trade secret as a type of business information with independent economic value, the record of an individual transaction covered by § 371.3(a), without more, is not likely to be covered as a trade secret. Brokers are not required to disclose additional information or documentation beyond the scope of what is covered in § 371.3(a). Further, § 371.3(c) does not require the type of public disclosure that would be economically damaging to a party. Instead, it only requires that brokers give the parties to a transaction access to a limited amount of information pertaining to that transaction.

8. Applicability of Other Statutes

Several comments argued that any rule preventing the waiver of § 371.3(c) would be contrary to 49 U.S.C. 14101. Those commenters argue that 49 U.S.C. 14101 should be interpreted to cover brokers and therefore permits brokers to include waiver provisions in contracts with motor carriers that waive the broker's obligations to the motor carrier

under § 371.3. In support of this claim, several commenters cited the *Dixie Midwest*[8] ICC decision for the proposition that a broker is a shipper in relation to a carrier.

FMCSA response: The language of 49 U.S.C. 14101 refers to shippers and motor carriers, not brokers. The Agency does not interpret that statute to apply to brokers, and the proposed rule therefore would not conflict with the statute. Motor carriers or shippers would not use 49 U.S.C. 14101 to contract out of their rights under § 371.3(c), because 49 U.S.C. 14101 is premised on a contract between a carrier and a shipper, not a brokered freight transaction, while § 371.3 is focused solely on a brokered freight transaction. It is unreasonable to say that a broker could rely on 49 U.S.C. 14101, which on its face does not apply to brokered freight transactions, in order to waive a right that applies only to brokered freight transactions.

Regarding the *Dixie Midwest* decision, in that case the ICC was determining whether a broker could be considered a shipper in the context of supporting an application for contract carrier authority. That situation has limited bearing on the interpretation of 49 U.S.C. 14101. Most federal courts that have addressed the issue of whether 49 U.S.C. 14101(b) applies to brokers in more recent years have held it does not.[9]

The Agency is aware that some courts have determined, after a fact-specific analysis, that a broker acted as a shipper under the particular conditions present in those transactions.[10] However, the Agency does not consider all brokers to be shippers in relation to motor carriers or for that to be the standard by which broadly applicable

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[8] *Dixie Midwest Express, Inc., Extension—General Commodities*, No. MC-125038 (Sub-No. 24), 132 M.C.C. 794 (Feb. 3, 1982).

[9] See, e.g., *Exel, Inc.* v. *S. Refrigerated Transp., Inc.*, 807 F.3d 140, 148–49 (6th Cir. 2015); *Supreme Auto Transp., Inc. v. JBL Logistics, LLC*, 2017 WL 4334064, at *4 (D. Colo. Mar. 8, 2017); *United Rd. Logistics LLC v. Alpha Transportation Grp. LLC*, 2017 WL 1755825, at *2 (E.D. Mich. May 5, 2017). See also *TransCorr Nat'l Logistics*, 2008 WL 5272895 at *4 and *REI Transp., Inc. v. C.H. Robinson Worldwide, Inc.*, 519 F.3d 693, 694 (7th Cir. 2008) (both recognizing that brokers are not shippers, but allowing for the possibility that a broker could step into a shipper's shoes to assert claims against motor carriers).

[10] See, e.g., *Jackson Rapid Delivery Serv., Inc.* v. *Thomson Consumer Elecs., Inc.*, 210 F. Supp. 2d 949, 954 (N.D. Ill. 2001).

regulations are formulated. In circumstances where the broker does, in fact, act as the shipper, 49 U.S.C. 14101(b) limits the circumstances under which the Agency may prohibit waivers in contracts. However, the Agency believes that in most brokered transactions, the broker is not the shipper, and 49 U.S.C. 14101(b) does not apply.

The proposed amendments to § 371.3(c) would also render this objection largely moot by clarifying that access to records is not a right belonging to motor carriers or shippers that can be contracted away, but instead is a regulatory compliance requirement that brokers must meet in order to operate in the interstate transportation industry.

9. Context and Impact of the COVID-19 National Emergency

The SBTC rulemaking petition, which was filed in May 2020, referred to the COVID-19 national emergency and its negative impact on freight rates. The OOIDA petition, also filed in May 2020, noted that freight rates had reached historic lows but did not reference the COVID-19 national emergency specifically. SBTC's petition raised concerns that brokers were taking advantage of the situation to obtain high margins, and several comments on the petitions expressed similar concerns. These concerns were not based on systematic data, but on personal experiences, beliefs, and anecdotes about broker margins during that time; however, motor carriers also noted the difficulty in providing supporting data because they rarely obtain information about broker margins. Several motor carriers made the related point that they provided essential transportation services during the COVID-19 national emergency and should be compensated accordingly.

The comments received from brokers disagree with the motor carriers' claims. These comments state that the COVID-19 national emergency did not provide brokers with high margins; instead, brokers claim they experienced the same weak freight market and had difficulty finding loads to broker. Several brokers characterized the rulemaking proposed in the petitions as a reaction to short-term economic forces and opposed the

petitions because they believed that such a reaction was inappropriate. These brokers noted that freight rates were already rebounding at the time they filed their comments, which was later in 2020. Some commenters referenced freight market indices to support this point.

Returning to the carrier point of view, the OOIDA petition did not directly tie its proposed rulemaking to COVID-19 and stated that "OOIDA has long pushed for greater transparency in transactions with brokers." In 2021, at a time when the freight market was stronger than when the petitions were filed, SBTC submitted a letter to DOT expressing continued interest in a broker transparency rulemaking. As described previously, FMCSA held a listening session at MATS in March 2023 on the topic of property brokers. During this session the Agency heard from several motor carriers expressing their support for a broker transparency rulemaking.

FMCSA response: The COVID-19 national emergency had a drastic negative impact on the freight market in 2020, but the market began to recover later that year. Subsequently the market has continued to fluctuate, reaching notable highs in 2021 and 2022 but dropping off significantly in the last few years. Though the Agency is aware of economic conditions in the industry, the proposed rulemaking is not intended to address those conditions. The circumstances of the COVID-19 national emergency may have increased the interest in broker transparency regulation, but the Agency believes the proposed rulemaking serves a purpose beyond the context of that emergency, a conclusion supported by the continued engagement of motor carriers on the issue of broker transparency.

10. Automatic Disclosure and Retaliation

The OOIDA petition sought a provision making disclosure of the records automatic. OOIDA stated the automatic disclosure was necessary to prevent selective retaliation, i.e., blacklisting, against motor carriers who exercise their option to review

the transaction records. The SBTC petition did not seek an automatic disclosure provision. Many commenters expressed the same concern with retaliation as OOIDA.

FMCSA Response: The proposed rule does not include an automatic disclosure provision. Instead, as in the current regulation, parties to the transaction would have the ability to review the records upon request. The Agency believes that an automatic disclosure provision is unnecessary at this time and could be excessively burdensome to brokers. Though the concerns regarding retaliation appear plausible, the Agency cannot determine how frequently retaliation would take place or its potential effect on the motor carrier transportation industry. The Agency seeks further comment on this issue.

C. Issues on Which the Agency Seeks Further Comment

While the Agency invites comment on all aspects of the NPRM, we are particularly interested in comments that address the following issues. In addressing topics, FMCSA requests that commenters number their remarks to correspond with the list below:

1. What impact, if any, would the proposed rule have on freight rates? Please provide support for your position.

2. How common is electronic recordkeeping among household goods brokers? What burden, if any, would be imposed if electronic recordkeeping was required?

3. How much time would a broker spend creating an electronic record from paper documents for the record mandated by § 371.3? What would be the costs for a broker to create an electronic record per transaction?

4. Do you believe that the 48-hour timeframe proposed for § 371.3(c) would create a substantial burden for brokers? Why or why not? If you disagree with the proposed 48-hour timeframe, what timeframe would best balance the objectives of transparency while minimizing the burden on brokers?

5. If this proposal effectively reduced instances of illegal brokering, through carrier policing with transparency information, would the brokers engaged in illegal practices exit the market, resulting in the transfer of illicit profits to legally operating motor carriers and/or brokers?

6. Should freight brokers and household goods brokers be subject to the same recordkeeping requirements under § 371.3? If your answer is "no," why should they be subject to different requirements?

7. Should parties requesting records under § 371.3(c) be required to submit their request in writing? Should parties requesting records under § 371.3(c) be required to submit their request electronically? Would requiring a specific format for submitted requests impose a cost on the parties or otherwise deter requests for transparency? Please provide support for your position.

8. Would the proposal that records be provided electronically under § 371.3(c) make broker transparency more likely, as compared to not specifying a method of provided the records? Should the Agency be more specific in requiring a particular format for records provided under § 371.3(c), and if so, what method and/or format is preferrable? Please provide support for your position.

VII. Section-by-Section Analysis

Part 371, entitled, "Brokers of Property," provides requirements for entities or individuals brokering the transportation of property by authorized motor carriers. FMCSA proposes to amend §§ 371.2, "Definitions," and 371.3, "Records to be kept by brokers."

A. Section 371.2 Definitions.

Section 371.2 defines terms used in part 371 and includes a definition for "non-brokerage service," which is used only in § 371.3. FMCSA's proposed amendments to § 371.3 would remove the term "non-brokerage service" from the section, and FMCSA

therefore proposes a corresponding amendment to § 371.2 to remove the definition, which would no longer be used.

B. Section 371.3 Records to be kept by brokers.

In § 371.3 the Agency proposes modernizing the language of the regulation by replacing the word “shall” with the word “must.” These words have the same meaning in the FMCSRs, as explained in § 390.7(b). Further, the addition of the electronic format in accordance with § 390.32(d) has been proposed to align with FMCSA’s electronic records requirements elsewhere in the FMCSRs and to make records readily available to all parties. Paragraph (a)(4) would be revised to include the amount of compensation received by the broker for each service performed in connection with each shipment, including, but not limited to, freight charges, surcharges, and accessorial fees; the date of payment; and the name of the payer, including any business aliases, if known. Paragraph (a)(5) would be revised to require broker records to include any penalties assessed in connection with each shipment and to delete reference to “non-brokerage service.” Paragraph (a)(6) would be removed, as FMCSA proposes incorporating its language into paragraph (a)(4). FMCSA proposes revising paragraph (b) to replace “three” with “3,” to align with the U.S. Government Publishing Office guidelines on numeral styling, and to add “must” to confirm that records are required to be kept for 3 years. Finally, FMCSA would revise paragraph (c) to include the requirement that brokers must provide records electronically within 48 hours of request to any party to the brokered transaction.

VIII. Regulatory Analyses

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), E.O. 14094 (Modernizing Regulatory Review), and DOT Regulatory Policies and Procedures

The Office of Information and Regulatory Affairs (OIRA) determined that this proposed rule is not a significant regulatory action under section 3(f) of E.O. 12866

(58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, as supplemented by E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and amended by E.O. 14094 (88 FR 21879, Apr. 11, 2023), Modernizing Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. This rule is also not significant within the meaning of DOT Order 2100.6A, "Rulemaking and Guidance Procedures" (June 7, 2021). Accordingly, OMB has not reviewed it under these Orders.

1. Need for the Regulation

This proposal would amend the requirements of § 371.3 to further improve transparency in brokered freight transactions between brokers, motor carriers, and shippers. The Agency seeks to increase transparency and reduce information asymmetry so that the freight brokerage market operates in a more ethical, fair, and efficient manner. Information asymmetry is a term describing a situation where one or more parties to a transaction have additional material information on a transaction not available to another party. Information asymmetry may give brokers a strategic advantage in contract negotiations, potentially enabling them to secure more favorable contractual terms. Information asymmetry is generally undesirable, and the Agency believes it creates inefficient outcomes in brokered freight transactions. Based on comments to the OOIDA and SBTC petition for rulemakings, the Agency understands that information asymmetry hinders motor carriers in their negotiations with brokers. Furthermore, motor carriers may not be able effectively to defend themselves against potential abuses, such as unfounded claims. The OOIDA petition argued that the prevalence of waiver clauses and instances of retaliation by brokers against motor carriers seeking to exercise their rights under § 371.3(c) undercut the transparency envisioned by § 371.3. The SBTC petition similarly highlighted the issue of waiver clauses and reported instances of "profiteering, price gouging and low-balling tactics."

2. Summary of the Requirements

As described above, the purpose of this NPRM is to reduce information asymmetry among parties to brokered freight transactions, i.e., brokers, shippers, and motor carriers. The NPRM proposes to do so by improving transparency. To accomplish these goals, the Agency proposes the following substantive amendments to § 371.3:

1. Amend § 371.3(a) to require that brokers keep the required records in an electronic format;
2. Amend § 371.3(a) to revise the required contents of brokers' records;
3. Amend § 371.3(c) to clarify that brokers must provide records upon request; and
4. Amend § 371.3(c) to require that records must be provided electronically within 48 hours of request.

The following analysis provides a discussion and overview of the impacts likely to result from the proposed changes. The analysis discusses the effects of these proposed changes qualitatively due to the limitations of available data, which preclude the Agency from making quantitative estimates.

3. Costs

The Agency provides the following cost analysis for each change in the proposed rulemaking.

Brokers Must Keep Records in an Electronic Format

The Agency is aware of brokers avoiding meaningful compliance with § 371.3(c) by making the required records available for inspection only at their principal place of business. The Agency believes this behavior may allow brokers to avoid their duty to provide the § 371.3 transaction records to the transacting parties. Brokers are already required to maintain a record of each transaction under § 371.3. The Agency also believes that most, if not all, brokers are currently maintaining records of their transactions in an

electronic format, as electronic recordkeeping is a standard practice in many business transactions. Electronic recordkeeping also offers several advantages over paper records:

1. Information can be easily searched and retrieved, eliminating the need to search through physical documents;
2. Electronic records are less susceptible to loss or damage, as data can be backed up to prevent permanent data loss; and
3. Electronic records offer a significant cost advantage over paper records. According to a study by MCC Innovations, creating and maintaining paper records can be up to 141 times more expensive compared to electronic records.[11]

Given the advantages of electronic recordkeeping, it is likely that brokers have already transitioned to electronic recordkeeping. Therefore, the Agency concludes that this requirement would not constitute a burden for most brokers. FMCSA recognizes that a small number of brokers may still maintain records solely in paper format. However, the Agency does not know how many brokers do not have records of their transactions in an electronic format, nor the number of transactions those brokers conduct relative to the overall number of broker transactions and is therefore unable to quantify a total cost for this proposal.

The Agency has instead attempted to quantify the cost of creating an electronic copy of a record on a per transaction basis. FMCSA believes that brokers who are not creating electronic versions of their transaction records currently have access to the technology needed to do so (e.g., document scanners, digital cameras, document management software, etc.). FMCSA anticipates that these tasks can be completed by an

[11] MCCi. "The Dollars and Cents of Paper vs. Digital." 2024. https://mccinnovations.com/insights/blog/the-cost-of-paper-vs-digital/#:~:text=Comparing%20%240.0159%20to%20store%20a,storage%20costs%2057.6%20times%20more (accessed Apr. 25, 2024)

office clerk in 5 minutes per transaction as these records are currently stored by transaction and should be easily accessible to the broker. The Agency is reinforced in this belief based on comments submitted in response to the OOIDA and SBTC petition for this rulemaking but requests further comment from the public on this assumption.

The burden hours associated with this task are monetized using an hourly wage for an office clerk adjusted for fringe benefits and broker overhead. The Bureau of Labor Statistics (BLS) median wage for an office clerk is $19.46 (SOC 43-9061). The hourly wage is increased by fringe benefits and broker overhead, which results in a $32.93 wage ($32.93 = $19.46 + ($19.46 × 48.2%) + ($19.46 × 21%)). The fringe benefits rate used was 48.2 percent[12] and relies on data published by BLS. Overhead costs are business expenses that are not directly tied to the production of goods or services. These may include rent for office space, payroll administration costs, and employee training costs. FMCSA relies on publicly available Service Annual Survey (SAS) data from the Census Bureau in the truck transportation industry (subsector 484) and transit and ground passenger transportation industry (subsector 485) to estimate a composite overhead rate.[13] After reviewing SAS data from 2013 through 2021, FMCSA found 2015 to be the most appropriate baseline from which to estimate industry overhead rates because it is the most complete year of pre-COVID data. FMCSA first summed the seven overhead expense categories most focused on firm fixed price expenses for both subsectors 485 and 484 including (1) expensed purchases of software, (2) data processing and other purchased computer services, (3) purchased repairs and maintenance to buildings, structures, and offices, (4) lease and rental payments for land, buildings, structures, store

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[12] DOL, BLS, *Employer Costs for Employee Compensation.* Mar. 17, 2023. Available at: https://www.bls.gov/news.release/archives/ecec_03132024.htm (accessed Apr. 22. 2024). Rate is calculated by dividing "wages and salaries" by "total benefits" for the transportation and warehousing industry.

[13] U.S. Department of Commerce, U.S. Census Bureau. *Service Annual Survey Historical Data (NAICS-basis): 2015. SAS Table 5*. Jan. 28, 2016. Available at: https://www.census.gov/programs-surveys/sas/data/tables.html (accessed Apr. 22, 2024).

spaces, and offices, (5) purchased advertising and promotional services, (6) purchased professional and technical services, (7) cost of insurance, and then divided the sum of the overhead expense categories by gross annual payroll to calculate an average industry overhead rate of 21 percent (21 percent = $16 billion ÷ $75 billion) for use in this analysis.

FMCSA estimates a $2.75 cost per record to create an electronic copy of a transaction record. As stated above, FMCSA finds it is likely that brokers have already transitioned to electronic recordkeeping, which would mitigate the impact of the potential burden. The Agency has no data that would allow it to quantify the overall size of the additional burden.

Table 1. Wage, Time, and Labor Costs (in 2023)

Occupation	BLS Occupation Code	NAICS Occupational Designation	Median Base Wage	Fringe Benefits Rate	Overhead Rate	Median Base Wage + Fringe Benefits + Overhead
Office Clerks, General[1]	43-9061	Cross-industry	$19.46	48.2%	21%	$33
FMCSA estimates that an office clerk could spend up to 5 minutes per document to create an electronic copy of that transaction record, at an hourly wage rate of $33. Therefore, the cost to create an electronic copy of each document would be up to $2.75 (5 ÷ 60 × $33) per record. Note: Industry wage with benefits and overhead is hourly and has been rounded to the nearest dollar.						

[1] DOL, BLS. Occupational Employment and Wage Statistics (OEWS). National. May 2023. 43-9061 Office Clerks, General. Available at: https://www.bls.gov/oes/current/oes439061.htm (accessed Apr. 18, 2024).

Revisions to the Required Contents of Brokers' Records

The Agency proposes updating the content of records under § 371.3(a) to include the date of payment for brokered services. The Agency believes this proposal would impose a minimal burden as most brokers likely already retain payment dates for brokered services as part of their standard transaction and accounting processes. Under this proposal, brokers would be required to update the contents of records kept under § 371.3 to include dates of payment. While the Agency cannot quantify the cost impact to include payment dates in records kept under § 371.3, due to the limitations of available

data, FMCSA expects it would be de minimis due to the minor adjustments that would be required to comply with this proposal, as discussed previously. FMCSA proposes this requirement in response to comments both to the OOIDA and SBTC petitions and to an FMCSA Broker Listening Session at MATS in March 2023, where multiple commenters discussed charge backs and claims after loads were delivered. The Agency believes the inclusion of a date of payment would provide additional information to motor carriers that they may use to counter any inaccurate claims. For example, date of payment information may aid a carrier to establish a timeline of events, such as payments to the broker by the shipper, and possibly aid in rectifying discrepancies and spurious charge backs with brokered freight contracts. The Agency lacks data to quantify the amount of fraudulent or inaccurate charge backs imposed on motor carriers but concludes that there would be some cost savings for motor carriers if they are able more readily to contest these charges with the increased transparency information.

The Agency also proposes to eliminate the distinction between brokerage services and non-brokerage services in § 371.3(a) by removing paragraph (5) and revising paragraph (4). The rationale for the distinction was initially set out in the brokers of property rule promulgated by the ICC in 1949, as detailed earlier in this NPRM in section V.A. History of Property Broker Regulations. In the past, the ICC attempted to regulate broker fees by setting a cap, but this relied on differentiating between brokerage and non-brokerage services. However, the broker fee cap was never adopted. With the current focus on transparency in broker transactions, the distinction between these service types is no longer necessary. The Agency, therefore, proposes to require that the records contain all charges and payments connected to the shipment. This proposed change is consistent with the obligation imposed on federal agencies by the Plain Writing Act of 2010. This law requires that federal agencies use, “clear Government communication that

the public can understand and use."[14] As this proposed amendment does not change the contents of records under § 371.3, the Agency finds that there would be no economic impact associated with the modernization of this language.

Brokers Must Provide Records Upon Request

FMCSA is proposing to amend the language of § 371.3(c) to state that brokers have an obligation to disclose records within 48 hours of request. The prevalence of waivers may be reduced through the framing of this regulatory obligation. Broker transparency is intended as a mechanism to allow parties to a brokered freight transaction to self-police the performance of the transaction. A free market in the brokered freight industry would represent a scenario where the demand, supply, and prices of brokered transportation of property are determined by the parties to these brokered transactions, i.e., shippers, brokers, and motor carriers. However, free markets require transparency to operate efficiently. When parties to a brokered transaction have unequal access to relevant information, known as information asymmetry, that could lead to an inefficient allocation of resources and therefore a sub-optimal outcome for society. Since waivers of § 371.3 inhibit the sharing of information in brokered freight transactions, these waivers may create some degree of market failure or inefficiency.

A party to a brokered transaction may seek records under § 371.3(c) for various reasons, including, but not limited to the following:

- Motor carriers may seek transaction records in furtherance of a remedy against potential charge back abuses or other erroneous charges on completed loads. For example, if the broker made a concession to the owner of a brokered load and attempted to recapture these funds from the carrier, this could be verified by the carrier through transaction records requested under §

[14] Plain Writing Act of 2020. *GovInfo.gov.* Oct. 2020. Available at: https://www.govinfo.gov/content/pkg/PLAW-111publ274/html/PLAW-111publ274.htm (accessed May 24, 2024)

371.3. It is evident from the comments received that some motor carriers believe spurious charge backs can be identified if motor carriers have access to transparency information.

- Shippers may use transaction records to verify that the services that they were billed for by the broker were provided. This can help to prevent fraud or errors in billing.
- Motor carriers and shippers may seek transparency on broker margins. Although a party to a brokered contract would have access to transaction records under § 371.3 only after the contractual service has been completed, carrier and shippers could use this information determine whether the margins are commensurate with the service provided, and potentially to negotiate for better rates or turn to other brokers for future loads. If many motor carriers and shippers were to make a similar decision, some brokers might find it difficult to contract out loads and therefore would face pressure to offer better rates and therefore improved margins for motor carriers.
- Motor carriers and shippers may use transaction information to identify instances where loads have been brokered without authority and to report such instances to FMCSA.
- Motor carriers believe less time would be spent resolving disputes if transaction information is readily available. Several reports submitted to FMCSA indicate that motor carriers have spent considerable time seeking such information or resolving issues stemming from its absence.

FMCSA does not regulate freight rates or broker margins. The proposed rule would reframe the existing regulation that requires the broker to provide a record of the transaction to the motor carrier on request after the transaction is complete, but it would not regulate rates or margins. The Agency believes that this transparency could have

some impact on rates and margins, and the current prevalence of waivers suggests that brokers likely derive some benefit from not providing transaction records to motor carriers. However, the Agency also believes that the proposed rule may have only a minimal impact on rates and margins, and other factors may still predominate in the setting of rates and margins. The possibility of a minimal impact is supported by the wide availability of rate information and the fact that carriers would only receive the transparency information after a transaction is completed, i.e., after the rate is negotiated. Due to the limitations of available data, FMCSA cannot judge the likely impact and the Agency seeks further information to determine the degree of impact.

To gain a clearer understanding of the impact of clarifying brokers' obligations to provide records under § 371.3, the Agency examined market conditions in the freight brokerage industry over the past few years. According to data from the U.S. Census Bureau, revenues for freight brokers increased, in aggregate, from 2019 to 2021.[15] While the Census Bureau data shows a decrease in motor carrier revenues from 2019 to 2020, it also shows a rebound in motor carrier's revenue in 2021. Truck driver wages also showed continuous growth during 2019 to 2021. A study conducted by the American Trucking Associations also shows average wage increased for truck drivers by 18% between 2019 and 2021.[16] The COVID-19 emergency also resulted in reduced costs for motor carriers. According to a report published by The Trucker, motor carriers benefitted from reduced costs in fuel and increased fuel economy due to lower traffic levels. Motor carriers' marginal operating costs per mile correspondingly decreased by approximately 5 cents.[17]

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[15] U.S. Census Bureau. *Impact of COVID-19 on Passenger and Freight Transportation* (census.gov). Sept. 2023. Available at: https://www.census.gov/library/stories/2023/09/air-transportation-pandemic-impact.html (accessed Apr. 18, 2024).
[16] Fisher, Josh. "Truckload driver wages up 18% over past two years." *Fleet Owner*. Aug. 2022. Available at: https://www.fleetowner.com/operations/article/21248550/truckload-driver-wages-up-18-over-past-two-years (accessed May 7, 2024).
[17] "Study details COVID-19's impact on trucking industry." *The Trucker*. Dec. 2021. https://www.thetrucker.com/trucking-news/the-nation/study-details-covid-19s-impact-on-trucking-industry (accessed Apr. 18, 2024).

These cost savings would have helped to offset the reduction in revenues for the industry during the COVID-19 national emergency.

The number of brokers with operating authority grew by 20.90 percent from 2020 to 2021. Similarly, the number of motor carriers with operating authority grew by 18.81 percent from 2020 to 2021. Public industry data shows that rates for brokered freight loads rebounded from their COVID-19 downturn in late 2020 and peaked in 2022.[18] Figure 1 provides a visual display of the relative change in brokered freight rates over time. The Agency finds that the rapid entry of new motor carriers into the market during 2022 was driven by a surge in freight demand beginning in 2021, with new brokers and motor carriers intending to capitalize on unprecedented market conditions. These conditions included government subsidies such as the COVID-19 economic impact payments, the Paycheck Protection Program (PPP), lower marginal costs and relatively high rates for trucking loads as seen in Figure 1.

By 2023, however, as a market correction emerged, brokers and motor carriers began leaving the market. As the initial pandemic response waned, demand began to normalize which led to an oversupply of capacity and subsequent broker and carrier exits. Freight rates also came down from their 2022 peak. Such rapid expansion, as seen in 2021, was unlikely to be sustainable, and a natural correction towards a new equilibrium was anticipated. However, the Agency finds that the average rate for a brokered load and the total number of motor carriers and brokers holding active authority remain at levels higher than their pre-pandemic numbers, indicative of a freight industry more robust than when OOIDA and SBTC submitted their petitions. This, combined with a study published in January 2024, indicating average broker margins of approximately 13.47

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[18] *Spot Market Insights*. Truckstop. Available at: https://truckstop.com/product/spot-market-insights/ (accessed Apr. 18, 2024).

percent to 15.4 percent, depending on the configuration of the truck, suggests a period of favorable margins for both brokers and motor carriers.[19]

In conclusion, analysis of available data suggests that brokerage margins generally align with the self-reported industry averages of approximately 15 percent. The Agency posits that isolated instances of higher margins are not indicative of broader trends within the industry. Instead, the Agency maintains that pricing trends in the brokerage industry are tied to market factors.

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[19] Lockie, Alex. "How much money are brokers really making from owner-operator's hauls?" *Overdrive Online*. Feb. 16, 2024. Available at: https://www.overdriveonline.com/business/article/15661579/how-much-money-are-freight-brokers-really-making-from-truckers (accessed Apr. 18, 2024).

Figure 1. Total Rates for Freight Loads[1]

`[1] Truckstop.com and FTR Transportation Intelligence, Spot Market Insights Newsletter, April 1, 2024 (accessed April 9, 2024).

Table 2. Year-over-Year Changes of Active Brokers and Motor carriers[1]

Year	Total Brokers Registered	Total Brokers Percentage Change	Total Motor Carriers Registered	Carrier Percentage Change
2015	16,745	-	551,150	-
2016	17,764	6.09%	524,058	-4.92%
2017	18,637	4.91%	543,061	3.63%
2018	20,154	8.14%	586,720	8.04%
2019	21,770	8.02%	602,542	2.70%
2020	24,138	10.88%	637,721	5.84%
2021	29,184	20.90%	757,652	18.81%
2022	31,885	9.26%	813,844	7.42%
2023	28,773	-9.76%	787,189	-3.28%

[1] Pocket Guide to Large Truck and Bus Statistics, FMCSA. Available at: https://www.fmcsa.dot.gov/safety/data-and-statistics/commercial-motor-vehicle-facts (accessed Jun. 10, 2024). Data for each year is captured at year end.

FMCSA understands that several factors influence freight brokerage pricing including, but not limited to:

1. Costs of fulfilling contractual obligations e.g., fuel, labor, depreciation of equipment, licensing, insurance, taxes;
2. Market rate information;
3. Demand by motor carriers for brokered loads;
4. The supply of brokered load contracts on the market;

5. Seasonal demand, i.e., the changes in demand for brokered loads depending on the time of year;
6. Type of commodity; and
7. Existing economic conditions, e.g., COVID-19 national emergency, recession.

The Agency believes that these factors, rather than the availability of additional information concerning broker margins, are likely dominant for pricing brokered loads. Through comments submitted by industry stakeholders, FMCSA understands that broker records would be of limited utility in negotiating contracts due to the effect of the pricing factors listed above, as such records are provided only upon request and after the completion of the contractual obligations. Therefore, the records may only be useful for negotiating pricing for future loads. However, a broker may refuse such negotiations by claiming that all the pricing factors for the load are not the same.

Any shift in pricing in the brokered freight industry would take the form of transfers. A transfer in this context would be a shift in revenue from one party to another, specifically from brokers to motor carriers. FMCSA cannot predict the magnitude or frequency of any transfers between parties to brokered transactions but believes transfers could occur because of this proposed rule.

The Agency is unable to quantitatively estimate the magnitude or frequency of any transfers due to lack of data on:

1. How many transactions under § 371.3 are waived;
2. The number of transactions in the brokered freight industry;
3. The margins of brokers and motor carriers throughout the industry; and
4. The degree to which those margins are impacted by waivers to the current regulation.

The Agency believes transfers may occur based on the following factors:

1. A significant number of motor carriers have said they intend to use transparency information to negotiate for better rates. However, as discussed previously, FMCSA believes the content of records under § 371.3 would be of limited utility in negotiating rates;
2. Brokers who currently use § 371.3 waivers may relinquish some degree of competitive advantage if the proposed rule is effective at reducing the frequency at which these brokers use waivers to the regulation. If brokers currently price the value of this competitive advantage into their brokerage contracts, their ability to maintain current margins could be weakened; and
3. If this proposal were to effectively reduce the prevalence of waivers then carriers may be better able to detect unauthorized brokering by examining transparency data to identify the parties involved in the brokered transaction. Carriers could then report suspected unauthorized brokering to FMCSA for enforcement action. If these measures successfully reduce unauthorized brokering, then those profits could potentially be redirected to motor carriers and brokers with the appropriate authority.

FMCSA also acknowledges that transfers need not be large, as a percentage of total industry revenue, to meet the economically significant threshold of $200 million, under E.O. 14094. The Agency estimates the actual revenues specific to the broker entities subject to this regulation range from $11.6 billion[20] to $65 billion[21] per year. Additional revenue estimates for the entire industry also include $16.58 billion.[22] The

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[20] Freight Brokerage Market Size & Share, Growth Trends. Global Market Insights (GMI). Feb. 2024. Available at: https://www.gminsights.com/industry-analysis/freight-brokerage-market (accessed May 10, 2024).

[21] *2017 Economic Census*. Table *EC1700SIZEREVFIRM - Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the US.: 2017*. U. S. Census Bureau. Available at: https://data.census.gov/table/ECNSIZE2017.EC1700SIZEREVFIRM?t=Receipt%20Size&n=488510 (accessed Apr. 18, 2024).

[22] Global News Wire. "United States Freight Brokerage Market Revenues to Reach USD 24.75 billion by 2028." Mordor Intelligence. July 2023. Available at: https://www.globenewswire.com/en/news-

Agency has no industry revenue information specific to brokers that would be impacted by this rulemaking. Due to limitations in available data, it is not possible to isolate revenue estimates specifically for brokers subject to this proposed rulemaking. Since these brokers represent a subset of the overall U.S. brokerage industry, their revenue is unlikely to be at the upper end of this range.

The maximum percentage of transfers that could occur in response to this rulemaking without reaching the economically significant threshold of $200 million of impacts in any 1 year ranges from 1.7 percent[23] to 0.3 percent.[24] As discussed, the Agency believes the economic threshold for significance is likely closer to 1.7 percent than to 0.3 percent, as the broker entities subject to this regulation represent a subset of the total number of transportation brokers operating in the United States. The Agency requests comment on the frequency and magnitude of transfers that may occur as a result of this rulemaking and invites all interested parties to submit relevant data and information.

It is important to note that any shift away from the current practice of including waivers of § 371.3(c) may present economic disadvantages to brokers. The Agency acknowledges England Logistics' comment that inappropriate solicitation of freight to owners of brokered loads presents a business risk to them. The Agency recognizes that a broker's role extends beyond matching shippers with motor carriers. Brokers act as an extension of the shipper's team, managing and overseeing cargo transportation with the carrier and handling varying documentation. The Agency does not believe that this proposal would materially alter the value proposition offered by brokers to shippers or make brokers less competitive as compared to working directly with motor carriers.

release/2023/07/06/2700461/0/en/United-States-Freight-Brokerage-Market-Revenues-to-Reach-USD-24-75-billion-by-2028-Market-Size-Share-Forecasts-Trends-Analysis-Report-by-Mordor-Intelligence.html (accessed Apr. 18, 2024).

[23] $200 million ÷ $11.6 billion = 1.7%

[24] $200 million ÷ $65 billion = 0.3%

Although the proposed rule clarifies that brokers have a regulatory obligation to disclose records upon request, it does not prevent them from including confidentiality clauses in their contracts with motor carriers or shippers.

The proposed amendments to paragraph (c) would not impose any duty on motor carriers. They clarify that the broker has a duty to provide records to the motor carrier upon request, as intended by the current regulation, but the motor carrier is not obligated to request the records. The Agency does not believe that the proposed amendments will impose a cost on motor carriers.

Records Must Be Provided Within 48 Hours of Request

The current regulation lacks a defined timeframe within which brokers must fulfill information requests. The Agency has received reports of motor carriers experiencing lengthy delays in obtaining required information from brokers. The Agency has heard from at least one carrier claiming that a broker asserted that § 371.3, "does not state how long they have, to comply with that request and we can wait 10 years before we give you those records."[25] A defined 48-hour compliance period for brokers to respond to transparency requests under § 371.3 would directly address industry stakeholder concerns about excessive delays.

The Agency acknowledges that the requirement for broker records to be provided within 48 hours may present some costs for brokers. Brokers may need to restructure their processes, invest in IT systems, or develop new IT systems altogether to meet this requirement. Through comments to the OOIDA and SBTC petitions, the Agency understands that not every broker may have pertinent transaction records in the same database, filing system, or transport management system.

Under this proposal, brokers would not be required to produce or create new information. However, some brokers may need to increase total available staffing hours

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[25] Complaint reported to FMCSA's National Consumer Complaint Database in January 2022.

or invest in technology upgrades to meet the 48-hour timeframe. The Agency lacks data to estimate these costs.

The Agency believes that most, if not all, brokers are complying with the current regulation to maintain a record of each transaction in accordance with § 371.3. The Agency is unable to quantify the costs to brokers of providing transparency information within 48 hours due to limited available data on:

1. The total number of transactions processed by brokers that would be subject to the proposed regulation in any given time;
2. The anticipated volume of requests for transaction-specific information under § 371.3; and
3. The technological readiness of brokers to fulfill these requests within the proposed 48-hour timeframe.

However, the Agency believes that some of these costs could be minimally offset by cost savings from having to respond to repeated inquiries from motor carriers for the content of records under § 371.3. The Agency acknowledges that currently motor carriers may, in some instances, submit repeated requests for records under § 371.3, extending over long periods, potentially lasting months. A defined 48-hour compliance period for brokers to respond to transparency requests under § 371.3 would directly address delays in receiving transparency information and therefore mitigate the need for repeated inquiries.

4. Benefits

The primary purpose of this proposed rule is to modernize FMCSA’s existing recordkeeping requirements and transparency provisions for brokers and clarify the obligation imposed on brokers to respond to requests for transaction records and the process parties must follow when requesting and supplying such records. The electronic recordkeeping requirement would offer several advantages over paper records.

Information can be easily searched and retrieved, eliminating the need to search through physical documents. Electronic records are also less susceptible to loss or damage, as data can be backed up to prevent permanent data loss. A lack of transparency in freight brokerage contracts has been linked to excessive and inappropriate charge backs by brokers. Motor carriers argue that access to broker information mandated by § 371.3 is essential for them to effectively challenge or even verify the legitimacy of charge backs. Without this information, they claim their ability to defend themselves against potentially inaccurate charges is significantly hampered.

The Agency believes the inclusion of the date of payments with the contents of records would provide additional information a carrier may use to counter any inaccurate claims, or spurious charge backs. The intent of the current regulations in § 371.3 is, in part, to enable self-policing of freight-brokered contracts in the absence of more restrictive regulation. The proposed rule would help improve self-policing of freight-brokered contracts on issues such as charge back abuses and unauthorized brokering.

Some motor carriers allege that broker information would enable them to negotiate for better rates. The Agency has not been able to determine the frequency or magnitude of any possible transfers resulting from this rulemaking but acknowledges that motor carriers and shippers may be able to negotiate better rates over time using such information due to a decrease in the information asymmetry present in the brokerage industry. Any resulting shift in revenues between the entities that would be subject to this rulemaking would take the form of transfers. Transfers are not considered to be economic benefits or costs at the societal level.

The Agency believes that broker information would offer limited utility in securing more favorable rates. This belief is based on a few key considerations. First, the pricing of brokered contracts is primarily driven by prevailing market forces. Factors such as the overall economic climate, supply and demand dynamics within the brokerage

industry, and other relevant market conditions, as discussed in Section VIII.A.3. Costs, exert a great influence on brokered contract pricing. Second, the information itself would become available only after the contractual obligations have been fulfilled. Because brokered contracts are highly specific, with variation in terms, length, and conditions, information on past contracts would be only minimally applicable for direct comparison in future contract negotiations. However, the reduction in information asymmetry due to increased transparency should enable a more efficient market by reducing charge back abuses.

5. Alternatives Considered

The Agency explored alternative approaches, such as a phased implementation, automatic disclosure of the content of records under § 371.3, prohibiting waivers, and a longer timeframe for providing transparency information than the proposed 48 hours. FMCSA decided against these alternative approaches. The Agency finds that a phased implementation would not reduce potential burdens imposed by this proposed rule for the following reasons:

1. Brokers are already obligated to maintain records under § 371.3. Therefore, they possess the information necessary to comply with the proposed 48-hour turnaround for information requests;
2. The Agency believes that most brokers are maintaining a record of their transactions in an electronic format; and
3. Brokers likely capture the date of payment for brokered services as part of their standard transaction and accounting processes.

The OOIDA petition sought a provision making disclosure of the records automatic. OOIDA stated the automatic disclosure was necessary to prevent selective retaliation, i.e., blacklisting, against motor carriers that exercise their right to review the transaction records. The proposed rule does not include an automatic disclosure

provision; instead, parties to the transaction would continue to have the ability to review the records upon request. The Agency believes that an automatic disclosure provision would be excessively burdensome to brokers. Though the concerns regarding retaliation appear plausible, the Agency cannot determine how frequently that retaliation would take place. This is, in part, because motor carriers have frequently waived their right to review, which makes it difficult for the Agency to determine if retaliation would be a common problem if the proposed regulation is implemented.

Automatic disclosure would provide the content of records under § 371.3 to all motor carriers, but many motor carriers may choose not to utilize this information. A request-based system ensures that motor carriers who value access to the content of records under § 371.3 receive it, while minimizing the burden for brokers who, under an automatic disclosure requirement, would need to distribute the content of records to all parties, whether or not they wanted to receive it. The Agency is unable to develop quantitative cost estimate comparisons for this alternative due to lack of data on the number of transactions per broker, how many of these transactions include waiver clauses, and how many parties request access to the content of records under § 371.3.

As previously discussed, FMCSA considered whether to include an explicit ban on waivers, as suggested by SBTC and OOIDA, in the regulation and decided against it.

The proposed timeframe of 48 hours to provide requested records would benefit motor carriers by ensuring timely access to information and would produce cost savings for brokers by reducing the frequency at which brokers would need to respond to or consider repeated inquiries under § 371.3. A longer timeframe than 48 hours would diminish these cost savings. The Agency views 48 hours as a balanced approach, promoting both industry efficiency and manageable burdens for brokers. The Agency seeks comment on the 48-hour proposed timeframe to provide requested records.

B. Advance Notice of Proposed Rulemaking

Under 49 U.S.C. 31136(g), FMCSA is required to publish an advance notice of proposed rulemaking (ANPRM) or proceed with a negotiated rulemaking if a proposed safety rule "under this part" is likely to lead to the promulgation of a major rule. "This part" is Part B of Subtitle VI of Title 49, United States Code, i.e., 49 U.S.C. chapters 311-317. The statutory authority for this rule, however, is derived from the Agency's commercial authorities in Part B of Subtitle IV of Title 49, United States Code, i.e., 49 U.S.C. chapters 131-149. Therefore, the Agency is not required to publish an ANPRM or proceed with a negotiated rulemaking.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996,[26] requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term *small entities* comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000 (5 U.S.C. 601(6)). Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses.

Affected Small Entities

This rule has the potential to impact shippers, brokers, and motor carriers. The Small Business Administration's (SBA) size standard for a small entity (13 CFR 121.201) differs by industry code. The entities affected by this rule fall into many different industry codes. In order to determine the number of affected small entities, FMCSA examined the 2012 and 2017 Economic Census data for two different North

[26] Pub. L. 104–121, 110 Stat. 857, (Mar. 29, 1996).

American Industry Classification System (NAICS) subsectors: Truck Transportation (subsector 484) and Transit and Ground Transportation (subsector 485).

As shown in Table 3 below, the SBA size standards for subsectors 484 and 485 range from $19.0 million to $43.0 million in revenue per year. To determine the percentage of firms that have revenue at or below SBA's thresholds within each of the NAICS national industries, FMCSA examined data from the 2017 Economic Census.[27] The Census Bureau will suppress (omit) data in Economic Census tables if the data, were it to be known, would allow one contributor's value to be too closely estimated. This can occur when there are very few contributors, or when there are one or two large contributors that dominate the aggregate statistic.[28] In instances where 2017 data were suppressed, the Agency imputed 2017 levels using data from the 2012 Economic Census.[29] Boundaries for the revenue categories used in the Economic Census do not exactly coincide with the SBA thresholds. Instead, the SBA threshold generally falls between two different revenue categories. However, FMCSA was able to estimate the percentage of small entities within each NAICS code.

The percentages of entities with annual revenue less than the SBA's threshold, and therefore considered small, ranged from 93.1 percent to 99.5 percent. Specifically, approximately 93.1 percent of the firms in the category representing brokers, Freight Transportation Arrangement (national industry 488510), had annual revenue less than the SBA's revenue threshold of $20.0 million and would be considered small entities.[30]

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[27] U.S. Census Bureau. *2017 Economic Census*. Table *EC1700SIZEEMPFIRM - Selected Sectors: Employment Size of Firms for the U.S.: 2017*. Available at: https://www.census.gov/data/tables/2017/econ/economic-census/naics-sector-48-49.html (accessed Feb. 3, 2023).
[28] U.S. Census Bureau. *Disclosure: Cell Suppression.* Available at: https://www.census.gov/programs-surveys/economic-census/technical-documentation/methodology/disclosure.html (accessed Jun. 14, 2024).
[29] U.S. Census Bureau. *2012 Economic Census*. Table *EC1248SSSZ4 - Transportation and Warehousing: Subject Series - Estab & Firm Size: Summary Statistics by Revenue Size of Firms for the U.S.: 2012.* Available at: https://www.census.gov/data/tables/2012/econ/census/transportation-warehousing.html (accessed Feb. 3, 2023).
[30] All national industries under this subsector have an SBA size threshold of $34 million with the exception of General Freight Trucking, Long Distance, Less Than Truckload (484122), which has a revenue threshold of $43 million.

FMCSA estimates 99.5 percent of firms in the General Freight Trucking, Local (national industry 484110) had annual revenue less than the corresponding SBA's revenue threshold of $34.0 million and would be considered small entities.

The Agency believes that the burden to small brokers would be de minimis. The proposed rule would not impose any burdens on small motor carriers. Small brokers would be required to maintain transparency records electronically, include the date of payment for each service performed in connection with each shipment, and would be permitted to include confidentiality clauses in their contracts.

The Agency believes that most, if not all, small brokers are currently maintaining records of their transactions in an electronic format. For brokers who are not maintaining their records electronically, the Agency estimates that these records can be made available electronically at a per transaction cost of $2.75, based on the assumption that it would take an office clerk approximately 5 minutes to create an electronic record of each transaction. The Agency also believes that small brokers likely already retain payment dates for brokered services as part of their standard transaction and accounting processes. The Agency finds that including date of payments with records requested under § 371.3 would constitute a minimal burden. Small brokers could incur some loss in revenues through transfers if the proposed regulation is effective in increasing transparency between brokers, shippers, and carriers. However, the Agency is unable to quantify the frequency and magnitude of possible transfers but believes it would be small based on the following factors:

1. Pricing for brokered contracts is nuanced, and the economic conditions affecting any given brokered contract are unlikely to be identical to those affecting any future brokered contracts. This limits and may possibly negate the effectiveness of using broker information to negotiate for better rates on future contracts;

2. The willingness of motor carriers to accept brokered freight contracts are based on several factors, such that increased transparency may have minimal to no impact on carrier preferences. These factors include costs of fulfilling the contractual obligations, market rate information, existing economic conditions, the type of commodity, and the time of year; and
3. Brokers may find that they can retain current margins due to the relatively strong demand for brokered freight contracts.

Table 3 below shows the complete estimates of the number of small entities within the industries that may be affected by this rule.

Table 3. Estimates of Number of Small Entities

NAICS Code	Description	SBA Size Standard (millions)	Total Number of Firms	Number of Small Entities	Percent of All Firms
484110	General Freight Trucking, Local	$34.0	22,066	21,950	99.5%
484121	General Freight Trucking, Long Distance, Truckload	$34.0	23,557	23,045	97.8%
484122	General Freight Trucking, Long Distance, Less Than Truckload	$43.0	3,138	3,050	97.2%
484210	Used Household and Office Goods Moving	$34.0	6,097	6,041	99.1%
484220	Specialized Freight (except Used Goods) Trucking, Local	$34.0	22,797	22,631	99.3%
484230	Specialized Freight (except Used Goods) Trucking, Long Distance	$34.0	7,310	7,042	96.3%
488510	Freight Transportation Arrangement	$20.0	13,252	12,332	93.1%

Consequently, I certify that the proposed action would not have a significant economic impact on a substantial number of small entities.

D. Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), FMCSA wants to assist small entities in understanding this proposed rule so they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the person listed under FOR FURTHER INFORMATION CONTACT.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman (Office of the National Ombudsman, see https://www.sba.gov/about-sba/oversight-advocacy/office-national-ombudsman) and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) requires Federal agencies to assess the effects of their discretionary regulatory actions. The Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of $200 million (which is the value equivalent of $100 million in 1995, adjusted for inflation to 2023 levels) or more in any one year. Though this NPRM would not result in such an expenditure, and the analytical

requirements of UMRA do not apply as a result, the Agency discusses the effects of this rule elsewhere in this preamble.

F. Paperwork Reduction Act

This proposed rule contains information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). As defined in 5 CFR 1320.3(c), *collection of information* comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The title and description of the information collection, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

TITLE: Property Broker Recordkeeping Requirements

OMB CONTROL NUMBER: [2126-NEW].

SUMMARY OF THE INFORMATION COLLECTION: There are two information collections. The first covers brokered transaction recordkeeping, including the requirement for brokers to keep records of their transactions for three years and make those records available for inspection by FMCSA on demand. The second covers disclosure of records to parties involved in a brokered transaction. A broker is obligated to provide transaction records, upon request, to a shipper or motor carrier involved in the transaction.

NEED FOR INFORMATION: The first collection of information is needed for determining whether a broker is complying with FMCSA's recordkeeping regulations. The second information collection is needed for resolving disputes between shippers, brokers, and motor carriers arising from brokered transactions.

PROPOSED USE OF INFORMATION: In the first information collection, FMCSA would inspect and copy records of brokered transaction, to confirm whether the

broker is complying with FMCSA's regulations. This would generally occur as part of an investigation following a complaint about a broker's practices. In the second information collection, shippers and motor carriers would use the records to verify transaction data, answer questions regarding charges and payments made, and provide supporting evidence in the event of disputes.

DESCRIPTION OF THE RESPONDENTS: The respondents are brokers of property, that is, persons who, for compensation, arrange, or offer to arrange, the transportation of property by an authorized motor carrier. The respondents include HHG and non-HHG brokers.

NUMBER OF RESPONDENTS: The estimated number of respondents is 32,362.

FREQUENCY OF RESPONSE: For the first information collection, the frequency of response as it pertains to a broker's obligation to make records available for inspection by FMCSA on demand will depend on how often the Agency inspects brokers' transaction records. The Agency believes that this will be a relatively rare occurrence compared to the total number of brokered transactions. For the second information collection, FMCSA finds no material difference in the anticipated frequency of requests for information from HHG brokers and non-HHG brokers. The Agency estimates that 5 percent of brokered property transactions will result in a request for transaction records. This would correspond to an average of 4 requests per year for each HHG property broker and 630 requests per year for each non-HHG property broker.

BURDEN OF RESPONSE: The first information collection would impose no annual burden hours on brokers because it is an ordinary and customary business practice. The second information collection would impose an estimated burden of 2 minutes per request.

ESTIMATE OF TOTAL ANNUAL BURDEN: There is no annual burden for the first information collection. For the second information collection, the total annual burden is estimated at 670,000 hours, which corresponds to an estimated $22,110,000 of labor costs. There are no non-labor costs associated with the second information collection.

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), FMCSA will submit a copy of this NPRM to OMB for review. You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for FMCSA to perform its functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

G. E.O. 13132 (Federalism)

A rule has implications for federalism under section 1(a) of E.O. 13132 if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." FMCSA has determined that this rule would not have substantial direct costs on or for States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

H. Privacy

The Consolidated Appropriations Act, 2005,[31] requires the Agency to assess the privacy impact of a regulation that will affect the privacy of individuals. This NPRM would not require the collection of personally identifiable information (PII).

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[31] Pub. L. 108-447, 118 Stat. 2809, 3268, note following 5 U.S.C. 552a (Dec. 4, 2014).

The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency that receives records contained in a system of records from a Federal agency for use in a matching program.

The E-Government Act of 2002,[32] requires Federal agencies to conduct a Privacy Impact Assessment (PIA) for new or substantially changed technology that collects, maintains, or disseminates information in an identifiable form. No new or substantially changed technology would collect, maintain, or disseminate information as a result of this rule. Accordingly, FMCSA has not conducted a PIA.

The Agency will complete a Privacy Threshold Assessment (PTA) to evaluate the risks and effects the proposed rulemaking might have on collecting, storing, and sharing personally identifiable information. The PTA will be submitted to FMCSA's Privacy Officer for review and preliminary adjudication and to DOT's Privacy Officer for review and final adjudication.

I. E.O. 13175 (Indian Tribal Governments)

This rule does not have Tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

J. National Environmental Policy Act of 1969

FMCSA analyzed this proposed rule pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680), Appendix 2, paragraphs 6(k)(1) and (2). The categorical exclusions (CEs) in paragraphs 6(k)(1) and

[32] Pub. L. 107-347, sec. 208, 116 Stat. 2899, 2921 (Dec. 17, 2002).

(2) cover requirements pertaining to the duties and obligations of a broker, and the records a broker must keep. The proposed requirements in this rule are covered by these CEs.

K. Rulemaking Summary

As required by 5 U.S.C. 553(b)(4), a summary of this rule can be found in the Abstract section of the Department's Unified Agenda entry for this rulemaking at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=2126-AC63.

List of Subjects in 49 CFR Part 371

Brokers, Motor carriers, Reporting and recordkeeping requirements.

Accordingly, FMCSA proposes to amend 49 CFR part 371 as follows:

PART 371—BROKERS OF PROPERTY

1. The authority citation for part 371 is revised to read as follows:

Authority: 49 U.S.C. 13301, 13501, 13904, and 14122; subtitle B, title IV of Pub. L. 109–59; and 49 CFR 1.87.

§ 371.2 [Amended]

2. Amend § 371.2 by removing the definition of "Non-brokerage service".

3. Revise and republish § 371.3 to read as follows:

§ 371.3 Records to be kept by brokers.

(a) A broker must keep a record of each transaction. Such records must be maintained in an electronic format as described in § 390.32(d). For purposes of this section, brokers may keep master lists of consignors and the address and registration number of the carrier, rather than repeating this information for each transaction. The record must show:

(1) The name and address of the consignor;

(2) The name, address, and registration number of the originating motor carrier;

(3) The bill of lading or freight bill number;

(4) The amount of compensation received by the broker for each service performed in connection with each shipment, including freight charges, surcharges, and accessorial fees; the date of payment; and the name of the payer, including any business aliases, if known; and

(5) Any penalties assessed in connection with each shipment.

(b) Brokers must keep the records required by this section for a period of 3 years.

(c) Brokers must provide, upon request by any party to a brokered transaction, a copy of the record of the transaction required to be kept by this section. Records must be provided electronically within 48 hours of the broker's receipt of the request.

Issued under authority delegated in 49 CFR 1.87.

Vincent G. White,
Deputy Administrator.