ANALYSIS OF FFIT LEGISLATION INCLUDED IN MAP-21
AS INCORPORATED INTO FEDERAL STATUTE

The stated purpose of the Fighting Fraud in Transportation provisions of MAP-21 (§§32914-32919) is to eliminate fraud in the payment of freight charges by requiring anyone who arranges for truckload transportation to have readily available funds to pay claims "arising from the broker's failure to pay freight charges under contracts, agreements and arrangements for transportation of regulated freight." See 49 U.S.C. 13906 (MAP-21 Section 32918). This short presentation will address *ad seriatim* the changes which the legislation makes to prior existing statute, noting where relevant the portions of the legislation which became effective on December 1, 2013 and the portions that have yet to be implemented.

<u>49 U.S.C. 13901</u>. One of the major goals of MAP-21 was to reduce the problem of "double brokering." Double brokering results when an intermediary accepts a transactional truckload shipment as a carrier and in turn, without the shipper's or customer's approval, tenders the load to a subcontracted carrier which is then not paid for the services it renders. Upon default of the "carrier/broker" the $10,000 broker's bond was quickly exhausted, leaving the consignor and the actual service provider as victims to sort out which party is liable for the intermediary's failure to transmit freight charges upon receipt.

MAP-21 attempts to treat this issue by now requiring that a motor carrier which arranges for door-to-door transportation must in every instance, first obtain separate registration as a freight forwarder or broker and post a $75,000 surety bond or bank trust agreement (joint line service when the carrier provides a part of the service is not subject to FFIT).

While creating a larger bond corpus to treat the issue of double brokerage, the "separate registration" requirement does not treat the practical issue of how the same entity represents itself both as a carrier and as a property broker, albeit through the issuance of separate licenses. Nor does it reconcile the new statute with the existing regulations which require that a broker may not represent itself as a carrier and must segregate its broker receivables and payables from any other business in which it is engaged. 49 U.S.C. 13901(c) requires that a registrant shall in writing specify the authority under which it is providing transportation or service but how this requirement is implemented by carriers which have previously outsourced excess capacity shipments pursuant to accepted concurrences or "convenience interlining" has not been addressed.

Revised Sections 13903 and 13904 treat changes in the registration of freight forwarders and brokers in parallel fashion. After the effective date of yet to be promulgated agency regulations, new applicants for freight forwarder and broker authority will have to demonstrate fitness and relevant qualifications, including participation by an officer with three years of experience.

After promulgation by the agency of appropriate rules which must be completed no later than 4 years after MAP-21 was signed into law in 2013, broker and freight forwarder authority will be of limited duration, not to exceed 5 years, and will have to be renewed. (see 49 U.S.C. 13905(c)).

The revised registration statutes for forwarders and brokers make clear that neither may provide motor carrier services unless separately registered to do so.

Section 13906 contains the modifications to the financial security requirements which MAP-21 initiates. It provides that the surety or bank trust agreement must be composed of "readily available assets without resort to personal guarantees or the collection of pledged accounts receivable."

The express mention in the freight forwarder financial security requirements that a surety bond "may only be obtained by a bonding company that has been approved by the Secretary of Treasury" provides certainty that a surety bond filed by an approved surety meets the bonding requirements, even if the surety retains recourse to its customer for claims made. Although the legislation contemplates the granting of group surety arrangements, the FMCSA has declined to promulgate any rules in that regard.

With respect to bank trust agreements, the new BMC-85 expressly requires a financial institution to acknowledge that it "acknowledges receipt of the sum of $75,000…to be held in trust under the terms and conditions set forth herein" which seems to require a corpus composed of cash, bank letters of credit, etc.

The revised statute makes clear that the purpose of the financial responsibility is to pay claims arising from the broker's failure to pay freight charges under contracts and that the purpose of the bonding requirement does not extend to cargo claims or vicarious liability for the negligent act or omission of the retained carriers. It should be noted, though, that the self-help provisions of Section 14906 permit an injured party to sue the intermediary and all officers and directors for all valid claims incurred regardless of amount as a result of unlawful brokerage. (Presumably, this federal cause of action is limited to failure to pay freight charges but the statute is less than clear.)

The new statute makes provisions for how claims must be handled. The surety (or bank trustor) must respond to claims within 30 days and must take one of three actions:

(1) Subject to its review the surety must pay the claim if the principal consents;
(2) If the principal does not respond and the surety finds the claim to be valid, the surety must pay the claim; and
(3) If the claim is contested and cannot be resolved within a reasonable period of time, the surety must pay the claim if it is reduced to judgment against the principal.

The statute further provides that in the case of a denial, the reasons must be set forth in writing and that in any action against a surety, the prevailing party is entitled to recover all reasonable costs and attorney's fees. See 49 U.S.C. 13906 (FFIT 32918).

A surety or bank trustor may cancel a bond or trust agreement on 30 days notice and the agency will immediately publish the cancellation notice on its website. In addition, the Secretary shall "immediately suspend the registration of a forwarder or broker if the available financial security falls below the amount required under the Act." This would seem to indicate that if a surety or bank trustor pays a claim that is not immediately reimbursed, the agency upon notice will deactivate through suspension the forwarder or broker's authority pending the 30 day cancellation.

In the event that a broker or forwarder becomes insolvent, the surety must notify the agency, which presumably will put the broker on suspension. The surety must then immediately provide 60 day notice that the bond is being closed out, paying all claimants or pro rating claims 30 days after the 60 days has elapsed. No provision for when, where or how to publish this notice has been specified.

Sureties and bank trustors are subject to civil actions brought by the Secretary or the Attorney General to enforce their obligations with penalties including a civil fine of not to exceed $10,000 and suspension of eligibility to write license and bonds for three years. Sureties and bank trustors may not deduct the cost of administrating the bond from the funds available.

Rulemaking. By Federal Register Notice in August of 2013, the agency implemented the self-executing portions of MAP-21, providing for the filing of the bond and setting December 1 as a grace period. Soon after that date, it canceled approximately 9,000 brokers' licenses for reasons yet to be determined.

Unlawful Brokerage. Exceptions to complying with the $75,000 bond are extended to certain multimodal intermediaries including (1) NVOCCs and OFFs involved in through ocean movements; (2) Customs brokers involved in transactions covered by 11 C.F.R. 111.1; and (3) indirect air carriers operating with TSA approval and engaged in activities as defined in 49 U.S.C. 40102. See 49 U.S.C. 14916(b).

Unresolved Issues. The agency is yet to promulgate new forms for brokers and forwarders or to promulgate regulations for issuing separate registration and other revisions to existing regulations. Apparently it believes the 4 year grace period affords it time to respond.

CONCLUSIONS

The cost of obtaining the bond for a freight forwarder or broker (less than $2,000 per annum) standing alone should not have a substantial adverse effect on small carriers which have previously outsourced freight through convenience interlining. Yet, many have objected to the cost and red tape imposed by the statute. 35 state trucking associations, 3 divisions of ATA and several other trade associations have sought Congressional review of the legislation.

The Association of Independent Property Brokers & Agents (AIPBA) has filed a lawsuit challenging the legislation in the U.S. Court of Appeals and has petitioned the agency to seek waiver of the statute on public policy grounds (Case 5:13-cv-00342-WTH-PRL).

Issues MAP-21 does not address include:

(1) How carrier contract to outsource freight in light of the bonding and separate licensing or entity requirements of the statute;

(2) What contract language is best suited to meet the needs of the shipper, ensure payment to the contracted carrier, while properly limiting the intermediary's liability for uninsured cargo loss or damage and vicarious tort liability.

These issues will be addressed in a January 21 Webinar, "Update on MAP-21" at https://www2.gotomeeting.com/register/199351282. Registration is free.