

Association of Independent Property Brokers & Agents Transportation Brokers Service Association

November 1, 2011

Via Facsimile (202) 226-5276 & US Mail

The Honorable Sam Graves
Chairman, House Small Business Committee
2361 Rayburn House Office Building (RHOB)
Washington, D.C. 20515

Dear Congressman Graves:

We are writing to the Small Business Committee on behalf of the memberships of the *Association of Independent Property Brokers & Agents* ("AIPBA") and the *Transportation Brokers Service Association* ("TBSA"), two industry trade groups representing small and mid-sized property brokers, in response to proposed legislation called the "**Fighting Fraud in Transportation Act of 2011**" (HR-2357) introduced on Friday, June 24th, 2011.

In June 2010, similar legislation was proposed and introduced into the Senate (S. 3483) called the "*The Motor Carrier Protection Act of 2010*." This bill would have, among other things, raised the financial security of property brokers who are licensed by the Federal Motor Carrier Safety Administration ("FMCSA") tenfold from \$10,000 to \$100,000. This bill died in committee after we contacted the members of the Committee on Commerce, Science & Transportation and pointed out the adverse impacts on small business.

The AIPBA & TBSA similarly oppose HR-2357 in that it, too, seeks to implement a \$100,000 property broker bond. If the bond were to be drastically increased as proposed, then small and mid-sized property brokers would not be able to afford the premium and/or the cash collateral requirements that would be imposed by surety companies. As a result, **thousands of small business owners, including most of our members, would be forced out-of-business. Tens of thousands of employees and agents would lose their jobs.** In the midst of a stagnant 9.1% unemployment rate, "Occupy Wall Street" demonstrations, and Washington's debate over a jobs bill, a \$100,000 bond is clearly the wrong move for the industry and for America.

This proposed legislation is also generally overly burdensome and unfair in that it calls for a renewal of broker and forwarder licenses but not motor carriers' operating authority. The AIPBA & TBSA believe renewals are not necessary because motor carriers, brokers and forwarders are already required to renew their registration with the states annually through the Unified Carrier Registration program.

In talking to existing surety companies and financial institutions, including Pacific Financial-- the leading provider of surety instruments, we expect many bond issuers would actually cease offering surety instruments to property brokers. Rather than protect small owner-operators, a large property broker bond would actually eliminate competition among property brokers and their surety companies alike and would only serve the interests of the large brokerage companies and their trade group Transportation Intermediaries Association ("TIA"), **which already sells a \$100K bond.**

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Indeed, without small and mid-sized brokers-- including our members-- serving the industry, independent truckers would be at the mercy of a small, powerful group of large property brokers to secure their loads on the backhaul. Due to anti-competitive effects, shippers --and ultimately consumers-- would pay more as a result of the oligopoly that a \$100,000 bond would create.

The TIA's president, Robert Voltmann, was recently quoted in an online "Transport Topics" article (4 July 2011) wherein he allegedly "refuted the notion that the bill would put small brokers out of business". The TIA alleges that the only small business enterprises that the proposed new \$100,000 surety requirement would hurt are:

"... underfunded or undercapitalized brokers [since]... A \$100,000 bond to move DOD freight costs \$1,500. If you can't afford \$1,500 what right do you have to collect someone else's money? You shouldn't start a brokerage if you don't have proper capitalization [at least \$1,500?]...."

We find this specious. We believe such an argument could only be valid if the verifiable underwriting risks characteristic of "a \$100,000 bond to move DOD freight", the sole purpose for which would be indemnification of a single particular "shipper", somehow were even remotely comparable to the verifiable underlying risks characteristic of a \$100,000 surety property broker instrument, which specifically entails the indemnification of some unlimited number of unpaid "motor carriers" to the extent that no collateral or other category of "proper capitalization" for a brokerage operation-- beyond the ability to afford a mere \$1,500 annual premium --would be required.

As a concrete example of just how preposterous the TIA's premise in support of that argument actually is, you only need to consider the following: (i) the fact that the specific language found in the introductory paragraphs of both the BMC-84 "Property Brokers Surety Bond" and the BMC-85 "Property Broker Trust Fund Agreement" forms expressly provides for the indemnification of both "motor carriers and shippers"; and (ii) the corresponding fact that during the year 2010 Pacific Financial Association, the nation's leading provider of transportation surety instruments, processed more than 15,000 claims asserted against brokers' BMC-85 filings by allegedly unpaid "motor carriers" and precisely three (3) were asserted by "shippers".

In other words, the relative underwriting risk characteristic of the indemnification of "shippers" (such as the DOD), as distinct from allegedly unpaid "motor carriers" may be assumed to be no less than 5,000 to 1. That's why, unlike a typical TIA member (such as C.H. Robinson), the vast majority of the current brokerage community is never going to find a legitimate surety provider willing to assume responsibility for what is virtually a blanket \$100,000 letter of credit... an instrument applicable primarily to the payment of allegedly unsatisfied vendors and maintained for the express benefit of the entire

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regulated motor carrier industry... without \$100,000 in hard collateral in the form of a cash deposit, letter of credit, or other immediately liquid assets above and beyond a typical broker's receivable financing and other operational capitalization requirements. In fact, the underwriting risk for a BMC-84 bonding company is significantly higher than that for a BMC-85 trustee even with the current \$10,000 instrument, a verifiable consideration even otherwise sophisticated ATA staff attorneys apparently fail to appreciate.

Remarkably, in an email addressed to the Association's Chief Administrator, the ATA's Robert Digges actually supports the TIA's premise that the vast majority of small business brokers somehow would have no trouble convincing a BMC-84 bonding company underwriter to agree to an open ended \$100,000 guarantee of payment to "motor carriers" since, to quote Mr. Digges: "[t]he terms of the bond under subpart A [of the new bill] are left to be negotiated by the broker and surety." We suggest that opportunities for fruitful "negotiations" to that particular end would be quite rare.

Significantly, and quite apart from the unprecedented claims activity and risk exposure characteristic of both BMC-84s and BMC-85s referenced above, BMC-84 bonding companies alone are subject to a further ongoing responsibility. We view this in terms of their government-mandated insurance reserves, against which, allegedly unpaid "motor carriers" could assert claims at any time within the statute of limitations for any jurisdiction. This might be deemed more appropriate. Typically, that would be up to six (6) years even after a BMC-84 filing had been cancelled and all the brokers' collateral had been refunded. In contrast, when a BMC-85 filing has been cancelled and all the brokers' collateral has been refunded with no claims in prospect, the trustee is "off the hook".

As a matter of fact, based on the TBSA's research, more than half of the brokers with BMC-85 filings chose such a collateralized trust instrument because the BMC-84 bonding companies they'd approached had demanded full collateralization for even a \$10,000 filing anyway. Historically, as a direct result of the unprecedented claims activity that such exposure is known to invite, the insurance industry has not been enthusiastic about this category of coverage. This is why insurance brokers and other producers regularly refer such business to Pacific Financial and other BMC-85 providers as a matter of course.

We believe that a \$100,000 bond would constitute an 'inappropriate bonding requirement' that would be a 'barrier to the success of small business enterprises' contrary to the spirit of the proposed "Small Business Access to Surety Bonding Survey Act of 1992" (S. 2609 [102nd]), of which, we ask your committee to take notice.

The AIPBA & TBSA recently reached out to the Department of Justice's Antitrust Division and requested a competitive impact statement as to the current bill's anti-competitiveness. With respect to the "Noerr-Pennington Doctrine," we pointed to paragraph [40] of the Supreme Court's June 2002 decision in BE & K Construction Co. v. NLRB: (see: <http://www.law.cornell.edu/supct/html/01-518.ZO.html>):

“Even then, however, we emphasized that such immunity did not extend to “illegal and reprehensible practice[s] which may corrupt the ... judicial proces[s],” id., at 513, hearkening back to an earlier statement that antitrust immunity would not extend to lobbying “ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.” Noerr, supra, at 144. This line of cases thus establishes that while genuine petitioning is immune from antitrust liability, sham petitioning is not.”

We advised DOJ that we believe the TIA’s lobbying efforts, which failed before the Senate last year, now essentially amounts to a “sham” insofar as they are “objectively baseless” in the sense that no reasonable lobbyist “could realistically expect success on the merits” to raise the bond tenfold; and that the TIA lobbyists’ subjective motivation “concea[ls] an attempt to interfere directly with the business relationships of [competitors] ... through the use [of] the governmental process”. That is, we believe the TIA’s lobbying efforts amount to a “mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships” of its own competitors in the area of selling transportation broker surety instruments to brokers and its member-brokers’ competitors in the area of brokering freight, in which case we contend the **TIA does not enjoy anti-trust immunity under Noerr. We believe its activities should be investigated by DOJ, your committee, or both.**

Finally, the AIPBA & TBSA believe the FMCSA has the expertise necessary to determine a fair property broker bond amount and properly assess the potential anti-competitive impact, as evidenced by its recent rulemaking in the area of household goods broker bonds. We therefore respectfully request that the House defer to the FMCSA’s expertise in the area of regulation of property brokers’ financial security.

The word on Capitol Hill is that these anti-small business lobbying efforts are now focused on adding the \$100,000 bond to the pending Surface Transportation bill that is currently on extension, due to general lack of Congressional support as a stand-alone bill. We therefore wanted to alert your committee and ask your committee to please help thwart such an anti-competitive political move.

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Should you, your staff, or the Committee have any questions, we would be happy to meet with you and/or testify at any Congressional hearings on behalf of the industry's small and mid-sized property brokers and agents.

Our contact information is referenced below.

Sincerely,

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cc: The Honorable Anne S. Ferro, FMCSA Administrator
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