United States Department of Transportation

Federal Motor Carrier Safety Administration

Docket No. FMCSA-2014-0211

RIN 2126-AB74

Financial Responsibility for Motor Carriers, Freight Forwarders, and Brokers

Advance Notice of Proposed Rulemaking (ANPRM)

Comments of the American Bus Association

February 26, 2015

By publication in the Federal Register on Friday, November 28, 2014 (Vol. 79, No. 229, at 70839) the Federal Motor Carrier Safety Administration (FMCSA) announced its intention to consider a "rulemaking that would increase the minimum levels of financial responsibility for motor carriers, including liability coverage for bodily injury or property damage; establish financial responsibility requirements for passenger carrier brokers; implement financial responsibility requirements for brokers and freight forwarders, and revise existing rules concerning self-insurance and trip insurance." FMCSA seeks comments on these topics[1].

[1] Like FMCSA in the April report (Page 1, fn. 2) and in the ANPRM, ABA uses the term "financial responsibility" to refer to insurance. As ABA understands it, insurance means liability coverage for bodily injury or property damage in the case of freight and passenger motor carriers. The terms "financial responsibility" and "insurance" are used interchangeably in these comments.

The American Bus Association (ABA) appreciates the opportunity to comment on this ANPRM. The ABA is the leading trade association for private and over-the-road operators who transport the public and serve the motorcoach industry. The ABA has been in operation for over 80 years and has over 800 bus operating company members, large and small, intercity and charter and tour operators, rural and urban. Indeed, our members provide all manner of transportation services, including intercity scheduled service, charter and tour operations, airport and employee shuttle services. In addition, ABA membership includes hotels, convention and visitors bureaus, attractions, restaurants, motorcoach manufacturers and companies that provide services to the motor coach industry. Motorcoach companies carry out more than 750 million passenger trips per year, moving individual passengers a total of 65 billion miles annually[2].

In addition, the ABA's membership is largely comprised of small business entities. The average ABA bus operator member has six motorcoaches and the minimum price for a new motorcoach is approximately $500,000. This basic price does not contemplate the addition of federally mandated equipment changes currently going through rulemaking at the National Highway Transportation Safety Administration (NHTSA), nor does it take into consideration passenger-required amenities such as Wi-Fi, plug-in and DVD player systems. The ABA's membership has a vital interest in this ANPRM for it is clear that any increase in the "financial responsibility" limits will cause an increase in the premiums that our members will have to pay to obtain and maintain adequate insurance. For small businesses, a large increase in the insurance premiums will likely force many ABA members out of business. In addition, we do not agree that requiring higher insurance limits has any correlation with the financial security or financial wherewithal of a carrier. It would, however, be an unjustified significant financial

[2] American Bus Association Census 2012.

burden. Insurance is in place to protect the interest of the companies and their passengers. Many ABA members carry insurance limits in excess of the current required limits. In some cases, two or three times the required limits. The limits of insurance carried is a decision make by the individual carriers and based on their specific business needs Thus, ABA and its members are particularly interested in this ANPRM .

ABA concludes that FMCSA has no evidence to support any increase to the current financial responsibility limits required for motor carriers of passengers. The FMCSA is relying largely on the report filed with Congress in April, 2014 ("April 2014 Report") for its conclusion that insurance limits should be increased. This report, "Examining the Appropriateness of the Current Financial Responsibility and Security Requirements for Motor Carriers, Brokers, and Freight Forwards – Report to Congress" , was required by Section 32104 of Moving Ahead for Progress in the 21st Century, P.L. 112-141 (2012) ("MAP-21"). ABA concludes that the report relied on by the Agency (79 FR 70841) does not provide, despite the Agency's contention, even "…preliminary support for increasing the current levels of financial responsibility…" Likewise, FMCSA's assertion, at 79 FR 70841, that the current insurance limits do not adequately cover catastrophic crashes is unfounded. As ABA will show, the number of claims against motorcoach operators that have exceeded the current financial responsibility limits of the carriers is extremely small and does not justify any increase in the financial responsibility limits for motorcoach operators.

As a preliminary matter, ABA must insist that the majority of the twenty-six questions propounded by the Agency in the ANPRM must be directed towards the companies that provide motorcoaches with their insurance coverage. As the April 2014 Report makes clear, only insurance companies can answer questions concerning how and under what circumstances premium rates are determined and what affect any increase in requirements would have on current insurance premiums. As insurance premiums are driven by many factors, especially the claims experience of each individual motor carrier, it is clear that the insurance companies which provide motorcoach operator with the required minimum insurance limits should be a necessary party to any FMCSA rulemaking on insurance and be afforded the appropriate protections to share such proprietary information without fear of being put at a business disadvantage by their competitors. We would recommend that FMCSA move expeditiously in instituting a rule similar to 49 CFR Part 512, Confidential Business Information (Part 512) before issuing the accompanying notice of proposed rulemaking to this docket, FMCSA-2014-0211. Indeed, one cannot imagine a rulemaking without their active and enthusiastic participation and proprietary information will be key to helping to determine the scope and impact of any potential final rule.

For the purposes of this ANPRM, ABA will limit its comments to some of the issues within questions about the current minimum levels of financial responsibility (question 5); the impacts of increasing minimum levels on the industry (question 8), the State insurance requirements (question 10); how would increasing the minimum levels affect out of court settlements (question 15) and the proposed requirement of bus brokers filing evidence of financial responsibility (question 25). ABA expects that many ABA bus operator members will also weigh in on these specific issues before the closing date of the comment period.

Before detailing our specific objections to the ANPRM, we must again point out that FMCSA’s reliance on the April 2014 Report to justify any increase n insurance limits on motorcoach operators is totally misplaced. This is so for several reasons. First, the April 2014 Report was written without any reference to, and as far as is known, without any input from the insurance companies who specifically provide coverage to the motorcoach industry The report provides no mention of the insurance industry's view on the critical point of using the so-called "medical consumer price index" as the vehicle for requiring any increase in the financial responsibility limits. Further, it provides no basis for an increase of more than four times the current financial responsibility limits for motorcoaches (April 2014 Report, 11). What FMCSA presents here is not evidence but a wish list. Second, the April 2014 Report shows no relevance to the motorcoach industry. Besides a brief discussion of the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1126 (1982), the only place buses are mentioned is in the concluding page of the report, which rather insignificantly states that the study is "applicable to passenger and hazardous materials carriers" (April 2014 Report, 12). There is no evidence or data to support this assertion. Again, it is FMCSA's wish list. FMCSA seems to believe that if it says it often enough and loud enough the Agency can make it so. Whatever the relevance of the Medical CPI to the motorcoach industry and the industry's financial responsibility requirements, FMCSA has failed to make any correlation to that factor in either the report or in the ANPRM. Third, FMCSA used just <u>three</u> accidents in <u>four years</u> to link the April 2014 Report to motorcoaches, the medical CPI and the need to increase financial responsibility limits. There is no evidence to support that any claimants in these accidents were uncompensated due to limited financial responsibility limits. Moreover, nothing in the April 2014 Report specifically links the accidents with the liability of the carriers and therefore the need for or lack of insurance and further, there is no link between insurance limits and safety performance. While the report states that "…the NTSB's post-crash investigation results suggest that key crash factors were the motorcoach driver, the mechanical condition of the vehicle and the carrier's operations." there is no correlation to suggest an increase in the financial responsibility limit is warranted or would have any impact on these factors. Increasing the financial responsibility WOULD NOT make a bus operator safer. Further to this point, the April 2014 Report admits, "Catastrophic motor carrier related crashes are relatively rare, comprising less than one percent of all CMV crashes per year" (April 2014 Report, 10). FMCSA's decision to increase financial responsibility limits is based on extremely rare incidents but would impact an entire industry with significant detrimental financial implications. In allowing such a result FMCSA would in fact be allowing regulation of an entire industry by exception. Finally, the April 2014 Report fails to disclose whether the carriers involved in the accidents were operating in interstate commerce or under the purview of one or more States or whether they had any insurance at all. In either case, the financial responsibility requirements would have been significantly different. Further to this point, if the operator was an intrastate carrier, they would not have been to carry the five million dollar financial responsibility limit at all[3]. For all of these reasons, the April 2014 Report cannot possible be cited as even preliminary support for an increase in insurance rates for motorcoaches.

ABA objects to the ANPRM's determination that the "evidence" so far weighs in favor of an increase in the financial responsibility limits for motorcoaches. In addition, ABA does not agree that this increase in insurance limits is needed to "fully cover the costs of some crashes…" (April, 2014 Report, 14). FMCSA is wrong.

Lancer Insurance Company is one of the two largest providers of insurance to motorcoach companies. It has been in business for thirty years and provides insurance to a significant number of motorcoach companies. In October, 2014, Lancer provided the Bus Association of New York (BANY) with a brief report detailing Lancer's claims experience since 1986. The year 1986 is significant as it is the year after the current financial responsibility

[3] As we will explore infra, State insurance regulations vary widely but to date no State requires any motorcoach operator to have even close to the ten million dollar limit contemplated by the federal government in its April, 2014 Report. In addition, States do have the ability to change their motor carrier insurance limits to accord to those of the federal government. So far only one State has chosen to do so.

minimums for motor carriers of passengers (five million dollars) took effect. See, April, 2014 Report at 5.[4]

Lancer's report states that since 1986 there have been 142 claims of two million dollars or over in value. The number of claims that have breached the five million dollar limit since 1986 is 12. One way to look at this is to note that in almost thirty years less than 12% of all claims filed breached the insurance policy limit of five million dollars. Another way to view this is to realize that less than one claim every three years exceeded the current financial responsibility limit. There is simply no reason to even contemplate an increase the limit based on this record.

Moreover, Lancer's report also details that the occurrence and claimant counts have decreased almost every year since 2000 continuing to 2013, the last year for which statistics have been compiled. Starting with 10,000 occurrences and 6,000 claimants in 2000, the industry in 2013 had 6,000 occurrences and fewer than 4000 claimants. In ABA's view based on the data from one of the leading insurance providers to the motor coach industry, there is absolutely no data to support that increasing the financial responsibility limit would increase public safety in any way or would combat an increase in claims occurrences. Industry data supports that the motor coach industry has never been safer and the number of accidents, injuries and fatalities have rarely been lower than they are today. The motor coach industry is one of the safest modes of passenger transportation. A decision to raise the financial responsibility limits will not make the industry safer. It will only increase the financial burden on the hundreds of operators who provide safe and reliable transportation to the public every day.

[4] See also 49 CFR 387.33

As indicated, ABA believes it can provide significant information in response to several of the questions FMCSA has posed in the ANPRM. One issue is that of the effect on the motorcoach industry if FMCSA increases the financial responsibility limits. According to input from ABA members, and the industry's insurance carriers and based on the evidence of past financial responsibility increases, we expect the following impact from another round of increases:

Insurance carriers will increase rates, ask motorcoach companies to increase their retention[5] or stop writing motorcoach insurance policies entirely. Currently, there are motorcoach operators which pay in excess of $25,000 a year in premiums per motorcoach. In that event a motorcoach operator with just six coaches can pay $150,000 a year in premiums just to maintain his or her insurance. Any increase in the required financial responsibility limits by the federal government will significantly increase the amount of the premiums required of the insured[6]. Many small motorcoach companies will be unable to afford this increase and will be forced out of the industry. Another effect of a significant increase in the financial responsibility limits will be the increase of the amount of retention each carrier could be forced to absorb. This impact of any increase in retention will result in less money for business development, replacing equipment, increasing service or hiring additional employees. Each of these outcomes significantly disadvantage the operator and the traveling public. Finally, with an increase in financial responsibility requirements, more motorcoach operators will be forced out of the industry. There is no possible way that many small operators can absorb this increase and

[5] Insurance retention refers to the amount of money an insured is responsible for in the event of a claim. For insurance companies the system of retentions moderate their risks by placing a financial responsibility onto those they insure.

[6] Lancer estimates a rate increase of 60% to the bus industry based on its estimate that the current industry premium is $250 million dollars.

maintain service. It bears repeating that the motorcoach industry is comprised largely of small, “Mom and Pop” companies. Few such companies will be able to survive given the significant increase in insurance premiums while continuing to maintain millions of dollars of equipment, meeting payroll and trying to compete in a competitive marketplace. The industry will suffer losses which means that the public will suffer with a lack of transportation and transportation options including significant cost to the public for transportation service.

Moreover, the increase in financial responsibility limits may also cause companies who provide insurance to the motorcoach industry to exit the market entirely. There are very few insurance companies that provide liability insurance to the industry. The motorcoach industry is a relatively small industry and is not able to support many insurance company providers. Two of the bigger companies are Lancer and National Interstate Insurance. In neither company is their motor coach business their sole or largest insurance product line. In Lancer’s case, they also provide commercial liability and property insurance, as well as auto rental and other forms of CMV insurance. National Interstate was formed in 1989 and provides truck, RV, Household Goods Insurance (moving & storage) as well as motorcoach insurance. With the contemplated increase in insurance limits it may be that the costs and the risks of providing insurance to the motorcoach industry as opposed to any return from insurance premiums may be too much for either company. It may be more profitable, with less risk, to move into other lines of insurance. Thus, there may potentially be a large gap in the ability to provide insurance to the motorcoach industry at any price, but we do not currently have access to any data and only limited anecdotal information to substantiate that potential gap in industry-wide coverage.

The potential for there being a void in the market and an inability to find insurance at any price is not unprecedented. After the passage of the Bus Regulatory Reform Act of 1982

Congress granted the Secretary of Transportation a two year grace period before the current financial responsibility limits were put into effect. One reason for this hiatus was the view that the increased limits would have to be phased-in so that the industry could absorb the increase. Without the phase-in Congress was worried about a "serious disruption in transportation"[7]. A serious lack of insurance due to a rise in insurance limits is likewise a possibility thirty years after the current financial responsibility limits went into effect.[8]

Another issue FMCSA has requested comments on is how increasing the minimum financial responsibility requirements would affect out-of-court crash damage settlement of agreements? The answer is that the amount of the final settlement will significantly increase. In the industry, this rise in settlements is referred to as "limits pull." This phenomenon obtains where, because of the policy limits increase, the settlement values are pulled, as if by a magnet, higher. Lancer has estimated that if insurance requirements were doubled, the limits pull will add an additional twenty five million in claims costs to the industry. This amount is based on a current industry premium of $250 million dollars. Furthermore, Lancer Insurance predicts that the increase in financial responsibility limits will result in an additional ten full limit losses per year which would result in an additional $50 million dollars in losses to the industry. What FMCSA promises with this ANPRM is an unsustainable increase in insurance rates for the entire

[7] See, Bus Regulatory Reform Act of 1982 Conference Report (No.97-780), 97th Congress, 2d Session. August 19, 1982. Page 53.

[8] In fact, one result of the increased financial responsibility minimums enacted in 1983 was the development of the then Interstate Commerce Commission's (ICC) motor carrier's self-insurance program. The ICC, until its termination with the passage of the ICC Termination Act of 1995, P.L.104-88, 109 Stat.803 (1995), was the federal government agency with responsibility for enforcing the federal motor carrier financial responsibility limits. As the then Special Assistant in the ICC's Office of Compliance and Consumer Assistance (OCCA) the undersigned drafted the Commission's regulations allowing motor carriers to self-insure their operations. The ICC enacted those regulations in part to combat the lack of insurance available in the open market occasioned by the passage of the Bus Regulatory Reform Act. The motor carrier self-insurance program continues to this day.

industry in order to perhaps cover the less than 1% of claims over 30 years that have not been covered by the current financial responsibility limits[9].

The individual states have financial responsibility limits and FMCSA rightly asks about those limits and how they vary from federal requirements. Even a cursory look at the States' limits supports ABA's view that no increase in financial responsibility limits are necessary. States' insurance requirements are as varied as the States. Alabama, Georgia and Hawaii require $100,000 in insurance for bodily injury and property damage. Wisconsin has a $750,000 insurance minimum for every commercial motor vehicle that is over 10,000 pounds. New Jersey requires that motor vehicles with a capacity of more than 30 passengers have in place an insurance policy with a minimum liability of $25,000 and a maximum liability of $600,000. Florida has a $300,000 limit per occurrence for CMV's with a gross vehicle weight off 44,000 pounds or more. New Hampshire has a limit of $500,000. The State of Pennsylvania has a $5,000,000 per accident, per vehicle minimum for all CMV's that carry more than 28 passengers. In fact, Pennsylvania is one of only twenty-one states that require motorcoaches to have a $5,000,000 insurance limit for bodily injury and property damage. And this number includes only one state which expressly models its financial responsibility limits on the federal limits. More significantly, no State requires that a motorcoach operator have any insurance limit in excess of $5,000,000.

Finally, ABA must address the issue FMCSA raises, namely whether to impose the requirements of 49 U.S.C. 13904(f) on brokers of motor carriers of passengers. Section 13904(f)

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[9] With respect to any increase in the insurance limits for motorcoach operators, ABA can point to the minutes and findings of the May/June 2014 meeting of the Agency's Motor Carrier Safety Advisory Committee (MCSAC) in which the members of the Committee indicated that any increase in insurance limits on the motorcoach industry should be implemented gradually. Specifically, members of the MCSAC stated that any insurance should increase $5 million dollars over 5 years.

purports to give the Secretary of Transportation authority to impose "such requirements for bonds or insurance or both as the Secretary determines are needed to protect passengers and carriers dealing with such brokers." In answering this question ABA points to the FMCSA's definition of "brokers" and to ABA's objection to FMCSA's proposal. A broker is defined as "a person or entity which arranges for the transportation of passengers by a motor carrier for compensation." ABA's issue here is the scope of the definition of "broker" when used in connection with Section 13904(f). Without additional information it could be, that as written, the agency's ANPRM could require that any local church, Girl Scout troop, senior citizens' center or high school, either through a paid member of the staff or a volunteer, who arranges a group tour for its members to any destination will be swept into the definition of a "broker" and may be required to give a bond or provide insurance. ABA is certain that FMCSA does not propose to protect the passengers of Troop 9 from the failures or mistakes of the volunteer Mom who arranged the trip to Disney World. ABA does agree, however, that the Agency should have the authority to go after "bad" brokers. That is, the brokers who sell people a charter bus that never arrives or those who send the chartering party a thirty-year old motorcoach when a new one was advertised. ABA simply counsels caution to the FMCSA as it develops this particular proposal.

The essential point of ABA's comments is that there is no evidence to support, for safety, security or protection of the public, FMCSA's desire to significantly increase the current minimum financial responsibility limits for motorcoaches. There is no "gap" in coverage occasioned by the current limits on either the federal or state level. The evidence provided by the Agency to support any increase is unfounded. The ABA and its 3,500 members comprised of bus operators, convention and visitors' bureaus, destinations, and attractions respectfully submits that no increase in the financial responsibility limits is necessary and that in doing so would severely harm the motorcoach industry and have significant negative effects on the citizens who rely on this industry. When he signed the Bus Regulatory Reform Act into law on September 20,1982, President Ronald Reagan explained that it was his Administration's view that "private enterprise…be as private as possible…guided by the market judgments of business managers rather than the dictates of government regulators." With this rulemaking, FMCSA is attempting to dictate a significant increase of financial responsibility limits for 100% of an industry to cover a supposed and unfounded gap in coverage for less than 1% of all of the insurance claims filed since Ronald Reagan signed the Bus Regulatory Reform Act. This presumed goal which is be pursued under the auspices of improving industry safety has no basis in the industry's safety record, no estimate of improved future safety performance, no history of unmet or underfunded insurance claims experience, and no existing precedent from any State's regulatory judgment as state insurance levels have also not increased in decades nor are they anywhere near the amounts currently required by the federal interstate minimums. This potential increase in the financial responsibility limits would substantially affect and cause serious harm to the motorcoach industry and has no corresponding safety benefit.

Respectfully submitted.

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