PRACTICES, PROCEDURES AND RISK UNDER (MAP-21), AND MORE SPECIFICALLY, 49 U.S.C. §14916, UNLAWFUL BROKERAGE ACTIVITIES

I. General Impact of MAP-21 on Prior Practices:

While regulation of property brokers has been statutorily prescribed since 1935[1], for just as long, various logistics service providers have arranged, negotiated and provided brokered motor carrier transportation, either unknowingly or for lack of enforcement, without regard to such regulations. Many who by statutory definition have been providing broker services, assumed for a variety of reasons they were not regulated. Reasons have included the notion that new industry vernacular such as, "third party logistics provider", "3PL", "4PL", "transportation management", or "consulting" could somehow cause them to avoid the clear statutory definition of a "broker" of motor carrier transportation.

As with any void in the law, years of abuse of the brokerage function led the Federal Motor Carrier Safety Administration ("FMCSA") to seek strong reform legislation as part of what now is known comprehensively as Moving Ahead for Progress in the 21st Century Act, "MAP-21". At the instance of FMCSA and its oversight committees, Congress had the intent to identify more clearly and regulate more stringently these statutorily defined functions:

> **(2) Broker.—** The term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.
>
> **(3) Carrier.—** The term "carrier" means a motor carrier, a water carrier, and a freight forwarder; and
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> **(8) Freight forwarder.—** The term "freight forwarder" means a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and in the ordinary course of its business—
> **(A)** assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;
> **(B)** assumes responsibility for the transportation from the place of receipt to the place of destination; and
> **(C)** uses for any part of the transportation a carrier subject to jurisdiction under this subtitle.[2]

This Congressional intent went beyond establishing more financial accountability for those who participate in brokered transactions, and was intended to also identify to the transportation industry clear and separate roles for all such participants, a new accountability of each to the other; and to the shippers. The resulting stringent language of 49 U.S.C. §14916 (and MAP-21 in

general) was a function of the many hours of testimony heard by the legislative committees on how the concept of "brokerage" was being abused; or left with many loopholes, whereby there was too little accountability for some who were participating in interstate transportation in the role of a broker without clear identity and regulation as such.

A close reading of prohibited activities and penalties of §14916 gives one an idea of just how "motivated" Congress was in correcting some of the abuses and bringing more accountability to those who had heretofore fundamentally avoided regulation:

> **(a) Prohibited Activities.—** A person may provide interstate brokerage services as a broker only if that person—
> **(1)** is registered under, and in compliance with, section 13904; and
> **(2)** has satisfied the financial security requirements under section 13906.
>
> **(c) Civil Penalties and Private Cause of Action.—** Any person who knowingly authorizes, consents to, or permits, directly or indirectly, either alone or in conjunction with any other person, a violation of subsection (a) is liable—
> **(1)** to the United States Government for a civil penalty in an amount not to exceed $10,000 for each violation; and
> **(2)** to the injured party for all valid claims incurred without regard to amount.
> **(d) Liable Parties.—** The liability for civil penalties and for claims under this section for unauthorized brokering shall apply, jointly and severally—
> **(1)** to any corporate entity or partnership involved; and
> **(2)** to the individual officers, directors, and principals of such entities.[3]

From this language, we can see that Congress (and FMCSA) had the intent of bringing clear focus to all who had previously participated in "brokerage", without being registered and properly bonded, that they were indeed subject to regulation and serious penalties would follow should they continue, ***either inadvertently or purposefully***.(emphasis added) This intent is further conveyed in the fact that Congress saw no need to amend or in any manner alter the existing definition of "Broker", "Carrier", or "Freight forwarder"; and still made clear to any who would aid or abet unauthorized brokerage that should they participate with an unlicensed party performing brokerage, they too would be subject to civil penalties and private causes of action.

Historically, many such as warehousemen, distributors, merchandisers; and more vague categories, such as third party logistics providers, logistics services, etc., had either assumed they were not covered under the definition of "broker", or were happy to continue under the permission of benign neglect. However, a close reading of the statutory definition of "broker"[4], in conjunction with the language of §14916, should leave little doubt that if one participates in the intermediary action of providing motor carrier transportation for compensation, such activity is likely to be construed as brokerage for the purposes of regulation and resulting penalties.

Obviously, the legislative committees heard much from various vested interests as to desired distinctions and the broad definition of broker activities. Congress had the option to

draw the very narrow distinctions suggested by those who only "negotiate" or "arrange for" motor carrier transportation. Noticeably for the cautious, they did not.

To this writer, there are no escapes from this Congressional history, intent and resulting language of §14916, read in conjunction with 49 U.S.C. 13102. Those participating in offering for sale, negotiating, or even holding themselves out by advertisement, marketing material or websites, as selling, providing or arranging for transportation by motor carrier for compensation, are clearly subject to this regulation and penalties for violation. There are no marketing descriptions, such as 3PL, 4PL or consultant, that will avoid the purpose and intent of §14916. The following analysis confirms this conclusion.

FMCSA took a strong message to Congress, the primary theme of which was that the concept of brokerage was being abused, both by lack of professionalism and financial accountability to the shipping public and motor carriers. Congress responded by providing new and more extensive statutory requirements for qualifying as a broker[5], the allowable registration period[6], and financial accountability[7]. Clearly, future enforcement of all such reforming legislation could not allow those who could no longer qualify to avoid the intent of the legislation by the device of changing their names from "broker" to "3PL", "logistics management", or any version of nomenclature, whereby those parties were still participating in selling, offering for sale, negotiating for, or holding themselves out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.

Just as clearly, no matter how large or consequential in the industry a "logistics services company" might be, neither FMCSA nor the courts can allow a double standard of enforcement for those who have never qualified and are participating in the same clear statutory definition of brokerage, notwithstanding the title they may assume. If it walks like a broker, talks like a broker, and in the process receives compensation for arranging motor carrier transportation…it is a regulated broker.

II. <u>Penalty Provisions of §14916 and What They May Mean to Violators—Both Direct and Indirect:</u>

Typically, lawyers like to write about statutory intent and the effect of penalty provisions from the safety of prior court decisions, or at the very least, administrative history and enforcement actions. Due to the need for follow-up guidance from FMCSA, and of course no court decisions yet, we can only infer on the cautious side of likely impact of §14916. However, we should do so from the perspective of not only those who may be found to be without proper authority, but also those who participate in transactions within supply chain management with such potential violators, since the penalty language for violation of brokerage authority includes those who "…knowingly authorizes, consents to, or permits, directly or indirectly, either alone or in conjunction with any other person a violation of subsection (a)"[8].

A. <u>Civil Penalties</u>

The potential serious consequences of direct and indirect violation cannot be overstated, since each violation can result in penalties up to $10,000 per violation, and since such liability

goes not only to the business entity, but also to individual officers, directors, and principals of such entities. But perhaps more ominous is the creation by Congress of a right of private action, whereby the statute could be used as the basis of a civil suit for an "injured party for all valid claims incurred ***without regard to amount***"[9] (emphasis added). While direct violation by a party without proper authority and financial security is fairly straightforward (insofar as anticipating the risk and corrective action), the more complicated question is how otherwise properly registered and financially accountable parties might be in jeopardy from acting in concert with an unauthorized "broker".

Again, the provision for civil penalties and a right to a private cause of action at 49 U.S.C. §14916 (c) provides:

> **Civil Penalties and Private Cause of Action.—** Any person who knowingly authorizes, consents to, or permits, directly or indirectly, either alone or in conjunction with any other person, a violation of subsection (a) is liable—
> **(1)** to the United States Government for a civil penalty in an amount not to exceed $10,000 for each violation; and
> **(2)** to the injured party for all valid claims incurred without regard to amount.

Without court construction of this provision, it seems clear that Congressional intent was to anticipate the potential for unlicensed brokers to attempt to continue operating without proper authority through and with the cooperation of those who are properly licensed and bonded. There are innumerable examples of how this could occur, which include:

1. A formerly licensed and bonded (when bond requirement was only $10,000) broker can no longer qualify, and a properly licensed and bonded broker enters into a "co-brokering" arrangement with them. This situation calls for additional attention to any broker/carrier agreement by a carrier/forwarder, with proper warranties and indemnifications as to the tendering broker not having co-brokered with an unauthorized broker.

2. A motor carrier or forwarder accepts a load from an unlicensed broker, without proper vetting and assurances.

3. A motor carrier or forwarder accepts a load from a carrier acting only as a broker and without separate brokerage authority.

4. A warehouseman, without brokerage authority, provides distribution services to a shipper by "arranging" inbound or outbound transportation by motor carrier/forwarder. The key element here would seem to be whether the warehouseman receives any portion of compensation for the motor carrier transportation, along with how such transportation is dispatched and documented.

5. A merchandiser, without brokerage authority, agrees to get product into a big box retailer, and some portion of the compensation is for "arranging', "negotiating", etc., the motor carrier transportation.

6. A complicated third party logistics project includes the 3PL/4PL, without brokerage authority, receiving compensation for "arranging"/"negotiating" the motor carrier transportation, and involving others in accomplishing such motor carrier transportation.

There are of course many other possible examples, but in each, close attentions should be paid to whether any party is acting within the statutory definition of a broker. The analysis is best approached by the old adage of "follow the money", and whether any unauthorized party is receiving compensation for "offering to sell", "negotiating" and/or "arranging" the motor carrier transportation portion of the project or continued services among the parties.

The next step in this analysis, particularly for those who are serving a portion of the transaction as a properly qualified participant (i.e., authorized broker, freight forwarder, or motor carrier), is to ask whether they are in violation resulting from enabling the unlicensed broker by knowingly authorizing, consenting to, permitting, directly or indirectly, either alone or in conjunction with that unauthorized broker the completion of interstate transportation by a motor carrier. If so, such a party who enables the unlicensed broker is clearly in jeopardy of the civil penalties that may be imposed under §14916 (c) (1), as well as the potentially unlimited damages that may be result from a private cause of action, under §14916 (c) (2).

B. Private Cause of Action

It is perhaps fair to say that Congress has historically been reluctant to create a private cause of action, but for exceptional circumstances. The most common circumstance is probably where the governmental enforcement agency admits in some manner their inability to fully enforce the full intent of regulation. Clearly, FMCSA does not have the resources to fully enforce violations of §14916 (a). Therefore, it is believed by some that FMCSA signaled the need for the private cause of action created by §14916 (c) (2) of potential liability "to the injured party for all valid claims incurred without regard to amount".

Regardless of the enabling rationale, this provision should get the full attention of any party who might be a potential violator of §14916 (a). Since there has yet to be judicial interpretation of the limits of this provision, again, we can only cautiously infer its ramifications. By any construction, it should be considered potentially ominous in opening the door (likely to be energetically and creatively assisted by the plaintiff bar) to private causes of action against violators for cargo loss/damage claims, personal injury and death claims, and another extension of the concept of vicarious liability in general.

One need only know something of the history of the Federal Truth in Leasing statute[10] and regulations[11], and the private right of action granted by Congress for enforcement, to be properly concerned with how far the private right of action within §14916(c) may ultimately go. Similar perhaps to the early history of regulation by FMCSA, because FMCSA simply could not properly administer disputes over violations of Federal Truth in Leasing, Congress soon made private right of action the only method for resolving such disputes. What followed was perhaps the most litigious single issue for motor carriers who employed independent contractor owner operators. It is no stretch of predictability to warn unlicensed brokers and those who participate

with them in violations of §14916 (a) of the many creative ways in which plaintiffs' bar will pursue all such violators.

Questions arise as to the breadth and scope of this private cause of action which only future jurisprudence can answer. However, those who intend to wear both suspenders and belt with regard to this risk should consider some hypotheticals:

1. Should a properly registered broker accept a load for further brokering from a broker without proper authority, is there negligence per se (due to violation of §14916 (a)) for all misdescription of the nature of the load (perhaps hazardous) by the unregistered broker to the authorized broker?

2. Should a properly registered freight forwarder be responsible for unlimited consequential damages, after accepting a load from an unregistered broker (i.e., 3PL) who fails to pass along clear obligations for such consequential damages in the contract between 3PL and shipper?

3. Since in the absence of contractual obligation a broker is not ordinarily responsible for cargo loss and damage claims, does the private cause of action now create a higher duty for the broker who accepted a load from an unauthorized broker?

4. Does the private cause of action create a higher standard of care for vicarious liability in the instance of catastrophic injury, where the unauthorized broker specified the carrier to the authorized broker/forwarder?

5. In hypothetical #4, can the plaintiff use negligence per se resulting from violation of §14916 (a), and avoid a higher burden of proof as to the broker/forwarder who accepted the load from the unauthorized broker?

III. Conclusion:

MAP-21, and in particular 49 U.S.C. §14916, have the very clear purpose to bring more accountability to all brokerage activity, not only as it applies to those who have heretofore been unregistered and participating in brokerage, but also to those who in any manner facilitate the continued practice of unlicensed brokerage. The penalties for continued participation in either unlicensed brokerage, or in facilitating it as a participant, are potentially far too severe in relation to corrective action to be acceptable by responsible decision makers.

All participants in the transportation industry should accept the clear Congressional intent of this reforming legislation, and establish policies and procedures that avoid the appearance of either misfeasance or malfeasance in this regard. The corrective action is clear for those who conduct unlicensed brokerage activities by the clear definition of a "broker" to be found at 49 U.S.C. §13102 (2). The relative ease of acquiring brokerage authority and appropriate financial assurance in relation to the severe penalties for failing to do so gives clear direction to all those who may now be operating in violation, or even within some ambiguous gray areas of the law.

All properly authorized participants who may possibly be within the ambit of "…knowingly authorizes, consents to, or permits, directly or indirectly, either alone or in conjunction with any other person, a violation…" of §14916 (a), also have a clear duty to establish diligence procedures that remove doubt as to such knowing aiding and abetting the unauthorized practice of brokerage. Providing a comprehensive list of due diligence is difficult until FMCSA has provided all regulations and enforcement guidance, but such a list would surely include:

1. Vetting any intermediary between you and the shipper to determine their purpose, nature of contracts with the shipper, and ultimately, whether they do indeed, sell, offer for sale, negotiate for, or hold themselves out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation; and if so, do they have brokerage authority.

2. With regard to Item #1, and the clear statutory definition of "broker", it is important to avoid confusion as to some industry nomenclature, such as "logistics provider", "consultant", "3PL/4PL", as though they are statutory or common law exceptions to the mandates and penalties of 49 U.S.C. §14916, et seq., as discussed above. They are not, at least until there are further clarifying regulations and/or court construction of the statutory language.

3. Should diligence establish that such intermediary is without proper brokerage authority, and the nature of the project/transactions require participation by the unlicensed party, it is suggested that relationships among the shipper, intermediary and any subsequent broker, forwarder or carrier be revised in a manner that establishes a direct relationship between the shipper and the properly licensed party. Should the unlicensed party claim an economic interest as a consultant, 3PL, etc., that interest may be modified between the shipper and unlicensed party such that they are compensated differently, not to include "arranging for transportation by motor carrier for compensation".

   If by commercial necessity the unlicensed party must continue to serve the shipper, it should be without contractual privity with the licensed broker, forwarder or motor carrier. The properly licensed party should receive shipping instructions either directly from the shipper, or in such other fashion that eliminates privity of contract, or knowing participation in brokerage, with the unlicensed party.

   In this regard, it is important to note that 49 U.S.C. § 13901(c) requires that "for each agreement to provide transportation or service… the registrant shall specify in writing the authority under which the person is providing such transportation or service." While FMCSA is yet to issue clear guidance on this notice requirement, it could be done by rate/load confirmation from the licensed party directly to the shipper. It could not be accomplished by an unlicensed broker or intermediary.

In summary, while we don't yet have all implementing regulations and guidance from FMCSA, we clearly know that unlicensed brokerage, or participating knowingly in unlicensed brokerage, is now more clearly prohibited, with very significant penalties for those who continue. For those who might by rationalization consider the risk of "getting caught", it is likely true that FMCSA will not for sometime have the full capability to investigate and assess civil penalties for all such possible infractions. However, before any party should consider taking such a chance, it should be noted that by way of interim preparation for enforcement, FMCSA has publicly encouraged aggrieved parties (or "whistleblowers") to file complaints with its National Consumer Complaint Database for instances of unauthorized brokerage, and noticeably, "strongly" encouraged "all motor carriers *not* to accept loads from unregistered brokers or freight forwarders..."[12] Also, as previously discussed, the private cause of action created by §14916 (c) (2), may well become the more impactful method of enforcement, with yet unknown breadth and scope.

I cannot resist concluding with a paraphrase of Shakespearean wisdom…three thousand words to the wise should be sufficient.

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[1] Section 215 of the Motor Carrier Act of 1935 (P.L. 74-255). at 1161.

[2] 49 U.S.C. §13102

[3] 49 U.S.C. §14916 (a),(c)

[4] 49 U.S.C. §13102 (**2**) **Broker.—** The term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.

[5] 49 U.S.C. §13904

[6] 49 U.S.C. §13905

[7] 49 U.S.C. §13906(b)

[8] 49 U.S.C. §14916(c)

[9] 49 U.S.C. §14916(c)(2)

[10] 49 U.S.C. §14704

[11] 49 C.F.R. §376.12

[12] 78 FR 54720, at 54722