

A Demand for Due Diligence Action by the FMCSA to Fulfill Their Responsibility To Appropriately Adjust the Motor Carrier Minimum Financial Responsibility Levels

After a truck crash killed our daughters, AnnaLeah (17) & Mary (13), on May 4, 2013, we discovered that there are many problems with truck safety, including inadequate trucking liability insurance. In 1980, Congress set the level of liability insurance for trucking companies at a MINIMUM of \$750,000. If that were adjusted for inflation, it would be \$2,225,643 in 2017. Yet, DOT has not once raised that level in 37 years -- thereby jeopardizing the safety of the traveling public.

In fact, on June 5, 2017, the FMCSA withdrew the Advanced Notice of Proposed Rulemaking (ANPRM) on the Appropriateness of the Current Financial Responsibility and Security Requirements for Motor Carriers, Brokers, and Freight Forwarders, which was intended to raise that minimum. The history of that rulemaking is summarized below.

Prior to that ANPRM, the FMCSA issued a [Report](#) in April 2014, as required (actually one year late). They are required by Congress to issue reports every four years, which means another report should have been completed by April 4, 2017 (or thereabouts). "Section 32104 of MAP-21. . . directed the Secretary [of Transportation] to determine the appropriateness of these requirements every 4 years beginning April 4, 2013."

The Motor Carrier Act of 1980 initially established the minimum level of financial responsibility for motor carriers.

The legislative history of the MCA shows that Congress included section 30 because "the issue of financial responsibility...is inextricably bound to the entry provisions of the legislation that directly concern the 'fitness' of the carrier to operate in interstate commerce."¹¹ Further, the legislative history of the MCA indicates that the purpose of section 30 was "to create additional incentives to carriers to maintain and operate their trucks in a safe manner as well as to assure that carriers maintain an appropriate level of financial responsibility."¹²

The legislative history of section 30 indicates that setting minimum levels of financial responsibility would address two concerns. First, **the minimum levels would "assure that public safety is not jeopardized"** in connection with the increased entry to the industry due to deregulation.¹³ Second, the minimum levels would ease concerns that the largely deregulated industry would put pressure on safe operators to cut costs to meet the prices of their competitors, "some of which may cut costs by operating in violation of minimum safety standards."¹⁴

<https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Financial-Responsibility-Requirements-Report-Enclosure-FINAL-April%202014.pdf>

Clearly, Congress intended for the insurance industry to be the gatekeeper of the motor carrier industry to ensure the safety of the American public.

MAP-21 continued the process to ensure that appropriate increases would be put in place. A summary of the April 2014 FMCSA Report, from the Executive Summary on page 1, sheds light on the matter:

On July 6, 2012, President Obama signed into law the Moving Ahead for Progress in the 21st Century Act (MAP-21; P.L. 112-141). Section 32104 of MAP-21 directed the Secretary of the U.S. Department of Transportation (DOT) to issue a report to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and

Infrastructure of the House of Representatives on the appropriateness of the current minimum financial responsibility requirements for motor carriers of property and passengers, and the current bond and insurance requirements for freight forwarders and brokers.

Section 32104 also directed the Secretary to issue a report on the appropriateness of these requirements every 4 years starting April 1, 2013. The Secretary delegated the responsibility for this report to the Federal Motor Carrier Safety Administration (FMCSA).

Interstate motor carriers and transportation intermediaries, as well as certain intrastate hazardous materials carriers, are required by law to maintain minimum levels of financial responsibility. 2 This report explains the history of these requirements, examines the current minimum insurance levels for the different sectors, provides background on the motor carrier industry, and summarizes the findings of a recent FMCSA-sponsored study on the adequacy of the Agency's current required minimum levels of financial responsibility, as well as findings from other reports on minimums. The report does not examine the current bond and insurance requirements for freight forwarders and brokers since MAP-21 mandated these requirements to be \$75,000 effective October 1, 2013, and the Agency will report on the appropriateness of these levels after it has had the opportunity to observe their impacts.

The legislative history of minimum insurance requirements for commercial motor vehicles (CMV) indicates that **Congress recognized that crash costs would change over time and that DOT would periodically examine the levels and make adjustments as necessary. A variety of recent studies indicate that inflation has greatly increased medical claims costs and related expenses. In conclusion, FMCSA has determined that the current financial responsibility minimums are due for re-evaluation.** The Agency has formed a rulemaking team to further evaluate the appropriate level of financial responsibility for the motor carrier industry and has placed this rulemaking among the Agency's high priority rules. The FMCSA will continue to meet with the stakeholders, including impacted industries, safety advocacy groups, and private citizens, as it moves forward with developing a proposed rule.

<https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Financial-Responsibility-Requirements-Report-Enclosure-FINAL-April%202014.pdf>

Although the Secretary delegated the responsibility for this report to the FMCSA, Senator Richard Burr (R-NC) stated to us in person on August 12, 2013 – three months after our tragic truck crash – that the Secretary of Transportation has the authority to act administratively to increase the minimum financial responsibility levels.

In fact, FMCSA, subsequent to publishing their initial report in April 2014, issued an ANPRM on November 28, 2014, to continue study of this issue. Following that, FMCSA took these actions:

1. The Agency formed a rulemaking team to evaluate the appropriate level of financial responsibility for the motor carrier industry and placed this rulemaking among the Agency's high priority rules.
2. This study was discussed at the FMCSA Motor Carrier Safety Advisory Committee (MCSAC).
3. FMCSA asked for Public Comments.
4. FMCSA reportedly did not receive the substantive information -- through the Public Comment process – which they have stated is necessary for them to do the required cost benefit analysis (according to their interpretation of EO 12866) in order to move the rulemaking process forward (for signature by the Secretary and approval by the OMB/OIRA).
5. FMCSA asked for voluntary compliance from the insurance industry. However, there has been

no information provided from the insurance industry to verify the claim that the insurance premiums for trucking companies would skyrocket to \$20,000/year when the minimum liability levels are raised (as reported to independent owner-operators by the OOIDA, who is in fact an insurer for many OOIDA members <http://www.landlinemag.com/Story.aspx?StoryId=29050>) and that “the only winners would be trial attorneys and large motor carriers.” This allegation has never been substantiated.

6. The next step by FMCSA, according to an email which we received on June 11, 2015, from an administrator in the FMCSA, was to try another tactic to get the information from the insurance industry:

FMCSA does not have information to estimate the increase in insurance premiums if the Agency increased the current \$750,000 limit (for property carriers transporting general freight) to \$4.2 million. As part of the rulemaking process, the Agency would need to gather this type of information to determine the costs of requiring carriers to increase their coverage.

We just published a rulemaking on “Confidential Business Information” to help encourage insurance companies to share some of their proprietary information with the Agency for our use in the rulemaking process, without disclosing to the general public the confidential information. Hopefully, the new rules on confidential information will help us get the data we need.

7. The final step was taken by the FMCSA to formally withdraw the ANPRM on June 5, 2017.

It should be noted that, if the Secretary of Transportation merely raised the minimum level to adjust for inflation, the **\$750,000 set in 1980**, using the latest U.S. Government CPI data (<http://www.usinflationcalculator.com/>), would be equivalent to **\$2,225,643.20 in 2017**. Additionally, the Value of Statistical Life set by the Department of Transportation is currently listed as \$9.6 million as of August 8, 2016.

<https://www.transportation.gov/sites/dot.gov/files/docs/2016%20Revised%20Value%20of%20a%20Statistical%20Life%20Guidance.pdf>

It must therefore be asked, Has the FMCSA done due diligence to obtain the required information to do the study mandated by Congress? In fact, could they have gone a step further, as we have been told by a former DOT administrator, and issued a subpoena to the insurance industry to obtain this information? Could FMCSA even have requested Congress to hold a formal hearing – as we have requested numerous times -- to obtain information from the insurance industry?

Where do we go from here? What are the options at this point for resolving this issue? Given that it has been over 30 years since the current level was set, and that the FMCSA has had adequate time to act and report on this supposedly priority rulemaking, it now seems prudent to:

1. Call upon Elaine Chao, as the Secretary of Transportation, to do what no other Secretary since 1980 has done and act upon her authority to set a new minimum level of financial responsibility for the motor carrier industry and immediately raise it from \$750,000 to \$2,225,000.
2. Following that decisive action, FMCSA should then:
 - Ask Congress to hold a public hearing to obtain the necessary information from the insurance industry; OR
 - Subpoena the insurance industry to provide the required information.
 - Then immediately proceed with NPRM rulemaking – setting it as a top priority to determine future actions which should be taken to raise the minimum levels according to other calculations besides adjustment for inflation, both now and in the future.

If we do nothing to address this problem, then we will continue to expose the traveling public to greater risk of truck crash tragedies. Who should we hold responsible for the resulting deaths? And who will bear the economic burden of this negligence?

Jerry and Marianne Karth

June 4, 2017