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ARTICLES

Motor Freight Brokers: A Tale of Federal Regulatory Pandemonium

*Jeffrey S. Kinsler**

I. INTRODUCTION

Motor freight brokers are the connecting link between shippers and carriers, uniting shippers who have cargo to deliver with carriers who have available motor transportation.[1] Acting as traffic managers for shippers and sales agents for carriers, brokers arrange thousands of transactions each day, many of which either start or end up in the international stream of commerce. If used effectively, brokers can lower the transportation costs of domestic and international shippers and increase the revenue of carriers, which ultimately will stimulate interstate and overseas trade.

Freight brokers arrange shipments for both domestic and overseas shippers. A typical international brokerage transaction occurs as follows:

> An international manufacturer ("shipper") hires an ocean liner or air carrier to transport its freight to the United States. Before the goods arrive in the U.S., the manufacturer retains a freight broker who, in turn, hires a trucking company ("carrier") to haul the freight from the port of entry to the final destination within the United States. The international

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1 As used herein, the term "freight brokers" means brokers of property and does not include brokers of passengers or brokers of household goods.

manufacturer has the option to bypass the broker and deal directly with the trucking company, but most foreign entities are unfamiliar with the U.S. transportation market and are thus dependent upon brokerage services. After delivery is made, the broker collects the entire motor freight charge from the shipper. The shipper expects the broker to remit a portion of this payment to the carrier, but often the broker absconds with the funds leaving the carrier and shipper to quarrel over payment.[2]

Freight brokers have the potential to play a pivotal role in the movement of interstate and foreign commerce. A reputable brokerage industry would enhance the availability of dependable, reasonably priced service to all segments of the transportation market, not only within the United States but throughout the world.[3] Brokerage service will be particularly important in the coming decade, as countries begin to lower trade barriers with multilateral agreements such as the European Community and North American Free Trade Agreement. The brokerage industry, however, is riddled with serious problems that are threatening its very existence.

Most brokerage problems are traceable to the troubled history of freight brokers, which has been a constant struggle between regulation and deregulation. Arguably, brokers have been subjected to more extremist regulation than any other industry during the last fifty years. The pattern of extremism began when Congress imposed massive regulations on freight brokers as part of the Motor Carrier Act of 1935.[4] The 1935 regulations completely stifled the U.S. brokerage industry.[5] Forty-five years later, Congress moved to the other regulatory extreme when it passed the Motor Carrier Act of 1980,[6] which virtually deregulated the brokerage industry.[7] The eased entry controls of the 1980 Act have led to considerable broker abuse.[8] Since

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2 This is merely an example of the problems associated with the U.S. brokerage market. *See* Section IV, *infra*, for additional examples of broker abuse. Domestic shippers face these same problems, except that there is no ocean or air carrier involved.

3 Gregory J. Stachura, LICENSED PROPERTY BROKERS: THEIR ROLE IN TRANSPORTATION SERVICE 1 (1991) (available at Transportation Brokers Conference of America).

4 Motor Carrier Act of 1935, 49 U.S.C. §§ 1-27 (1970) (hereinafter the "1935 Act").

5 TERRANCE A. BROWN, TRANSPORTATION BROKERS: HISTORY, REGULATION AND OPERATIONS 64 (1992); JOHN P. MARTELL, BROKERS IN TRANSPORTATION 9 (1984) (as few as seven active brokers existed in the early 1970s).

6 Motor Carrier Act of 1980, 49 U.S.C. §§ 10924-10927 (1980) (hereinafter the "1980 Act").

7 *Id.* § 10924.

8 *See, e.g.*, Dave Russ, *Could You, Should You, Use a Broker; Property Brokers in Transportation*, 24 TRANSP. & DISTRIBUTION 30 (a common joke about brokers is: A traffic manager summons a motor carrier, a railroad sales representative and a freight broker to his office individually and asks each "what is two plus two?" The motor carrier and railroad representative each answer "four." The broker, on the other hand, pulls down the shades, closes the door, leans over the desk, and replies "what do you want it to be?").

deregulation, the industry has been inundated with undercapitalized, fly-by-night brokers who are preying on unsuspecting carriers and shippers.[9] While the strict entry controls of the 1935 Act stifled the brokerage industry's development, the eased entry controls of the 1980 Act resulted in higher prices, financial instability, protracted litigation[10] and an increase in bankruptcies.[11] Due to this regulatory pandemonium, brokers present an exemplary microcosm of the intrinsic struggle between the forces of regulation and deregulation.

The lack of financial certainty in the brokerage industry has harmed domestic and international shippers alike. Disreputable brokers, whose only goal is to make a quick dollar, have taken a toll on both imports and exports. Broker abuse has cost U.S. shippers and carriers millions of dollars but, more importantly, broker abuse is beginning to adversely effect international trade. U.S. manufacturers who export goods overseas, for instance, have been forced to pay twice for the same shipment of goods because of untrustworthy middlemen.[12] Likewise, international manufacturers who import goods to the United States have faced "double payment" upon arrival in this country because the intermediaries they hired absconded with the initial funds.[13]

Broker misconduct is especially destructive in the international market. Brokers typically arrange transportation for small or mid-sized manufactures. If these manufacturers are based overseas, they usually have little familiarity with the U.S. freight carriage industry.

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9 *See generally* Judith A. Fuerst, *Sorting Out the Middlemen: Keeping the Wheels of Distribution in Motion, Third Parties Make Matches Between Shippers and Carriers*, 26 TRANSP. AND DISTRIBUTION 46.

10 *See, e.g.*, ANR Freight System, Inc. v. Weldbend Corporation, No. 90 C 1948, 1993 U.S. Dist. LEXIS 3558 (N.D. Ill. Mar. 22, 1993).

11 *See, e.g., Transportation Property Brokers: Hearing Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, Science, and Transp.*, 100th Cong., 1st Sess. 13-14 (1987) (hereinafter "*1987 Hearing*"). Many persons unfamiliar with interstate transportation have started freight brokerage operations knowing virtually nothing about brokerage services or operating procedures. Senn Trucking Co., Lawful Practices of Property Brokers, Petition for Rulemaking, No. 39962, 1986 M.C.C. LEXIS 74, at *1 (I.C.C. Nov. 17, 1986).

12 *See, e.g.*, Johnson Products Co. v. M/V LA Molinera, 628 F. Supp. 1240 (S.D.N.Y. 1986) (shipper successfully sued international transportation intermediary to recover double payment); Farrell Lines, Inc. v. Titan Industrial Corp., 306 F. Supp. 1348 (S.D.N.Y.) (ocean carrier unsuccessfully sued domestic exporter to recover freight charges which exporter had previously paid to forwarder); Randy Intern., Ltd. v. American Excess Corp., 501 So. 2d 667 (Fla. App. 1987) (shipper unsuccessfully sued freight forwarder to recover second payment made on export of goods).

13 Olympic Airways, S.A. v. Aeolian Shipping Co., N.Y.L.J., Jun. 14, 1979, at 10 (international shipper exporting freight to the U.S. forced to pay the same freight bill twice before the carrier would release the goods).

As a result, international shippers must often rely on freight brokers to arrange motor transportation for their freight once it arrives in a U.S. port. Cognizant of this reliance, brokers frequently extort excessive freight charges from international shippers. More often than not, the international shipper's only recourse is in the U.S. court system. To foreigners, U.S. courts are confusing, costly and intimidating, and thus many international shippers are left without adequate recourse against disreputable brokers. If the freight brokerage industry continues on its current path, a time will come when international shippers, who essentially require the services of freight middlemen, will discontinue, or at the very least decrease, business with companies in the United States because it is no longer economically feasible to transport their freight. The brokerage industry's ills must be cured before this occurs.

The answer to the brokerage industry's problems lies somewhere between the two extremes of massive regulation and total deregulation. Congress needs to find an amicable middleground between the stifling regulation of the past and the unstable deregulation of the present. Responsible regulations can be enacted to stabilize the brokerage industry without imposing undue financial or administrative burdens on brokers and without unnecessarily impeding competition. This article proposes a set of regulations which, if enacted, will provide stability to an industry that has teetered on the brink of disaster since 1935.[14]

Because licensed brokers act as conduits for millions of dollars of freight charges per year, safeguards are needed to ensure that fit and able brokers are allowed entry into the market regardless of existing competition, while excluding undercapitalized and unfit applicants. The proposed regulations, therefore, limit entry to those who have adequate capital.[15] The proposed regulations also outline certain payment and collection duties of brokers, place restrictions on the funds collected by brokers, and allocate property damage and personal injury liability among brokers and carriers. These regulations will protect domestic and international shippers, carriers and honest brokers at the expense of dishonest, fly-by-night brokers.

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[14] The proposed regulations are entirely consistent with the new administration's view that positive economic change can be achieved through responsible federal legislation. ICC Chairman Gail McDonald's Address to Raritan Traffic Club on Current Issues, ICC's Role and Future Trends, I.C.C. News Release, 1993 Westlaw 69259, at *5 (Mar. 10, 1993).

[15] Some applicants with very limited financial means may be excluded from the market, but these are the same individuals who are causing the current instability.

The proposed regulations are required for three reasons. First, the current system of deregulation chooses expensive and unproductive litigation over responsible regulations. Transportation entities are compelled to seek recourse in court for every minor dispute involving a broker.[16] These lawsuits are attributable to the lack of regulations defining a broker's duties and responsibilities, particularly those regarding the collection of freight charges. The costs that the transportation industry incurs in litigation far exceeds the costs it will incur under the proposed regulations.[17] Therefore, the proposed regulations should result in an overall cost savings for the transportation sector, which, in turn, should stimulate international trade.

Second, intermediaries by their very nature live entirely off the labor of others. As such, intermediary professions seem to attract a substantial share of knaves. Because of this inherent problem, intermediaries who handle large sums of money for other parties, such as lawyers, stockbrokers, real estate brokers and trustees, are heavily regulated.[18] No one would advocate repealing this legislation.[19] Freight brokers, like these other intermediaries, are in a position of responsibility which requires them to handle large sums of money for other parties. As a result, regulations are needed to govern their activities.[20]

Third, the brokerage industry has been particularly hard hit by deregulation. The ICC has been issuing broker licenses at a breakneck pace over the last fifteen years. Even convicted felons have managed to enter the brokerage industry.[21] It has become difficult, therefore, to locate a financially sound and reputable broker, and

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16 *See, e.g.*, Thrasher Trucking Co. v. Empire Tubular, Inc., 983 F.2d 46 (5th Cir. 1993) (claim by broker for undercharges); Atlantis Express, Inc. v. Standard Transp. Services, 955 F.2d 529 (8th Cir. 1992) (carrier's action to collect freight charges from broker); Milan Express Co. v. Western Surety Co., 886 F.2d 783 (6th Cir. 1989) (carrier's action to recover on broker's surety bond).

17 Judicial review consumes vast amounts of time, energy and money and therefore is not a viable substitute for ICC regulation and oversight; Paul S. Dempsey, *The Interstate Commerce Commission — Disintegration of an American Legal Institution*, 34 AM. U. L. REV. 1, 50 (1984).

18 Attorneys and real estate brokers are governed by codes of professional conduct. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1989); National Assoc. of Realtors, INTERPRETATIONS OF THE CODE OF ETHICS, art. 18 (8th ed. 1984). Stockbrokers and trustees are governed by common law and statutory law. *See, e.g.*, LOUIS LOSS & JOEL SELIGMAN, 7 SECURITIES REGULATION 3169-71 (3d ed. 1991); AUSTIN W. SCOTT AND WILLIAM B. FRATCHER, 2A THE LAW OF TRUSTS § 179.1 (4th ed. 1987).

19 *See, e.g.*, MARTELL, *supra* note 5, at 144.

20 The situation in the freight brokerage industry is similar to that in the real estate brokerage industry: brokers perform services for the benefit of two parties simultaneously. Property Broker Practices, 132 M.C.C. 233 (1980).

21 *See* Wilkett v. I.C.C., 710 F.2d 861 (D.C. Cir. 1983).

the distrust of brokers has permeated the entire transportation sector. Regulations are desperately needed to instill trust into the brokerage industry.

Section II of this article depicts the brokerage industry as it exists today. Section III details the history of federal regulation of freight brokers. Section IV illustrates the recurring problems posed by unregulated and undercapitalized brokers. Finally, section V proposes a series of regulations that are intended to cure many of the current ills of the brokerage industry.

II. Freight Brokers

Freight brokers are the connecting link between trucking companies and shippers.[22] A broker is defined by the ICC as:

> [a] person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of motor carriers, are not brokers within the meaning of this section when they arrange or offer to arrange transportation of shipments which they are authorized to transport from which they have accepted and legally bound themselves to transport.[23]

Acting in a traffic role for the shipper and in a sales role for the carrier, brokers play an essential role in bringing goods to market by filling the gap between motor carriers and shippers.[24] Freight brokers participate in thousands of daily transactions between shippers and

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22 David Dinell, *Transportation Brokers Fill Deregulation Void*, 7 Wichita Bus. J., Mar. 6, 1992, at 11.

23 49 C.F.R. § 1045.2(a) (1992). A broker is also defined as "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." 49 U.S.C. § 10102(1) (1979).

24 Milan Express Co. v. Western Sur. Co., 886 F.2d 783, 784 (6th Cir. 1989). Brokerage service is defined as "the arranging of transportation or the physical movement of a motor vehicle or of property.... on behalf of a motor carrier or [shipper]." 49 C.F.R. § 1045.2(c) (1992). A broker offers the following services:

(1) Solicits traffic in lieu of carrier sales staff;
(2) Dispatches shipments and carrier equipment;
(3) Locates owner-operators or trip lease equipment;
(4) Verifies carrier insurance;
(5) Verifies carrier authority;
(6) Verifies carrier rates and charges;
(7) Prepares trip lease documentation;
(8) Instructs owner-operators on a carrier's procedures;
(9) Inspects equipment on a trip lease;
(10) Issues authorized carrier door placards;
(11) Advances funds;
(12) Supervises drivers; and
(13) Arranges rail-motor routings.

carriers;[25] they arrange transportation for approximately two billion dollars of freight traffic per year.[26] Brokers are the most utilized intermediaries in the transportation industry,[27] handling nearly twenty percent of the nation's freight traffic.[28]

Brokerage services are performed for the benefit of both shippers and carriers.[29] Brokers provide valuable information to carriers on price and service availability; they arrange for carriers to pick up and deliver freight on a daily basis; and participate in scheduling, collection, billing, damage evaluation and other carrier functions.[30] They provide carriers with an additional source of traffic which can improve the balance of a carrier's traffic lanes.[31] But, most importantly, brokers arrange "backhaul" service for carriers. If a Chicago-based carrier has a shipment of freight to deliver to Denver, the carrier faces the unappealing prospect of returning to Chicago with an empty truck.[32] By using a broker, the carrier can arrange to backhaul a load from Denver to Chicago and not only avoid the costs of returning empty, but also make a profit on the backhaul.[33] If used effectively, brokers can reduce empty truck miles and generate additional revenue for carriers.[34]

Brokers also perform valuable services for both large and small shippers, often performing the tasks of a small shipper's traffic department.[35] This is a particularly important role for international shippers, who are often unfamiliar with U.S. carriers. Brokers offer shippers an

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Norman A. Cooper, *Property Broker: Who, What & How*, 48 I.C.C. PRAC. J. 441, 442-43 (May-June 1981).

25 *Senn Trucking Co.*, 1986 MCC LEXIS at *10.

26 *1987 Hearing*, *supra* note 11, at 13.

27 Michael R. Crum, et al., *Motor Freight Transport Third Party Service: Shipper and Carrier Perspectives*, 60 TRANSP. PRAC. J. 37, 56 (Fall 1992).

28 BROWN, *supra* note 5, at 14.

29 Fuerst, *supra* note 9, at 46 ("The broker middleman is an agent for the carrier and secures service on behalf of the shipper. His role is similar to that of sales agents, manufacturing reps, and brokers active in other industries; he sells the use of the carrier's equipment in the transportation of property.")

30 Fuerst, *supra* note 9, at 46.

31 Fuerst, *supra* note 9, at 46.

32 Depending upon the particular fleet, trucks travel empty up to 50% of the time. *1987 Hearing*, *supra* note 11, at 52.

33 Tom Bassing, *Transportation Brokerage Can Be a Dirty Job, So Curry Does it Right*, 10 KAN. CITY BUS. J., Oct. 25, 1991, at 4 ("XYZ Inc. might have customers in an out-of-the-way burg. They have their own trucks, getting there is no problem. But they face the prospect of returning empty. A brokerage is called to find a revenue-bearing load for the so-called backhaul.")

34 Terrance A. Brown, *Property Brokers: A Pilot Study of Carriers' Perspectives*, 30 TRANSP. J. 32, 37 (Winter 1990).

35 *Id.* at 35.

additional tool for obtaining responsible transportation services for reasonable prices.[36] A broker can save shippers the headache of dealing with a myriad of small carriers,[37] and depending on the destination of the goods, brokers can usually save shippers money.[38] This is especially true for small shippers who do not have large traffic departments and who are unfamiliar with the transportation industry.[39]

Brokers also perform services for overseas companies who transport freight to and from the United States. Working in conjunction with freight forwarders and other international intermediaries, freight brokers often arrange for overseas cargo to be moved by motor carrier once it arrives at domestic sea ports and airports. Freight brokers thus play a vital role in international, as well as interstate, commerce.

Even though the term "brokerage service" is defined by regulation,[40] persons involved in the transportation industry have difficulty understanding a broker's functions.[41] The current atmosphere encourages the growth of brokers, but leaves their activities uncertain.[42] The reasons for this uncertainty are twofold. First, the principal-agent relationship of brokers is unclear. Some brokers perceive themselves as agents of the carrier,[43] while others believe they are agents of the shipper.[44] In a way, both are right.[45] In each specific transaction, a broker is in a sense an agent of both the shipper and carrier.[46] Nonetheless, the law is well-settled that a broker is an independent inter-

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36 *Id.* at 35.

37 Terrance A. Brown, *Property Brokers: A Pilot Study of Shipper Perspectives*, 31 TRANSP. J. 45, 48 (Fall 1991) ("From the respondents' comments it appears that nine used brokers primarily because of lower prices, eleven for service reasons, and five for both reasons.")

38 Dinell, *supra* note 22, at 11.

39 Dinell, *supra* note 22, at 11.

40 49 C.F.R. § 1045.2(c) (1992); the term "non-brokerage" service is defined as "all other service performed by a broker on behalf of a motor carrier, consignor, or consignee." 49 C.F.R. § 1045.2(d) (1992).

41 MARTELL, *supra* note 5, at 1 ("The problem may be due to the fact that the transportation broker's authority and status arises from statutes, regulations, and judicial concepts embedded in many proceedings over a long period.")

42 MARTELL, *supra* note 5, at 144.

43 Terrance A. Brown, *Freight Brokers and General Commodity Trucking*, 24 TRANSP. J. 4, 12 (Winter 1984).

44 SAUL SORKIN, 2 GOODS IN TRANSIT § 14.13[2] (1993) (brokerage services can be performed on behalf of a motor carrier, shipper or consignee, but a broker generally acts on behalf of the shipper).

45 Prior to deregulation, the ICC viewed the party making the first request for transportation as receiving the full benefit of the broker's service. Thus, if a shipper requested that a broker arrange transportation, the shipper was the broker's principal. The ICC has since changed its position on this issue. 45 Fed. Reg. 31140 (1980) (to be codified at 49 C.F.R. § 1045 (1980)).

46 MARTELL, *supra* note 5, at 2.

mediary who does not act on behalf of either the shipper or carrier.[47] ICC decisions stress that a broker is only an arranger of transportation acting in an advisory nature and is independent of both carriers and shippers.[48]

The second reason for the uncertainty of a broker's role in interstate commerce is that there are a number of different types of transportation intermediaries who perform services similar to those performed by freight brokers.[49] The most similar is the freight forwarder.[50] Freight forwarders are transport intermediaries that utilize both rail and motor carriage.[51] A freight forwarder is best described as being a carrier to a shipper and a shipper to a carrier.[52] Unlike brokers, freight forwarders issue bills of lading in their own names and assume cargo loss and damage liability.[53] The work performed by shipper's agents also resembles that done by brokers. Shipper's agents are unregulated intermediaries who arrange rail-piggyback service on behalf of shippers.[54] Due to the quasi-regulated nature of the

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47 P.D. Copes Broker Application, 27 M.C.C. 153, 157-58 (1940) (quoting Cain Broker Application, 2 M.C.C. 633, 635-36 (1937)).

48 Dal-Tile Corp. and Red Arrow Freight Lines, Inc., Petition for Declaratory Order, No. 40437, 1990 I.C.C. LEXIS 350, at *4 (1990) (the very nature of brokerage is that it is performed jointly for the benefit of both shipper and carrier).

49 Tom Andel, *Don't Gamble with Brokers*, 32 TRANSP. & DISTRIBUTION, Aug. 1991, at 24 ("Deregulation made the roles and responsibilities under the law much more confusing for shippers.").

50 Freight forwarders were deregulated under the Surface Freight Forwarders Deregulation Act of 1986, Pub. L. No. 99-521, 100 Stat. 2993 (1986).

51 A freight forwarder is defined as:

> a person holding itself out to the general public (other than as an express, pipeline, rail, sleeping car, 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 place of receipt to place of destination; and
>
> (C) uses for any part of the transportation a carrier . . . .

49 U.S.C. § 10102(9) (Supp. 1992).

52 *See* BROWN, *supra* note 5, at 18 (the obligations and responsibilities of the shipper and the carrier apply to a freight forwarder, principal of which is payment of freight charges and fees, as well as payment of cargo loss and damage claims).

53 BROWN, *supra* note 5, at 18-19.

54 BROWN, *supra* note 5, at 7-8. Shipper's agents provide the following services:

> (1) Make all transport arrangements, including all rail and motor carriage and trailer leasing.
>
> (2) Provide the shipper with one bill for the entire move instead of several bills from several carriers.
>
> (3) Accomplish the move with expertise and knowledge of current market conditions.

BROWN, *supra* note 5, at 8. Shipper's agents, however, do not assume liability for lost or damaged cargo.

transportation industry, there is no clear distinction between the duties and responsibilities of freight forwarders, shipper's agents and freight brokers; the work performed by each often overlaps with the others. This is especially true when a single entity holds itself out as more than one type of transportation intermediary.[55] Unfortunately, litigation is often necessary to determine the status of a particular intermediary.[56]

Although freight brokers have existed since the 1920s, the vast majority of currently licensed brokers are new to the business.[57] As of 1975, there were only seventy property broker licenses in existence.[58] Of those holding licenses, as few as five were active in the brokerage industry.[59] As a result of deregulation, the brokerage industry grew by leaps and bounds between 1978 and 1992.[60] By 1992 there were 11,000 licensed brokers, of which an estimated 7,000 were active.[61] The number of brokers is estimated to exceed 15,000 by 1994,[62] but it is difficult to make accurate estimates given the high level of attrition in the industry.[63]

Most freight brokers are small independently-owned companies that market trucking services to local shippers.[64] Nonetheless, brokers generally have authority to arrange transportation anywhere in the

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55 *See* Stachura, *supra* note 3, at 3 (it is appropriate for a broker to act as a freight forwarder and a shipper's agent).

56 *See, e.g.*, Dal-Tile Corp. and Red Arrow Freight Lines, Inc., 1990 I.C.C. LEXIS 350, at *6 (court asked to determine whether party was a broker, shipper's agent or freight forwarder). Most of this litigation can be avoided by requiring freight brokers to maintain the same level of liability insurance as freight forwarders.

57 Fifty-nine percent of all brokers have been in business less than seven years. Dinell, *supra* note 22, at 11.

58 Brown, *supra* note 43, at 6 (this number included household goods brokers and many inactive freight brokers).

59 BROWN, *supra* note 5, at 64.

60 During this same period, the number of motor carriers tripled from 12,900 in 1978 to 39,000 in 1992. BROWN, *supra* note 5, at 9.

61 Crum, *supra* note 27, at 39. Approximately 1,000 licensed brokers are members of the Transportation Brokers Conference of America, the freight brokers' lobbying association. Dinell, *supra* note 22, at 11.

62 Fuerst, *supra* note 9, at 46.

63 During a five-week period in 1987, 200 new brokers were added to the rolls and 189 were deleted. This amounts to an annual turnover rate of 33%. *1987 Hearing*, *supra* note 11, at 17. There is a dispute over whether the brokerage industry will continue to expand. *Compare* Property Broker Practices, 132 M.C.C. 233 (1980), and Crum, *supra* note 27, at 52-53.

64 Brown, *supra* note 37 at 45. Sixty percent of brokers are independently owned; most of the rest are departments or subsidiaries of motor carriers. *See also* Terrance A. Brown, *Size and Operating Characteristics of Property Brokers*, 29 TRANSP. J. 52, 55 (Summer 1990). As many as 50% of carriers and 12% of shippers operate as freight brokers. Crum, *supra* note 27, at 51.

forty-eight contiguous states.[65] A large broker may deal with more than 500 carriers and 150 domestic and international shippers.[66] Shippers who use brokers tend to be small manufacturers employing fewer than 100 workers.[67] The primary reason shippers hire brokers is to obtain lower prices, although many shippers utilize brokers for service reasons.[68] Nearly sixty percent of carriers and forty-five percent of shippers utilize brokerage services.[69]

Most brokerage service is arranged by telephone, with the parties rarely meeting face-to-face.[70] Shippers place transportation orders with brokers, who in turn telephone carriers to arrange for the actual pickup and delivery of the shipper's freight.[71] Once the freight is delivered, the broker bills the shipper and the shipper sends payment directly to the broker. The broker then remits a portion of this payment to the transporting carrier.[72] The broker typically keeps between ten and fifteen percent of the charges as its commission.[73] A broker may charge any price it can obtain for its service and may change prices without notice; unlike common carriers, brokers are not required to file their rates with the ICC.[74]

A reputable brokerage industry would have unlimited potential in the transportation industry. Unfortunately, it is all too easy for crooked or seriously undercapitalized intermediaries to take advantage of the current deregulated marketplace to the detriment of carri-

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65 Acceptable Forms of Requests for Operating Authority (Motor Carriers and Brokers of Property), 364 I.C.C. 432, 454 (1980) (The proper description of brokerage authority for purpose of a broker application is: "To operate, in interstate and foreign commerce, as a broker of general commodities (except household goods), between points in the United States.")

66 Bassing, *supra* note 33, at 4.

67 Brown, *supra* note 37, at 46. The typical shipper who utilizes brokerage services ships between two and 20 truckloads per week of products such as paper, chemicals, petroleum, plastics, rubber, food and tobacco. Brown, *supra* note 34, at 33.

68 Brown, *supra* note 37, at 48 (for large shippers, service is more important than lower prices).

69 Crum, *supra* note 27, at 44-45 (in 1980, 119 of the 266 motor carrier respondents reported using external third parties; this number increased to 152 of 266 by 1989).

70 Johanson Transportation Service, Petition for Declaratory Order, No. MC-C-30079, 1988 I.C.C. LEXIS 298, at *8 (1988).

71 The broker may be known to the shipper, but the trucker who shows up at the dock to pick up the freight may be a total stranger. Fritz Kahn, *Get It in Writing; Contract Between Shipper and Freight Broker*, DISTRIBUTION, Sep. 1991, at 71.

72 *See, e.g.*, Andel, *supra* note 49, at 26.

73 Dinell, *supra* note 22, at 11 (broker's usual commission is 12 or 13%).

74 Brown, *supra* note 43, at 10 ("In contrast, common carriers must file rates with the ICC and cannot change them instantaneously and without cost. Thus, price flexibility is an advantage brokers can sometimes have in comparison to regulated common carriers.")

ers, shippers and honest brokers.[75] Brokers, as a whole, remain a shadowy element in the transportation sector.[76] There must be laws in the marketplace to establish the stability necessary for competition to be fostered and encouraged.

III. Evolution of Brokerage Regulation

Federal regulation of brokers has come full circle in the last sixty years. In the 1920s, freight brokers engaged in business virtually free of federal regulation. Between 1935 and 1980, brokers were heavily regulated by the ICC. Since 1980, brokers have been virtually free, once again, of federal regulation.[77]

Brokerage early became an incident of motor transportation, as described in *P.D. Copes Broker Application*:[78]

> the vast majority of motor carriers of freight are small operators with only a few pieces of equipment and neither a need for nor means to support a large organization including salaried solicitors. . . . Nevertheless, economy and efficiency of operation require that they have some means of obtaining at points away from their home bases either return loads or lading for some other point.
>
> Out of this situation there grew up, long prior to the adoption of the Motor Carrier Act, 1935, . . . agencies independent of both carriers and shippers, devoted to the solicitation of traffic to be moved by carriers selected by them from whom they exacted a charge for their services. . . . In theory, the system was designed to work not only to the convenience of the carriers, but also to that of shippers and passengers, many of whom were not sufficiently informed or situated so that they could readily locate available motor-carrier service when desired, but the resulting dependence of both carriers and shippers or passengers on these independent transportation agents gave rise to abuses. Irresponsible persons exacted excessive charges for their services or engaged the services of unreliable and unqualified carriers, or both. Available traffic was held out to competing carriers, and the bids of each were used to beat down the price of others until all were reduced to a bare subsistence basis, and unconscionable commissions were obtained by the brokers.[79]

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75 *1987 Hearing, supra* note 11, at 24-30 (in one case, a broker filed bankruptcy listing 133 carriers as creditors for a total of more than $300,000).

76 Joseph V. Barks, *Brokers Close In*, Distribution, Nov. 1984, at 48-49 (victims of broker abuse "from both the carrier and shipper sides are also quick to relate grisly details about demands for large cash advances, incidents of false or deceptive representation, subversive schemes, take-the-money-and-run scams, smash-the-freight-and-hide stunts, and other sordid crimes").

77 *See generally*, Samuel P. Delisi, *Interstate Commerce Commission Regulation, 1887-1987: The Carrier Viewpoint*, 54 Transp. Prac. J. 262 (1987).

78 27 M.C.C. 153 (1940).

79 *Id.* at 154-55.

In the 1920s, brokers were unregulated on the federal level.[80] Regulatory control of interstate commerce rested with the states. Brokers operating in different states had to obtain authority from each jurisdiction through which they passed.[81] The state regulations covered a variety of fields, including the grant of operating certificates, the regulation of rates and the prescription of compulsory insurance.[82]

On March 2, 1925, the Supreme Court handed down its decision in *Buck v. Kuykendall*,[83] in which it held that states may not restrict the operations of motor vehicles engaged in interstate commerce unless the state regulation was aimed primarily at assuring safety or conservation of highways. As a result of this decision, there was no economic regulation of interstate motor carriers and brokers, either state or federal, for the next ten years, but the forces which would shape the 1935 Act were already in place.[84]

A. Motor Carrier Act of 1935

After *Buck*, Congressional attention was focused on the problem of motor carrier regulation. From 1925 to 1934, thirty-one bills were introduced in Congress seeking federal regulation of motor transportation.[85] It was widely believed that unrestrained competition was not the solution to the ills of the transportation industry.[86] The public sentiment favored federal regulation of interstate commerce.[87]

Not infrequently, shippers patronizing brokers in the early 1930s were subjected to great inconvenience or substantial losses, without

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80 Brown, *supra* note 43, at 5-7. Prior to the enactment of the 1935 Act, the ICC administered steam railroads, electric railways, express companies, sleeping car companies, pipelines and steamship companies.

81 William E. Thoms, *Rollin' On To A Free Market Motor Carrier Regulation 1935-1980*, 13 TRANSP. L. J. 43, 47 (1983) (to this date, carriers must still obtain license plates from each state through which they pass).

82 Coordination of Motor Transportation, 182 I.C.C. 263, 371 (1932). The states also regulated safety devices, size, weight and speed of vehicles, and the prescription of uniform accounting procedures. The gradual improvement in the conditions of motor carriers in the early 1930s is attributed to comprehensive state regulations. S. Rep. 152, 73d Cong., 2d Sess. 24 (1934).

83 267 U.S. 307 (1925) (court struck down a Washington law which required motor carriers to obtain certificates declaring that the public convenience and necessity required their services).

84 George M. Chandler, *Convenience and Necessity: Motor Carrier Licensing by the Interstate Commerce Commission*, 28 OHIO ST. L.J. 379, 380 (1967) (the year after *Buck*, the ICC instituted an investigation into the possibilities of regulating interstate motor transportation; its conclusion was that while regulation was probably in the public interest, the primary responsibility should be turned back over to the states).

85 S. Rep. 641, 96th Cong., 2d Sess. 87 (1980).

86 Coordination of Motor Transportation, 182 I.C.C. 263, 380 (1932).

87 *Id.*

recourse against the brokers.[88] Long hours, unsafe operations and low earnings of motor carriers were attributed to unregulated brokers.[89] These conditions precipitated the passage of the 1935 Act.

A series of reports from the Commerce Commission and the Federal Coordinator of Transportation preceded the regulation of freight brokers. The first report called "for the issuance of brokerage permits to insure responsibility of transportation agents or brokers and to lessen the present evils of brokerage in transportation."[90] In the second report to Congress, the Coordinator proposed "more thoroughgoing regulation of brokers or transportation agents."[91] To avoid confusion, this report used the term "licenses" instead of "permits."[92] Licenses would be required of all persons "making contracts, agreements, or arrangements to provide transportation of persons or property in interstate or foreign commerce."[93] A showing of public interest and financial responsibility was a condition to the issuance of a license.[94]

The purpose of Congress in regulating freight brokers was to protect carriers and the shipping public from dishonest and financially unsound middlemen.[95] To this end, section 211(c) of the 1935 Act directed the ICC to prescribe rules and regulations for the protection of the public to be observed by anyone holding a broker's license.[96] The ICC was authorized to establish reasonable requirements with respect to licensing, financial responsibility, accounts, records, reports, operations, and practices of brokers.[97]

As for entry into the brokerage market, § 211 of the 1935 Act, in essence, provided:

> no person shall engage in operation as a broker of motor transportation of passengers or property unless it has first established that its proposed service is or will be consistent with the public interest and the national

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88 Practices of Property Brokers, 49 M.C.C. 277,279 (1949) (often the carrier is merely a dupe of the transportation agent who supplies it with business, takes a disproportionate share of the rate, and repossesses the carrier's equipment upon the carrier's failure to meet payments or its refusal to handle further shipments).

89 P.D. Copes Broker Application, 27 M.C.C. 153,157 (1940).

90 S. Rep. 152, 73d Cong., 2d Sess. 47 (1934).

91 H. Rep. 89, 74th Cong., 1st Sess. 61-62 (1935).

92 *Id.*

93 *Id.*

94 *Id.*

95 Milan Express Co. v. Western Sur. Co., 792 F. Supp. 571, 574 (M.D. Tenn. 1992) (motor carriers are entitled to proceeds of broker's surety bond).

96 1935 Act § 221(c).

97 *Id.* at § 204(a).

transportation policy and has obtained a broker's license authorizing such service.[98]

The ICC interpreted this statute as requiring issuance of a broker's license to any applicant who convincingly demonstrates (1) that it is fit, willing and able to properly perform the proposed service and to conform to governing statutes and regulations; and (2) that the proposed service is or will be consistent with the public interest and the national transportation policy.[99] An applicant seeking authority had to show that its services would fulfill a useful public function and would contribute something of value to the shipping public.[100]

The "fitness" portion of this standard involved four factors: good general character, an ability to conduct the proposed operations in a manner satisfactory to patrons, willingness to comply with regulatory requirements, and the ability to obtain the required bond.[101] The "public interest" aspect of § 211(b) encompassed a broader range of deliberation than did the "fitness" standard. The applicant was required to prove that its proposed operations would not needlessly duplicate existing services.[102] Consideration of existing brokerage service was relevant to brokerage applications for it was obvious that the creation of needlessly duplicative services is not in the public interest.[103] In fact, as early as 1938, the ICC denied a brokerage application because of possible adverse affects on existing service, even though the application was unopposed.[104] As of November 30, 1946, the ICC had issued 154 broker licenses and denied approximately 700 applications.[105] Of those issued, twenty-one were to freight brokers.[106]

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98 Entry Control of Brokers, 126 M.C.C. 476, 479 (1977), *vacated and remanded*, 591 F.2d 896 (D.C. Cir. 1978). Entry of brokers under § 211(b), where the governing test is consistency with public convenience and necessity, is not as stringent as the public convenience and necessity criteria applied in motor carrier applications pursuant to § 207 of the 1935 Act. Paul S. Dempsey, *Entry Control Under The Interstate Commerce Act: A Comparative Analysis Of The Statutory Criteria Governing Entry In Transportation*, 13 WAKE FOREST L. REV. 729, 770 (1977).

99 Dempsey, *supra* note 98, at 761-62.

100 Dempsey, *supra* note 98, at 762.

101 *Entry Control of Brokers*, 126 M.C.C. at 485-86 (the requirement that a broker furnish a $5,000 security bond was designed to ensure the broker's continuing financial ability to operate).

102 *Id.* at 484. Normally, the applicant was required to make such a showing through testimony of potential shippers and carriers, although it was theoretically possible to make such a showing based on a convincing plan of future operations. *Id.* at 484.

103 *Id.* at 483-84.

104 *See* Interstate Ticket Sales, Inc., Broker Application, 8 M.C.C. 483 (1938).

105 Practices of Property Brokers, 49 M.C.C. 277, 280-81 (1949).

106 *Id.* (approximately 80 of the licenses were issued to brokers of property, and of this number 21 were issued to brokers of general commodities; the balance were issued to special commodity brokers and brokers of household goods).

Following the passage of the 1935 Act, the ICC moved slowly to adopt broker regulations. In 1936, the ICC mandated that all brokers secure a $5,000 surety bond before being issued a license.[107] In 1942, the ICC prescribed rules requiring brokers to maintain certain records.[108] Seven years later, the ICC enacted a comprehensive set of regulations governing the practices of freight brokers.[109] These regulations defined the terms "brokers" and "brokerage services"; required the maintenance of certain brokerage records;[110] required brokers to utilize the services of licensed carriers; and prohibited brokers from collecting rebates.[111]

The 1935 Act made entry into the market not only difficult, but expensive.[112] Those who acquired licenses, however, prospered during this period.[113] Between 1935 and the late 1970s, brokers were protected from the forces of competition that virtually every other business had to deal with on a daily basis.[114] All this was to change in the late 1970s, first by administrative action and then by legislation.

B. Administrative Deregulation

During the late 1970s, deregulation embraced a multitude of diverse industries, including airlines, railroads, bus companies, telecommunications, broadcasting, banking, cable television, oil and gas, pipelines and motor carriers.[115] The Airline Deregulation Act,[116] for example, completely deregulated the air transportation industry.[117]

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107 Motor Carrier Ins. for Protection of the Public, 1 M.C.C. 45, 59 (1936) (no one at the hearing objected to this amount).

108 Records of Passenger Brokers, 32 M.C.C. 267, 268 (1942) (passenger brokers).

109 Practices of Property Brokers, 49 M.C.C. 277 (1949). The rules considered in this opinion were slightly modified in 1951. *See* Practices of Property Brokers, 53 M.C.C. 633 (1951).

110 The primary purpose of the record keeping requirements was to ascertain whether improper rebating activities were taking place. 45 Fed. Reg. 31, 140 (1980) (to be codified at 49 C.F.R. pt. 1045) (proposed May 12, 1980).

111 *Practices of Property Brokers*, 49 M.C.C. at 286-328. The ICC refused, however, to adopt rules limiting the amount of fees a broker could charge for its services. *Id.* at 308-18.

112 *1987 Hearing*, *supra* note 11, at 34.

113 H. Rep. 1069, 96th Cong., 2d Sess. 2 (1980) ("the motor carrier of property industry for all intents and purposes is a healthy industry that effectively competed with other freight-hauling modes"); Cong. Rec. 7767, 7777 (Daily ed. Apr. 15, 1980) (statement of Sen. Cannon) (reporting that the motor carrier industry of the late 1970s was financially sound).

114 *Id.*

115 *See generally*, Paul S. Dempsey, *Interstate Trucking: The Collision of Textbook Theory and Empirical Reality*, 20 TRANSP. L. J. 185, 186 (1992).

116 Airline Deregulation Act of 1978, Pub. L. No. Law 95-504, [Federal Laws], 92 Stat. 1705 (1978).

117 Thoms, *supra* note 81, at 69. ("By 1978, Americans had an example of deregulation. The Air Cargo Deregulation Act and the Airline Deregulation Act had been passed, thus creating a

During this same period, economists persuaded Presidents Carter and Reagan to appoint conservatives to the ICC, who in turn began a defacto deregulation of the motor transportation industry.[118] Both Presidents believed that four decades of federal regulation had impeded the operating efficiency of motor carriers and brokers, resulting in inadequate service and higher costs.[119]

Even before the enactment of the Motor Carrier Act of 1980, the ICC began to remove entry barriers into the brokerage market by granting brokerage authority on a fitness only test.[120] The Commission determined that there was no compelling reason to require each brokerage applicant to establish that its proposed service would be consistent with the public interest and the national transportation policy, so the Commission made a general finding that all brokerage operations were consistent with the public interest and the national transportation policy.[121] After this point, protests to brokerage applications were limited to matters pertaining to the applicant's fitness.[122] Harm to existing brokers was no longer sufficient to block the issuance of a broker's license; opponents were required to show that the proposed service would be injurious to the public as a whole.[123]

The arguments advanced in favor of eased entry controls included:

> (1) smaller carriers would be able to compete more effectively with larger carriers if entry control were eased, (2) only bonding and record maintenance requirements seem necessary, (3). . .(4) for the smaller business, the cost of obtaining a broker license is prohibitively expensive, (5) the chances of success in obtaining a broker license, when weighed with the high cost, deter broker applications, [and] (5) present licenses are now too restrictive in the geographical scope. . . .[124]

The Commission also determined that there was no longer any need to impose commodity or territorial limitations on brokerage ap-

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sunset law for the CAB. Although there have been many adverse effects on price and service since the passage of these laws, there were enough one-shot benefits with innovative fares by airlines entering new markets to make the idea of deregulation palatable to customers.") *See also* Beth S. Adler, Comment, *Deregulation in the Airline Industry: Toward a New Judicial Interpretation of the Railway Labor Act*, 80 Nw. U. L. Rev. 1003 (1986).

118 Dempsey, *supra* note 115, at 187.

119 40 Cong. Q. 335 (Feb. 20, 1982).

120 Entry Control of Brokers, 126 M.C.C. 476, 485-86 (1977). It was within the ICC's authority to adopt a general finding that the public interest was served by the licensing of "fit" brokers. National Tour Brokers Ass'n v. I.C.C., 671 F.2d 528, 530 (D.C. Cir. 1982).

121 Entry Control of Brokers, 126 M.C.C. at 478 & 525.

122 Entry Control of Brokers, 126 M.C.C. at 525.

123 Thoms, *supra* note 81, at 74.

124 Entry Control of Brokers, 126 M.C.C. at 486.

plicants, since the focus of the application process was on the applicant's fitness and not existing competition.[125] In exchange for easier entry, the ICC increased the broker's security bond requirement from $5,000 to $10,000.[126] In 1980, the ICC revised the regulations governing brokers to reflect its new entry controls.[127]

Opponents of eased entry controls claimed that the ICC had bowed to deregulation pressures, attempting to quiet critics by deregulating a small segment of the motor transportation industry in the belief that this would show internal reform, without upsetting the entire industry.[128] They argued that if unchecked, brokers would exploit small shippers and carriers for the sake of profit alone, at the expense of efficient transportation service.[129] These warnings went unheeded by the ICC.

The open entry policy adopted by the ICC led to a large increase in the size of the freight brokerage industry.[130] By 1979, the ICC was granting nearly ninety-eight percent of applications.[131] The ICC's defacto deregulation served as a prelude to the Motor Carrier Act of 1980.

C. Motor Carrier Act of 1980

There was an increasing pressure in the late 1970s, at both the state and federal levels, to reduce government involvement in the private sector. Over the years, the federal government had become increasingly involved in the management of the nation's transportation system.[132] Congress had built a patchwork of economic regulation

125 Entry Control of Brokers, 126 M.C.C. at 513-14.

126 Entry Control of Brokers, 126 M.C.C. at 526.

127 49 C.F.R. pts. 1043-45 (1980). The regulations adopted in 1980 included bonding requirements; definitions of the terms "broker," "bona fide agents," "brokerage service," and "non-brokerage service"; record maintenance requirements; prohibition against representing brokers as carriers; ban on receiving rebates; outline of the duties and obligations of brokers; and mandatory accounting procedures.

128 Entry Control of Brokers, 126 M.C.C. at 490 (one respondent cautioned that eased entry control might mislead the public into thinking that every ICC-licensed individual was a reliable broker).

129 Entry Control of Brokers, 126 M.C.C. at 490-91.

130 Brown, *supra* note 43, at 6.

131 Dempsey, *supra* note 17, at 4. Most applicants escaped serious scrutiny. For example, the ICC issued operating authority to a convicted felon. *See* Wilkett v. I.C.C., 710 F.2d 861, 862 (D.C. Cir. 1983).

132 *President's Message to Congress Transmitting Motor Carrier Reform Act*, H.R. Rep. No. 307, 94th Cong., 1st Sess. 1 (1975). The portion of the motor carrier industry subject to federal regulation in 1979 was composed of 17,000 trucking firms that generated about $41.2 billion in transportation revenues. Regulated carriers, however, comprised less than 50% of the market. *See* H. Rep. 1069, 96th Cong., 2d Sess. 2 (1980).

that had stifled a naturally competitive industry.[133] The trucking industry had changed dramatically since 1935, but federal regulation had remained static.[134] The general consensus in Congress was that a competitive marketplace could serve the needs of interstate commerce better than a few bureaucrats in Washington.[135] Supporters of deregulation argued that it was impossible for any agency, no matter how wise and benevolent, to apply a 1935 statute to 1980 transportation problems.[136]

The Motor Carrier Act of 1980 established as federal policy the promotion of competition and efficiency among carriers and brokers of property in order to achieve certain goals.[137] Those goals included meeting the needs of shippers, consignees and consumers; allowing price flexibility; encouraging greater efficiency, particularly in the use of fuel; providing better service to small communities; and opening the market to minority groups.[138] The purposes of the Act were to reduce unnecessary federal regulation,[139] encourage competition,[140] and overhaul the outmoded and archaic regulatory scheme imposed in 1935.[141]

Technically, the 1980 Act did not deregulate the trucking industry, but re-regulated it.[142] It represented a sort of middleground between continuing the regulation of the previous 45 years, on the one

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133 H. Rep. 1069, 96th Cong., 2d Sess. at 2-6. For instance, the ICC had 36 categories of exempt and non-exempt products listed under the heading of milk and cream. Buttermilk was exempt from regulation, but butterfat and buttermilk with condensed cream were regulated. Constituted skim milk and powdered milk were exempt, but condensed milk and evaporated milk were not. Thoms, *supra* note 81, at 69.

134 *President's Message to Congress Transmitting Trucking Competition and Safety Act of 1979*, H.R. Rep. No. 155, 96th Cong., 1st Sess. 3 (1979).

135 Cong. Rec. 7767, 7777 (daily ed. Apr. 15, 1980) (statement of Sen. Cannon); 24 TRANSP. & DISTRIBUTION 21 (May 1983).

136 Cong. Rec. 7767, 7777 (daily ed. Apr. 15, 1980) (statement of Sen. Cannon). Opponents of deregulation countered with the argument that Congress was discarding a rich background of knowledge and experience on the basis of highly partial evaluations of deregulation. S. Rep. 641, 96th Cong., 2d Sess. 88 (1980).

137 Acceptable Forms of Requests for Operating Authority (Motor Carriers and Brokers of Property), 364 I.C.C. 432, 434 (1980). The 1980 Act was the product of over 18 months of continuous study in which 16 days of hearings were conducted and 215 witnesses testified. *See* H. Rep. 1069, 96th Cong., 2d Sess. 1 (1980).

138 H. Rep. 1069, 96th Cong., 2d Sess. at 3 ("The bill offers increased opportunities for new carriers to get into the trucking business and for existing carriers to expand their services.").

139 H. Rep. 1069, 96th Cong., 2d Sess. at 3.

140 Stephen J. Wallis Broker Application, No. MC-254878, 1992 M.C.C. LEXIS 159, at *3 (I.C.C. Oct. 29, 1992).

141 H. Rep. 1069, 96th Cong., 2d Sess. at 6-7.

142 *See generally* Lloyd N. Cutler, *Regulatory Mismatch and Its Cure*, 96 HARV. L. REV. 545 (1982) (reviewing Stephen Breyer, *Regulation and Its Reform*, (1982)).

hand, and total deregulation, on the other hand.[143] Because the trucking industry fought deregulation so bitterly, the final version of the 1980 Act was considerably softened.[144] There remained a greater degree of regulation over trucking than existed for any industry of comparable size.[145]

In a practical sense, however, the brokerage industry was completely deregulated. The 1980 Act codified the relaxed entry controls that the ICC had formulated in 1978.[146] The ease of entry, coupled with the Commission's laissez-faire policies, caused many brokerage applicants to escape serious scrutiny.[147] Posting a $10,000 bond and securing service agents[148] are the only remaining prerequisites to acquiring a brokerage license.[149]

During the 1980s, the ICC became a politically administered agency bent on promoting free enterprise.[150] Despite strong warnings from Congress and the courts, the Commission has repeatedly disregarded the few brokerage laws still on the books after the 1980 Act.[151] With the support of the White House, the ICC continued its program of administrative deregulation throughout the 1980s.[152]

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143 S. Rep. 641, 96th Cong., 2d Sess. 2 (1980). One of the principal purposes of the 1980 Act was to curtail the ICC's runaway deregulation. Dempsey, *supra* note 17, at 5 ("The Constitution confers on Congress, not the ICC, the power to regulate interstate and foreign commerce.")

144 *Florida's Test of Truck Deregulation*, BUSINESS WEEK, Sep. 22, 1980, at 125.

145 President's Message to Congress Transmitting Trucking Competition and Safety Act of 1979, H.R. Doc. No. 155, 96th Cong., 1st Sess. 4 (1979). One commentator cynically summed up the federal government's ever-changing regulatory policy as follows: "There will always be regulation — perhaps not as we have known it in the past in the transportation industry, but in some form. Regulation is hidden in every legislation designed to cancel some regulatory item. It's like a pancake — you flip it over, and it's still a pancake." MARTELL, *supra* note 5, at 21.

146 *See generally* Thoms, *supra* note 81, at 73-75. Section 10924 of the 1980 Act eliminated the requirement that the ICC find that an applicant's proposed service is consistent with the public interest and the national transportation policy. The ICC must determine only that the applicant is fit, willing and able.

147 Thoms, *supra* note 81, at 73-75. All third party operators are, for the most part, unregulated today. The ICC continues to issue licenses to brokers, but certification is merely a formality. Crum, *supra* note 27, at 38-39. There are essentially no natural or institutional barriers to entry. Thoms, *supra* note 81, at 73-75.

148 A broker must, after approval and before operations, file with the ICC a list of service agents in the 48 contiguous states. MARTELL, *supra* note 5, at 34. A broker may appoint a state's secretary of state as its service agent, but this will subject the broker to personal jurisdiction in that state. Ocepek v. Corporate Transport, Inc., 950 F.2d 556 (8th Cir. 1991).

149 *See generally*, 49 C.F.R. pts. 1043-45 (1992). Applicants must also pay $150 fee for a brokerage license. *See* Regulations Governing Fees for Services in Connection with Licensing, 1 I.C.C.2d 60 (1984).

150 *1987 Hearing, supra* note 11, at 42 (statement Senator Exon).

151 Dempsey, *supra* note 17, at 50.

152 Dempsey, *supra* note 17, at 10. Some members of Congress thought the ICC was moving too slowly in deregulating the motor transportation industry. 40 CONG. Q. 335 (Feb. 20, 1982).

In 1935, Congress regulated brokers in an effort to curtail competition. Forty-five years later, Congress repealed a large part of the 1935 Act hoping, ironically, to promote competition. While the 1935 Act stifled the brokerage industry's growth, the 1980 Act created excessive capacity, declining productivity, destructive competition and an increased number of bankruptcies.[153] The brokerage industry has progressively suffered every year since 1978.[154] Transportation costs, which were predicted to decrease with deregulation, have increased at alarming rates.[155]

In the last ten years, a number of bills have been introduced in Congress to sunset the ICC and thereby completely deregulate brokers.[156] None of these bills has succeeded, and rightfully so.[157] The brokerage industry has suffered enough under deregulation. It is time to stop the bleeding. This does not mean that Congress should return to the stifling regulations of 1935. Rather, the solution is for Congress to enact a comprehensive set of regulations like those proposed in this article.

D. Intrastate Regulation

If a freight broker wishes to broker freight intrastate, it must comply with the regulations of that state. Not all states regulate brokers; therefore, a broker must check the laws of the states in which it transports freight.[158] As of 1992, fifteen states regulated the intrastate operations of brokers.[159] Although not uniform, the state regulations typically require brokers to obtain licenses, post bonds, and in some instances, maintain liability insurance.[160]

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153 *See* Dempsey, *supra* note 115, at 188 ("The free market had produced the worst economic collapse in history, and millions of Americans lost their jobs, their homes, their self esteem, and their faith in the philosophy of laissez faire.").

154 Dempsey, *supra* note 115, at 193.

155 Dempsey, *supra* note 115, at 191-93.

156 *See, e.g.*, James E. Bartley, *Cooperation and Advocacy Rule*, 32 TRANSP. & DISTRIBUTION, Apr. 1991, at 10.

157 Some commentators have noted that fly-by-night brokers will be in the "catbird seat" if the ICC is dissolved. *See, e.g.*, Russ, *supra* note 8, at 30.

158 MARTELL, *supra* note 5, at 8.

159 *See* State Motor Carrier Guide (CCH) (1992). The states that regulate freight brokers are Alabama, Arkansas, California, Illinois, Indiana, Massachusetts, Nevada, New Mexico, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, Virginia and Washington.

160 *See, e.g.*, TEX. REV. CIV. STAT. art. 911f §§ 4,5,8,12 (1993).

IV. The Brokerage Industry's Problems

Prior to deregulation, the brokerage industry was trustworthy and reliable. Admittedly, this reputation may have resulted from the fact that there were less than a dozen brokers in existence during this period. Deregulation, however, has changed the public's image of freight brokers. There is now a black cloud hanging over the brokerage industry.[161] Carriers and shippers, who once trusted brokers without a second-thought, now consider it a "gamble" to deal with brokers.[162] One commentator summed up the disdain for brokers by reporting that transportation people no longer tell horror stories, they now tell broker stories.[163] The reputation of brokers has declined so far that brokerage industry leaders now suggest that brokers refrain from using the word "broker" in their business names.[164]

Broker abuse costs motor carriers and shippers thousands of dollars each year and has driven several firms into bankruptcy.[165] During 1987, the ICC received 610 broker complaints, most of which concerned the failure of brokers to remit freight charges.[166] One carrier reported a $100,000 loss over a four-year period from using brokers.[167] Shippers have discontinued using brokers,[168] and carriers have called for their elimination from the transportation industry.[169]

Carriers, shippers and reputable brokers agree on one thing: the image of brokers needs improvement and this improvement will occur only if brokers conduct business in a professional manner.[170] Brokerage is a service business that depends on trust.[171] The brokerage industry will not achieve the trust it needs to prosper as long as the duties and responsibilities of brokers remain uncertain.

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161 Brokerage industry leaders claim that the negative publicity is attributable to the acts of unlicensed transportation intermediaries. They claim that 80% of the broker complaints received by the ICC relate to unlicensed intermediaries. *See, e.g.*, Stachura, *supra* note 3, at 4.

162 Brown, *supra* note 34, at 35-36 (carriers reported losing up to $300,000 using brokers).

163 Barks, *supra* note 76, at 48 (author refers to brokers as "Godzillas" of deregulation).

164 Martell, *supra* note 5, at 39.

165 *1987 Hearing*, *supra* note 11, at 4 (statement of Senator Pressler).

166 1987 Hearing, *supra* note 11, at 3. (statement of Senator Packwood).

167 Brown, *supra* note 34, at 35-36.

168 E.J. Muller, *Forwarders v. Brokers*, 91 Distribution 38 (1992) (brokers simply locate freight for carriers and do not offer the same level of service or accountability shippers receive from freight forwarders).

169 Russ, *supra* note 8, at 30 (quoting Forrest Baker) ("[t]he only carrier who will use a broker is one who doesn't have freight").

170 *See* Brown, *supra* note 5, at 3.

171 See Brown, *supra* note 5, at 3.

A. Freight Charges

In a typical brokerage transaction, the broker sends a freight bill to the shipper and the shipper sends payment directly to the broker.[172] The broker, in turn, remits the payment to the delivering carrier, retaining a portion for its commission.[173] Unfortunately, it has become all too common for brokers to collect freight charges from shippers and then fail to remit any portion to the carriers.[174]

Motor carriers have complained for years of brokers who prolong payment, fail to pay, or file bankruptcy to avoid payment.[175] Studies indicate that nearly ten percent of brokers have failed to remit freight charges to carriers, and the number is increasing.[176] Due to the current deregulated marketplace, disputes concerning the failure of brokers to remit freight charges invariably lead to protracted litigation.[177]

1. A Shipper's Double Jeopardy

As a general rule, the shipper has the primary obligation to pay the carrier's freight charges,[178] but often freight charges are paid by the shipper to a broker or other transportation intermediary.[179] All too frequently, these intermediaries fail to pay the carrier which physically delivered the freight.[180] In such cases, the delivering carrier frequently seeks payment from the shipper. In recent years, shippers

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172 Brown, *supra* note 34, at 33 (in some cases, the carrier bills the shipper for the delivery and then remits a portion of the shipper's payment to the broker).

173 The amount of broker's commission is determined by agreement between the broker and carrier and usually ranges between ten and 15 percent of the freight charges. *See, e.g.*, Dinell, *supra* note 22, at 11 (broker's commission is usually 12-13% of bill). It is not unusual, however, for a broker's commission to exceed 35% of the freight charges. Practices of Property Brokers, 49 M.C.C. 277, 309 (1949). There are no limitations on the amount of fees a broker may charge. 45 FED. REG. 31140, 31141 (1980) (to be codified at 49 C.F.R. pt. 1045) (proposed May 12, 1980). The broker's revenue is dependent upon finding a carrier willing to haul the freight for a price lower than that offered by the shipper. Brown, *supra* note 37, at 45.

174 *1987 Hearing*, *supra* note 11, at 3-5; Milan Express Co. v. Western Sur. Co., 886 F.2d 783, 784 (6th Cir. 1989). As a practical matter, shippers should require brokers to execute a written contract whereby the broker agrees to be solely responsible for the delivering carrier's freight charges. *See generally* Muller, *supra* note 168, at 38.

175 BNA Daily Report for Executives, *available in* LEXIS, Nexis Library, BNA File, DER No. 219; Pg. A-16 (Nov. 16, 1987).

176 Andel, *supra* note 49, at 24 (of the 6,700 licensed brokers, 500 have been reported by at least one carrier for non-payment of freight bills exceeding $100).

177 This assumes, of course, that it is economically feasible for the carrier or shipper to pursue such litigation. Very often, the costs of retaining a lawyer to pursue the claim will far exceed the amount of the claim itself, which generally does not exceed $2,000. *1987 Hearing*, *supra* note 11, at 13-14.

178 SAUL SORKIN, 3 GOODS IN TRANSIT § 2201 (1993).

179 *Id.*

180 *Id.*

have been repeatedly sued by carriers seeking "double payment." In all such cases, the shipper paid the broker, but the broker absconded with the funds never to be seen again. The liability in these cases often depends on common law contract and agency principles.[181] These suits involve a battle of two innocent parties, both of whom were duped by fast-talking, undercapitalized brokers.

The most recent decision in this area is *ANR Freight System, Inc. v. Weldbend Corporation*.[182] In that case, Fleet-Rail, Inc., an ICC-licensed broker,[183] was occasionally hired by Weldbend Corporation to arrange for the transportation of Weldbend's freight. In some instances, Fleet-Rail contracted with ANR Freight Systems, Inc. ("ANR"), an ICC-licensed common carrier, to physically deliver the freight.[184] Fleet-Rail was named as the "carrier" on the bill of lading, and Weldbend was named as the "shipper."[185] ANR never had any contact with Weldbend, other than when ANR's drivers arrived at Weldbend's facility to pick up the freight.[186] After delivery, Fleet-Rail would send a freight bill to Weldbend, which Weldbend would pay directly to Fleet-Rail.[187] ANR would then send a separate freight bill to Fleet-Rail, which Fleet-Rail was supposed to pay to ANR from its own accounts.[188] Over a two-year period, Fleet-Rail failed to remit more than $80,000 to ANR.[189] ANR did not inform Weldbend of Fleet-Rail's arrearages until after Fleet-Rail filed bankruptcy.[190]

At trial, the court observed that a shipper is primarily liable for a carrier's freight charges, but nevertheless found in favor of Weldbend for three reasons.[191] First, Fleet-Rail was not an agent of Weldbend,

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181 Joseph Steinfeld, Jr., *When Is a Third Party Liable*, 90 DISTRIBUTION 90; MARTELL, *supra* note 5, at 77-78.

182 No. 90 C 1948, 1993 U.S. Dist. LEXIS 3558 (N.D. Ill. Mar. 22, 1993).

183 *Id.* at *2. Fleet-Rail was also an ICC-licensed common carrier, which on occasion hauled freight with its own trucks, *Id.*. Brokers may provide transportation themselves only if they have been issued certificates or permits to provide such transportation. MARTELL, *supra* note 5, at 56.

184 *Weldbend Corporation*, 1993 U.S. Dist. LEXIS 3558 at *3.

185 *Id.*

186 *Id.* at *5.

187 *Id.* at *4. It was undisputed that Weldbend paid Fleet-Rail in full for all of the deliveries in question.

188 *Id.* at *4.

189 *Id.* at *4.

190 *Id.* at *4-5. For almost two years, ANR attempted to collect the arrearages from Fleet-Rail. ANR chose not to inform Weldbend of the arrearages, fearing that Weldbend would terminate its relationship with Fleet-Rail, which would most likely cause Fleet-Rail to go out of business. Weldbend first learned of the arrearages when it was served with a copy of ANR's complaint. *Id.*

191 *See also* Southern Refrigerated Transp. Co. v. RLN Traffic Unlimited, No. 83 C 2745, at 6 (N.D. Ill. Apr, 23, 1985) (shipper, who paid unlicensed broker for deliveries, is not liable to

as ANR had argued.[192] Fleet-Rail set its own prices, chose its own carriers, sent out its own invoices, and received payment in its own name, all of which indicated that Fleet-Rail was an independent third-party.[193] Second, there was no contract between Weldbend and ANR. The parties' conduct unequivocally demonstrated that there were two separate contracts between the parties, one between Fleet-Rail and ANR, and one between Fleet-Rail and Weldbend.[194] Finally, ANR's failure to notify Weldbend of Fleet-Rail's arrearages equitably estopped ANR from recovering the charges from Weldbend.[195]

Likewise, in *Glosson Enterprises, Inc. v. Rexcel Company*,[196] a carrier sought payment of freight charges from a shipper who had already paid an unlicensed broker for the deliveries. In facts very similar to those in *Weldbend Corporation*, the carrier argued that it had an enforceable contract with the shipper and that the broker was an agent of the shipper. Rejecting these arguments, the court held that there was no contract between the shipper and carrier because the carrier was not named in the bills of lading and did not send freight bills to the shipper; all of the carrier's contacts were with the broker.[197] The court also declared that there was no principal-agent relationship between the shipper and the broker. The broker "operated in a completely independent manner and was not subject to any control or direction of [the shipper]."[198]

International shippers are not immune to broker abuse. In *Farrell Lines, Inc. v. Titan Industrial Corporation*,[199] an ocean carrier brought suit against an international shipper to recover freight charges for the shipment of steel between Africa and the United States. The shipper paid a broker for the delivery, but the broker failed to remit payment to the carrier.[200] Although finding that the middleman was

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carrier for double payment); Brown, *supra* note 34, at 33 ("once shipper pays the broker, the shipper has no further financial obligation to the carrier"); Muller, *supra* note 168, at 38 (shipper not liable to carrier once payment is made to broker); Fuerst, *supra* note 9, at 46 (there is no double jeopardy for freight bills when a shipper elects to deal with a broker).

192 *Weldbend Corporation*, 1993 U.S. Dist. LEXIS 3558, at *9.

193 *Weldbend Corporation*, 1993 U.S. Dist. LEXIS 3558, at *9. Actually, the court noted that Fleet-Rail was more an agent of ANR than of Weldbend. *Weldbend Corporation*, 1993 U.S. Dist. LEXIS 3558, at *4.

194 *Weldbend Corporation*, 1993 U.S. Dist. LEXIS 3558, at *9.

195 *Weldbend Corporation*, 1993 U.S. Dist. LEXIS 3558, at *9-10.

196 1984 Fed. Carr. Cases 83,137 (D. Mass. Jan. 18, 1984).

197 *Id.*

198 *Id.*

199 306 F. Supp. 1348 (S.D.N.Y. 1969).

200 *Id.* at 1349. The middleman in this case was an international freight forwarder, but the analysis of the double payment issues would be the same as that for freight brokers.

an independent contractor and not the agent of either the shipper or carrier, the court concluded that the carrier's extension of credit to the intermediary precluded the carrier from collecting freight charges from the shipper.[201]

On the other hand, a number of decisions have come down in favor of the carriers. For instance, in *Ranger Transportation, Inc. v. Wal-Mart Stores*,[202] a shipper was compelled to pay a carrier's freight charges, even though the shipper had previously made payment to a transportation intermediary.[203] Similarly, in *Dal-Tile Corporation and Red Arrow Freight Lines, Inc.*,[204] a common carrier brought suit against a shipper seeking payment of freight charges. The shipper had already paid an unlicensed broker for these same deliveries. Both litigants agreed to refer the case to the ICC for a determination of whether it was an "unreasonable practice" for a carrier to collect freight charges from a shipper who had already paid a broker for the deliveries.[205] The ICC determined that it was not an "unreasonable practice" for carriers to collect double payments from shippers.

In recent years there has been a profusion of broker litigation, much of which involves a shipper's double payment.[206] Resolving these disputes on common law principles leads to inconsistent outcomes, which itself breeds more litigation. The prospect of "double payment" undoubtedly puts a chill on both domestic and international trade. Even if shippers can avoid double payment, they incur thousands of dollars in defense costs. All of this can be averted by enacting responsible regulations.

2. *Carrier v. Broker*

It has also become common for delivering carriers to bring suit against brokers for unpaid freight charges.[207] For instance, in *Sovran*

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201 *Id.* at 1350-51.

202 903 F.2d 1185 (8th Cir. 1990).

203 *Id.* at 1187. The decision did not specify the type of transportation intermediary involved.

204 No. 40437, 1990 I.C.C. LEXIS 350 (I.C.C. May 15, 1990).

205 *Id.* at *3-4; *see also* 49 U.S.C. § 10701(a) (prohibiting any unreasonable practices in the collection of freight charges).

206 Double payment cases are also prevalent in Canada. *See generally* M. Scott Watson, *Shippers, Load Brokers, and Carriers; Who Bears the Loss When the Load Broker Defaults?* 60 TRANSP. PRAC. J. 29 (Fall 1992) (reviewing various litigation in Canada and proposing risk abatement measures stemming from the role played by load brokers in the shipper, broker, and carrier relationship).

207 There has also been litigation between brokers and shippers over unpaid freight charges; *see, e.g.*, Rumm Transp., Inc. v. General Motors Corp., No. 86-CV-40562-FL, 1988 U.S. Dist. LEXIS 18360 (Jan. 19, 1988).

Bank Southeast v. ICB Transportation Services,[208] a common carrier sued a licensed broker to recover freight charges, claiming that the broker received payment from the shipper, but failed to remit any portion thereof to the carrier.[209] The broker countered with the argument that shippers, not brokers, have the primary obligation to pay a carrier's freight charges. The court sided with the carrier, concluding that "[i]f a broker bills and collects for freight charges, it assumes the shipper's principal payment obligation to the authorized carrier which transported the shipment."[210] The court based its ruling on 49 C.F.R. § 1045.10, which provides: "Where the broker acts on behalf of a person bound by law or a Commission regulation as to the transmittal of bills or payments, the broker must also abide by the law or regulations which apply to that person."[211] This regulation, according to the court, shifted payment liability as a matter of law from the shipper to the broker.[212] According to this reasoning, if the broker undertakes the duty to bill and collect freight charges from the shipper, the broker is obligated to pay the carrier even if the shipper fails to make payment.[213]

Conversely, in *United Shipping Company v. Tucker Company*,[214] a carrier unsuccessfully asserted an action against a broker for unpaid freight charges. The court in that case noted that although the shipper has the primary obligation to pay transportation costs, this liability may be shifted to a third party.[215] Neither the Interstate Commerce Act nor 49 C.F.R. § 1045.10, however, shifts liability for unpaid freight charges to a broker.[216] On the contrary, the primary liability for freight charges may be shifted only by contract or explicit actions of the parties.[217] Mere transmittal of payment from a shipper to a bro-

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208 No. 3-89-250, 1991 U.S. Dist. LEXIS 9326 (Jul. 13, 1991).

209 *Id.* at *2-3. The broker failed to remit approximately $28,000 to the delivering carrier. *Id.* at *3-4.

210 *Id.* at *4-5. The broker billed the shippers from the outset and looked solely to the shippers for payment. Moreover, the broker, not the carrier, was named in the bills of lading. *Id.* at *2-4.

211 49 C.F.R. § 1045.10 (1992).

212 *Sovran Bank Southeast*, 1991 U.S. Dist. LEXIS 9326, at *6.

213 MARTELL, *supra* note 5, at 57; William Tucker, *What Brokers Can and Can't Do for You*, DISTRIBUTION, Feb. 1985, at 50; *but see*, BROWN, *supra* note 5, at 19 (absent an agreement, the broker is generally not liable for freight charges).

214 474 N.W.2d 835 (Minn. App. 1991).

215 *United Shipping Company*, *supra* note 214, at 840.

216 *United Shipping Company*, *supra* note 214, at 840-41 n.2.

217 *United Shipping Company*, *supra* note 214, at 841.

ker is insufficient evidence of a broker's acceptance of primary responsibility for freight charges.[218]

As in the carrier/shipper cases, actions by carriers against brokers have become commonplace. This litigation adds expense and uncertainty to an industry already teetering on financial disaster.

3. *Timely Payment of Freight Charges*

The law obligates a shipper to pay a carrier's freight charges within fifteen days of delivery.[219] It is unclear, however, whether this rule applies to brokerage transactions. The ICC has suggested that brokers must make payment to carriers within fifteen days of delivery.[220] But strangely enough, shippers are not required to make payment to brokers within the fifteen-day window.[221] As a result, a broker may be compelled to pay a carrier before it receives payment from the shipper. This, of course, could lead to serious cash flow problems for brokers. Fortunately, this problem can be corrected with a set of regulations like those proposed in this article, without adding any financial or administrative burden on brokers.

B. Undercharges

Common carriers are required to publish their rates in a tariff filed with the ICC.[222] The filed-rate governs the legal relationship between the shipper and carrier[223] and is the rate which must be charged to all shippers alike.[224] It is illegal for a carrier to agree to haul freight for any price other than the filed-rate.[225] Ignorance or misquotation of rates is not an excuse for charging either less or more than the filed-rate.[226]

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218 *United Shipping Company, supra* note 214, at 841.

219 *See* 49 C.F.R. § 1320.2 (1992), which provides that "[u]nless a different credit period has been established by tariff publication pursuant to paragraph (d) of this section, the credit period is 15 days."

220 *1987 Hearing, supra* note 11, at 18, 39 (majority of brokers delay payment from 35 to 75 days). Although bound by ICC credit regulations, the broker who pays his bills in less than 30 days is the exception. Bassing, *supra* note 33, at 4.

221 MARTELL, *supra* note 5, at 4 (brokers are required to comply with I.C.C. credit rules in making payment to carriers, but shippers are not obligated by ICC rules in making payment to brokers).

222 49 U.S.C. § 10762 (1992).

223 Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126 (1990).

224 Arizona Grocery Co. v. Atchison, T. & S.F. R.R., 284 U.S. 370, 384 (1932).

225 *Maislin*, 497 U.S. at 127 n.9.

226 *Maislin*, 497 U.S. at 127.

If a carrier agrees to haul freight for a shipper at a rate less than the filed-rate, the carrier can recover the difference between the filed-rate and the negotiated rate, which is known as the "undercharge."[227] Regardless of the inequities of this rule, carriers and their representatives in bankruptcy have asserted thousands of actions against shippers to recover undercharges. Liability in these cases is relatively straightforward. Undercharge cases take on a new complexity, however, in brokerage transactions. Some courts have allowed carriers to collect undercharges from brokers,[228] but others have not.[229] As for the liability of shippers, some commentators have suggested that brokers provide an excellent shield for shippers against undercharge liability.[230] But this would seem true only if the shipper is in a jurisdiction which shifts primary payment liability from the shipper to the broker as a matter of law.[231] The only sure way to protect shippers, brokers and carriers is to pass regulations allocating responsibility for undercharges.[232]

C. Broker's Bond

To protect motor carriers and the shipping public, the ICC will issue a broker's license only if the applicant files a bond or other type of security approved by the ICC.[233] The bonds are intended to protect both motor carriers and shippers from property abuse and to guarantee payment of past-due freight charges.[234] Originally, the bond amount was $5,000,[235] but it was increased to $10,000 in 1978.[236] The original language of the standard broker's bond identified travelers and shippers, but not motor carriers, as the intended beneficiaries of

227 Thrasher Trucking Co. v. Empire Tubulars, Inc., 983 F.2d 46, 47 (5th Cir. 1993).

228 Atlantis Express, Inc. v. Unicorn Transp. Sys., Inc., 764 F. Supp. 135, 138 (D. Minn. 1991), reversed and remanded on other grounds sub nom., Atlantis Express Co. v. Standard Transp. Serv., Inc., 955 F.2d 529 (8th Cir. 1992); *accord* Atlantis Express, Inc. v. LL Transp. Serv., Inc., 481 N.W.2d 79 (Minn. App. 1992).

229 Johanson Transp. Serv., Petition for Declaratory Order, No. MC-C-30079, 1988 I.C.C. LEXIS 298 (Sep. 8, 1988) (carrier's attempt to collect undercharges from broker is an unreasonable practice).

230 Andel, *supra* note 49, at 24.

231 *See, e.g.*, Sovran Bank Southeast, 1991 U.S. Dist. LEXIS 9326, at *6.

232 Congress has considered and rejected a number of bills in the last three years aimed a rectifying the entire filed-rate dispute. *See generally* ICC Chairman Gail McDonald's Address to Raritan Traffic Club on Current Issues, ICC's Role and Future Trends, I.C.C. News Release, 1993 Westlaw 69259, at *6 (Mar. 10, 1993).

233 49 C.F.R. § 1043.2 (1992).

234 JOHN A. APPLEMAN & JEAN APPLEMAN, INS. L. AND PRACTICE § 6142 (Supp. 1991).

235 Motor Carrier Ins. for Protection of the Public, 1 M.C.C. 45, 59 (1936).

236 Entry Control of Brokers, 126 M.C.C. at 526.

the bond.[237] In 1987, the ICC redefined the parameters of the broker's bond, stating that the bond had always protected motor carriers, as well as shippers and travelers.[238]

Brokers can satisfy the security requirement by filing a $10,000 bond or establishing a $10,000 trust fund.[239] The trust fund must be maintained at a financial institution which is licensed or qualified to do business in a state or the District of Columbia.[240] The trustee must pay all claims which arise out of the broker's failure to perform its arrangements for transportation made while the trust agreement was in effect.[241]

Almost everyone in the transportation industry agrees that $10,000 is not sufficient to protect shippers and carriers from broker abuse.[242] The bond usually covers less than ten percent of the claims asserted against brokers.[243] In *ANR Freight Systems, Inc v. Weldbend Corporation*,[244] for example, the broker failed to remit more than $80,000 of freight charges to just one carrier.

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237 *Milan Express Co.*, 886 F.2d at 784 (the primary purpose of Congress in regulation motor transportation was to protect carriers and the shipping public against dishonest or financially unstable middlemen).

238 Clarification of Ins. Regulation, No. MC-183, 3 I.C.C.2d 689 (1987). The interpretation and construction of a broker's bond is a question of federal law. Expressco, Inc. v. State Surety Co., No. 88-341-II, 1989 Tenn. App. LEXIS 846, at *6 (Dec. 29, 1989). Because the bonds are required, promulgated and regulated by the ICC, federal courts have subject matter jurisdiction in bond disputes. Milan Express Co. v. Western Sur. Co., 886 F.2d 783, 786-87 (6th Cir. 1989). Interpleader is an appropriate procedure in broker bond disputes. Frontier Ins. Co. v. Mission Carrier, Inc., No. 91-5151, 1992 U.S. Dist. LEXIS 12904, at *12 (D.N.J. Aug. 24, 1992).

239 Annual premiums on broker bonds range substantially depending on the broker's net worth. Premiums could be as low as $100 a year or as high as $500. MARTELL, *supra* note 5, at 33. Due to the large number of fly-by-night brokers who have entered the market in the last 15 years, brokers are now having difficulty securing bonds. ICC Chairman Gail McDonald's Address to Raritan Traffic Club on Current Issues, ICC's Role and Future Trends, I.C.C. News Release, 1993 Westlaw 69259, at *4 (Mar. 10, 1993).

240 Property Brokers Security For The Protection Of The Public, 3 I.C.C.2d 916, 1987 M.C.C. LEXIS 297, at *17 (1987).

241 Property Brokers Security For The Protection Of The Public, 4 I.C.C.2d 358, 1988 I.C.C. LEXIS 255, at *19 (1988). The prescribed trust fund agreement provides for a 30-day period in which the broker can replenish the fund to the $10,000 level if the fund is drawn upon. If the broker fails to replenish the fund within 30 days, the trust fund ceases to satisfy the ICC's security requirement.

242 *1987 Hearing*, *supra* note 11, at 14; Russ, *supra* note 8, at 30 (counsel for Transportation Brokers Conference of America proposed increasing bond to $50,000); MARTELL, *supra* note 5, at 7.

243 Muller, *supra* note 168, at 38; *1987 Hearing*, *supra* note 11, at 24-25 (the $10,000 broker's bond is a "joke"; the total claims against intermediaries are often six figures, and each claimant is lucky to get ten cents on the dollar).

244 No. 90 C 1948, 1993 U.S. Dist. LEXIS 3558, at *4 (N.D. Ill. Mar. 22, 1993).

An increase in the amount of the bond would drive the fly-by-night brokers out of the market.[245] With that in mind, carriers have petitioned the ICC to increase the bond to $100,000, but the Commission believes that $10,000 is an adequate amount and that any increase, while facilitating full recovery in some instances, would discourage brokers from entering the brokerage business.[246] According to the ICC, the fact that surety companies thoroughly investigate bond applicants all but eliminates questionable brokers from the market.[247]

The ICC's refusal to increase the amount of the broker's bond is another example of the fact that the ICC is more interested in promoting free enterprise than in protecting the shipping public. All agree that $10,000 is inadequate, but the ICC refuses to enact any regulation that even remotely restricts entry into the brokerage industry.[248] The time has come to increase the bond to a level that will prevent seriously undercapitalized applicants from entering the market.

D. Cargo Liability

Common carriers and freight forwarders are liable for the actual amount of any loss or damage caused to a shipper's cargo.[249] As such, they are required by law to maintain cargo liability insurance.[250] Brokers, on the other hand, are not ordinarily liable for cargo loss or damage and, therefore, are not required to maintain liability insurance.[251] Brokers merely act as intermediaries and do not usually handle

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245 *1987 Hearing, supra* note 11, at 14-15 (comments of Sen. Kasten).

246 Petition For Investigatory Rulemaking Transp. Broker Bonds, No. MC-5, 1991 M.C.C. LEXIS 133, at *6 (I.C.C. Aug. 6, 1991) ("We continue to believe that the $10,000 amount of the security is reasonably adequate for the purpose for which it was intended, to define a minimum level of financial responsibility for brokers to ensure the broker's continuing financial ability to operate properly.")

247 *Id.* at *8.

248 *See generally* Petition for Investigatory Rulemaking, 1991 M.C.C. LEXIS 133, at *13 (Commissioner Simmons, dissenting).

249 Travelers Indemnity Co. v. Alliance Shippers, Inc., 654 F. Supp. 840, 841 (N.D. Cal. 1986).

250 Removal Of Regulations Governing Cargo Liability Ins., Surety Bonds Or Other Security Required By Motor Common Carriers Of Property And Freight Forwarders, No. MC-5, 1990 M.C.C. LEXIS 75, at *2 (I.C.C. Apr. 26, 1990).

251 *Travelers Indemnity Co.*, 654 F. Supp. at 841. *But see*, FDL Foods, Inc. v. Kokesch Trucking, Inc., 233 Ill. App. 3d 245, 253, 599 N.E.2d 20, 25 (1992) (court noting that cargo liability extends to brokers under 49 U.S.C. § 10924(b) and (e)).

cargo.[252] If cargo loss or damage occurs on a brokerage shipment, the shipper ordinarily has recourse only against the delivering carrier.[253]

Although brokers are not ordinarily responsible for cargo loss or damage claims, there are three ways in which they may face such liability. First, brokers may assume cargo liability by contract. This often occurs when the bill of lading is issued with the broker named as the "carrier."[254] Second, brokers can face cargo liability if they fail to act with reasonable care in placing the cargo with a delivering carrier.[255] This is especially true if they hire carriers who are not properly insured; brokers should always inspect a carrier's cargo certificate before delivery.[256] Finally, if brokers provide services beyond merely arranging transportation they may face exposure to cargo loss on the theory that they were acting as common carriers.[257] The greater the scope of the services offered, the more likely it is that brokers will be held liable for cargo damage or loss.[258]

In the last few years, the transportation industry has witnessed the genesis of lawsuits involving a broker's liability for cargo loss. For instance, in *Tokio Marine and Fire Insurance Company v. Amato Motors, Inc.*,[259] a broker was held liable for cargo loss where the broker held itself out to the public as performing the services of a common carrier.[260] In addition, in *FDL Foods, Inc. v. Kokesch Trucking, Inc.*,[261] the court held two brokers liable for the damage caused to the shipper's freight. The court determined that 49 U.S.C. § 10924 extends cargo liability to brokers.[262]

Regulations are needed to allocate the responsibility for cargo loss or damage. These regulations will not only decrease litigation,

252 Property Brokers Security For The Protection Of The Public, 4 I.C.C.2d 358, 1988 I.C.C. LEXIS 255, at *20-21 (Mar. 14, 1988). Most shippers believe that brokers are liable for cargo damage. Russ, *supra* note 8, at 30.

253 Brown, *supra* note 34, at 32. Although not liable for damages, reputable brokers often assist shippers in recovering from the carrier. Brown, *supra* note 43, at 9.

254 *See* BROWN, *supra* note 5, at 84.

255 BROWN, *supra* note 5, at 84.

256 Removal Of Regulations Governing Cargo Liability Ins., 1990 M.C.C. LEXIS 75, at *6-7 (cargo requirements are vital to the brokerage industry; although brokers are not ordinarily liable for cargo loss, brokers can become liable in the event the carriers they retain are not properly insured).

257 BROWN, *supra* note 5, at 84.

258 BROWN, *supra* note 5, at 85.

259 770 F. Supp. 426 (N.D. Ill. 1991).

260 *Id.* at 428. In its sales literature, the broker held itself out as an actual transporter of freight, even though the sales literature explicitly stated that it was a broker.

261 233 Ill. App. 3d 245, 599 N.E.2d 20 (1992).

262 233 Ill. App. 3d at 253, 599 N.E.2d at 25.

they will also place the parties to a brokerage transaction on notice of their respective liabilities. The brokerage industry will only come of age and be fully accepted when cargo liability is properly allocated.[263]

E. Tort Liability

The last decade has also witnessed the inception of personal injury litigation against freight brokers. In *Johnson v. Pacific Intermountain Express Company*,[264] a freight broker hired a motor carrier to deliver freight for a shipper. While enroute, the carrier was involved in an accident, causing personal injuries and property damage.[265] The persons injured in the accident brought suit against the broker, claiming that it was vicariously liable for the carrier's actions.[266] The court found against the broker, concluding that the broker and carrier were involved in a joint venture and, as such, the broker was liable for the carrier's negligence.[267]

In contrast, in *Tartaglione v. Shaw's Express, Inc.*,[268] two persons injured in an accident with an unlicensed carrier sued the broker, alleging that the broker was responsible for their injuries because it failed to comply with ICC regulations mandating that a broker place goods into the stream of commerce only with a certified motor carrier.[269] The court dismissed the plaintiffs' suit, concluding that "[a]lthough Section 10924 of the ICA requires a property broker to provide for transportation only by a motor carrier holding a certificate or permit issued by the ICC, the ICA does not create a private cause of action based on violations of its provisions."[270]

These cases are typical of the profusion of broker litigation now working its way through the state and federal courts. Most, if not all, broker litigation is attributable to three factors: first, the eased entry controls of the 1980 Act which allowed seriously undercapitalized and crooked brokers to enter the market; second, the lack of regulation defining the duties and responsibilities of brokers, especially with regard to the payment and collection of freight charges; and third, the fact that responsibility for cargo loss and personal injury has never

263 *See generally* MARTELL, *supra* note 5, at 45 (many brokers already maintain liability coverage).
264 662 S.W.2d 237 (Mo. 1983), *cert. denied*, 466 U.S. 973 (1984).
265 *Id.* at 238.
266 *Id.* at 239.
267 *Id.* at 241-42.
268 790 F. Supp. 438 (S.D.N.Y. 1992).
269 *Id.* at 440.
270 *Id.* at 441.

been allocated among the parties to a brokerage transaction. Many of the cases mentioned in this section could have been avoided with the enactment of responsible regulations.

V. Solutions to the Brokerage Industry's Problems

The brokerage industry needs financial stability and certainty to prosper. Deregulation has removed the trust that was once instilled in the brokerage industry.[271] The lack of financial stability of brokers has caused many shippers, both domestic and international, to utilize other services. Responsible regulations are needed to cure the brokerage industry's ills. Accordingly, I propose that the following regulations be enacted, either by Congress or the ICC,[272] to stabilize brokerage operations. The proposed regulations, for the most part, are meant to supplement, not replace, the few broker regulations still on the books.[273] The financial stability and certainty that will be attained by the proposed regulations far outweigh the minimal financial and administrative burdens they may impose on brokers.

A. Proposed Regulation Number 1

First and foremost, the brokerage industry needs to allocate responsibility among shippers, carriers and brokers. Allocation of liability, as the following regulation proposes, will decrease litigation and increase stability in the brokerage industry:

Proposed Regulation No. 1: A freight broker is an independent intermediary which does not act on behalf of either the shipper or carrier.[274]

This proposed regulation is meant to replace the common law principal-agent disputes involved in most broker litigation.

B. Proposed Regulation Number 2

The second proposed regulation is aimed at the brokerage industry's most pressing problem: collection and payment of freight bills. In the current deregulated marketplace, disputes concerning freight charges are battled out in court using state common law principles to ascertain federal statutory rights. The following regulation is aimed at halting the senseless onslaught of litigation:

Proposed Regulation No. 2: If a broker bills and collects freight charges from a shipper, the broker assumes the shipper's primary payment obli-

271 *See generally* 24 Transp. & Distribution 21.
272 Preferably, the regulations should be enacted by the ICC as part of 49 C.F.R. pts. 1043-45.
273 *See* 49 C.F.R. pts. 1043-45 (1992).
274 This regulation should be added as the last sentence to 49 C.F.R. § 1045.2(a) (1992).

> gation for all lawful charges owed to the authorized carrier(s) which transported the freight. Payment by the shipper to an authorized broker discharges the shipper's liability for all lawful charges owed to the carrier(s) which transported the freight. All parties to brokerage transactions shall comply with the credit requirements of 49 C.F.R. § 1320.2.[275]

Enactment of this proposed regulation should significantly reduce the amount of brokerage litigation and thereby stabilize the entire industry. Cases in which carriers sued shippers for double payment will become extinct, as will cases in which carriers sued brokers for payment of freight charges. Claims by carriers for "undercharges" will be expedited, since the proposed statute makes clear that brokers assume the shippers' primary payment obligation for "all lawful charges" owed to the carrier. Finally, the last sentence of the proposed regulation requires all parties to a brokerage transaction to make payment within the fifteen-day credit window set forth in 49 C.F.R. § 1320.2. Also, unlike the current common law approach, Proposed Regulation No. 2 places all parties to a brokerage transaction on notice of their respective duties and responsibilities as to freight charges.

C. Proposed Regulation Number 3

Clarification of payment duties is not enough to put the brokerage industry back on the right track. Regulations also are needed to prevent seriously undercapitalized applicants from entering the brokerage industry. Brokers act as conduits for millions of dollars of freight charges, collecting the charges from shippers and remitting them to carriers. As such, a certain measure of financial responsibility is needed to instill trust into the brokerage industry. The following regulation will aid in determining whether an applicant is fit, willing and able to perform the services of a freight broker:

> *Proposed Regulation No. 3*: A property broker must have a security bond or trust fund in effect for $50,000. The Commission will not issue a property broker license until a surety bond or trust fund for the full limits of liability prescribed herein is in effect. The broker license is effective only as long as a surety bond or trust fund remains in effect and shall ensure the financial responsibility of the broker.[276]

Proposed Regulation No. 3 provides an extra level of security in brokerage transactions. Admittedly, many current broker disputes in-

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275 This regulation is meant to replace 49 C.F.R. § 1045.10 (1992). In 1986, the ICC considered and rejected a proposed regulation that would have made the shipper secondarily liable for payment to the carrier, even if the shipper made payment to the broker. Senn Trucking Co., No. 39962, 1986 M.C.C. LEXIS 74 (I.C.C. Nov. 17, 1986).

276 Proposed Regulation No. 3 is derived from 49 C.F.R. § 1043.4(a)(1992). The only modification is an increase from $10,000 to $50,000.

volve more than $50,000. But with the addition of the "trust fund" requirement described below, $50,000 should be adequate to ensure financial responsibility, while at the same time not excluding moderately-capitalized applicants from the brokerage market.

D. Proposed Regulation Number 4

Intermediaries are charged with managing large sums of money for other parties. It is essential, therefore, to ensure that they handle such funds with the utmost care. Lawyers, stockbrokers and real estate brokers are required to keep the funds they collect on behalf of other parties in a separate account and are prohibited from commingling these funds with their personal money.[277] In the current deregulated marketplace, freight brokers are not required to maintain separate accounts for the money they collect from shippers. There is also no ban against commingling of funds.[278] As a result, dishonest and undercapitalized brokers are collecting funds from shippers and, instead of remitting this money to carriers, they are using it for personal expenses. The following regulation is levelled at this misconduct:

> *Proposed Regulation No. 4*: Freight charges collected by a broker from a shipper or consignee are held in a fiduciary capacity for the benefit of the authorized carrier(s) which transported the freight. These funds shall be maintained in a separate account and shall not be commingled with personal funds or other types of funds. After each delivery of freight, the broker may withdraw its commission from the funds only after all lawful charges of the authorized carrier(s) which transported the freight have been paid. Failure to comply with this regulation may result in revocation of authorization, fines or imprisonment.[279]

Proposed Regulation No. 4, together with the other proposed regulations, will provide the financial security so desperately needed in the brokerage industry.

E. Proposed Regulation Number 5

Common carriers have primary responsibility for cargo loss and personal injury and, as such, are required by law to maintain liability insurance.[280] Freight brokers, on the other hand, are not required to

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277 *See supra* note 18.

278 The ICC has considered and refused to ban commingling of funds. *See* Petition for Investigatory Rulemaking Transportation Broker Bonds, No. MC-5, 1991 M.C.C. LEXIS 133 (I.C.C. Aug. 6, 1991). *See also* Andel, *supra* note 49, at 24.

279 If enacted, appropriate penalties for violation of this proposed regulation will need to be enacted.

280 49 U.S.C. § 10927 (1979 and Supp. 1992); 49 C.F.R. § 1043.2 (1992).

carry insurance because they are not ordinarily involved in the physical transportation of freight. In the last few years, however, the transportation sector has witnessed the genesis of cargo liability and personal injury litigation against freight brokers. Most of these suits result from brokers hiring unauthorized and uninsured carriers.

Regulations are needed to allocate responsibility for cargo loss and personal injury among common carriers and freight brokers. Because carriers have the primary responsibility for physically transporting freight and because they are already required to maintain minimum levels of insurance, the proposed regulation continues to place the primary liability for cargo loss and personal injury claims on carriers. Conversely, brokers, who do not ordinarily transport freight, should be held liable only when they hire unauthorized or uninsured carriers. The following regulation allocates responsibility for cargo loss and personal injury claims and requires brokers to maintain a sort of "excess" insurance for those cases where they hire unauthorized or uninsured carriers:

> *Proposed Regulation No. 5*: A freight broker may not operate until it has filed with the Commission an appropriate certificate of insurance, qualifications as a self-insurer, or other securities or agreements, in the amounts prescribed for motor carriers in 49 C.F.R. § 1043.2, for loss or damage to cargo. In addition, a freight broker may not operate until it has filed with the Commission an appropriate certificate of insurance, qualifications as a self-insurer, or other securities or agreements, in the amounts prescribed for motor carriers in 49 C.F.R. § 1043.2, conditioned to pay any final judgment recovered against such broker for bodily injury to or the death of any person, or loss or damage to property (except cargo) of others. Freight brokers shall comply with 49 C.F.R. §§ 1084.4 to 1084.9 (as prescribed for freight forwarders) with respect to all other security requirements. Provided, however, that a freight broker is liable for the losses stated above only when it hires or retains an unauthorized, uninsured or underinsured carrier.[281]

If the five regulations proposed in this article are adopted, the profusion of brokerage litigation will substantially decrease and brokers will begin to prosper. Proposed Regulations 1 and 2 clarify the law without causing any administrative or financial burden. The burden that may result from Proposed Regulations 3, 4 and 5 is substantially outweighed by the stability and trust these regulations will instill into the brokerage industry.

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281 Proposed Regulation No. 5 is derived from 49 C.F.R. § 1084.2 (1992), which prescribes the security requirements for freight forwarders.

VI. Conclusion

In 1935, Congress enacted extensive legislation that stifled the brokerage industry for the next forty years. In 1980, Congress reversed course and deregulated the brokerage industry. Since that time, brokers, who were once reputable transportation intermediaries, are now distrusted by everyone in the transportation business. The all-or-nothing solutions of Congress have crippled the brokerage industry and have led to a profusion of expensive and unproductive litigation. This article proposes a middleground between the stifling regulations of 1935 and the free-for-all deregulation of 1980. The proposed regulations will decrease brokerage litigation, add stability to the brokerage industry, and instill trust into an industry that so desperately needs it. A stable brokerage industry is necessary to stimulate trade in the current global market.