NAIC
National Association of Insurance Commissioners
& The Center for Insurance Policy and Research

August 7, 2009

Rose McMurray
Acting Deputy Administrator
U.S. Department of Transportation
Federal Motor Carrier Safety Administration
Docket Operations (M-30)
West Building Ground Floor, Room W12-140
1200 New Jersey Avenue, SE
Washington, D.C. 20590

RE: Docket No. FMCSA-2006-26262

Dear Ms. McMurray:

On behalf of the National Association of Insurance Commissioners (NAIC), we are responding to the recent Federal Motor Carrier Safety Administration (FMCSA) Notice of Proposed Rulemaking (NPRM) dated June 10, 2009 regarding *Minimum Levels of Financial Responsibility for Motor Carriers*. The NAIC represents the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories, whose primary objective is to protect consumers and promote healthy insurance markets. With the benefit of over 135 years of experience in regulating insurance markets and protecting consumers, we are pleased to offer the following comments on your NPRM.

State Insurance Regulation and Financial Solvency

The NAIC is concerned that in developing this NPRM, the FMCSA has not adequately considered the States' regulatory and financial solvency authority over insurance activity in the U.S. FMCSA's primary mission is to "reduce crashes, injuries, and fatalities involving large trucks and buses." Although FMCSA does have the authority to determine minimum levels of financial responsibility, FMCSA does not have the authority to oversee the financial solvency of insurers, or to protect insurance consumers' interests. Rather, as you are aware, the responsibility for ensuring financial solvency and for protecting the rights of consumers in their insurance transactions rests solely with our Nation's state insurance regulators. As explained more fully below, we believe that by failing to ensure proper supervision by and accountability to state insurance regulators, FMCSA is placing the economic desires of Canadian commercial motor carriers – estimated at a mere $3,000 a year – ahead of the interests of and protections currently afforded to U.S. insurance consumers.

The NPRM approach would defer to the Office of the Superintendent of Financial Institutions (OSFI) and Provincial regulators in Canada to monitor the solvency of the Canadian insurers signing the MCS-90 forms; however, without a formal mutual recognition agreement and supporting analysis and verification, States are unable to recognize a Canadian insurer's ability to provide the same level of protections as those required under U.S. law. Among the critical issues to consider in this analysis are Canadian regulators licensing requirements; fit and proper criteria; ongoing financial supervision including accounting and capital requirements and auditing matters; winding-up, liquidation and bankruptcy rules; regulatory proceedings; and the administration of any guaranty funds. These factors are important to consider in verifying that objectives pursued in the Canadian insurer solvency system are comparable to U.S. insurer solvency standards.

Without such comparability considerations, it is imperative that the approach set forth by the FMCSA secure legal rights for claimants beyond the assertion in the NPRM that “there is no reason to believe that [Canadian insurers] would be financially unable to, or refuse to fulfill their financial obligations.” Under its authority the FMCSA is not responsible for overseeing the financial health of Canadian insurers. While the statement of opinion in the NPRM may represent strongly held views, it is particularly troubling that the proposed rule change will bypass the valuable legal protections for U.S. citizens that are at the core of the U.S. financial regulation system. In these uncertain financial times, historical performance and stability is no substitute for current regulatory analysis.

In considering the proposed rule change, it is important to recognize that the minimum levels of financial responsibility vary greatly between Canada and the U.S. According to the Canadian Council of Insurance Regulators (CCIR), for all Canadian jurisdictions other than Quebec the minimum level of financial responsibility for motor carriers is CDN$200,000, or approximately $186,000 [1], and in Quebec, it is CDN$50,000, or approximately $46,000. In comparison, the FMCSA minimums range from $750,000 up to $5,000,000 for this comparable category of vehicles. Moreover, some U.S. State jurisdictions will, as a matter of statute, expose Canadian insurers to unlimited liability for medical benefits if their insured is found to be at fault, and these claims could be significantly higher than even the FMCSA minimums.

Another key element of prudential oversight the NPRM does not address is whether Canadian regulators at both Federal and Provincial levels will amend their insurer reserving requirements to ensure that Canadian insurers executing the MCS-90s will be adequately provisioned to pay claims that may reach liability limits four times greater than under comparable Canadian requirements.

The NPRM notes that before a Canadian insurance company can sign the MCS-90 and MCS-90B the FMCSA will verify whether “the Canadian insurance company is licensed or admitted in Canada to write insurance policies for Canadian motor carriers.” The NPRM, however, does not mention any ongoing prudential supervision that is necessary to ensure the ability of these Canadian insurers to pay U.S. claims when they are due. The current annual check up or occasional re-verification proposal is insufficient and undermines essential consumer protections. Under the rigorous system in place in the U.S., State regulators require U.S. insurers to file quarterly financial statements with the States in which they write business and constantly monitor financial solvency to ensure the financial health of U.S. insurers. Under any circumstance, Canadian insurers should meet the same standards that we require of U.S. insurers.

Consumer Protection

State insurance regulators are on the front lines of helping consumers following accidents and in working with them to help facilitate claims payments from their insurance company or from the counterparties’ insurer. If this NPRM is granted, State insurance regulators will lack sufficient regulatory authority to adequately assess Canadian insurers with claims in the U.S., and undermine our ability to protect U.S. citizens. While a fundamental consumer protection is the underlying ability of the insurer to pay claims and honor their promises, it also includes how the insurer treats the injured party. In our view, insurer financial solvency regulation and consumer protection are inextricably linked. For over 135 years, State insurance regulators have been responsible for not only assuring insurer financial solvency, but also for ensuring proper market conduct – how the insurer treats its customers and claimants and what protections are in place for its complex insurance products. Granting this NPRM without assuring appropriate financial and market conduct oversight may cause payment/collection hardships and/or difficulties in enforcing U.S. court judgments against Canadian insurers.

Canada’s consumers can always rest assured that the States monitor U.S. motor carrier insurers’ solvency in line with FMCSA and State regulatory guidelines – which are more stringent than Canada’s; however, U.S. citizens would not have that same protection under the NPRM proposal. By way of example, in the U.S., all States

[1] Official Rate as of July 31, 2009 1 USD = 1.07709 CAD

maintain a Guaranty Fund to pay claims in the event of insurer insolvency, but should the Canadian insurer become insolvent, no such protection exists for U.S. consumers. The NPRM does not touch on the important question of whether Canada has a similar Guaranty Fund mechanism and/or whether U.S. consumers would be eligible to make a claim against it.

Recommendations

The NAIC's interest in commenting is to ensure that U.S. citizens remain protected by rigorous state law and regulation, while still enhancing the competitive position of North American businesses. In light of our concerns, we suggest that the FMCSA modify its NPRM to address these important consumer protection issues:

- As a prudential measure, we recommend that the FMCSA require Canadian insurers wishing to execute the MCS-90 and MCS-90B to submit quarterly financial filings to the NAIC simultaneous with their Canadian filings to allow State regulators to review quarterly financial reports, a critical tool for ensuring the solvency of those companies doing business in the U.S.

- The FMCSA should also require Canadian regulators to immediately notify the NAIC and FMCSA of any financial problems arising with any Canadian insurer operating on a cross border basis. Where the financial difficulty reaches a level of supervisory action in Canada, the FMCSA should have the authority to require the affected motor carriers to find an alternate insurance provider. Once the Canadian insurer is certified to no longer be in financial difficulty, and provides the NAIC and FMCSA with the insurer's latest financial reports, then that insurer will become eligible once again to execute the MCS-90 and MCS-90B.

- At a minimum, the FMCSA should consider some of the key benefits provided by the Power of Attorney and Undertaking (PAU) that is currently used by U.S. insurers of motor carriers operating in Canada. In addition to the important requirement of identifying an agent for service of process, since U.S. insurers must file a PAU with the Canadian Council of Insurance Regulators (CCIR), we believe Canadian insurers should also file an equivalent document with the NAIC (*in addition* to the MCS-90, since the MCS-90 does not include language regarding submission of Canadian insurers to U.S. jurisdiction). A PAU would at least give State insurance regulators – and U.S. claimants – some reassurance that there would be an agent/representative within that State to accept notice and service of process on behalf of the Canadian insurer and, more importantly, give greater protection to U.S. consumers.

- Finally, the FMCSA should revisit the Surplus Lines approach to this issue, which includes a streamlined process whereby Canadian insurers could quickly become approved surplus lines insurers through the NAIC International Insurance Department (IID). Once approved, these insurers would become immediately eligible to execute the MCS-90 and MCS-90B in the majority of the States. Surplus lines insurance is not solely for high risks, as the Insurance Bureau of Canada incorrectly asserts in its February 12, 2007 comment in response to the Advance Notice of Proposed Rulemaking. Surplus lines insurance refers to coverage that is not widely available through admitted insurance carriers, but can legally be placed with eligible non-admitted insurance companies located in other states or countries. This solution would also improve consumer protections over the NPRM because, as a surplus lines insurer, the Canadian insurer would have to post a bond or trust fund in the United States (in either a national bank or a member of the Federal Reserve System) to protect policyholders and U.S. consumers.

Conclusion

For all the foregoing reasons, we strongly urge the FMCSA to reconsider its approach to this issue. One accident, one improper claim denial or unpaid claim to a U.S. consumer (with all the associated damages and difficulties involved in attempting collection from a Canadian insurer) will far exceed the expected $3,000 annual cost savings per Canadian motor carrier. We certainly understand the motivation by FMCSA to reduce costs, but this must be weighed against the greater cost to consumers when financial stability and claims processing is jeopardized.

In conclusion, the NAIC and State insurance regulators remain ready and willing to promote greater cross border trade activities, but not at the expense of protections for U.S. citizens. We strongly urge the FMCSA to consult with the NAIC in revising this NPRM to ensure Canadian insurer financial solvency and consumer protection standards that U.S. consumers are entitled to receive. Before a final rule is issued the NAIC also requests a public hearing be conducted on the proposed regulations, and that State regulators be permitted to present their case.

Thank you for your consideration of our comments. We welcome the opportunity to provide further comment and look forward to working with you in resolving these important issues.

Sincerely,

Roger Sevigny
New Hampshire Insurance Commissioner
President, NAIC

Christina Urias
Director, Arizona Department of Insurance
Chair, NAFTA Working Group