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**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO. 13-05

**Comments on Ocean Transportation Intermediary
Licensing and Financial Responsibility Requirements, and General Duties**

Submitted by

**NEW YORK NEW JERSEY FOREIGN FREIGHT FORWARDERS & BROKERS
ASSOCIATION, INC.**

The New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (NYNJFFF&BA) respectively submits its comments on the Notice of Proposed Rulemaking (“NPRM”) under Docket No. 13-05 published October 10, 2014. As one of the oldest trade associations for licensed freight forwarders, NVOCCs, and Customs Brokers in the United States, the NYNJFFF&BA has over 100 regular members and 25 industry –related affiliated members who will be directly impacted by the proposed regulations. The membership consists of both publically traded multi-national companies as well as small businesses.

We would like to take this opportunity to express our appreciation to the Commission for considering the viewpoints of the industry in response to the Advance Notice of Proposed Rulemaking on Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements. It is our hope that the Commission will continue to listen as we provide our thoughts on the Notice of Proposed Rulemaking.

Issuance, Renewal and Use of License

The NYNJ FFF&BA does not agree with the Commission's proposal in Sec. 515.14 (c) – (d) to require that Ocean Transportation Intermediaries (OTIs) renew their license every three years. Currently, licenses once issued are considered valid until revoked or voluntarily returned. The Commission has at present ample authority to deny new license applications or revoke existing ones. To institute an expiration date for licenses and set up a system to control the process for 4,700 OTIs is unnecessary and only increases costs, particularly for the Commission.

We find that the Commission did not provide a compelling rationale for initiating such a significant change of requiring the termination and renewal of OTI licenses. While it did identify a need for updated information on OTIs, the goal of improving database information is not sufficient to require the establishment of a completely new system of license renewals. The present regulations require that OTIs timely file or inform the Commission of changes to the information on record. New regulations requiring additional submissions and confirmation of corporate information is redundant.

It is also unclear to determine how inaccurate are the Commission's OTI databases, which is the predicate the Commission is using for supporting this change. The NPRM states that "At any given time, Bureau of Certification and Licensing (BCL) has 30-40 inquiries concerning the identity of a licensee's QI, officers, owners, or business affiliations." Are these inquiries generally routine, such as from bonding companies looking to verify the accuracy of applications? The FMC cited a statistic of 14.6%-24.4% of inaccurate data after FMC had contact with OTIs. If the sample is covering only those OTIs where the Commission had a need to respond to inquiries and request information, it implies that it may not reflect the status for all licensed and registered OTIs or even a substantial number of OTIs. Thus, the actual percentage could be far less. Without a more scientific study or accurate assessment, it is hard to know exactly how severe is the problem.

We would like to suggest an easy way for the Commission to determine the accuracy of their database. It could issue a one-time request for confirmation of the essential corporate information that it is seeking on a triennial basis through the NPRM. A comparison of the responses to the existing database would indicate the extent of the

inaccuracy. It would also reveal patterns of the type of licensed or registered OTI or of information where the problems may be more prevalent. If the results of this exercise indicate severe deficiencies than a triennial reporting requirement can be implemented once a user friendly online vehicle has been put in place. We appreciate the Commission's recognition of the importance of having a simple online protocol for updating corporate information.

The industry could assist and agree to an updating of essential corporate information without linking this to an act of "renewal" of a license. States and other federal agencies periodically require this kind of confirmation. They will penalize an absence of or a late filing but will not revoke a company's right to exist, with the exception of failure to pay annual fees. The Commission does not assess annual fees. These government agencies will usually send a notice by mail and email about 60 days prior to when requested updated information is due. We would recommend that the Commission do the same.

In the event that a triennial reporting is put in place, we would further suggest that an OTI be able to have online access to its profile to check its record. That the Commission will allow report of changes to be made in writing by email as well as mail is useful and efficient, recognizing the changes that have occurred in business communication

While the NPRM states that the renewal process "will not trigger a detailed Commission review or consideration of the character and eligibility of existing licensed OTIs," the actual language added to Sec. 515.14 is less clear. The proposed section 515.14 (d) (3) reads, "Though the foregoing license renewal process is not intended to result in a re-evaluation of a licensee's character, the Commission may review a licensee's character at any time, including at the time of renewal, based upon information received from the licensee or other sources." This is very vague and if incorporated in a final rule could allow information from any source to be used as a reason to question a Qualifying Individual's character. This section could lead to unintended abuse of power in future years. We recommend that this section be eliminated. If the Commission is questioning an OTI's character it should at the very least be clear that the OTI be given every opportunity informally, short of a formal proceeding, to refute whatever incriminating information the Commission may have received from whatever source.

Hearing Procedures for Denial, Revocation, or Suspension of OTI Licenses

The Commission is proposing a streamlined process (Sec. 515.17) when applicants are denied licenses (Sec. 515.15) and when OTIs have their licenses suspended or revoked (Sec. 515.16). As stated in its' comments to the Advance Notice of Proposed Rulemaking, the NYNJFFF&BA strongly recommends that further consideration of this change cease. The issue for appeal concerns the very serious matter of an OTI's license, which affects a company's ability to exist and employment for scores of individuals and families. An OTI should have access to a full review process. The present rules for appeal procedure are complete and provide for oral arguments and questioning. The proposed streamlined process only allows for an applicant's or licensee's written response to the hearing officer's notice. After receipt of the written response from the Bureau of Certification and Licensing (BCL), a hearing officer would make a decision. These streamlined procedures could lead to a wrong decision with severely damaging consequences.

Financial Responsibility Requirements Claims against OTIs

A new section, 515.23 (c) (1- 3), would require financial responsibility providers to notify the Commission of "each claim, court action, or court judgment against the financial responsibility and each claim paid (including the amount) by the provider." That the notice must include the name and license number of the OTI involved suggests that the Commission is seeking to identify OTIs that can be considered irresponsible or non-compliant. This implies a kind of profiling of OTIs that may not have a real basis, depending on the underlying facts of those claims, judgments etc., which the Commission might not have available to it.

That a claim or court action or even judgment occurs, could stem from disputes that arise in the normal course of moving freight, such as from demurrage, delay, or damage, and are not necessarily a reflection that an OTI has been delinquent in its duties. In many cases, settlements are reached due to the expense factors of litigation, and which may not have any bearing on actual culpability.

Anecdotal evidence suggests that the vast majority of conflicts that could lead to claims against OTI bonds are settled out of court and by commercial decisions of the

parties involved. Even when claims are brought, settlements can be negotiated. If the parties are settling their differences, there is no need for the Commission to insert itself.

The NYNJFFF&BA finds it inherently unfair if the Commission is seeking claim information exclusively on OTIs and not on steamship lines or terminal operators.

If the Commission is interested in gathering data to understand better the usage of financial responsibility vehicles, then they can request aggregated data without reference to specific claimants and OTIs. At the very least, the OTI should be notified when such information is being transmitted to the Commission to give it opportunity to provide underlying information which may be exculpatory.

General Duties and Responsibilities of OTI

The NYNJFFF&BA is concerned about proposed changes to the general duties and responsibilities of OTIs with respect to their agents' actions and advertising.

In the proposed addition to section 515.31 (g), all OTIs are responsible "for requiring that upon the request of any authorized Commission representative, their agents make available all records and books of account relating to ocean transportation intermediary service provided by or for their principals and respond promptly to any lawful inquiries by such representative." OTIs engage agents to provide many sub-contracted services, such as the physical receiving of cargo, stuffing or unstuffing of containers, inland freight movement from or to interior destinations. OTIs have a responsibility to provide their own records to the Commission upon request. These records would encompass the transactions with their agents. While OTIs charge their agents with performance and compliance requirements, they are simply not in a position to ensure that their agents make available corporate records. These are not the legal records of the OTI and thus the Commission should not be holding the OTI liable for the response of their agents. The Commission has authority over OTIs. Relationships between OTIs and its agents should be subject to agency and contract law. There very well may be documents that agents may have a right to protect. The OTI can merely request these. If the agent resists production of these, the OTI should not have to experience regulatory consequences.

The new prohibition in 515.31 (j), states that " No person may advertise or hold out to provide OTI services unless that person holds a valid OTI license or is registered." There are many different types of companies that provide portions of OTI services as

vendors to many OTIs, exporters and importers. Would the blanket prohibition for these companies to advertise or promote themselves for providing some OTI services but not all OTI services make them subject to this restriction? It is very confusing, particularly in view of the expanded description of OTI services. The current regulations are very clear that if a company is acting as an OTI it must hold a valid license. This should be sufficient. The Commission should not involve itself with commercial issues such as advertising.

License; When not Required

The proposed change by adding agents in 515.4 (b) would make a licensed OTI “fully responsible for the acts and omissions” of its “agents that are performed in connection with the conduct of such licensee’s business.” Notwithstanding the best practices and procedures imposed on agents, the OTI would then become responsible for anything from gross negligence to simple inadvertent error not in the OTI’s direct control. For example, a company may be arranging motor carrier transportation to and from piers, which might be considered an OTI activity, yet the party that may be performing this function might be doing so pursuant to Federal Motor Carrier Safety Administration property broker authority clearly not an area regulated by the Commission. What happens if an accident occurs in the freight movement and people are injured and cargo is damaged. Will injured parties now be able to cite in court additional FMC regulatory authority holding OTIs responsible? The agent should be held accountable for its own actions under existing regulations and under agency and contract law to the OTI and not by an extension of the Commission’s authority through the OTI. Reference to agents should be removed from this section.

Forwarder and Carrier Compensation

The NPRM would authorize forwarders in Section 515.42 (c) to submit electronic certifications to carriers in order to obtain compensation commissions. The stated rationale to facilitate payments and reduce costs is commendable. Forwarders and carriers already have good systems in place to provide the required certifications. In most instances these are generated automatically from their computer systems. If it is easier for some forwarders to have the option to provide these certifications electronically to the carrier then that is useful. What is to be avoided is setting up external carrier systems requiring online verification of carrier lists. This would only add costs as there is no

easy way for a forwarder to respond automatically to differing carrier's systems and lists. We suggest that the FMC drop the requirement to have an electronic certification by the carrier as well as the forwarder. Certifications by the carrier are not required for the other forms of certification. That a carrier pays compensation identifying the shipment is sufficient carrier acknowledgment.

Since the carriers have greatly reduced or removed the payment of forwarder compensation and OTI NVOs do not pay tariffed compensation automatically without knowledge of their customer, it seems that the need for certification of any kind is no longer necessary in today's shipping environment. The NYNJFFF&BA would encourage the Commission to remove Section 515.42 (c) and accordingly amend Section 515.42 (b). The regulations prohibiting the payment of carrier compensation unless forwarding services are performed would remain in place. However, the shipping process would be streamlined by removing the cumbersome written certification.

Definitions

The NYNJFFF&BA agrees with the removal of definitions such as "ocean freight broker," "brokerage," and "small shipment," to reflect changing industry conditions.

The rewording of the definition of "principal" may have unintentionally broadened its meaning. Currently, the definition of "principal" clearly indicates that it is the one who is employing the services of a licensed freight forwarder. This is unclear in the proposed definition as it simply refers to "the shipper, consignee, seller or purchaser of such property, and to anyone acting on behalf of such shipper, consignee, seller or purchaser." Since the Commission has indicated its intent was not to change the meaning or scope of "principal" and that it is the person or entity to whom a licensed ocean freight forwarder owes a fiduciary duty, we suggest that the definition either remain unchanged or be restated as follows: "Principal refers to the person or entity employing the licensed ocean freight forwarder to facilitate ocean transportation of property."

While the NYNJFFF&BA recognizes the correctness of the proposed new definition of a Qualifying Individual as one who must meet the "experience and character requirements of section 19 of the Shipping Act," It is concerned by the approach that the Commission is taking to determine the character of the qualifying individual. The Commission has broadly listed such factors as violations of shipping laws related to import,

export, or transport in international trade; voluntary and non-voluntary bankruptcies not discharged, tax liens and other court and administrative judgments, denial, revocation, or suspension of a TWIC card or custom's broker license. It is quite possible that special circumstances not related to good character could have caused a qualifying individual to be involved in one of the above listed events. Tax liens, for example, could be placed erroneously and take considerable time to correct.

The relevance of a TWIC card or maintenance of a customs' broker license to a qualifying individual's ability to comply faithfully with OTI regulations is not apparent. How would the FMC factor in the numerous times an OTI is not shipping because red flags are raised for possible violations in export regulations? Are good actions wiped out by accidental error causing an infraction? The NYNJFFF&BA does not have the answer to quantifying good character but finds it dangerous to enumerate the specific factors that would be a requirement to prove it. Such a list could be limiting in the review of the record of a qualifying individual.

Financial Responsibility Requirements

We support the Commission's proposal to eliminate the requirement to provide additional financial responsibility for an OTI's unincorporated branch offices. This helps both large and small OTIs reduce the regulatory burden and the actual cost of maintaining financial coverage for branch offices. Large OTIs are relieved of the need to be reporting location and organizational changes for purposes of ensuring accuracy in its financial responsibility coverage. Smaller companies may often not even have sufficient volume in branch offices. The change in the ruling recognizes that technological advances are allowing OTIs of all sizes to operate nationally and centralize processes. The reduction in the actual financial responsibility coverage is not reflective of additional risk to the shipping public. Ultimate risk for the shipping public rests with the compliance posture of the corporation, which permeates throughout the branches.

Forms and Fees

The NYNJFFF&BA agrees with the Commission's position to have all forms and fees submitted electronically. We see no difficulty with the requirement that fees be payable within 10 days of submission.

Conclusion

The NYNJFFF&BA sincerely hopes that the Commission will continue to take in to consideration the true cost benefit of any change. Do the items in the NPRM assist in removing unwarranted regulatory burdens? Do they take in to consideration the changes in the shipping industry? The greatest concern of the NYNJFFF&BA is that Commission will increase the regulatory burden through its proposal to have OTI licenses expire and be renewed every three years. We believe the Commission's data on OTIs can be more easily verified and at minimal cost without setting up an elaborate renewal structure. Shouldn't the priorities of the industry and the Commission should be focused on our country's critical need to facilitate the efficient flow of import and export freight and bringing companies operating outside of the current regulations in to compliance?

The comments in this submission reflect the views of our membership and are submitted in recognition of the importance of industry participants becoming and remaining in compliance.

Executed on 12/11/14

On Behalf of the NYNJ Foreign Freight Forwarders & Brokers Association, Inc.



Charles Riley, President
NYNJ Foreign Freight Forwarders & Brokers Association, Inc.